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HOMOSEXUAL DISCRIMINATION IN EMPLOYMENT

Gary R. Siniscalco*

Although homosexuals traditionally have faced severe religious and social disapproval, it has been estimated that four to five percent of all adult males are homosexual. The percentage of female homosexuals is approximately half that of males.1 Persons within this minority group are becoming increasingly assertive in their opposition to discrimination directed against them because of their sexual status.

Activism is particularly vigorous in the employment realm, in both the public and private sectors. The purpose of this article is to analyze recent developments in these areas, with particular attention to the law governing private employment, for it is here that homosexuals are afforded the least legal protection against discrimination, despite a decade of fair employment legislation.2

I. PUBLIC SECTOR

Federal Employment

Federal employment cases can be broken down into two categories: (a) those dealing with regular civil service employment, and (b) cases on military employment or jobs involving national security.

Civil Service. Until recently, the United States Civil Service Commission maintained the position that "persons about

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It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin . . . .
whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts . . ., without evidence of rehabilitation, are not suitable for federal employment.” As early as 1969, the Court of Appeals for the District of Columbia imposed severe limits on this policy, holding that it was overly broad and a denial of due process. In Norton v. Macy,\(^4\) the court held that an otherwise competent civil servant could not be dismissed solely on the basis of off-duty homosexual conduct. A reasonably foreseeable and specific connection must be demonstrated between an employee’s potentially embarrassing conduct and the probability of detrimental impact on the efficiency of the agency. Having established such a connection, the federal agency and the Civil Service Commission must then balance that potential harm against the loss to the government of a competent employee.\(^5\) The Norton court found no sufficient connection, noting that the discharged employee was “at most an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public.”\(^6\) The court concluded that it was impermissibly arbitrary to dismiss the employee when the potential for embarrassment to the employer agency was minimal.\(^7\)

In 1973, a federal district court in California forbade enforcement of the same policy as to current and prospective employees, but declined to apply the anti-discrimination rule retroactively to employees previously discharged for homosexual conduct.\(^8\) The district court rejected the government’s bald assertion that employment of such persons would bring government service into “public contempt.” Citing the balancing test set out in Norton v. Macy, the court...

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5. 417 F.2d at 1167.

6. *Id*.

7. *Id*.

reiterated Norton's admonition that the government "cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame.'"9 Judge Zirpoli concluded that although the overbroad rule stated in the Federal Personnel Manual10 could not be enforced, the Commission was free to determine what particular circumstances might justify dismissing an employee for homosexual conduct.11 The Civil Service Commission considered the question, and in December, 1973, issued a bulletin advising federal agencies that, pending appeal, homosexuals would be found unsuitable for federal service only when the evidence established that such a person's conduct affects job fitness. Unsubstantiated conclusions as to possible embarrassment of the federal service were to be excluded from consideration,12 but suitability judgments were nevertheless to be based on then-current guidelines. Subsequently, the Civil Service regulations were amended to delete "imoral conduct" from the list of specific factors for disqualification for employment.13

The "rational connection" test was adopted recently in Singer v. United States Civil Service Commission;14 application of the test, however, resulted in the United States Court of Appeals for the Ninth Circuit upholding the dismissal of a homosexual clerk-typist employed, ironically, by the Equal Employment Opportunity Commission. The clerk had on several occasions publicly disclosed his sexual proclivities while identifying himself as an employee of a federal agency. Furthermore, he had, with full media coverage, applied for a license to marry another male. He was also active in a gay organization in Seattle which used his name and place of employment in connection with a symposium sponsored by the Seattle Gay Community.15

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10. See note 3 supra.
11. 63 F.R.D. at 401.
13. 5 C.F.R. § 731.201(b) was changed and § 731.202(b) was added, so that "criminal, dishonest or notoriously disgraceful conduct" may still be considered as reasons for disqualification from employment, but "imoral conduct" may not. 40 Fed. Reg. 28047 (1975).
14. No. 74-2073 (9th Cir., Jan. 14, 1976). Because the employee was dismissed prior to the issuance of the Commission bulletin in 1973 and the amendment of its regulations, the court did not rely on them in deciding this case. See notes 12 & 13 and accompanying text supra.
15. Id., at 3.
Distinguishing Norton v. Macy, in which the dismissed employee had not sought to publicize his status,16 the court of appeals concluded that the Civil Service Commission had established a rational connection between the employee's deliberately public homosexual involvement, and detriment to the efficiency of the federal service. The Commission was not obliged to sponsor homosexual activity, the court noted, and was properly concerned about public confidence in the Commission and the Federal Civil Service.17

The Singer court also addressed the employee's claim that he had been denied freedom of expression under the first amendment. The employee relied on two cases, the first of which had struck down a regulation prohibiting homosexual organizations from holding social activities on a university campus.18 The second case offered as support for the first amendment argument involved a teacher whose public statements on homosexuality were held protected speech.19 The court of appeals found, however, that neither of the cited cases "involved the open and public flaunting or advocacy of homosexual conduct."20 Applying the balancing test of Pickering v. Board of Education,21 the court concluded that the government's interest in promoting the efficiency of the public service outweighed Mr. Singer's interest in exercising his right to advocate the homosexual cause while publicizing his connection with a government agency.22

Military and national security. Civilians working for the Defense Department23 or engaged in employment involving

16. See text accompanying note 6 supra.
23. The problems facing military personnel under the Uniform Code of Military Justice are not included in this article. An historical discussion of the treatment of homosexuals in the armed forces is presented in Comment, Homosexuals in the Military, 37 Fordham L. Rev. 465 (1968-69).
national security are similarly protected by the government's obligation to establish a business justification for discharging or refusing to hire a homosexual. The court in *Gayer v. Schlesinger* discussed the necessity of establishing a nexus between homosexual conduct and the efficiency of the service rendered by the employee. It held that the mere fact of the plaintiffs' homosexuality was not sufficient to make them unsuitable and since they acknowledged their homosexuality, it was not likely to affect their performance. The court did indicate, however, that a different standard might have to be applied to persons in sensitive positions, in proportion to the risks involved.

*State and Local Government Employment*

Courts have not been unwilling to protect state and local employees from discriminatory regulations and practices, either under the first amendment or under section 1983 of the Civil Rights Act of 1871. But they have been most reluctant to extend protection to the homosexual plaintiff in the face of alleged risks or problems perceived by the employer, particularly when the homosexual employee has engaged in overt, public homosexual behavior. Even where rights have been unconstitutionally infringed, courts hesitate to afford homosexuals the same relief available to other minority groups.

In a recent federal case arising in Oregon, the Ninth Circuit Court of Appeals affirmed an award of back pay to a dis-

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25. *Id.* at 750.
29. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971). The court affirmed the refusal to hire a homosexual activist instructor/librarian who had attracted public attention by attempting to marry a fellow homosexual. The court viewed plaintiff's conduct as an attempt "to foist tacit approval of this socially repugnant concept upon his employer," and thus not legally protected. *Id.* at 196. The court did suggest, however, that "clandestine" (private) homosexual conduct would warrant protection. *Id.*
charged female teacher who was an avowed homosexual. The court declined, however, to require the reinstatement of the plaintiff to her nontenured position. The majority did not feel that the unlawful discharge was on a par with race discrimination or free speech activities, which commonly call for what the court termed the "extraordinary equitable remedy" of reinstatement.

The dissenting judge questioned the extent to which the monetary remedy recouped the loss suffered by the teacher, and concluded that the decision would hardly deter similar dismissals in the future, since any school board willing to incur a financial penalty of a few thousand dollars remained free to fire homosexual teachers at will.

As this discussion has indicated, homosexual persons employed in the public sector receive less protection against job discrimination than members of racial minority groups or fellow-employees whose religious or political rights are infringed, but they are at least making progress as judicial and administrative attitudes shift toward the liberal end of the spectrum. In the private sector, they have not fared so well.

II. PRIVATE EMPLOYMENT

Recent Cases Avoid the Problem of Homosexual Discrimination

It was not until 1975 that the first decisions involving homosexuality and Title VII of the Civil Rights Act of 1964 were rendered by the courts or the Equal Employment Opportunity Commission (EEOC).

In a case of first impression, Smith v. Liberty Mutual Insurance Co., Judge Hill of the Northern District of Georgia

31. Id. at 853.
32. Id. at 856 (Lumbard, J., dissenting).
34. The Equal Employment Opportunity Commission (hereinafter referred to as "Commission" or EEOC) is the agency created by Congress to effectuate the goals of Title VII. Id. § 2000e-4. It has the power to issue guidelines which interpret the statute. Courts generally hold that the guidelines are entitled to great deference. Wetzel v. Liberty Life Ins. Co., 511 F.2d 199, 209 (3rd Cir. 1975).
held that it was not unlawful sex discrimination for the employer to refuse to hire a male for a mail room job because he was effeminate. The court, after discussing at length the judicial philosophy of liberal versus strict construction of statutes, cited the Fifth Circuit's decision on long hair and concluded that "whether or not Congress should, by law, forbid discrimination based upon 'affectional or sexual preference' of an applicant, it is clear that Congress has not done so." There was no indication in this case that plaintiff was an avowed homosexual or had been arrested for homosexual activities in violation of a state or local ordinance. The decision not to hire apparently was based entirely on the employer's conviction that the plaintiff was "effeminate." The court properly rejected plaintiff's argument that to hire a female who is "effeminate" while refusing to hire a male who displays such characteristics is to discriminate because of sex. In the court's view, a male displaying female characteristics need only receive the same treatment as a female with "effeminate characteristics." Disparate treatment of effeminate males and masculine females would presumably have required a finding of illegal discrimination, in accord with the Congressional intent to insure equal employment opportunities for men and women.

Judicial support for the Congressional policy of equal employment was clearly set forth in older, more conventional Title VII decisions such as Phillips v. Martin Marietta Corp., where the United States Supreme Court held that section 703(a) of the 1964 Civil Rights Act "requires that persons of like qualifications be given employment opportunities irrespective of their sex." The Court determined that a policy of hiring men with pre-school-age children but not women with pre-school-age children was discriminatory.

40. See text accompanying note 45 infra.
41. 400 U.S. 542, 544 (1971).
42. The Court pointed out that conflicting family obligations, if demonstrated to be more relevant to job performance for a woman than for a man, could arguably be used as evidence to show that the condition in question constituted a "bona fide occupational qualification" under section 703(e) that is reasonably necessary to the
Applying the Phillips rationale, the court in Jurinko v. Edwin L. Weigand Co. held that a company which employed married men but not married women had engaged in unlawful discrimination. Since the sole variable was the sex of the applicant, the discrimination was based on sexual distinctions alone.

In Sprogis v. United Air Lines, Inc., the defendant airline company’s rule of not allowing stewardesses to marry, while imposing no such restriction on male stewards or other employees similarly was deemed to be discriminatory. The Sprogis court noted that the Congressional intent underlying Title VII’s proscription of sex discrimination in employment was “to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” This suggests that the courts might find that Title VII offers a remedy where a homosexual plaintiff could establish employment discrimination as between male and female homosexuals—a possibility that will be explored later in this discussion.

A second major Title VII decision, Voyles v. Ralph K. Davies Medical Center, involved not a homosexual but a transsexual. The plaintiff, a female medical technician employed by a private clinic, advised her employer that she intended to undergo a sex change operation. She was discharged, admittedly because of the prospective sex change, on the ground that her continued employment would have a disturbing effect on both patients and co-workers. A Federal District Court for the Northern District of California considered the threshold question of subject matter jurisdiction and concluded, after reviewing the legislative history of Title VII, that Congress simply had not considered the need to protect against discrimination based on sex change or sexual preference among males and females. The court found support for its view that Congress had not intended to include homosexuals, transsexuals or bisexuals under Title VII in the fact that bills currently

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normal operation of the business, and therefore allowable. But the Court did not consider the record adequate for a determination of this issue. 400 U.S. at 544.

44. 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).
45. Id. at 1198 (emphasis added).
46. See text accompanying notes 68-92 infra.
are pending in Congress which would add "affectional or sexual preference" to the statute's list of proscribed factors.\(^4\) Judge Williams did not appear concerned with whether the defendant did in fact apply or would have applied the same standard to a male who sought a sex change operation. Moreover, with the case dismissed for lack of subject matter jurisdiction, the proffered defense of customer or employee preference was not addressed.\(^4\)

Neither Smith nor Voyles dealt foursquare with the discrimination homosexuals face in employment. They do suggest that courts may "duck" homosexual discrimination cases solely on the basis that protection of homosexuals or transsexuals was not intended when Congress enacted Title VII. But if an employer should be found to treat male homosexuals or male transsexuals differently than their female counterparts, the variable would be sex—which is clearly prohibited by Title VII—and the protections of Title VII should be available.\(^5\) It is arguable that such a situation does indeed exist, and factors tending to prove its existence will be examined subsequently.

**EEOC Opinions: A Similar Reaction in the Administrative Forum**

The EEOC, more than ten years after its inception, and more than five years after first receiving cases involving charges of homosexual discrimination, has finally rendered two decisions.\(^5\)

In the first case, the charging party was refused employment because he was an admitted homosexual; in the second, the same employer had discharged another employee because he had been arrested with four others and was awaiting trial on charges of homosexual activity. The Commission found that it lacked jurisdiction to deal with either complaint. After ac-

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\(^5\) 403 F. Supp. at 457. The court observed that even the current bills may be limited only to homosexuals. Id. at 457 n.2; see 121 CONG. REC. E 1441 (daily ed. Mar. 25, 1975) (remarks of Congresswoman Abzug).

\(^5\) See text accompanying notes 42-45 supra.

\(^5\) EEOC Decision No. 76-75, 2 CCH EMPL. PRAC. REP. ¶ 6495 (Nov. 10, 1975); EEOC Decision No. 76-67, 2 id. ¶ 6493 (Nov. 10, 1975). The EEOC did issue a General Counsel Opinion (M108-66) on February 2, 1966, stating that an employer does not commit an unlawful employment practice by failing to hire or by discharging an individual who is a homosexual. EEOC General Counsel Opinions, however, may not be relied upon by any person other than the addressee(s). See Notice, 35 Fed. Reg. 18692 (1970).
knowing that there is "no definition of the term 'sex' in the language of Title VII" and "scant evidence of what Congress intended," the Commission noted that the Congressional debates "focused almost exclusively on disparities in employment opportunities between males and females." Coupling this view of Congressional intent with the standard principle of statutory construction that "unless there is clear legislative expression to the contrary, words used in the statutes are to be given their ordinary meaning," the Commission expressed the opinion that when Congress used the word "sex" in Title VII it was referring to gender, an immutable characteristic with which one is born. Each of the charging parties had alleged discrimination because of his sexual proclivities or practices and not "because of his gender;" the Commission found that "these two concepts are in no way synonymous," and concluded:

[T]here being no support in either the language or the legislative history . . . that . . . Congress intended to include a person's sexual practices within the meaning of the term sex, and since . . . Respondent failed to hire [or rehire] charging party because of his sexual practices, not his gender, the Commission must conclude that it is without substantive jurisdiction to decide the issue.

In support of its decision, the EEOC cited a series of appellate and district court opinions in which it had been held that hair-length requirements imposed by employers did not constitute unlawful discrimination against males. The thrust of these decisions was expressed most recently in Willingham v. Macon Telegraph Co., where the court adopted the view that

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when employers make distinctions in their employment practices between men and women on the basis of something other than immutable characteristics or protected rights—that is, on characteristics such as grooming standards—they do not inhibit employment opportunities in violation of Title VII.\textsuperscript{57} The Ninth Circuit Court of Appeals has also concluded that Congressional intent was to direct Title VII towards characteristics which a job applicant, otherwise qualified, has no power to alter.\textsuperscript{58}

The Commission's use of the hair-length decisions to support its inference that homosexuality is a mutable proclivity or practice and therefore not within the protection afforded by Title VII arguably is a demonstration of fallacious reasoning; it is at least a substantial retreat from its own earlier interpretations of Title VII, wherein the Commission showed little reluctance to assert jurisdiction based on "mutable" factors.

While it may be correct to assume that long hair is not a significant status or condition, it is simplistic to consider that one's sexual proclivities or preferences are as easily chosen or controllable as one's hairstyle.\textsuperscript{59} Theories as to the causes and contributing factors of homosexuality are not in accord. Some posit that homosexuality results from physical abnormalities such as an endocrine imbalance, while others hold that sexual preference is the product of environmental factors encountered before, during, or even after maturity.\textsuperscript{60} Given this psychiatric, biological and social ignorance, it seems unreasonably arbitrary for the Commission to conclude that homosexuality is a "preference" sufficiently mutable as to fall outside the scope of Title VII. The characteristic of being homosexual would seem to fit within the category of socio-biological-environmental factors which the courts have dealt with in other contexts, such as race.\textsuperscript{61}

\textsuperscript{57} 507 F.2d 1084, 1092 (5th Cir. 1975).
\textsuperscript{58} Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974).
\textsuperscript{59} For analyses of hair-length and general appearance requirements, see Oldham, Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ, 23 HAST. L.J. 55, 62-65 (1971) [hereinafter cited as Oldham]; Note, Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964, 46 So. CAL. L. REV. 965 (1973) [hereinafter cited as Note, Employer Dress and Appearance Codes].
\textsuperscript{60} These theories and their sources are discussed in Kovarsky, Fair Employment for the Homosexual, 1971 WASH. L.Q. 527, 527-78 (1971).
\textsuperscript{61} See discussion in text accompanying note 68 infra.
Even if homosexuality is, for legal purposes, to be considered a less-than-immutable status, it should be noted that the Commission in the past has consistently held that other characteristics which can be described as mutable are protected by Title VII. Despite several contrary decisions by federal appellate courts, the Commission had, until recently, steadfastly held that employer hair-length regulations applying only to males constitute sex discrimination within the meaning of Title VII. Given the growing weight of judicial authority to the contrary, the Commission presently has suspended the processing of sex discrimination charges arising from rules forbidding male employees to wear their hair in long styles. But it has not been reluctant to assert its jurisdiction in other "mutable" areas; sex discrimination has been found when employers have refused to hire males with beards and moustaches, and race discrimination when blacks have been penalized for wearing "afros" as an expression of racial pride and heritage.

It is apparent, however, that the present state of the law, as reflected in recent court and administrative decisions, does not provide a clear means of redress for the homosexual who has suffered employment discrimination in the private sector. The following analysis offers an approach which may be viable within the present constraints of the law.

III. THE IMPACT THEORY OF Griggs v. Duke Power Co.: A SUGGESTED APPROACH

With respect to claims of homosexual employment discrimination, neither the district court in Smith nor the EEOC actually examined the results of the allegedly anti-homosexual employment practices. But in other contexts, courts have struck down seemingly neutral employment policies which in practice have an unequal impact on one sexual, racial or ethnic group. The leading authority in this area is Griggs v. Duke Power Co., in which the United States Supreme Court disal-

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62. See note 56 supra.
63. See 2 EEOC Compliance Manual § 421.
64. See note 56 and accompanying text supra.
lowed an employer's policy of requiring a high school diploma or a specified score on intelligence tests as a condition of employment in or transfer between jobs at its plant. The Court found that this practice, although equally applied to white and black employees, had an adverse effect on blacks, and was discriminatory because the employer failed to show the relation of diploma or test score to successful job performance.

Since Griggs, other courts have found that hiring or promotion policies based on arrest, conviction or garnishment history, where a greater percentage of blacks than whites suffer garnishments or are arrested for or convicted of crimes, are discriminatory in the absence of a showing of business necessity.

In other cases in the Griggs line, neutral practices with adverse ethnic and sexual results have been declared unlawful under Title VII unless the employer can demonstrate job-relatedness. For example, a 150-pound minimum body weight requirement imposed by an employer, although neutral on its face, has been held discriminatory in practice. In a more obvious case, an employer's income-protection plan which covered all disabilities except pregnancy and treated maternity leave differently than other types of short-term disability leave has been categorized as sex discrimination.

As both the Smith court and the EEOC recently noted, Congress devoted little attention to defining the precise meaning of the word “sex” as it is used in Title VII. Yet under the

72. United States v. Inspiration Consolidation Copper Co., 6 CCH EMP. PRAC. DECISIONS ¶ 8918 (D. Ariz. 1973). High school education and testing requirements were found to have an adverse impact on citizens with Spanish surnames and American Indians.
73. See notes 74-75 and accompanying text infra.
76. 395 F. Supp. at 1101. See text accompanying note 37 supra.
77. See note 52 and accompanying text supra.
adverse impact theory, at least, the courts have interpreted Title VII as providing approximately the same scope, degree and type of protection for sexual groups that it does for racial, ethnic or religious groups, whether the discrimination be open and obvious, or apparent only after close examination of the challenged policy’s impact.

Thus it seems clear that if a “neutral” policy of discharging or not hiring homosexuals proves to have an adverse impact on males or females as a class, that policy should be proscribed. The following analysis suggests how future court and Commission decisions might deal adequately with charges of employment discrimination against homosexuals, in accord with Congressional intent as defined in Griggs.

Establishing a Prima Facie Case

To make a prima facie case under Griggs, a plaintiff would first have to meet the burden of showing the necessary adverse impact of an apparently neutral policy against hiring any homosexual persons. Available data indicates that an adverse impact on male homosexuals may well exist. For example, one study in Los Angeles indicated that of 468 persons arrested on misdemeanor charges for homosexual activity, 466 were male and only two were female.78 An employer’s policy, therefore, of discharging or refusing to hire persons who have been arrested and/or convicted of homosexual activity would clearly affect male homosexuals disproportionately.

The availability of draft and military service records to employers also makes the male homosexual more vulnerable than his female counterpart. Although males are no longer required to register, those who registered in the past and were determined to be homosexual were regularly given a 4F rating. Until 1974, it was relatively easy for an employer to gain access to a prospective employee’s Selective Service file; a broadly worded clause in an employment application signed by a job applicant was routinely regarded by the Selective Service as sufficient consent to allow disclosure of the applicant’s records at the employer’s request.79 The requirement that a registrant’s

79. In discussing the consent requirement, the Senate Subcommittee on Constitutional Rights noted that the Selective Service System rather coyly stated that it
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consent be obtained for disclosure of his records was given some force with the passage of the Privacy Act of 1974, since the Selective Service must comply with its provisions. The Act also forbids the Defense Department to release veterans’ service records without the consent of the individual concerned. Employers, however, are still free to ask applicants for a release, and access to military records, in the case of homosexuals, impacts almost exclusively on males.

The public’s view of homosexuals may also be shown to have an adverse impact on males in the job market. Most people object to effeminate behavior in males, or to overt physical contact between males, while similar conduct between females is tolerated if not actually condoned by the public, employers, and co-workers. “Tomboy” behavior in girls is not only generally accepted, but may even be viewed favorably by parents and others as indicative of healthy “female” aggressiveness. “Sissy” behavior in boys, on the other hand, is rarely tolerated; “equality” is still routinely defined in terms of male characteristics.

Where a plaintiff is seeking to establish a prima facie case, it may be possible to establish, through testimony of experts or of co-workers, a greater or more pervasive disapprobation of effeminate males than of masculine females. Thus, an employer is more likely to have detected or received complaints about the effeminate male, and even a neutral policy of discharging only those persons against whom such complaints are received is likely to affect homosexual males disproportionately, as compared with homosexual females.

The impact approach permits the Commission and the courts to view the problem in male/female terms rather than

honored registrants’ consent to having their files examined by prospective employers without questioning the motive or reason for giving consent. The Subcommittee interpreted this response to mean:

In other words, by merely signing a broadly worded employment or (presumably) credit application a registrant may have been deemed to waive the confidentiality of his Selective Service Records.


81. 32 C.F.R. § 1608.4(b) (1975).
83. Yet, among some ethnic groups such physical activities are common and, indeed, a long-accepted custom among family and friends.
in terms of gender versus sexual preference. But demonstrating impact is only half the problem. Under Griggs, the burden then shifts to the employer to demonstrate a business necessity for imposing a policy against homosexual employees.

Employer Defenses

The employer's defenses are likely to be grounded on one or more of several factors: (1) job efficiency or suitability; (2) employee morale or customer preference; and (3) national security. Factors (1) and (2) may sometimes overlap, but the cases appear to suggest that only the first will carry much weight, and then only in specific fact situations. The courts have continually rejected sweeping, unsupported claims of public employers that the mere fact of homosexuality affects suitability or job performance. But where the defendant can show some actual or potential risk of a homosexual actively advocating unorthodox views, specifically where children or students are concerned, the courts seem to be more likely to deny relief. "Socially repugnant" views which plaintiff sought overtly to impose on his employer persuaded the court in McConnell v. Anderson to find that the university's decision not to hire the plaintiff was justified. The Fourth Circuit, in Acanfora v. Board of Education, held that the plaintiff's practice of publicly advocating community acceptance of homosexuals was protected since it did not impair his ability to teach, and he had stressed that he would not discuss his views on sexuality with his students. The court found, however, that the plaintiff lacked standing to contest his transfer since he had made false statements in his employment application concerning prior affiliation with a homosexual organization.

In analogous Title VII cases where employers have raised employee morale or customer preference as a defense, the courts have uniformly remained unimpressed by the claims. The Fifth Circuit, in Diaz v. Pan American Airlines, rejected


88. 442 F.2d 385 (5th Cir. 1971).
defendant’s claim that only females could work as flight cabin attendants because the majority of its customers were men and they preferred female attendants. An attempt by a school district to remove an unmarried pregnant teacher because of the potential effect such a “role model” might have on students has also failed, though the case is currently on appeal to the United States Supreme Court. Alleged poor employee morale has been held not to be a proper business justification for refusing to make reasonable accommodation to the requirements of a particular employee’s religion.

Employers might assert as a defense the fear that homosexuals, unlike males or females as a class, will harass or intimidate customers or co-workers. It is unlikely that the courts would be persuaded by such speculation without actual evidence of such activity. Courts should balance the interest to be protected. Purely speculative dangers and the prejudices of customers and employers must be weighed against the right to equal employment which Congress sought to protect.

The national security defense is restricted to military and defense-related activities and to certain security-sensitive public and private positions. While courts may be more willing to give the government or a private employer the benefit of the doubt as to security needs, here, too, a mere claim of nonsuitability will be denied as grounds for dismissal.

**CONCLUSION**

Only in recent years has the problem of employment discrimination against homosexuals been addressed. Satisfactory

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92. In Ulrich v. Laird, No. 203-71 (D.D.C., Sept. 28, 1971), consolidated and aff’d, Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973), plaintiff’s security clearance was cancelled after he admitted he was a homosexual, but refused to respond to questions designed to elicit details of his homosexual lifestyle and friendships. Because plaintiff admitted his homosexuality, and because he intended to maintain his lifestyle, the court concluded that absent proof of a nexus between homosexuality and plaintiff’s ability to protect secrets, he could not be deprived of his security clearance.
solutions have by no means been reached.

Homosexuals presently are afforded more legal protection if they enter the public service. Current case law indicates some liberalization of social and judicial attitudes, but despite the fact that the federal government no longer classifies homosexuality as an "immoral" condition,\(^3\) it will countenance the employment of homosexuals only so long as they keep their status and their activities discreetly out of the public eye.

Individuals employed in the private sector are still without any significant legal recourse against discriminatory practices. The meaning of "sex" in Title VII has yet to be clarified by Congress,\(^4\) and the courts and the Equal Employment Opportunity Commission have narrowly construed the statute so as to avoid any meaningful inquiry into the problem of homosexual discrimination in this area.\(^5\)

Although a number of private companies are beginning to announce their willingness to hire homosexuals,\(^6\) it is doubtful that any broad-based reform will occur without some increased governmental prodding. To further that end in the judicial forum, the adverse impact analysis is offered as a possible means of alleviating—albeit in a limited and partial fashion—the problems faced by homosexual employees and prospective employees.

\(^{93}\) See note 13 and accompanying text supra.

\(^{94}\) See note 47 and accompanying text supra.

\(^{95}\) See text accompanying notes 33-66 supra.

\(^{96}\) Time, Sept. 8, 1975, at 32.