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## LEGAL PROTECTIONS IN THE WORKPLACE FOR GAYS, LESBIANS, AND BISEXUALS

### STATE OF VERMONT<sup>1</sup>

#### **VERMONT'S ANTI-DISCRIMINATION LAW**

Vermont state law protects individual employees from discrimination in the workplace based on their sexual orientation. Vt. Stat. Ann. tit. 21, § 495.

#### **Who is protected?**

Vermont's anti-discrimination law prohibits discrimination in employment against any employee who is gay, lesbian or bisexual. Vermont does not specify whether discrimination may be based upon your actual sexual orientation or can also be based on what others perceive it to be, if for example, you are inaccurately perceived as gay or lesbian. However, according to the Attorney General's Office, the statute also covers persons who are inaccurately perceived as gay, lesbian or bisexual. Under that interpretation, you do not have to be "out" to be protected.

#### **Does it apply to all employers?**

Vermont's anti-discrimination law pertains to most private and all public (government) employers. On the other hand, certain religious organizations may give preference to persons of that religion and are also not prevented from taking actions which are calculated to promote their religious principles.

#### **What constitutes discrimination?**

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<sup>1</sup> This document is intended to provide general information regarding anti-discrimination law. It necessarily simplifies complex legal issues and should not be considered a comprehensive analysis of all legal issues affecting gays, lesbians, and bisexuals in the workplace. It is important to consult an attorney for advice on specific legal problems.

Determining what constitutes discrimination can be tricky. Some actions (or inaction) are clearly discriminatory. **Hiring or termination** decisions cannot be based on an individual's sexual orientation. Vermont also prohibits discrimination in **terms, conditions or privileges of employment**. As a result, employment decisions beyond hiring and firing may also not be based on an employee's sexual orientation or perceived sexual orientation. This prohibition includes the employer's decisions regarding compensation, promotion, job classification, training, demotion, and transfer as well as many other terms of employment.

What counts as a term of employment may be quite broad. It includes denial of job promotions, benefits, and performance evaluations. In addition, an employer may not discriminate in shift, holiday, or vacation preferences based on an employee's sexual orientation or perceived orientation. Nor may an employer assign a gay employee less preferable duties on the grounds of sexual orientation.

It is not possible to identify everything which may count as a term, condition or privilege of employment in a particular workplace. As a general rule, an employer must not treat similarly situated gay and non-gay employees differently. Different treatment of gay employees because they are gay amounts to discrimination. For example, if non-gay employees generally discuss details of their personal lives in the workplace, including conversations about their spouses, an employer could not discipline only gay employees for engaging in the exact same conduct. Such discipline would amount to a denial of an employment privilege based on sexual orientation. As a second example, consider the case of an employer who receives complaints from co-workers about a particular gay employee. If the employer typically investigates co-worker complaints about a non-gay employee before crediting them, the employer may not credit the co-worker complaints about the gay employee without a similar investigation.

Another type of different treatment may occur when a gay employee is singled out and harassed by co-workers or supervisory personnel. For example, co-workers might make disparaging or homophobic comments to the gay employee. Where these comments are sexual in nature, the employee may also have a claim for sexual harassment. (See discussion below.) If the comments are not necessarily of a sexual nature and the employee has not suffered an adverse consequence, a gay employee may still have a claim for discrimination where the homophobic or disparaging remarks affect the employee's ability to do the job.

GLAD has heard of a number of situations where, once co-workers found out that one of their co-workers was gay, the co-workers started interpreting the gay employee's conversations and actions as sexual harassment. For the reasons discussed above, an employer should not validate a charge of sexual harassment made by a non-gay employee against a gay employee where the gay employee has simply discussed his/her personal life to the same extent non-gay people discuss their personal lives. Singling out the gay employee for disciplinary action based on the gay employee's conversations about personal matters generally commented on in the workplace by non-gay employees is likely discrimination.

The mere fact of discrimination does not guarantee a successful lawsuit. Proving the legal responsibility of an employer for such anti-gay harassment may turn on whether the comments were made by co-workers or by supervisory personnel and what, if any, response the employer had when the gay employee reported the misconduct. As a general matter, Vermont courts have followed the federal courts' interpretations in the area of employer liability for discrimination perpetrated by employees. The federal standard and the one Vermont courts have applied is that an employer is liable for discrimination by a supervisory employer. With respect to discrimination by co-workers, an employer is liable for such misconduct if it knew or should have known of the harassment and failed to remedy it.

### **What must I show to prove I have been discriminated against?**

You must prove that sexual orientation was a motivating factor in whatever employment decision forms the basis of your discrimination claim. Once you do that, your employer has to show that it would have taken the same action even if your employer did not know or perceive that you are gay. As long as you can show that your sexual orientation was a motivating factor for your employer's discriminatory conduct, in order to avoid liability, your employer must show that it would have taken the same action even if it had not taken your sexual orientation into account.

### **Do laws prohibiting sexual harassment apply to gay people?**

Vermont's anti-discrimination law prohibits sexual harassment and harassment based on sexual orientation. This means that an employer may not condition any employment decisions on an employee's submission to unwelcome sexual advances or requests for sexual favors. Nor may an employer permit or condone conduct that creates a hostile or offensive working environment either on the basis of sex or on the basis of sexual orientation. The language of the state law and recent guidance from the Supreme Court in construing federal anti-discrimination law suggests that state prohibitions on sexual harassment apply equally to gay and non-gay employees. This means that prohibitions on sexual harassment pertain to men who harass men (whether gay or non-gay) as well as to women who harass women (whether gay or non-gay) where that harassment is because of the person's sex.

As stated above, Vermont courts have typically been guided by the federal courts' interpretation of anti-discrimination law. Assuming this trend continues, recent decisions of the Supreme Court suggest an employer is strictly liable for sexual harassment by a supervisor when the sexual harassment results in the employer taking an adverse employment action such as discipline, denial of a promotion, or reassignment. When no tangible employment action is taken but the employee charges a supervisor with sexual harassment, the employer may defend by proving that the employer exercised reasonable care to prevent and correct the sexually harassing behavior, and the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer, such as sexual harassment policies.

Where the sexual harassment is perpetrated by co-workers, an employer is liable for the conduct if it knew or should have known of the harassment and failed to take prompt and appropriate steps to remedy it.

### **Can I be fired for complaining about discrimination or sexual harassment?**

Some employees worry that if they exercise their right to redress sexual orientation discrimination then their employer will retaliate against them. Vermont's anti-discrimination law prohibits retaliation by an employer against an employee because the employee files a complaint of discrimination or assists someone else in the prosecution of a complaint. This prohibition covers any steps taken by an employer including expulsion or termination in retaliation for an employee making efforts under the anti-discrimination law to stop unlawful discrimination. If the employer retaliates, the employee faces the same choices about how to respond to the retaliation as with discriminatory acts of the employer.

### **What are allowable interview questions?**

Vermont has no regulations or statutes that address this issue. The Vermont Attorney General's Office recommends employers abide by the United States Equal Employment Opportunity Commission's regulations with respect to interview questions. Under those guidelines, no employer can inquire about marital status. This prohibition may provide some comfort to gay employees who are concerned that an employer will discriminate based on information learned in pre-employment interviews.

### **What do I do if I think I have been discriminated against?**

The decision of how to respond to discrimination in the workplace is a difficult and very personal one. Each case is different and you are well-advised to seek peer and legal advice before deciding how to proceed. A document as broad as this one cannot incorporate every job scenario and discrimination nuance and as a result can serve, at best, as an incomplete checklist of alternatives to consider.

A person subjected to discrimination in the workplace has a number of non-litigation alternatives which may or may not be effective removing problems attendant with being the object of discrimination. What follows is an incomplete list of options followed by some discussion of the ramifications of each alternative. When weighing the alternatives, do not ignore physical safety concerns and keep in mind that most legal recourse requires a lengthy period of litigation. Some of these options can be pursued simultaneously. The decision about how to proceed is yours. To fully consider the ramifications of all of the choices, you should consult an attorney.

You can:

Tolerate the Discrimination. People remain in jobs where they experience discrimination for a variety of reasons. Economic necessity is one of the foremost factors to consider in deciding whether or not to complain about discrimination. Some people live in small (or not so small) communities where complaining about workplace discrimination could have devastating personal repercussions which are simply not worth risking. If you choose to remain in a job where you are discriminated against, it may be advisable to seek support from friends or family to minimize the damaging effects of such discrimination.

Leave Without Challenging the Discrimination. Most employment is at-will. From the employee's perspective, this means that you may quit your current position for any reason or no reason at all. Sometimes the best option is to quickly remove yourself from a workplace where you are discriminated against and for many of the reasons discussed above, the repercussions of seeking redress are not worth the risks.

Even if your position is a contractual one, and not at-will, an employer could be persuaded not to enforce a contract term in exchange for an employee's agreement not to take legal action in pursuing a legal remedy.

Follow Internal Grievance Procedures. Many employers provide internal grievance procedures when an employee has suffered discrimination in the workplace. This is particularly true for employers that have anti-sexual harassment policies. Sometimes, curtailing discriminatory conduct of a supervisor or a co-worker is as simple as notifying human resource personnel who may be responsible for ensuring a workplace free from discrimination. There may be reasons to follow internal grievance procedures even if you are convinced an employer is unwilling to redress your concerns. A court or administrative agency that hears your claim may determine that your failure to follow internal procedures deprived your employer an opportunity to rectify the situation.

On the other hand, there may be reasons not to follow internal grievance procedures. Notifying an employer about discrimination could (where confidentiality is not adequately maintained) result in your being more "out" than you prefer as your employer could disseminate information about your sexual orientation to others in the workplace.

Again, you should consider all of the possible repercussions of your choices. Note, however, that recent caselaw suggests that an employer may successfully defend against a charge of sexual harassment if you unreasonably fail to avail yourself of opportunities provided you to notify your employer of the misconduct. An employer with a sexual harassment policy would likely vigorously defend against a charge of sexual harassment where an employee failed to follow internal grievance procedures.

Review Union Contracts, If Applicable. Employees who are union members may have contracts that detail protections and remedies for discrimination. Union employees should review their contracts to determine if there are grievance procedures that should be followed or pursued.

### Take Intermediate Steps in Anticipation of Litigation.

- 1) Make a chronology of events leading up to and following the discrimination. Include as much detail as possible including names, witnesses, a description of events, locations, etc. Be sure to write down all offensive comments or actions. Retain this chronology; do not provide it to your employer.
- 2) Save any written notes, articles, documents, or letters you received during the as a result of the discriminatory actions.
- 3) Try to get a letter of recommendation when appropriate. A letter of recommendation can be extremely useful if you press your case legally.
- 4) Obtain your personnel file if you can. Vermont law does not require an employer to provide an employee with personnel records but many employers will comply with a written request to review your file. Note that asking to see your file may tip an employer off that you are considering legal action.
- 5) Retain all written policies, procedures, and employee manuals you receive during the course of your employment.
- 6) Apply for unemployment. Even if you do not think you will be eligible because you were fired, filing for unemployment clearly signals your employer that you do not agree with the employer's actions.

### Take Legal Action.

Vermont prohibits sexual orientation discrimination, and you do have legal recourse. You can file a claim of discrimination either in state court or with the relevant Vermont state agency.

### **What do I do if I want to take legal action?**

Determining how to proceed depends on whether you work for the State of Vermont or for any other employer. If you work for the state, you may first file a charge with the Vermont Human Rights Commission. All other employees may first file a charge with the Attorney General's office. At any time before the time to file a claim runs out, an aggrieved employee may file suit against an employer in state court even if a complaint has been filed with either the Attorney General or the Human Rights Commission. You should consult a lawyer for advice regarding the best way to proceed in your particular case.

### **State Employees**

For state employees, the first step of the process is fairly simple. You do not need an attorney to file a complaint. Most complaints filed with the Vermont Human Rights

Commission are taken over the phone. The Human Rights Commission will then likely send you an employment discrimination questionnaire for you to fill out and return.

Filing a complaint with the Commission triggers an investigation into the facts and circumstances of your case. This means an investigator will contact your employer to obtain information and materials related to your charge of discrimination.

If a Commissioner determines, after the investigation, that there are reasonable grounds to believe unlawful discrimination has occurred, the Commission will convene a conference or conciliation session in an effort to redress or halt the discrimination. If no satisfactory relief has been obtained after 6 months, the Commission may bring a lawsuit in state court to redress the unlawful discrimination. If the Commission brings your case to court, it will serve as co-counsel. You will likely need to obtain an attorney at that time. At any time during this process, you may file suit in state court. If you do so, the Commission will close the case.

### **All Other Employees**

The Attorney General's Office is charged with prosecuting all other allegations of discrimination in employment in Vermont. To file a charge with the AG's office, you should first contact the office by phone. The office will then send you a questionnaire. This questionnaire is also available on-line at [www.atg.state.vt.us](http://www.atg.state.vt.us) in the public protection section. Returning the questionnaire will trigger an investigation by the Attorney General's Office. If the office finds that there are reasonable grounds to credit the charge of discrimination, it will go forward with efforts to mediate or conciliate the charge. If these efforts are unsuccessful, the AG's office will file suit against the employer in state court. At this point, you are encouraged to obtain an attorney and may also file a civil suit.

At any time in this process, an aggrieved employee may file a separate lawsuit against the employer in state court.

### **When must I file a complaint?**

Employees who decide to file a complaint should consider filing it as near in proximity to the time of the discriminatory action as possible. Vermont's statute of limitations provides for a much longer time to file a complaint than many other states. However, the longer you wait to file a claim, the more likely the memories of persons who witnessed the discrimination will fade and the more likely that witnesses (including the perpetrators of the discrimination) will move or be unreachable. In short, your claim will grow stale over time.

If you decide to sue in court, you should do so in most cases well within three years of the date of the discriminatory conduct. If you wish to pursue the complaint with the Attorney General's Office, you should do so sufficiently prior to the three year period to reasonably provide the Attorney General time to complete an investigation and pursue

conciliation. The Attorney General's Office has considerable discretion in determining what cases it take and has reported a practice of rejecting claims that are filed over 300 days after the date of the discriminatory conduct. Claims filed with the Vermont Human Rights Commission must be filed within one year of the discriminatory action that forms the basis of the complaint.

Note that even if the Attorney General or the Vermont Human Rights Commission rejects your claim, you may still file it in state court if you are within the three year statute of limitations period.

### **Do any other laws protect me?**

#### Federal Law

Although federal anti-discrimination law does not yet protect employees from discrimination rooted in sexual orientation, federal law provides relief for victims of sexual harassment in some cases regardless of the sexual orientation of the harasser or victim. Federal law also provides relief for sex and disability discrimination as well as unlawful retaliation which may also be applicable in some cases. When applicable, an employee may file a complaint both with the Vermont Human Rights Commission or Vermont Attorney General's Office and the United States Equal Employment Opportunity Commission. A claim filed with the EEOC must be filed within 6 months of the day on which the discrimination occurred.

#### State Common Law Claims

In certain circumstances, promises made by employers in personnel manuals, written employment policies, and employee handbooks can be contractually binding on the employer. This contractually binding commitment can apply to anti-discrimination policies contained in such documents. The law in this area can be complicated; any aggrieved employee who believes that promises made by an employer in such documents have not been met should consult an attorney. In any case, all employees should keep copies of all personnel manuals and materials distributed during the course of their employment.

You may be able to pursue other common-law claims as a result of being subjected to discrimination. To determine which are applicable to your case, consult an attorney.

**Helpful Addresses:**

Vermont Attorney General's Office  
Civil Rights Division  
109 State Street  
Montpelier, VT 05609  
(802) 828-3657

Human Rights Commission  
135 State Street  
Drawer 33  
Montpelier, VT 05633  
(802) 828-2480