

# EMPLOYMENT PROTECTION FOR LESBIANS AND GAY MEN

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## I. INTRODUCTION

On February 19, 1992, Robert Borquez was hard at work as an associate attorney with the law firm of Ozer and Mullen, P.C.<sup>1</sup> That day, Borquez disclosed to a partner at the firm that his male lover had AIDS.<sup>2</sup> The partner, without Borquez's consent or knowledge, divulged Borquez's sexual orientation to others at the firm.<sup>3</sup> In short order, Borquez's employment was terminated, even though he had earned three merit raises for his work, including one only eleven days before his

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1. See *Borquez v. Ozer*, No. 93-CA1805, 1995 WL 656871, at \*1 (Colo. Ct. App. Nov. 9, 1995).

2. See *id.*

3. See *id.*

dismissal.<sup>4</sup> At first, the firm claimed that Borquez was let go as a cost-cutting measure.<sup>5</sup>

Borquez challenged his dismissal, asserting that he had been discharged on account of his sexual orientation, specifically his sexual relationship with another man.<sup>6</sup> On November 9, 1995, the Colorado Supreme Court agreed.<sup>7</sup> The court sided with Borquez in part on grounds that his firing violated Colorado's "lifestyle protection" statute.<sup>8</sup> This statute says, in relevant part that "[i]t shall be a discriminatory . . . practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . ."<sup>9</sup> According to the court, since same-sex relationships are not unlawful, forcing Borquez out flew in the face of the Colorado statute. In short, Borquez stated a valid claim because his off-duty conduct, his sexual relationship with a man, was not taboo under Colorado law.<sup>10</sup>

This Article explores the legal claims open to lesbians and gay men challenging employment discrimination on grounds of sexual orientation and concludes that emerging arguments such as those relying on "lifestyle protection" statutes are both effective and necessary.<sup>11</sup> The need for new arguments is demonstrated through an analysis of conventional employment law that deals with, or more accurately fails to deal with, lesbians and gay men. Given these concerns, Part II looks at the common-law doctrine of employment at will, with its narrowly conceived exceptions. Part III surveys limitations that have been placed on the common-law doctrine by federal and state legislation. Part IV assesses "lifestyle protection" statutes enacted by some states and explores how they may be harnessed to secure some, albeit limited, protection for lesbians and gay men. Part IV analyzes the concerns that are raised when lesbians and gay men must shape their arguments to fit within the dogmatic framework of employment discrimination law. Finally, Part V concludes that as long as the law affords no employment

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4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. COLO. REV. STAT. § 24-34-402.5(1) (Supp. 1995).

10. *See Borquez*, 1995 WL 656871, at \*1.

11. These statutes, which are also referred to as "lifestyle discrimination statutes," provide employment protection for individuals who engage in certain legal activities during nonworking hours. *See* Jessica Jackson, Comment, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 144 (1996).

protection for lesbians and gay men directly, members of sexual minorities must learn to exploit existing laws creatively.

## II. EMPLOYMENT AT WILL AND THE COMMON-LAW EXCEPTIONS

### A. Generally

The harsh common-law doctrine of employment at will was not an English transplant. Rather, it was conceived by American courts of the late 19th century.<sup>12</sup> Under employment at will, an employee may be discharged by an employer “for good cause, for no cause, or even for cause morally wrong, without [the employer] being thereby guilty of legal wrong.”<sup>13</sup>

Courts have determined that the broad doctrine as unmodified does not protect any employee who is terminated, no matter the reason, and so allows discharge of an at-will employee solely by virtue of sexual orientation.<sup>14</sup> For example, in *Greenwood v. Taft, Stettinius & Hollister*,<sup>15</sup> an attorney alleged that he was fired from his law firm because he is gay and because of his pro bono work on behalf of a human rights ordinance in the city of Cincinnati.<sup>16</sup> The Ohio appellate court, without much discussion, agreed with the law firm that its summary dismissal of Greenwood was beyond legal review under the at-will doctrine.<sup>17</sup> In his concurring opinion, Judge Painter noted that “appellant has stated no ground cognizable at law for avoiding the employment-at-will doctrine.”<sup>18</sup>

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12. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976)(tracing the development of the doctrine from the English rule of employment for a fixed term to the American rule of employment at will).

13. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled by* *Hutton v. Watters*, 179 S.W. 134, 137-38 (Tenn. 1915). “[A] general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee’s rights, and a discharge without cause does not give rise to an action for damages.” *Collins v. Rizkana*, 652 N.E.2d 653, 656 (Ohio 1995).

14. See *Joachim v. AT&T Info. Sys.*, 793 F.2d 113 (5th Cir. 1986); John W. Barker & Sheila Kennedy, *The Gay '90s—Sexual Orientation and Indiana Law*, 27 IND. L. REV. 861, 873 (1994). “It is reasonably certain, therefore, that a private employer in Indiana may discharge an employee because the employee is gay or lesbian or even expresses opinions about being gay or lesbian, regardless of how well the employee performs.” *Id.* at 873.

15. 663 N.E.2d 1030 (Ohio Ct. App. 1995).

16. *Id.* at 1031.

17. *Id.* at 1034.

18. *Id.* at 1036.

*B. Contract Exception*

Four narrow loopholes to the at-will doctrine are recognized under the common law. The most universally recognized and least controversial common-law exception is that an employer and employee can adjust their relationship by contract.<sup>19</sup> So, for example, employment is not at will when employer and employee agree to restrict the employer's untrammelled right to discharge the employee.<sup>20</sup> The clearest example of this exception is when the restrictions are spelled out in no uncertain terms in the body of the contract.<sup>21</sup> Courts recognize that "[a]n employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise."<sup>22</sup> For example, the parties' contract may stipulate that the employee may only be cashiered for just cause or make clear that the employment relationship is for one year.<sup>23</sup>

Lesbian or gay male employees fired in violation of an express covenant built into the employment agreement, regardless of the substance of that covenant, may sue the employer for breach of contract.<sup>24</sup> Thus, if the employment contract guarantees that the duration of the contract is for one year and a non-breaching employee is fired before the year is up, the employee has a strong breach of contract claim against the employer. Breach of contract will lie whether the employee was fired on account of her sexual orientation or on any other grounds.

A more controversial version of the "contract" exception arises when no express contract ties the parties but an implied-in-fact contract is found on the strength of restrictions on termination embodied in an employee handbook, manual, or similar personnel document distributed by the employer.<sup>25</sup> As a rule, an employee handbook spells out the terms

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19. This article will not address the esoteric issue of whether there is a "contract exception" or if instead the contract cases simply recognize the principle that an employer and employee may enter into a valid contract setting forth the term of the employment, which makes the employment for a term and not at will.

20. See HENRY H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 4.1 (1992). "When a formal written contract of employment exists, signed by both employer and employee, courts historically have accepted the proposition that discharge of the employee before the end of contract can give rise to liability under ordinary breach of contract principles." *Id.*

21. See *id.*

22. *Witkowski v. Lipton*, 643 A.2d 546, 552 (N.J. 1994).

23. See generally CHARLES A. SULLIVAN ET AL., *CASES AND MATERIALS ON EMPLOYMENT LAW* 85 (1993). "Accordingly, while at will doctrine continues to dominate the workplace, a significant portion of the workforce is employed under formal, written contracts providing for employment for a fixed-term, typically from one to five years." *Id.*

24. See PERRITT, *supra* note 20, § 4.11.

25. See *id.* § 4.13.

and conditions of employment,<sup>26</sup> as well as the policies and philosophies of the employer.<sup>27</sup> Courts read this “implied” contract exception as evidence of the parties’ agreement.<sup>28</sup>

In *Witkowski v. Lipton*,<sup>29</sup> an employee claimed that his discharge was wrongful because it violated the company’s termination policies as spelled out in the employee manual.<sup>30</sup> The Supreme Court of New Jersey affirmed the appellate court’s judgment that the “manual established an implied employment contract that governed termination of employment.”<sup>31</sup> The *Witkowski* court reasoned that “[t]he key consideration in determining whether an employment manual gives rise to contractual obligations is the reasonable expectations of the employees.”<sup>32</sup> The court explained why it was willing to enforce an implied contract exception: “[w]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of employment (including, especially, job security provisions) courts should continue and enforce that manual ‘in accordance with the reasonable expectations of the employees.’”<sup>33</sup> Viewed in this light, the manual is deemed to tax the employer with contractual obligations. In *Williams v. Precision Coil, Inc.*,<sup>34</sup> however, the Supreme Court of Appeals of West Virginia refused to find that the employee handbook foreclosed at-will dismissals. The court concluded that “the plaintiff [employee] failed to put into dispute an essential element of his cause of action, i.e., that he knew of the handbook and accepted its terms by continuing in the defendant’s employ.”<sup>35</sup> The court reasoned that “[t]ypically, in such contract cases, an employer has issued a handbook or similar manual that sets forth the requirements for a job and, in effect, informs the employees that if they abide by the rules they

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26. See *Woolley v. Hoffman*, 491 A.2d 1257 (N.J. 1985). See generally PERRITT, *supra* note 20, § 4.13.

27. See Richard Harrison Winters, Note, *Employee Handbooks and Employment At Will Contracts*, 1985 DUKE L.J. 196 (1985). “[The employee handbook] is frequently an elaborate expression of the employer’s personnel policies. An employee handbook typically informs the employee about grievance and termination procedures, severance pay, insurance, vacation pay, and general operating rules.” *Id.* at 196.

28. See *Woolley*, 491 A.2d at 1267. “[J]ob security provisions contained in a personnel policy manual widely distributed among a large workforce are supported by consideration and may therefore be enforced as a binding commitment of the employer.” *Id.*

29. 643 A.2d 546, 546 (N.J. 1994).

30. *Id.*

31. *Id.* at 549.

32. *Id.* at 550.

33. *Id.* (quoting *Woolley*, 491 A.2d at 1264).

34. 459 S.E.2d 329 (W. Va. 1995).

35. *Id.* at 343.

can expect job security.”<sup>36</sup> The court further reasoned, however, that only when “the employees, acting in reliance on such promises, either accepted employment or continued in the same employment and conformed their conduct to the rules,” should they secure the protection of an implied-in-fact contract.<sup>37</sup>

A lesbian or gay employee, like any other employee who has been discharged contrary to procedures set forth in an employee manual, is entitled to bring suit based on the breach, even if the breach does not implicate sexual orientation. In addition, an employee terminated because of sexual orientation may be able to rely on the implied contract/handbook exception if the handbook contains anti-discrimination language pointedly covering sexual orientation. For example, a manual distributed by AT&T Information Systems promises that “sexual preference will not be used as a basis for job discrimination or termination.”<sup>38</sup> With such language, the employee may credibly argue that the pledge was a term of the implied-in-fact contract with her employer.

Whether the employee challenging discharge is a gay man or a lesbian fired for sexual orientation or an employee challenging any manner of dismissal on the strength of the implied contract exception, he or she will need to overcome the “waiver” defense. Employers in jurisdictions recognizing the implied contract/handbook exception to the at-will doctrine have sometimes successfully avoided the exception by inserting a disclaimer in the handbook.<sup>39</sup> For the most part, waivers or disclaimers avow that the handbook does not contractually stay the employer’s hand from discharging employees at will.<sup>40</sup> To be effective, the disclaimers must be “clear, conspicuous, and likely to be understood by the subject employees.”<sup>41</sup> In *Bailey v. Perkins Restaurants, Inc.*,<sup>42</sup> the Supreme Court of North Dakota stopped short of finding an implied contract when the employee manual at issue contained the following

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36. *Id.* at 342.

37. *Id.*

38. See *Joachim v. AT&T Info. Sys.*, 793 F.2d 113, 114 (5th Cir. 1986). This language was found in the AT&T personnel handbook that was in effect when Steven Joachim, the plaintiff in *Joachim v. AT&T Information Systems* was terminated. The Fifth Circuit found that, under Texas law, employee handbooks did not create contractual rights in employees, and thus that the plaintiff, an at-will employee, had no cause of action against his employer.

39. See SULLIVAN ET AL., *supra* note 23, at 181. “Employers . . . will consider the escape hatch of a disclaimer of contractual liability.” *Id.*

40. See *Williams*, 459 S.E.2d at 341.

41. *Id.*

42. 398 N.W.2d 120 (N.D. 1986).

language: “[t]his Employee Handbook has been drafted as a guideline for our employees. It shall not be construed to form a contract between the Company and its employees. Rather, it describes the Company’s general philosophy concerning policies and procedures.”<sup>43</sup> The court noted that “the presence of the clear and conspicuous disclaimer in the employee handbook operated to preserve the presumption of at will employment and thus [the employer] was not bound to follow the ‘Progressive Discipline Policy’ set forth in its employee handbook.”<sup>44</sup>

However, an employee may still frame her claim on an implied agreement in a manual bearing a disclaimer. Judge Levine, in his concurring opinion in *Bailey*, noted that the employees had not addressed the disclaimer issue in their oral arguments or brief.<sup>45</sup> Moreover, the Judge underscored that the opinion did not address “issues of ambiguity and reliance created by an employer’s disclaimer in an employee handbook that purports to ‘taketh’ what the remainder of the handbook appears to ‘giveth,’ and the effect of such ambiguity on the employer-employee relationship.”<sup>46</sup>

### C. *Promissory Estoppel Exception To At Will Employment*

The estoppel exception is a second common-law exception to the doctrine of employment at will recognized by some states. This exception stems from the concept of promissory estoppel, defined in Section 90 of the Restatement (Second) of Contracts<sup>47</sup> as “a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”<sup>48</sup> Under this line of analysis, the right of an employer to fire an at-will employee is checked when an employee relies, to her detriment, on promises of job security uttered by her employer. To be enforceable, the employer’s promise must be clear and unambiguous, a pledge the “promisor could reasonably have expected to induce reliance.”<sup>49</sup> In addition, the promise must be

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43. *Id.* at 121.

44. *Id.* at 123.

45. *Id.*

46. *Id.*

47. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1982).

48. *Id.*

49. See *Margolis v. Sweet Foods, Inc.*, No. 345004, 1993 U.S. App. LEXIS 2876, at \*8 (Conn. Supp. Ct. Oct. 29, 1993).

sufficiently definite.<sup>50</sup> In *D'Ulisse-Cupo v. Board of Directors*,<sup>51</sup> the plaintiff, a teacher, pegged her claim on the basis of promissory estoppel on employer remarks such as “there would be no problem with her teaching certain courses and levels the following year, . . . and that she should continue her planning for the exchange program.”<sup>52</sup> The Connecticut Supreme Court, however, found that the “representations manifested no present intention on the part of the [employer] to undertake immediate contractual obligations to the [employee],”<sup>53</sup> leaving the ousted employee without legal recourse.

The force of promissory estoppel on an employer’s right to discharge an employee was much in evidence in *Sheppard v. Morgan Keegan & Company*.<sup>54</sup> In *Sheppard*, the employer, an investment banking and stock brokerage firm, offered the plaintiff, a California resident, a job for an open-ended term in its Memphis, Tennessee office.<sup>55</sup> Relying on the employer’s offer, the plaintiff quit his California job, moved to Memphis, and rented an apartment.<sup>56</sup> Two days before the plaintiff was to begin working full time, he was coolly informed that the employer had decided to “separate” him.<sup>57</sup> The California Appellate Court held that the employer’s conduct was governed by the doctrine of promissory estoppel and concluded “that under the facts of this case the [plaintiff] had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [the employer] once he was on the job.”<sup>58</sup>

Promissory estoppel, when wielded by a lesbian or gay plaintiff, requires that its elements have been strictly satisfied. Whether the promise involves mention of the employer’s sexual orientation policy is of no moment. What is key is whether there is a clear and unambiguous promise, justifiable reliance on the promise, and a subsequent breach of that promise.<sup>59</sup> An employer’s nondiscrimination policy may not rise to

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50. See *D'Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch.*, 520 A.2d 217 (Conn. 1987).

51. *Id.*

52. *Id.* at 218.

53. *Id.* at 221, 222.

54. 266 Cal. Rptr. 784 (Ct. App. 1990).

55. *Id.* at 785.

56. *See id.*

57. *See id.* at 786.

58. *Id.* at 787 (quoting *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981)) (omissions in original).

59. See *Margolis v. Sweet Foods, Inc.*, No. 345004, 1993 U.S. App. LEXIS 2876 (Conn. Supp. Ct. Oct. 29, 1993).

the level of a promise when it does not spell out the employer's intention to enter into a contractual relationship with a particular employee.

*D. Good-Faith Exception*

A third common-law exception to the doctrine of employment at will is known as the "good faith" exception. All employment contracts, according to this view, including contracts for at-will employment, contain an implied covenant of good faith and fair dealing.<sup>60</sup> As a result, a discharge undertaken in bad faith, i.e., motivated by ill will or dishonesty, gives rise to a breach of the employment contract and is legally actionable.<sup>61</sup>

The good-faith exception to at-will employment was first applied by the Supreme Court of Delaware in *Merrill v. Crothall-American, Inc.*<sup>62</sup> In *Merrill*, the employee argued that the defendant-employer had offered him an at-will position for an indefinite duration, although the employer's unspoken intent was to employ him only briefly.<sup>63</sup> The employee produced evidence from which a rational jury could infer that the employer was actively pursuing the employee's replacement when the job offer was made.<sup>64</sup> While the court recognized that this exception to at-will employment fetters an employer's management of its workforce, in the end the interference is "minimal, and wholly justifiable."<sup>65</sup> The court reasoned that "[s]uch a requirement merely prevents one side from obtaining an unfair advantage when bargaining for a contract. An employer has wide latitude in deciding how it conducts its business including its employment undertakings, but it may not do so by trickery or deceit."<sup>66</sup>

After ruling that a covenant of good faith and fair dealing inheres in all employment contracts drawn under Delaware law, the court spelled out the conditions for a breach of the covenant. For the employee to prevail, "the conduct of the employer must constitute 'an aspect of fraud, deceit or misrepresentation.'"<sup>67</sup> In *Merrill*, the defendant strung the employee along by masking a key term of employment from him, namely

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60. See *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

61. See BLACK'S LAW DICTIONARY 139 (6th ed. 1990).

62. *Merrill*, 606 A.2d at 96.

63. *Id.* at 98.

64. See *id.* at 102.

65. See *id.* at 101.

66. *Id.*

67. See *id.* (citations omitted).

that he would be let go as soon as a replacement could be found.<sup>68</sup> Viewed in this light, the court concluded that a jury could find that the defendant breached the implied covenant of good faith and fair dealing and overruled the defendant's motion for summary judgment.<sup>69</sup>

This check on an employer's right to dismiss employees has not found favor in many jurisdictions because, as noted by the Hawaii Supreme Court in *Parnar v. Americana Hotels, Inc.*,<sup>70</sup> such a gaping loophole "subject[s] each discharge to judicial incursions into the amorphous concept of bad faith."<sup>71</sup> One court has reasoned that a good faith duty "would unduly restrict an employer's discretion in managing the workforce."<sup>72</sup>

A lesbian or gay employee challenging a sexual orientation-based ouster under the good-faith exception must pinpoint employer conduct that is fraudulent, deceitful, or exhibits some measure of misrepresentation. Proving this elusive element is a daunting task for plaintiffs. If the employer issues a nondiscrimination policy, however, an employer's disregard of its own nondiscrimination policy appears to be in bad faith.

#### *E. Public Policy Exception*

A fourth and fertile common-law exception to the at-will doctrine is known as the public policy exception. Under this exception, it is unlawful for an employer to terminate an employee if the dismissal violates public policy.<sup>73</sup> This exception is easier to understand by example than it is to define in the abstract as states have struggled over both the meaning of the term "public policy" and its provenance.<sup>74</sup> In fact, the slippery nature of what is meant by "public policy" is its "Achilles heel."<sup>75</sup> In practice, public policy is a "broad concept embodying the community common sense and common conscience."<sup>76</sup> Given public policy's elusive nature, some states have confined it to what can be found in constitutional or state legislative provisions.<sup>77</sup> On the other

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68. *Id.* at 102.

69. *See id.*

70. 652 P.2d 625 (Haw. 1982).

71. *Id.* at 629.

72. *See Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wis. 1983).

73. *See id.* at 839.

74. *See id.*

75. *See Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 877 (Ill. 1981).

76. *Brockmeyer*, 335 N.W.2d at 840.

77. *See id.*

hand, some jurisdictions have recognized that a state's public policy can be found not only in federal and state constitutions and statutes, but also in administrative rules, regulations, and decisions; in common law and judicial decisions; and in professional codes of ethics.<sup>78</sup> With "public policy" evading a precise definition, what is clear is that:

public policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions. . . [and] must be clearly mandated such that the acceptable behavior is concrete and discernible as opposed to a broad hortatory statement of policy that gives little direction as to the bounds of proper behavior.<sup>79</sup>

The public policy exception has succeeded in challenges to at-will discharges when an employee is fired for the following: (1) refusing to commit an unlawful act, such as perjury or fraud, under the state's constitution, statutes or common law;<sup>80</sup> (2) fulfilling an important public obligation such as jury duty;<sup>81</sup> (3) exercising a right or privilege such as filing for worker's compensation;<sup>82</sup> (4) reporting employer misconduct—i.e., whistleblowing;<sup>83</sup> and (5) challenging employer conduct at odds with a professional code of ethics governing employer behavior.<sup>84</sup>

The first four "public policy" exceptions play no role in protecting an employee discharged by reason of her sexual orientation, unless, of course, federal or state law outlawed such discharge.<sup>85</sup> Accordingly, the focus here is on public policy found in codes of professional ethics. In *Rocky Mountain Hospital and Medical Service v. Mariani*, an accountant was discharged by her employer.<sup>86</sup> The accountant claimed that her dismissal violated public policy because she

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78. See *MacDougall v. Weichert*, 677 A.2d 162, 167 (1996).

79. *Rocky Mountain Hosp. and Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996).

80. See *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (holding a dismissal for refusing to violate a law with a criminal penalty is actionable at law).

81. See *Shaffer v. Fronrunner, Inc.*, 566 N.E.2d 193 (Ohio Ct. App. 1990) (finding employee fired for jury service stated a claim for wrongful discharge).

82. See *Murry v. St. Michael's College*, 667 A.2d 294 (Vt. 1995) (holding a dismissal for filing workers' compensation claim is actionable).

83. See *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988) (finding a cause of action for retaliatory discharge for an employee terminated for reporting employer's Medicaid fraud).

84. See *Rocky Mountain Hosp.*, 916 P.2d at 519.

85. An employee who lives in a jurisdiction that has enacted a statute that prevents discrimination based on sexual orientation should be able to argue that the nondiscrimination statute reflects the state's public policy and therefore that the exception applies. See Part IV for an examination of direct challenges to discharge based on such statutes.

86. *Rocky Mountain Hosp.*, 916 P.2d at 519.

was forced out for refusing to follow her employer's directive to falsify accounting statements.<sup>87</sup> To the accountant, such an act contravenes Rule 7.3 of the Colorado State Board of Accountancy Rules of Professional Conduct.<sup>88</sup> Rule 7.3, titled "Integrity and Objectivity," declares, in relevant part, that "[a] certificate holder shall not in the performance of professional services knowingly misrepresent facts, nor subordinate his judgment to others."<sup>89</sup> The Colorado Supreme Court ruled that professional codes, including the one at issue, may be a source of public policy for purposes of applying the "public policy" exception.<sup>90</sup> The court, however, reserved the scope of these codes as sources of public policy to situations where "the ethical provision [is] designed to serve the interests of the public rather than the interests of the profession. . . . [T]he provision must provide a clear mandate to act or not act in a particular way."<sup>91</sup> The court concluded that "the viability of ethical codes as a source of public policy must depend on a balancing between the public interest served by the professional code and the need of an employer to make legitimate business decisions."<sup>92</sup>

Whether an employee who has been dismissed on grounds of sexual orientation can prevail on the strength of the public policy exception turns on (1) whether her employer is governed by a code of ethics and (2) whether such code encompasses discrimination on the basis of sexual orientation. For example, the professional conduct of attorneys is governed by a code of ethics.<sup>93</sup> In the District of Columbia the Rules of Professional Conduct, Rule 9.1, Discrimination in Employment, clearly state that "[a] lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, *sexual orientation*, family responsibility or physical handicap."<sup>94</sup>

This ethical rule is a suitable source of public policy because it is a rule aimed at serving the interests of the public and because it furnishes a clear statement on how lawyers who employ others should behave. First, such a rule serves the interests of the public by forbidding discriminatory employment practices. Second, because the rule offers a

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87. *See id.* at 522-23.

88. *See id.* at 523.

89. *Id.* at 524 n.6.

90. *Id.* at 525.

91. *Id.*

92. *Id.* at 525.

93. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 11, 12 (6th ed. 1995).

94. D.C. RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1996) (emphasis added).

bright line test for measuring employment decisions, employers can take comfort in a clear standard for judging employment decisions.

Job protection secured by a code based, public policy exception to the at-will employment doctrine is confined to those jurisdictions that recognize these codes as sources of public policy<sup>95</sup> and to professional employees who are regulated by a code of ethics that outlaws discrimination on the basis of sexual orientation. Reliance upon such codes, however, does not guarantee that a discharged employee will prevail in her suit over sexual orientation-based discharge. For example, paragraph 4 of the Scope to the Washington, D.C., Rules of Professional Conduct makes clear that “[v]iolation of a Rule [of Professional Conduct] does not necessarily give rise to a cause of action, nor does it create a presumption that a legal duty has been violated. Some violations may be subject to redress only through the disciplinary process . . . .”<sup>96</sup> Such restrictions may first require a discharged employee to convince a court that private action to enforce the code of ethics is vital to achieving the public policy reflected in the code.

### III. STATUTORY HURDLES

An employer’s common-law right to terminate an employee has also been curbed by federal and state legislation.<sup>97</sup> This section looks at legislation that lesbians and gay men have tapped to challenge employment discrimination and how unavailing such legislation has proved to be in practice.

#### A. *Title VII*

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s race, color,

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95. See Opinion 9.03 of the Current Ethical Opinions drafted by the American Medical Association, providing that “[o]pportunities in medical society activities or membership, medical education and training, employment, and all other aspects of professional endeavors should not be denied to any duly licensed physician because of sex, color, creed, race, religion, disabilities, ethnic origin, national origin, sexual orientation, or age.” AMERICAN MEDICAL ASSOCIATION POLICY COMPENDIUM § 9.03 (Current Ethical Opinions 1996).

96. D.C. RULES OF PROFESSIONAL CONDUCT SCOPE ¶ 4 (1996).

97. See generally 42 U.S.C. §§ 2000e-2000e-2(1988) (protecting certain classes from termination because of their class status); MINN. STAT. § 363.03(02) (Supp. 1995) (including sexual orientation as unlawful grounds for termination).

religion, sex, or national origin.”<sup>98</sup> Claims that discrimination on grounds of sexual orientation is tantamount to gender discrimination, thereby falling under Title VII’s ban on “sex” discrimination, have met with little success.<sup>99</sup> Discrimination directed at gay men and lesbians is deemed wholly unlike gender-based differential treatment since an employer policy singling out homosexuals targets both men and women.<sup>100</sup>

*DeSantis v. Pacific Telephone and Telegraph Co.*<sup>101</sup> is the principal case holding that Title VII does not cover discrimination on the basis of sexual orientation.<sup>102</sup> In *DeSantis*, one of the plaintiffs alleged he had not been hired because he was gay.<sup>103</sup> Two other plaintiffs asserted they had been fired because they were involved in a lesbian relationship.<sup>104</sup> According to the plaintiffs, when Congress barred “certain employment discrimination on the basis of ‘sex,’ [it] meant to include discrimination on the basis of sexual orientation.”<sup>105</sup> The court felt constrained to give the statute its plain meaning and noted, moreover, that nothing in the legislative history of Title VII invited the court to read sexual orientation into the statute.<sup>106</sup> Absent Congressional approval, the court concluded that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”<sup>107</sup>

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98. 42 U.S.C. §§ 2000e-2000e-17 (1988).

99. See, e.g., Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992).

100. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979).

We must again reject appellants’ efforts to “boot strap” Title VII protection for homosexuals. While we do not express approval of an employment policy that differentiates according to sexual preference, we note that whether dealing with men and women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes.

*Id.* at 331.

101. *Id.* at 327.

102. *Id.*

103. *Id.*

104. See *id.* at 328.

105. *Id.* at 329.

106. *Id.* at 329-31.

107. *Id.* at 329-30 (footnote omitted). See also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). “While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.” *Id.*

Similarly, the EEOC, when surveying the scope of Title VII cases brought by gay men and lesbians, pointed out “that when Congress used the word ‘sex’ in Title VII it was referring to a person’s gender” and not to “sexual practices.”<sup>108</sup> Professor Charles Calleros has noted that:

The legislative history of the 1972 amendments to Title VII [incorporating the term “sex” into the statute] clearly reflect Congressional intent to put women on an equal economic footing with men. Accordingly, the courts and the Equal Employment Opportunity Commission, the federal agency that helps administer and enforce the provisions of Title VII, have interpreted the statutory term ‘sex’ narrowly to encompass only gender rather than any characteristic relating to sexuality or sexual behavior.<sup>109</sup>

Due to the failure of Title VII to provide redress to gays and lesbians, those seeking such protection have turned to state legislative guarantees of nondiscrimination.

*B. State Nondiscrimination Statutes*

Nine states and the District of Columbia have laws on the books that expressly prohibit employment discrimination based on sexual orientation.<sup>110</sup> Although two patterns have emerged, each appears to be equally effective. Under one pattern, states fold a “Title VII-type” statute into their state legislative scheme, but specifically count “sexual orientation” among its protected classes. Minnesota’s statute, for example, states that it is an unfair employment practice:

[f]or an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, *sexual orientation*, or age, (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (b) to discharge an employee; or (c) to discriminate against a person with respect to hiring,

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108. See 2 Empl. Prac. Guide (CCH) ¶ 6495 (Mar. 2, 1975).

109. Charles R. Calleros, *The Meaning of “Sex”: Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 57-58 (1995) (footnotes omitted).

110. The nine states are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont, and Wisconsin.

tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.<sup>111</sup>

Under the second pattern states adopt what can be referred to as free standing sexual orientation protection statutes. The Connecticut statute is typical:

It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation . . . .<sup>112</sup>

The Connecticut statute defines sexual orientation broadly to mean "having a preference for heterosexuality, homosexuality, or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of Chapter 952 [dealing with sexual offenses]."<sup>113</sup>

Protection secured by state nondiscrimination legislation is obviously confined to employees working in those select jurisdictions. The only comfort those working in other states can fairly take is that their jurisdiction cannot enact a law or adopt a constitutional amendment that leaves gays or lesbians outside the laws' protection altogether, thanks to a landmark Supreme Court case. In 1996, the United States Supreme Court, in *Romer v. Evans*,<sup>114</sup> was invited to decide whether Amendment 2 to the Colorado constitution violated the Equal Protection Clause of the Federal Constitution. Amendment 2 provided:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim

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111. MINN. STAT. § 363.03(2)(a)-(c) (1995) (emphasis added).

112. CONN. GEN. STAT. § 46a-81c (1994).

113. *Id.*

114. 116 S. Ct. 1620 (1996).

any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>115</sup>

The amendment was introduced in response to several local ordinances enacted by several Colorado municipalities banning discrimination on the basis of sexual orientation. For example, the cities of Aspen, Boulder, and Denver had adopted ordinances outlawing discrimination on the grounds of sexual orientation.<sup>116</sup>

In a six to three decision, the Supreme Court ruled that Amendment 2 violated equal protection because it did not bear a rational relationship to a legitimate government purpose on two grounds.<sup>117</sup> First, it left lesbians and gay men with virtually no legal recourse from governmental action.<sup>118</sup> Under Amendment 2, lesbians and gay men were enjoined from challenging sexual orientation-based discrimination, even when laws prohibited arbitrary discrimination, because such a challenge would entail taking account of sexual orientation.<sup>119</sup> Second, Amendment 2 flunked constitutional muster because it was stoked by animus towards a discrete group of individuals.<sup>120</sup> Lesbians and gay men were singled out by Amendment 2 because of their political unpopularity, which is not a sound impulse for a constitutional amendment.<sup>121</sup>

The Supreme Court's decision in *Romer* ensures that no statute or constitutional provision can emerge to forestall nondiscrimination policies from becoming law. *Romer* is no guarantee, however, that legislation barring discrimination against gays and lesbians will be adopted. In jurisdictions without statutes protecting lesbian and gay employees attention must turn to "lifestyle protection" statutes.

#### IV. LIFESTYLE PROTECTION STATUTES

Until legislation is enacted that prohibits discrimination on the basis of sexual orientation on its face, gays and lesbians may find some protection under what are known as lifestyle protection statutes. Roughly twenty-eight states have adopted lifestyle protection statutes which prevent employers from singling out employees by virtue of certain off-

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115. *Id.* at 1623.

116. *See id.*

117. *Id.* at 1629.

118. *See id.* at 1626.

119. *See id.*

120. *See id.* at 1628.

121. *See id.*

duty, nonemployment-related, and lawful activity.<sup>122</sup> Lifestyle protection statutes can loosely be grouped into three categories, protecting: (1) employees who smoke or use tobacco products while off duty;<sup>123</sup> (2) employees who use lawful products off duty;<sup>124</sup> and (3) employees who engage in certain lawful behavior unrelated to their employment.<sup>125</sup>

The first type of lifestyle protection statute, what has become known as the “smoker’s rights” statutes, affords no particular protection for gays and lesbians. The limited scope of these statutes is illustrated by Connecticut’s statute:

No employer or agent of any employer shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment for smoking or using tobacco products outside the course of his employment . . . .<sup>126</sup>

Minnesota Statute section 181.938 offers an example of a second type of lifestyle protection statute governing the “lawful products”: “An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment take place off the premises of the employer during nonworking hours.”<sup>127</sup> For purposes of this statute, Minnesota defines lawful consumable products as those “whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.”<sup>128</sup>

Both the lawful products statutes and the smoker’s rights statutes are narrowly drafted and offer no protection to employees singled out on other grounds. However, the statutes recognize that employees should not be penalized for certain activities unrelated to their employment.<sup>129</sup>

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122. See Jackson, *supra* note 11, at 143.

123. See e.g., CONN. GEN. STAT. § 31-405 (Supp. 1995).

124. See e.g., MINN. STAT. § 181.938 (Supp. 1995).

125. See e.g., N.Y. LAB. LAW § 201-d (McKinney 1996).

126. CONN. GEN. STAT. § 31-40 (1995).

127. MINN. STAT. § 181.938 (1995).

128. *Id.*

129. In fact, the introduction to the Nevada lawful products type statute reads: “Unlawful employment practices: Discrimination for lawful use of any product outside premises of employer which does not adversely affect job performance or safety of other employees.” NEV. REV. STAT. § 613.333 (1993).

Tellingly, several of these statutes were enacted to provide some measure of privacy protection for employees. For example, Illinois' lawful products statute is part of its "Privacy In the Workplace Act."<sup>130</sup> Similarly, the Louisiana and New Mexico smoker's rights statutes are respectively part of the "Interference with Individual Rights" and of the "Employee Privacy" statutes.<sup>131</sup> Whether or not gays and lesbians can exact some secondhand measure of comfort from privacy protection, such legislation depends on whether the statutes signify legislative recognition of a need for basic privacy protection for nonemployment related behavior.<sup>132</sup>

Since the first two lifestyle protection statutes on their face offer no safe harbor to gays and lesbians, attention turns to the third type of lifestyle protection statute, "lawful activity" statutes found in Colorado, North Dakota, and New York. The Colorado and North Dakota statutes are similar in that they both protect lawful activity.<sup>133</sup> The Colorado statute cited in the introduction of this article reads in its entirety:

(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's *engaging in any lawful activity off the premises of the employer during nonworking hours* unless such a restriction: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of

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130. ILL. ANN. STAT. ch. 820, ¶ 55/5 (Smith-Hurd 1995).

131. LA. REV. STAT. ANN. § 966 (West 1996).

132. The author is aware that these statutes may simply signify the continuing strength of the tobacco lobby in state legislatures, but hope springs eternal.

133. The North Dakota statute, but not the Colorado statute, lists certain classifications as specifically protected. The North Dakota statute provides:

It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interest of the employer.

N.D. CENT. CODE § 14-02.4-03 (1995).

interest with any responsibilities to the employer or the appearance of such a conflict of interest.<sup>134</sup>

In *Borquez v. Ozer*,<sup>135</sup> the case that opens this Article, a gay man successfully challenged his discharge under Colorado's lifestyle protection statute.<sup>136</sup> To escape liability under the statute the employer, a law firm, insisted that Borquez was dismissed by virtue of his "status as a homosexual, rather than upon his conduct and, therefore, that there was no lawful activity in which Borquez was engaged during his off-work hours that could have been the basis for his discharge."<sup>137</sup> Tellingly, had the court agreed with the employer that Borquez was dismissed for "being gay," the discharged employee would have had no legal recourse.<sup>138</sup> Sexual orientation alone, to be sure, does not fall under any exception to the at-will doctrine and is not a protected classes under Title VII. Moreover, Colorado has no state statute expressly protecting sexual orientation, and the lifestyle protection statute protects "activity" and not status. In response to the employer's "status" argument, Borquez presented evidence that the employer "particularly objected to Borquez's sexual relationship during his off work hours."<sup>139</sup> The Colorado Court of Appeals agreed with Borquez that the same sex relationship contributed to the discharge.<sup>140</sup> Accordingly, the court held that the employers "discharged Borquez based upon lawful conduct or activity in which he engaged during his off work hours in violation of [the Colorado lifestyle protection statute]."<sup>141</sup>

The New York lifestyle protection statute,<sup>142</sup> like its Colorado cousin, also protects legal off-duty "activity" unrelated to employment.

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134. COLO. REV. STAT. § 24-34-402.5 (1995) (emphasis added).

135. No. 93-CA1805, 1995 WL 656871, at \*1 (Colo. Ct. App. Nov. 9, 1995).

136. Borquez was able to make this argument because Colorado has neither a sodomy statute, nor any other statute that makes same-sex relationships unlawful.

137. *Borquez*, 1995 WL 656871, at \*2.

138. *Id.* at \*2.

139. *Id.* at \*3.

140. *Id.*

141. *Id.*

142. This New York statute is categorized as a type three lifestyle protection statute because it refers to a form of activity, namely, "recreation." It also is, however, in part, a "lawful products" statute because it specifically protects "legal use of consumable products." The statute provides that:

[I]t shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: (a) an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal . . . ; (b) an

Unlike the Colorado statute, however, New York's version only protects legal "recreational activity." Under New York's statute:

[I]t shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual . . . because of: . . . (c) an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property.<sup>143</sup>

The term recreational activities is defined in the statute as "any lawful leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."<sup>144</sup>

In *New York v. Wal-Mart Stores, Inc.*<sup>145</sup> two employees were discharged for violating the employer's fraternization policy.<sup>146</sup> Under its policy, "a 'dating relationship' between a married employee and another employee, other than his or her own spouse" is prohibited.<sup>147</sup> New York's attorney general brought suit against Wal-Mart, claiming that the discharge violated New York's lifestyle protection statute.<sup>148</sup> The state argued that "dating" is encompassed in the term recreational activity.<sup>149</sup> The state appellate court disagreed.<sup>150</sup> The court distinguished dating from recreational activity by equating the former with "romantic" overtones or "amorous" interests not present in the latter.<sup>151</sup> The court found nothing in the plain meaning of the statute that would protect "romantic" behavior and reasoned that "[w]here words of the statute are free from ambiguity and express plainly, clearly and

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individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property; (c) an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or (d) an individual's membership in a union . . . .

N.Y. LABOR LAW § 201-d (McKinney 1996).

143. *Id.*

144. *Id.*

145. 621 N.Y.S.2d 158 (N.Y. App. Div. 1995).

146. *Id.*

147. *See id.* at 159.

148. *See id.*

149. *See id.*

150. *New York v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d, 158 (N.Y. App. Div. 1995).

151. *See id.*

distinctly the legislative intent, resort may not be had to other means of interpretation.”<sup>152</sup> The court noted that even if resort to legislative history were appropriate, nothing in its history supported such a broad reading of the term “recreational.”<sup>153</sup>

By contrast, when analyzing the same statute under similar facts, a New York federal district court found that “social activity,” whether amorous or not, was protected by the term recreational activity.<sup>154</sup> In *Pasch v. Katz Media Corporation*,<sup>155</sup> the plaintiff, who had received several salary increases, was constructively discharged because she was cohabitating with a coworker.<sup>156</sup> The court found that

the purpose of the statute is to prohibit employers from discriminating against their employees simply because the employer does not like the activities an employee engages in after work . . . , so long as the activity occurs outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property. . . .<sup>157</sup>

Accordingly, the court found that cohabitating was a protected “recreational activity” within the meaning of the lifestyle protection statute.<sup>158</sup>

Even if the *Pasch* court’s interpretation of the lifestyle protection statute is eventually accepted by New York courts, and even if homosexual cohabitation is as protected as heterosexual cohabitation, the question remains for gays and lesbians whether sexual orientation is covered by the lifestyle statute. Recall that the court in *Borquez* did not have to wrestle over whether a discharge because of sexual orientation alone violates the Colorado lifestyle protection statute that protects “lawful activity” because *Borquez* introduced evidence regarding his involvement in a same-sex relationship and it was that “activity” that was found protected under the statute.<sup>159</sup> Similarly, if the plaintiff in *Pasch* had been a homosexual and had introduced evidence regarding his

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152. *Id.* (quoting McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 76, at 168) (alteration in original).

153. *Id.*

154. *See Pasch v. Katz Media Corp.*, No. Civ.8554, 1995 WL 469710, at \*4 (S.D.N.Y. Aug. 8, 1995).

155. *Id.*

156. *Id.*

157. *Id.* at \*5.

158. *Id.*

159. *Borquez v. Ozer*, No. 93-CA1805, 1995 WL 656871, at \*3 (Colo. Ct. App. Nov. 9, 1995).

cohabitation, presumably the New York court would have found the discharge unlawful under the “recreational activity” language of its lifestyle protection statute.

Both statutes clearly prohibit termination on account of certain “activity.” For the employee who is involved in a same-sex relationship, both *Borquez* and *Pasch* contemplate that evidence the employee was cashiered because of that relationship is sufficient to invoke either states’ lifestyle protection statute.<sup>160</sup> But what about the employee who is not involved in a relationship or is involved in a relationship of which the employer is unaware? If the employee admitted that she socialized with lesbians and gay men, frequented gay bars, was a member of a gay or lesbian organization, subscribed to gay and lesbian magazines, and her employer was aware of such activities, would that trigger the statute’s protection? Would an employee successfully invoke the lifestyle protection statute if she could prove that her employer knew she was a lesbian and assumed that she participated in certain activities?

Even if these evidentiary hurdles can be overcome, there are two other problems with tapping lifestyle protection statutes to redress sexual orientation-based employment discrimination. First, the only employees who will enjoy protection are those whose sexual orientation is evinced by some sort of activity known to the employer. The lesbian or gay employee whose sexual orientation is known to the employer, who is discharged because of her sexual orientation, yet who takes part in no known off-duty “activity,” goes unprotected. Her discharge will not trigger the lifestyle protection statute even if her employer admits that the discharge was attributable to her sexual orientation, if the discharge was not also owing to some off-duty “activity” that reflects her orientation.

The second problem for the ousted gay or lesbian employee is that the use of lifestyle protection statutes to challenge a discharge unavoidably entails some loss of privacy for the employee.<sup>161</sup> Under statutes that bar discrimination on the basis of sexual orientation, a discharged employee need only prove that he was terminated because of his sexual orientation. Lifestyle protection statutes require the same employee to prove that he was discharged because of legal off-duty activity that his employer associated with his sexual orientation. It is not enough for the employee to show that his termination was based on his

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160. *See id.* at \*3, \*5.

161. For a discussion of privacy concerns relevant to sexual orientation, see Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African-American Communities as Viewed Through the Privacy Prism*, 38 *How. L.J.* 231 (1994).

sexual orientation because that termination would be lawful. Activity, not orientation, is protected under the statute. These problems attending the use of lifestyle protection statutes, together with the lack of protection for gay men and lesbians under employment statutes at the state and federal level and the free reign accorded employers under the common-law doctrine of employment at will, suggest that legislation unambiguously prohibiting discrimination on the grounds of sexual orientation is sorely needed to protect sexual minorities from termination based on their minority status.

#### V. CONCLUSION

In jurisdictions that do not recognize sexual orientation discrimination, gay men and lesbians who have been discharged on that basis may be able to seek redress through the use of lifestyle protection statutes. Reliance on such statutes, however, forces a lesbian to argue not that she was discharged on account of her sexual orientation, but rather that she was discharged by virtue of some activity related to her orientation and in which she took part. Furthermore, she cannot argue that she was fired because of her employer's hostility towards her sexual orientation. Rather, she must take the additional step of arguing that she was discharged because she engaged in a particular activity related to her orientation, like having a sexual relationship with a member of the same sex, of which her employer disapproved. This argument requires her to reduce or equate her sexual orientation to some "activity" in order to prevail. In *Borquez*, the activity was a same-sex sexual relationship. Such an argument, while successful, assumes that same-sex sexual activity is what makes an individual gay. Not only is the assumption unfounded, it perpetuates the stereotype that a same-sex sexual orientation is solely, or even primarily, about sexual relationships. What is more, this added step forces the employee to adduce evidence that is not related to her employment in order to protect her employment. While this is true for any employee who is challenging a dismissal on the basis of a lifestyle protection statute, it is particularly troubling for lesbians and gay men because of the privacy concerns it raises.

What is needed is legislation that would protect employees from employment related decisions based on sexual orientation. On September 10, 1996, by a fifty to forty-nine vote, the United States Senate failed to pass the Employment Non-Discrimination Act of 1996

(ENDA).<sup>162</sup> ENDA, if enacted into law, would have prohibited discrimination in employment based on sexual orientation. Section 4 of ENDA declared:

A covered entity shall not, with respect to the employment or employment opportunities of an individual—(1) subject the individual to a different standard or different treatment on the basis of sexual orientation; (2) discriminate against the individual based on the sexual orientation of a person with whom the individual is believed to associate or to have associated; or (3) otherwise discriminate against the individual on the basis of sexual orientation.<sup>163</sup>

Although ENDA did not become law in 1996, Senator Edward Kennedy (D. Mass.), one of its chief sponsors, has promised that passage of the bill will be a priority of the congress.<sup>164</sup> According to Senator Kennedy, “[t]he march toward freeing Americans from discrimination is a continuum. But we are not there yet. . . . This issue is now on the front burner of the national agenda. This is an issue whose time has come.”<sup>165</sup>

A bill currently pending in Congress that would provide employment protection for lesbians and gay men is the Workplace Fairness Act of 1996 (WFA)<sup>166</sup> which was introduced in the United States House of Representatives on July 11, 1996. The WFA does not overtly bar employment discrimination on grounds of sexual orientation. Instead, under the WFA “[a] covered entity shall not subject an individual to different standards or treatment on any basis other than factors pertaining to job performance in connection with employment or employment opportunities, or beginning on the 91st day of employment following hire or rehire, the compensation, terms conditions, or privileges of employment.”<sup>167</sup> The WFA would protect employees from bias on grounds unrelated to job performance or qualifications, thus protecting individuals from discrimination on the basis of sexual orientation. Either bill would accord some measure of employment security for lesbians and gay men who, in most states, find themselves in legal limbo. Fairness demands explicit rights.

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162. S.2056, 104th Cong., 2d Sess. (1996).

163. *Id.* § 4.

164. See Melissa Healey, *Senate OKs Bill Against Same-Sex Marriages*, LOS ANGELES TIMES, Sept. 11, 1996, at A3.

165. *Id.*

166. H.R. 3784, 104th Cong., 2d Sess. (1996).

167. *Id.* § 2.