

COMMENT

Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes

Elizabeth R. Cayton*

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I. INTRODUCTION

Guadalupe Benitez and her partner, Joanne Clark, wanted to become parents.¹ They decided to pursue insemination options with the hope that Benitez would become pregnant.² Following several failed attempts to inseminate Benitez using semen from a sperm bank the couple was referred to North Coast Women’s Care Medical Group (North Coast) for fertility assistance in 1999.³ After meeting with the couple,

* © 2010 Elizabeth R. Cayton. J.D. candidate 2010, Tulane University School of Law; B.A., 2007, Boston University. The author would like to thank Victor Broccoli, Christopher Scott, Kristen Kelsch, and her parents for their support.

1. See *N. Coast Women’s Care Med. Group v. San Diego County Superior Court*, 189 P.3d 959, 963 (Cal. 2008).

2. *Id.*

3. *Id.*

North Coast physician Dr. Christine Brody informed them that an intrauterine insemination was an option but her religious beliefs prevented her from performing the procedure on Benitez.⁴ Though Dr. Brody assisted Benitez by providing infertility treatment, she refused to perform the insemination.⁵ Dr. Brody's North Coast colleague, Dr. Douglas Fenton, shared Dr. Brody's religious objections and also refused to perform the insemination on Benitez citing his personal beliefs.⁶ Consequently, the couple was referred to a physician not affiliated with North Coast who successfully performed in vitro fertilization on Benitez.⁷

In 2001, Benitez filed suit in the Superior Court of San Diego County against North Coast for sexual orientation discrimination under the California Unruh Civil Rights Act.⁸ The Act prohibited discrimination by "business establishments that offer to the public 'accommodations, advantages, facilities, privileges, or services.'" In response, the North Coast physicians argued that their actions were protected by the First Amendment.¹⁰ The Superior Court, however, disagreed with the North Coast physicians, and the lawsuit proceeded to the California Court of Appeal, which concluded that the physicians could argue their First Amendment rights as affirmative defenses at trial.¹¹ In 2008, the case reached the California Supreme Court, which held that "the First Amendment's right to the free exercise of religion does not exempt . . . physicians here from conforming their conduct to the [Unruh] Act's antidiscrimination requirements even if compliance poses an incidental

4. *Id.* Benitez informed Dr. Brody that she was a lesbian during this initial meeting. *Id.*

5. *Id.* at 963-64.

6. *Id.* at 964.

7. *Id.*

8. *Id.* at 964-65. Though the California Unruh Civil Rights Act has been amended since Benitez's interactions with North Coast in 1999, it stated:

[A]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Id. at 965.

9. *Id.* While during "the period relevant here, the Unruh Civil Rights Act did not list sexual orientation as a prohibited basis for discrimination . . . [B]efore 1999, California's reviewing courts had . . . described the Act as prohibiting sexual orientation discrimination." *Id.* Because the Act was amended to include "sexual orientation" as a protected class in 2005, the California Supreme Court conducted its analysis by taking into consideration the 2005 amendment. *Id.*

10. *Id.* at 964-65.

11. *Id.*

conflict with [their] religious beliefs.”¹² In essence, California’s Civil Rights Act and its antidiscrimination provisions trumped the North Coast physicians’ personal beliefs about sexual orientation.¹³

Lying at the heart of the California Supreme Court decision in *North Coast* is the state public accommodation antidiscrimination statute that prohibits unequal treatment of people based on their “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation” by businesses that serve the public.¹⁴ Currently, nineteen states and the District of Columbia have public accommodation antidiscrimination statutes similar to California’s Unruh Civil Rights Act.¹⁵ The *North Coast* decision suggests the potential for such statutes to be legislated and strongly considered by courts in future cases involving health care service providers’ personal objections to treating patients based on the sexual orientation of the patient.

This Comment looks at current medical association policies regarding sexual orientation discrimination and then examines the status of sexual orientation in state public accommodation antidiscrimination statutes as applied in court decisions. In Part II, I present a brief overview of national and state medical association antidiscrimination policies that prohibit sexual orientation discrimination by physicians. Next, in Part III, I discuss the inclusion of sexual orientation as a protected class in state antidiscrimination statutes and the interpretation and enforcement of such statutes by courts. In Part IV, I address current and potential obstacles to the success of public accommodation antidiscrimination statutes in combating sexual orientation discrimination. Finally, in Part V, I look at the future applicability of these statutes to lawsuits in which plaintiffs allege sexual orientation discrimination by health care service providers.

II. MEDICAL ASSOCIATION SEXUAL ORIENTATION ANTIDISCRIMINATION POLICIES

Disparities between the treatment of LGBT (lesbian, gay, bisexual, and transgender) patients and heterosexual patients have sparked

12. *Id.* at 967.

13. *See id.*

14. CAL. CIV. CODE § 51(b) (West 2007).

15. The District of Columbia and the following states have public accommodation antidiscrimination statutes that include sexual orientation as a protected class: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, Wisconsin, and Vermont. Lambda Legal, Quick Facts, <http://www.lambdalegal.org/news/quick-facts/quick-facts.html> (last visited Sept. 30, 2009).

antidiscrimination policy views sexual orientation as a protected class is open to interpretation.

Likewise, state medical associations have not adopted uniform and unambiguous policies of sexual orientation antidiscrimination.²⁴ The California Medical Association (CMA), for example, “does not support discrimination of any kind, including discrimination based on sexual orientation.”²⁵ Initially, however, the CMA submitted an amicus curiae brief in support of the North Coast physicians in June 2005.²⁶ Though the CMA did not expressly condone the actions of the physicians, its brief stated that a jury should be permitted to hear evidence that the physicians’ First Amendment rights were violated by not allowing them to make professional decisions based on their personal religious beliefs.²⁷

Just over three months later, in September 2005, the CMA withdrew its brief because it determined that its position had been mistaken for an endorsement of sexual orientation discrimination.²⁸ In a CMA press release issued to explain the withdrawal of the amicus curiae brief, CMA CEO Dr. Jack Lewin stated that while

CMA continues to believe that the defendant physicians deserve a right to due process and a jury trial . . . [I]t is clear that CMA’s policy commitment to oppose any form of invidious discrimination had been so significantly confused and misrepresented, that it was in the best interest of CMA to withdraw the brief.²⁹

The withdrawal of the CMA brief suggests that medical association policy regarding sexual orientation is greatly affected by public perception of such policy.

Unlike the CMA, many state medical associations have been slow to issue sexual orientation antidiscrimination policies. Nonetheless, state medical associations, such as the Ohio State Medical Association and the Washington State Medical Association, offer hyperlinks on their Web sites to the AMA code of ethics.³⁰ Inclusion of the AMA code of ethics

24. See *infra* notes 25-30 and accompanying text.

25. Press Release, Cal. Med. Ass’n, California Medical Assn. Files Friend-of-Court Brief (June 6, 2005), available at http://www.cmanet.org/publicdoc.cfm?article_id=318&docid=2&parent=1&templateinc=presssection2&all=yes.

26. *Id.*

27. *Id.*

28. Press Release, Cal. Med. Ass’n, CMA Withdraws Friend-of-Court Brief in San Diego Case Of Woman Who Sought Infertility Treatments (Sept. 20, 2005), available at http://www.cmanet.org/publicdoc.cfm?article_id=328&docid=2&parent=1&templateinc=presssection2&all=yes.

29. *Id.*

30. Ohio State Med. Ass’n, Laws, Rules and Regulations, <http://www.osma.org/i4a/pages/index.cfm?pageid=3304> (last visited Sept. 27, 2009); Wash. State Med. Ass’n, AMA

on state medical association Web sites may indicate that state medical associations are aware of and have accepted the AMA's sexual orientation antidiscrimination policy.³¹ However, some state medical associations appear to go beyond acceptance by implication. The Massachusetts medical society encourages health care service providers to post signs in their offices that declare that their staff "support[s] the Massachusetts medical society nondiscrimination policy, in that: This office appreciates the diversity of patients and does not discriminate based on race, age, religion, ability, marital status, sexual orientation, sex, or gender identity."³² Thus state medical association policies regarding sexual orientation range from not mentioning sexual orientation as a protected class at all to encouraging health care service providers to make sure that patients are aware of sexual orientation antidiscrimination policies.

The Gay and Lesbian Medical Association (GLMA) has emphasized that sexual orientation discrimination by physicians can have negative consequences for the overall health and well-being of LGBT persons.³³ Studies have shown that discrimination by health care providers against LGBT patients can lead to unfortunate ramifications that go beyond civil rights violations.³⁴ GLMA reports that "perhaps in an effort to avoid . . . bias or because of internalized homophobia, LGBT patients frequently withhold personal information about their sexual orientation, gender identity, practices, and behavioral risks from their health care providers."³⁵ Refusing to disclose this information to health care providers can result in serious health consequences for LGBT patients.³⁶ Health care and equality concerns, therefore, provide motivations for medical associations to put forth and enforce sexual orientation antidiscrimination policies. While medical association policy is not binding law, it likely influences member physicians and their

Ethics, http://www.wsma.org/medical_professionalism/ama_ethics.cfm (last visited Sept. 27, 2009).

31. See *supra* notes 17-20 and accompanying text.

32. Mass. Med. Soc'y, MMS Nondiscrimination Policy, http://www.massmed.org/AM/Template.cfm?section=Committees_Task_forces_and_sections&Template=CM/ContentDisplay.cfm&ContentID=31371 (last visited Nov. 15, 2009).

33. See GAY & LESBIAN MED. ASS'N, HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) HEALTH 49 (2001), http://www.glma.org/_data/n_0001/resources/live/HealthyCompanionDoc3.pdf.

34. See THE HUMAN RIGHTS CAMPAIGN FOUND. & GAY & LESBIAN MED. ASS'N, HEALTHCARE EQUALITY INDEX 8 (2009), http://www.hrc.org/documents/Healthcare_Equality_Index_2009.pdf [hereinafter HEALTHCARE EQUALITY INDEX] (discussing how gay and lesbian patients often do not disclose information about their sexual orientation to their physicians which can be detrimental to their medical treatment and thus their health).

35. GAY & LESBIAN MED. ASS'N, *supra* note 33, at 49.

36. See HEALTHCARE EQUALITY INDEX, *supra* note 34.

patients. Furthermore, strong antidiscrimination policies by national and state medical associations could be an asset to plaintiffs in lawsuits that allege sexual orientation discrimination and to advocates for the inclusion of sexual orientation as a protected class in state public accommodation antidiscrimination statutes.

III. SEXUAL ORIENTATION AS A PROTECTED CLASS IN PUBLIC ACCOMMODATION ANTIDISCRIMINATION STATUTES

State public accommodation antidiscrimination statutes, such as the California Unruh Civil Rights Act, are the principal means of prohibiting sexual orientation discrimination by health care service providers.³⁷ In *Romer v. Evans*, the United States Supreme Court struck down a state constitutional amendment that prohibited government protection of sexual orientation.³⁸ Specifically, the Court addressed Colorado's "Amendment 2," which forbade state and city antidiscrimination laws from designating sexual orientation as a protected class.³⁹ Because such legislation necessarily marked LGBT persons as unequal to other state residents, the Court concluded that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁰ In declaring antidiscrimination legislation that directly excluded sexual orientation from protection unconstitutional,⁴¹ the Supreme Court implicitly held that state antidiscrimination statutes *may* include sexual orientation as a protected class.⁴² Following the *Romer* decision in 1996, a number of states amended their antidiscrimination statutes and added sexual orientation as a protected class.

Colorado, the state in which *Romer* originated, was among the first states to include sexual orientation as a protected class in its antidiscrimination statute.⁴³ Colorado law now prohibits discrimination based on sexual orientation by places of public accommodation.⁴⁴ Its antidiscrimination statute defines a "place of public accommodation" [as] any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including . . . a dispensary, clinic,

37. See *supra* note 8 and accompanying text.

38. 517 U.S. 620, 623-34, 635-36 (1996).

39. *Id.* at 623-24.

40. *Id.* at 635.

41. *Id.*

42. See Lambda Legal, *Romer v. Evans*, <http://www.lambdalegal.org/in-court/cases/romer-v-evans.html> (last visited Mar. 17, 2010).

43. COLO. REV. STAT. ANN. § 24-34-601 (West 2008).

44. *Id.*

hospital, [or] convalescent home.”⁴⁵ The statute declares that it is unlawful for a place of public accommodation to discriminate “because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.”⁴⁶

The language of Colorado’s public accommodation antidiscrimination statute is similar to that of other state antidiscrimination statutes that include sexual orientation as a protected class.⁴⁷ However, statutory definitions of “public accommodation” are frequently interpreted and revisited as state courts endeavor to draw distinctions between places of public accommodation and private organizations. Where public accommodations provide services to the public and may not discriminate arbitrarily, private organizations tend to be allowed more selectivity in choosing their membership and/or clientele.⁴⁸ This distinction is significant because the antidiscriminatory provisions of state public accommodation antidiscrimination statutes are inapplicable to most private organizations.⁴⁹

A. *Place of Public Accommodation or Private Organization?*

In the past decade, the United States Supreme Court has repeatedly addressed whether private groups constitute places of public accommodation for purposes of state antidiscrimination statutes.⁵⁰ In *Boy Scouts of America v. Dale*, the United States Supreme Court held that the Boy Scouts of America and its New Jersey affiliate did not violate the state public accommodation antidiscrimination statute by prohibiting the employment of a gay man as a scout master.⁵¹ The Court concluded that because homosexuality was contrary to the values promoted by the private, nonprofit organization, forcing the Boy Scouts to employ a gay man was a violation of the group’s First Amendment right to freedom of expression.⁵² Additionally, the Court was uncomfortable with the fact that New Jersey had “applied its public accommodations law to a private entity without even attempting to tie the term ‘place’ to a physical location.”⁵³ Therefore, the Court found that the statutory prohibition of

45. *Id.*

46. *Id.*

47. *See supra* note 15 and accompanying text.

48. *See infra* notes 51-63 and accompanying text.

49. *See infra* notes 51-63 and accompanying text.

50. *See infra* notes 51-63 and accompanying text.

51. 530 U.S. 640, 643 (2000). The New Jersey public accommodation antidiscrimination statute was N.J. REV. STAT. § 10:5-4 (West 2000).

52. *Boy Scouts of Am.*, 530 U.S. at 655-57.

53. *Id.* at 657.

sexual orientation discrimination did not preempt the free expression rights of the private organization.⁵⁴ With its holding in *Boy Scouts of America*, the Supreme Court essentially implied that private nonprofit organizations are free to pick and choose their members without having to conform to state public accommodation antidiscrimination laws.

As a result of the Supreme Court's decision in *Boy Scouts of America*, the current New Jersey public accommodation antidiscrimination statute provides that "[n]othing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private."⁵⁵ *Boy Scouts of America* and the New Jersey antidiscrimination statute illustrate that one of the first steps in determining whether a state public accommodation antidiscrimination statute applies to a particular group or business is to discern whether the organization in question is "distinctly private."⁵⁶

The United States Supreme Court's affirmation of the free expression rights of private organizations in *Boy Scouts of America* echoed the Court's prior decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.⁵⁷ In *Hurley*, the Court ruled that a private group who organizes a parade is not required to admit participants whose specific message is contrary to the overall message of the parade.⁵⁸ Citing the Massachusetts public accommodation law that prohibits discrimination based on sexual orientation, an Irish LGBT group (GLIB) received a state court order to march in a St. Patrick's Day parade whose organizers had refused to allow the participation of GLIB.⁵⁹ The Supreme Court held that the issuance of the court order was a violation of the First Amendment free expression rights of the parade's organizers.⁶⁰ Because GLIB "understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own," the Court reasoned that GLIB's expression directly interfered with that of the parade's organizers.⁶¹ As parades inherently are expressive, the Court concluded that private parade organizers may choose who can participate in their parade in furtherance of the overall message and expression of

54. *See id.* at 659.

55. N.J. REV. STAT. ANN. § 10:5-5 (West 2009).

56. *See id.*; *Boy Scouts of Am.*, 530 U.S. at 663.

57. 515 U.S. 557 (1995).

58. *Id.* at 559.

59. *Id.* at 561-63. The Massachusetts public accommodation antidiscrimination statute "prohibit[ed] 'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'" *Id.* at 561 (quoting MASS. GEN. LAWS ch. 272, § 98 (1992)).

60. *Id.* at 573.

61. *Id.* at 570.

the individual demonstration.⁶² Both *Hurley* and *Boy Scouts of America* indicate the United States Supreme Court's tentative commitment⁶³ to upholding the First Amendment free expression rights of private organizations in the face of state public accommodation antidiscrimination statutes.

In order to avoid interpretive confusion, state public accommodation antidiscrimination statutes generally include explanatory definitions and illustrative (but not necessarily exhaustive) lists of which businesses qualify as "place[s] of public accommodation."⁶⁴ Businesses that are usually categorized as places of public accommodation in state statutes include: hotels, theaters, stadiums, restaurants, state and government agencies, health clubs, retail businesses, amusement parks, and importantly for this Comment, hospitals, clinics, and physicians' offices.⁶⁵

To provide additional clarification, courts and agencies have edited and added to statutory illustrative examples of businesses that are considered places of public accommodation. For example, in several states, whether a taxicab is a place of public accommodation has raised questions.⁶⁶ In *Barbot v. Yellow Cab Co.*, the Massachusetts Commission Against Discrimination found that a taxicab company violated the Massachusetts public accommodation antidiscrimination statute when one of its drivers yelled homophobic insults at a customer.⁶⁷ The Commission held that the lawsuit fell under the state public accommodation statute because "the conduct complained of occurred in a taxicab, which is a 'carrier' and, therefore, a place of public accommodation."⁶⁸ Similarly, Minnesota includes a notation in its public accommodation statute that "[i]t is an unfair discriminatory practice . . . for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability."⁶⁹ The inclusion

62. *Id.* at 576-77.

63. In *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1194 (2008), the United States Supreme Court noted that there may still be a question about cases "in which the mere *impression* of association . . . threatened to distort the groups' intended messages."

64. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 4553 (2008).

65. *See, e.g., id.*; COLO. REV. STAT. ANN. § 24-34-601 (West 2008).

66. *See infra* notes 67-69 and accompanying text.

67. *See* 23 MDLR 317, 317 (Mass. Comm. Discrim. 2001). The Massachusetts statute is MASS. ANN. LAWS ch. 272, § 98 (LexisNexis 2009), which prohibits discrimination by places of public accommodation by "[w]hoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation."

68. *Barbot*, 23 MDLR at 317-18 (citing *Rome*, 19 MDLR 159, 161 (Mass. Comm. Discrim. 1997)).

69. MINN. STAT. ANN. § 363A.11 (West 2004).

of taxicabs in public accommodation statutes is suggestive of the wide range of services and businesses that are considered public accommodations as well as of the latitude courts have taken in applying these statutes.

Other state court decisions offer further examples of the expansiveness of judicial interpretation of “public accommodation.”⁷⁰ In addition to taxicabs, state university sports arenas⁷¹ and public elevators in housing complexes⁷² have also been found to be places of public accommodation by state courts. Collectively, therefore, state antidiscrimination statutes present a broad definition of what constitutes a place of public accommodation.

B. Health Care Service Providers as Places of Public Accommodation

Offices of health care service providers clearly fall under state statutory definitions of “public accommodations.” Most public accommodation antidiscrimination statutes include hospitals and/or clinics in their illustrative lists of places of public accommodation.⁷³ In the Massachusetts public accommodation statute, “a hospital, dispensary or clinic operating for profit” are specifically mentioned as places of public accommodation.⁷⁴ Likewise, Hawaii’s public accommodation statute notes that “[a] professional office of a health care provider . . . or other similar service establishment” is a place of public accommodation.⁷⁵ Wisconsin’s public accommodation statute provides a list of health care service providers that are places of public accommodation; those places include: “barber or cosmetologist, aesthetician, electrologist or manicuring establishments; nursing homes; clinics; [and] hospitals.”⁷⁶ Thus, state public accommodation antidiscrimination statutes encompass a wide array of health care service providers within their respective definitions of “public accommodation.”

Because so many businesses are considered places of public accommodation under state antidiscrimination statutes, sexual orientation

70. See *infra* notes 71-72 and accompanying text.

71. See *State v. Hushijo*, 76 P.3d 550, 561 (Haw. 2003) (holding that a sports arena owned by a state university was a public accommodation under Hawaii’s antidiscrimination statute).

72. The Maine antidiscrimination statute provides that public elevators in “buildings occupied by two or more tenants or the owner and one or more tenants” are places of public accommodation. ME. REV. STAT. ANN. tit. 5, § 4553 (2008).

73. See, e.g., COLO. REV. STAT. ANN. § 24-34-601 (West 2008); see *supra* notes 74-76 and accompanying text.

74. MASS. ANN. LAWS ch. 272, § 92A (LexisNexis 2009).

75. HAW. REV. STAT. ANN. § 489-2 (LexisNexis 2009).

76. WIS. STAT. § 106.52 (2009).

discrimination lawsuits filed against public accommodations are varied. Generally, however, lawsuits that allege sexual orientation discrimination in violation of state public accommodation statutes fall into three categories: (1) alleged discrimination based on the personal beliefs of a health care service provider, (2) alleged discrimination to gay families and couples due to their lack of legal marriage, and (3) alleged discrimination based on a presumption that an individual's sexual orientation predisposes him or her to HIV infection.

Before proceeding with a discussion of sexual orientation discrimination cases, it is important to note that the state statutes discussed herein generally do not include transgendered or transvestite individuals in their definitions of sexual orientation. Indeed, if gender identity is included in a public accommodation statute, it is mentioned as its own class, apart from sexual orientation and gender, respectively.⁷⁷ Because state public accommodation antidiscrimination statutes rarely include a special protection for gender identity, lawsuits filed against places of public accommodation based on gender identity discrimination elicit a great deal of statutory interpretation by courts.

C. Sexual Orientation Discrimination Cases Involving Health Care Service Providers

New Hampshire's public accommodation antidiscrimination statute provides a definition of "sexual orientation" that is similar to the definition found in most state public accommodation antidiscrimination statutes: "'Sexual orientation' means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality."⁷⁸ However, as scholar Robin Cheryl Miller has pointed out, the inclusion of sexual orientation in state antidiscrimination statutes is meant to protect individuals of all sexual orientations, including heterosexuals who may be the victims of discrimination due to mistaken assumptions about their sexual orientation and/or gender identity.⁷⁹ To avoid the perception that the inclusion of sexual orientation as a protected class in public accommodation statutes constitutes state endorsement of gay marriage or homosexuality generally, several state statutes specifically

77. See, e.g., HAW. REV. STAT. ANN. § 489-3 (LexisNexis).

78. N.H. REV. STAT. ANN. § 354-A:2 (2009); see also R.I. GEN. LAWS § 11-24-2.1 (2009) (providing an identical definition of "sexual orientation").

79. Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination*, 82 A.L.R.5TH 1, 18 (2009) (citing *LaFleur v. Bird-Johnson Co.*, 3 Mass. L. Rptr. 196 (Mass. Super. Ct. 1994), as an example of a case in which a heterosexual individual was the victim of discrimination due to an erroneous belief that he was homosexual).

explain that the sexual orientation antidiscrimination language in their statutes should not be construed as “legislative approval of such status.”⁸⁰ The implication of such legislative nonapproval disclaimers is that in many states the illegality of sexual orientation discrimination is confined only to places of public accommodation as defined by state statutes.

To date, the personal beliefs of health care service providers have not resulted in a substantial number of lawsuits in which plaintiff patients successfully argued violations of state public accommodation antidiscrimination statutes. Because there is not a plethora of cases dealing with health care service providers, I will examine sexual orientation discrimination lawsuits against health clubs (which are similar in their nature and purpose to health care service providers and are generally considered places of public accommodation). One of the biggest challenges for plaintiffs who allege sexual orientation discrimination is proving that the alleged discrimination was due to their sexual orientation and not something else.⁸¹ In several cases involving health clubs, plaintiffs have alleged sexual orientation discrimination only to have courts conclude that the plaintiff’s unequal treatment was unrelated to the club’s perception of his or her sexual orientation.⁸²

In *Hassan v. City of Boston*, two lesbian women alleged that a recreation center (the Center) owned by the city of Boston discriminated against them because of their gender and sexual orientation, respectively.⁸³ In their suit before the Commonwealth of Massachusetts Commission Against Discrimination, the women charged that the Center violated the Massachusetts public accommodation antidiscrimination statute by designating female- and male-only weight rooms.⁸⁴ In its opinion, the Commission found that the Center’s manager had no knowledge of the sexual orientation of either plaintiff when he asked them to refrain from using the male-only weight room and to stop being “disruptive” there.⁸⁵ As a result, there was no way for either plaintiff to prove that she was a victim of sexual orientation discrimination rather than a victim of gender discrimination.⁸⁶ While the Massachusetts statute recently had been amended to “exempt gender segregated health clubs

80. *E.g.*, N.H. REV. STAT. ANN. § 354-A:2.

81. *See infra* notes 81-91 and accompanying text.

82. *See id.*

83. 20 MDLR 83, 83 (Mass. Comm. Discrim. 1998).

84. *Id.* at 83, 85. The statute is currently codified at MASS. ANN. LAWS ch. 272, § 98 (LexisNexis 2009), entitled “Discrimination as to Race, Color, Religious Creed, National Origin, Sex, Sexual Orientation, Deafness, Blindness, Physical or Mental Disability or Ancestry.”

85. *Hassan*, 20 MDLR at 84-85.

86. *See id.*

from coverage under the state's public accommodation law . . . the new law [did] not exempt publicly funded facilities, which must continue to guarantee equal access regardless of gender."⁸⁷ Consequently, the Commission determined that the Center, a publicly funded facility, had violated the public accommodation antidiscrimination statute by discriminating based on the gender of the plaintiffs and not based on their sexual orientation.⁸⁸ *Hassan* is indicative of the potential for claims of sexual orientation discrimination to be mistaken for other types of discrimination without clear evidence of sexual orientation discrimination.⁸⁹

Potter v. LaSalle Court Sports & Health Club illustrates a judicial need for concrete evidence of sexual orientation discrimination when other types of discrimination may be at issue.⁹⁰ In *Potter*, the Supreme Court of Minnesota determined that a Minneapolis health club violated the Minneapolis Civil Rights Ordinance by discriminating against a gay male weightlifter based on his sexual orientation by asking him to refrain from socializing in the weight room.⁹¹ Because the health club had articulated a policy that sought to get rid of a "gay atmosphere" in the club, the court held that there was evidence of sexual orientation discrimination against the plaintiff.⁹² Specifically, "the club's own rules, later reduced to writing as the 'LaSalle Sodomite Regulations,' confirm[ed] an intent[ion] to treat heterosexuals and homosexuals differently."⁹³

Potter and *Hassan* point to the difficulty of ascertaining the motivation behind an alleged act of discrimination by a place of public accommodation. Because LGBT individuals frequently belong to other protected classes found in antidiscrimination statutes due to their race, gender, and/or handicap, courts may conclude that an alleged instance of discrimination was due solely to the victim's membership in another minority group. While there was evidence of sexual orientation

87. *Id.* at 85 (citing *Foster v. Back Bay Spas*, 1997 Mass. Super. LEXIS 194 (Mass. Super. Ct. Sept. 29, 1997), a Massachusetts case that held that female-only health clubs violated the Massachusetts public accommodation statute through discrimination against men).

88. *Id.* at 85.

89. *See Potter v. LaSalle Court Sports & Health Club*, 384 N.W. 2d 873, 876 (Minn. 1986).

90. *Id.*

91. *Id.* at 874, 876. The Minneapolis Civil Rights Ordinance prohibited discrimination in public accommodations because of "race, color, creed, religion, ancestry, national origin, sex, *affectional preference*, disability, marital status, or status with respect to public assistance." *Id.* at 875.

92. *Id.* at 874-75.

93. *Id.* at 875-76.

discrimination in *Potter* because of the health club's policy of eliminating a "gay atmosphere,"⁹⁴ there was no proof in *Hassan* that the Center's manager was even aware of the plaintiffs' sexual orientations.⁹⁵ This problem of determining discriminatory motive is exemplified by the situation in *North Coast* in which Dr. Brody claimed that the basis for her objection to inseminating Benitez was the fact that Benitez was unmarried and not the fact that she was a lesbian.⁹⁶ However, Benitez's "complaint [did] not allege marital status discrimination [and she] assert[ed] that Dr. Brody objected to performing IUI for a lesbian, and consequently the alleged denial of the medical treatment at issue constituted sexual orientation discrimination."⁹⁷ Judicial uncertainty about the impetus for alleged discriminatory acts by places of public accommodations appears to be present, to different degrees, in most sexual orientation discrimination cases.

Additionally, it is often difficult for courts to determine whether alleged discrimination against a gay and lesbian couple resulted from the couples' status as unmarried individuals or as a result of the sexual orientation of each partner.⁹⁸ One scholar has noted that

in a variety of contexts, courts have held or recognized that the failure to provide, to gay or lesbian individuals and their domestic partners, benefits or services offered only to married persons did not constitute sexual orientation discrimination, since unmarried same-sex couples are treated the same as are unmarried opposite-sex couples.⁹⁹

Similarly, Holning Lau, a teaching fellow at the Williams Institute on Sexual Orientation Law & Public Policy, argues that although many public accommodations do not discriminate against gay individuals per se, they may hold "heteronormative presumptions."¹⁰⁰ According to Lau, many businesses "such as ballroom dance studios and romantic beach resorts . . . formally welcome sexual minorities as long as they suppress their sexual orientation and conform to heterosexual norms by coupling with members of the opposite sex."¹⁰¹ As a result, a number of businesses target heterosexual couples and, thus, implicitly shut out same-sex

94. See *id.* at 874-76.

95. See *Hassan*, 20 MDLR 83, 84-85 (Mass. Comm. Discrim. 1998).

96. *N. Coast Women's Care Med. Group v. San Diego County Superior Court*, 189 P.3d 959, 963 n.1 (Cal. 2008).

97. *Id.*

98. See Miller, *supra* note 79, at 19; Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1278-79 (2006).

99. Miller, *supra* note 79, at 19.

100. Lau, *supra* note 98, at 1278-79.

101. *Id.* at 1278.

couples while not technically violating a state public accommodation antidiscrimination statute that forbids discrimination based on sexual orientation.¹⁰²

For example, in *Monson v. Rochester Athletic Club*, a lesbian couple who parented a child together was denied a family membership at a health club in Minnesota.¹⁰³ The women filed suit alleging sexual orientation discrimination in violation of the Minnesota Human Rights Act, which prohibits sexual orientation discrimination by places of public accommodation.¹⁰⁴ The Court of Appeals of Minnesota held that because the health club denied the women membership based on the fact that they were unmarried individuals and not due to their respective sexual orientations, there was no violation of the antidiscrimination statute.¹⁰⁵ The court determined that unmarried persons are not members of a protected class subject to the protections of the Minnesota antidiscrimination statute.¹⁰⁶ In its decision, the court explained that the health club policy “does not discriminate on the basis of sexual orientation; it denies family memberships to unmarried heterosexual couples and unmarried homosexual couples alike.”¹⁰⁷ However, the court did not accept the argument that the reasoning was discriminatory due to the fact that Minnesota forbids gay couples to marry, which means that gay individuals would never be eligible for the family membership benefits of the health club unless they were to marry a member of the opposite sex.¹⁰⁸ Consequently, gay couples in Minnesota are effectively excluded from obtaining recourse for any sexual orientation discrimination against them by places of public accommodation based on their status as a same-sex couple.

Presented with state public accommodation antidiscrimination statutes and issues concerning gay couples, most state courts defer to state legislative pronouncements on gay marriage.¹⁰⁹ In *Koebke v. Bernardo Heights Country Club*, the California Supreme Court held that it was a violation of the California Unruh Civil Rights Act for a country club to deny family membership benefits to a lesbian couple who were

102. *See id.* Lau argues for the inclusion of “couples’ moral rights” in public accommodation antidiscrimination statutes in addition to sexual orientation. *Id.* at 1278-80.

103. 759 N.W.2d 60, 62 (Minn. Ct. App. 2009).

104. *Id.* The statute is MINN. STAT. ANN. § 363A.11 (West 2008).

105. *Monson*, 759 N.W.2d at 64-65.

106. *See id.*

107. *Id.* at 64.

108. *See id.*

109. *See infra* notes 110-113 and accompanying text.

registered domestic partners.¹¹⁰ While the court acknowledged that “domestic partner” was not a protected class under the Unruh Act, it pointed out that the Act’s list of protected classes was meant to be illustrative and not exhaustive.¹¹¹ The court, however, based most of its decision on the California Domestic Partner Act which affords domestic partners the same rights as opposite-sex married couples.¹¹² Favoring a policy of expansive civil rights, the court noted that “the Legislature has found that expanding the rights and obligations of domestic partners ‘would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.’”¹¹³ Therefore, the California Supreme Court deferred to the State Constitution and the Domestic Partner Act. The implication is that plaintiffs who allege discrimination by a place of public accommodation based on their membership in a same-sex relationship likely will be unsuccessful absent state legislation that specifically allows same-sex marriage, civil unions, domestic partnerships, or similar legal recognition of same-sex relationships.

In addition to allegations of discrimination to same-sex couples, public accommodation antidiscrimination statutes are also cited by plaintiff patients who argue that sexual orientation discrimination occurs when a health care provider assumes that a homosexual person is HIV positive or infected with the AIDS virus.¹¹⁴ In *Doe v. District of Columbia Commission on Human Rights*, the District of Columbia Court of Appeals held that a hospital had a “reasonable basis” for believing that a homosexual patient could be a carrier for HIV based on his medical history, which included his sexual orientation.¹¹⁵ Following a suicide attempt by patient Doe, the hospital that treated him refused to transfer him to its psychiatric ward until it received results of an HIV test because its policy forbade individuals with infectious diseases from being treated in the psychiatric ward.¹¹⁶ Unhappy with the amount of time he waited before being transferred to the psychiatric ward, Patient Doe filed suit against the hospital in which he alleged that he had not

110. 115 P3d 1212, 1217 (Cal. 2005). Note that the California Unruh Civil Rights Act is also the antidiscrimination statute discussed in *North Coast*. See *supra* note 8 and accompanying text.

111. *Koebke*, 115 P3d at 1219 (citing *In re Cox*, 474 P2d 992, 999 (Cal. 1970)).

112. See *id.* at 1223. The rights of domestic partners in California are codified in CAL. FAM. CODE § 297 (Deering 2008).

113. *Koebke*, 115 P3d at 1223 (quoting Stats. 2003, ch. 421, § 1, subd. (b)).

114. See *infra* notes 115-119 and accompanying text.

115. 624 A.2d 440, 445-46 (D.C. 1993).

116. *Id.* at 442.

consented to the HIV test and the only reason for the test was his homosexuality.¹¹⁷ Furthermore, he argued that the hospital had violated the District of Columbia public accommodation antidiscrimination statute by taking medical precautions to guard against his suspected HIV status solely due to his homosexuality.¹¹⁸ However, the court ruled that the delay in admitting the patient to the psychiatric ward was based on a belief that patient Doe may have HIV and not his sexual orientation.¹¹⁹

Often an individual's infection with the AIDS virus is categorized as a "disability" under state public accommodation antidiscrimination statutes.¹²⁰ The Maryland Human Rights Commission has interpreted infection with HIV or AIDS to be a handicap under the Maryland public accommodation antidiscrimination statute.¹²¹ Despite the fact that infection with HIV is a protected class in public accommodation antidiscrimination statutes such as Maryland's, discrimination based on an individual's diagnosis of AIDS is allowed in certain circumstances in Maryland and in other states.¹²² In a written opinion of the Attorney General of Maryland on whether electrologists (who operate public accommodations) may refuse to provide hair removal services to individuals affected with AIDS, the Attorney General noted "[t]he Public Accommodations Law permits some deference to bona fide medical judgment."¹²³ Thus, a known diagnosis of HIV infection or AIDS and a perception that someone *might* have the AIDS virus due to his sexual orientation are two different categories, the latter of which might be actionable under state public accommodation antidiscrimination statutes.

IV. OBSTACLES TO THE SUCCESS OF STATE PUBLIC ACCOMMODATION ANTIDISCRIMINATION STATUTES IN PREVENTING AND REMEDYING

117. *Id.* at 443-44.

118. *Id.* at 443-45. The statute was D.C. CODE § 1-2519(a), which stated:

It shall be an unlawful discriminatory practice to do any of the following acts, *wholly or partially* for a discriminatory reason based on the . . . sexual orientation . . . of any individual: (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

A hospital is considered a place of public accommodation.

119. *Doe*, 624 A.2d at 446.

120. *See* 81 Op. Att'y Gen. Md. 62, 69 (1996) (discussing MD. CODE ANN. art. 49B, § 5 (2003)); *see also* 77 Op. Att'y Gen. Md. 100, 100-01 (1992) (advising that funeral homes are public accommodations and any unequal services that they provided to corpses based on their HIV status constituted handicap discrimination under MD. ANN. CODE art. 49B, § 5).

121. 77 Op. Att'y Gen. Md. at 100-01; 81 Op. Att'y Gen. Md. at 69.

122. 81 Op. Att'y Gen. Md. at 70.

123. *Id.*

SEXUAL ORIENTATION DISCRIMINATION BY PLACES OF PUBLIC ACCOMMODATION

A tremendous setback in the ability of state public accommodation antidiscrimination statutes to remedy sexual orientation discrimination is the fact that several states have adopted laws that effectively forbid the inclusion of “sexual orientation” in their statutory lists of protected classes.¹²⁴ Though *Romer* declared that legislation that specifically discriminates against people based on their sexual orientation is contrary to the Equal Protection Clause of the Fourteenth Amendment,¹²⁵ states have passed legislation that seemingly fits through the loopholes of *Romer*.¹²⁶ Holning Lau points out the perplexing policies of “some states, such as Illinois, [which] simultaneously proscribe discrimination on the basis of sexual orientation in public accommodations while explicitly prohibiting same-sex marriage.”¹²⁷ Indeed, state prohibitions of sexual orientation discrimination seem to run counter to state “Defense of Marriage” acts and send conflicting messages about state policy.

Additionally, states that do not include sexual orientation in their public accommodation antidiscrimination statutes grapple with cities and localities in their states that pass public accommodation antidiscrimination ordinances that include sexual orientation as a protected class.¹²⁸ In *Hartman v. City of Allentown*, the Pennsylvania Commonwealth court concluded that an Allentown city ordinance that prohibited sexual orientation and gender identity discrimination in public accommodations was not contrary to state law.¹²⁹ At issue was the fact that the Allentown ordinance was inconsistent with the Pennsylvania Human Relations Act (PHRA), which did not include sexual orientation as one of its protected classes.¹³⁰ Nevertheless, the court determined that the ordinance was within the powers of the city of Allentown because there was “no evidence that Allentown designed or intended to impose affirmative duties of business management on businesses; rather, the Ordinance is intended to protect Allentown’s citizens from

124. See, e.g., *infra* note 137 and accompanying text

125. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996).

126. See Lau, *supra* note 100, at 1280.

127. *Id.*

128. See *infra* notes 129-133 and accompanying text.

129. 880 A.2d 737, 740, 752 (Pa. Commw. Ct. 2005).

130. *Id.* at 740. The Pennsylvania Human Relations Act states that it is “the public policy of this Commonwealth . . . to assure equal opportunities to all individuals and to safeguard their rights to public accommodation and to secure housing accommodation and commercial property regardless of race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability.” 43 PA. CONS. STAT. ANN. § 952 (West 2009).

discrimination.”¹³¹ Because “the PHRA was not intended to be exclusive in the field of anti-discrimination,” the court reasoned that the inclusion of sexual orientation in Allentown’s ordinance was not a violation of the State statute.¹³² Though *Hartman* indicates that Pennsylvania may allow city ordinances that prohibit discrimination by public accommodations based on sexual orientation in the future, Pennsylvania has not specifically amended the PHRA to prohibit sexual orientation discrimination.¹³³

Like Pennsylvania’s PHRA, Ohio’s public accommodation antidiscrimination statute does not include sexual orientation as a protected class.¹³⁴ Section 4112 of the Ohio Revised Code (2009) states that “it is an unlawful discriminatory practice . . . [f]or any . . . place of public accommodation to deny to any person, . . . regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations.”¹³⁵

The definitions section of the Ohio Revised Code Annotated notes that a disability denotes a “physical . . . impairment” that “does not include . . . [h]omosexuality and bisexuality.”¹³⁶ Using the language in the definitions section of the Ohio Code, several Ohio courts have reasoned that the statutory explanation that sexual orientation is not a protected disability indicates that sexual orientation is not to be considered a protected class at all.¹³⁷

The determination of some state legislatures and legislators to exclude sexual orientation from public accommodation antidiscrimination statutes will be a challenge to plaintiffs who seek to assert sexual orientation discrimination in the thirty-one states that currently do not recognize sexual orientation as a protected class in their public accommodation statutes.¹³⁸ The fact that a state may prohibit discrimination based on sexual orientation while also forbidding gay marriage, civil unions, and/or domestic partnerships is a conundrum that presents another challenge to plaintiffs who seek to assert sexual

131. *Hartman*, 880 A.2d at 746-47.

132. *Id.* at 751.

133. 43 PA. CONS. STAT. ANN. § 952.

134. OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2009).

135. *Id.*

136. *Id.* § 4112.01.

137. *See, e.g., Greenwood v. Taft*, 663 N.E.2d 1030, 1033-34 (Ohio Ct. App. 1995) (holding that a plaintiff could not successfully allege sexual orientation discrimination in an employment case because there was no statewide policy that forbade sexual orientation discrimination by employers).

138. *See supra* note 15 and accompanying text.

orientation discrimination by public accommodations in violation of state statutes.¹³⁹

V. CONCLUSION

While discrimination by health care service providers based on their personal beliefs about sexual orientation has not resulted in a significant number of lawsuits citing violations of state public accommodation statutes, *North Coast* suggests the potential for future lawsuits that allege sexual orientation discrimination by health care service providers to be successful. The inclusion of sexual orientation as a protected class in state public accommodation antidiscrimination statutes is a recent development to which *Romer* seemingly opened the floodgates in 1996. In addition to bringing forth discussion of the inclusion of sexual orientation in public accommodation antidiscrimination statutes, *North Coast* challenged medical associations, namely the California Medical Association, to develop official policies regarding sexual orientation discrimination.¹⁴⁰ Because the American Medical Association and state medical associations have stipulated official policies of sexual orientation antidiscrimination, it is likely that other state medical associations will follow suit.

State public accommodation antidiscrimination statutes clearly define hospitals, physicians' offices, and clinics as places of public accommodation. Though only nineteen states and the District of Columbia currently prohibit sexual orientation discrimination by places of public accommodation, some cities have developed their own antidiscrimination ordinances that prohibit sexual orientation discrimination.¹⁴¹ The inclusion of sexual orientation in antidiscrimination statutes and the increasing number of lawsuits in which plaintiffs successfully argue sexual orientation discrimination may help to alleviate confusion regarding the motivation behind an establishment's alleged discrimination. With the growing recognition of sexual orientation as a protected class, the likelihood that a sexual orientation discrimination claim might be confused with another type of discrimination claim is likely decreasing.

139. See Lau, *supra* note 100, at 1280.

140. See, e.g., Wyatt Buchanan, *When Rights Collide: Doctor and Patient Both Say Their Liberty Was Violated*, S.F. CHRON., July 29, 2005, at A1; *GLMA Objects to California Medical Association's Position in Sexual Orientation Discrimination Case*, ADVOCATE, June 25, 2005; Lambda Legal, Lambda Legal and the Gay and Lesbian Medical Association Praise the California Medical Association for Affirming Equal Treatment for All Patients (Sept. 20, 2005), <http://www.lambdalegal.org/news/pr/lambda-legal-and-the-gay-and-the.html>.

141. See *supra* notes 129-133 and accompanying text.

Antidiscrimination policies of state and national medical associations, unambiguous statutory classification of health care service providers as places of public accommodation, and the fact that nineteen states include sexual orientation as a protected class in their antidiscrimination statutes will be very beneficial to future victims of health care discrimination based on their sexual orientation. Therefore, state public accommodation antidiscrimination statutes will play an important but not yet defined role in preventing and remedying sexual orientation discrimination by health care service providers in the future.