

EMPLOYMENT DISCRIMINATION AGAINST LESBIANS AND GAYS: THE INCOMPLETE LEGAL RESPONSES OF THE UNITED STATES AND THE EUROPEAN UNION

I. INTRODUCTION

The 1990s have repeatedly been referred to as the “gay nineties.”¹ Homosexuals have gained increased visibility; however, they also face more intense hostility and backlash. In the United States, 1993 was the year the military’s policy on excluding homosexuals became the subject of a high-profile debate and national legislative action.² 1993 also saw lesbian mother Sharon Bottoms lose custody of her biological son because of her sexual orientation.³ In the European Union (EU), the 1990s have also seen the increasing prominence of issues relating to homosexuality. In 1993, Ireland passed legislation ending the criminal prohibition on homosexual acts.⁴ In Great Britain a major policy debate in Parliament focused on whether to lower the age of consent for male homosexual acts to conform with the age of consent for heterosexual acts.⁵ The European Court of Human Rights ruled in 1993 that Cyprus’s prohibition of private, consensual homosexual conduct violated the European Convention on Human Rights.⁶ Many more examples of the

1. HARPERS, Jan. 1994, at 28 (counting uses of the term).

2. See *infra* notes 10-16 and accompanying text.

3. William A. Henry III, *Gay Parents: Under Fire and On the Rise*, TIME, Sept. 20, 1993, at 66 (noting that the court declared that her sexual orientation made Ms. Bottoms an “unfit parent”); Torie Osborn, *America Without Closets*, N.Y. TIMES, Oct. 29, 1993, at A29.

4. See David Norris, *Decriminalising Homosexual Acts an Historic Event*, IRISH TIMES, June 25, 1993, at 12 (reaction of a gay senator to passage of the sexual offenses bill).

5. On February 22, 1994, the British Parliament lowered the age of consent for sex between men from twenty-one to eighteen. Richard W. Stevenson, *British Gay Rights Groups Vow to Fight Consent Age*, N.Y. TIMES, Feb. 23, 1994, at A2. This is higher than the age of consent for both heterosexual and lesbian sex, which is sixteen. *Id.* The amended age of consent will be challenged before the European Court of Human Rights. Sally Weale, *Europe Test for Rights Case*, THE GUARDIAN, Feb. 23, 1994, at 2.

6. *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993) (Commission report). See *Cyprus Homosexual Law Violates Freedom*, THE TIMES, May 17, 1993, at 30.

prominence of lesbians and gay men and issues relating to them could be listed.

Among the various legal issues relating to lesbians and gay men, the problem of employment discrimination is particularly significant. Similarly, “[o]f the many issues facing employers in the 1990s, few will prove as difficult and controversial as the question of homosexual rights.”⁷ This Note addresses the specific issue of employment discrimination against lesbians and gay men in the United States⁸ and in the EU member states.⁹ Part II examines the realities of employment discrimination that lesbians and gay men currently face in both the United States and the EU. Part III discusses the extent and nature of state and local remedies in the United States and of national and local remedies in the EU. Part IV focuses on existing legislation in the field of employment discrimination and judicial interpretation of such legislation. Further, it analyzes the possibility of addressing the problem of antihomosexual discrimination in the workplace with remedies covering the entirety of the United States or the entirety of the EU. Part V concludes by reasserting the need for action to remedy this problem by both the United States federal government and the EU on a community-wide level.

II. EMPLOYMENT DISCRIMINATION CURRENTLY FACED BY HOMOSEXUALS IN THE UNITED STATES AND THE EUROPEAN UNION

A. The United States

Explicit employment discrimination against lesbians and gay men in the United States can be observed most prominently in the current policies of the military. The current policy, which became effective on Feb. 28, 1994, states that a member of the United States Armed Forces “shall be separated” from the forces if the member engages in

7. Howard A. Simon & Erin Daly, *Sexual Orientation and Workplace Rights: A Potential Land Mine for Employers?* 18 EMP. REL. L.J. 29, 29 (1992).

8. In the United States the rapid development and increasing significance of this particular area of the law has been recognized. Arthur S. Leonard, *Sexual Orientation and the Workplace: A Rapidly Developing Field*, 44 LAB. L.J. 574 (1993).

9. For an explanation of the utility of comparing EC and U.S. labor legislation, see Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI-KENT L. REV. 1427 (1993).

homosexual acts or states that he or she is homosexual.¹⁰ In 1992, the United States military employed slightly over 1.8 million women and men.¹¹ Arguably 180,000, or ten percent, of these people are lesbians or gay men.¹² Although during the past year the policy has been in flux,¹³ if the military were to discover the sexual practices of any of these 180,000 employees, or if these employees disclosed their orientation, they could be discharged from their jobs. Military policy continues to limit, if not completely prohibit, homosexuals from serving in the armed forces.¹⁴ This discriminatory policy has been actively applied. Some recent notable instances in which this policy has been enforced involve Keith Meinhold,¹⁵ Margarethe Cammermeyer,¹⁶ and Dusty Pruitt.¹⁷

10. 10 U.S.C.A. § 654. *See also* *Able v. United States*, 1994 WL 112117 (E.D.N.Y. 1994) (ruling on the first legal challenge to the new policy and issuing a preliminary injunction to prevent the government from enforcing the policy).

11. THE WORLD ALMANAC AND BOOK OF FACTS 1994 705 (1994).

12. The ten percent figure comes from Alfred Kinsey's studies in the 1940s. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948). The Kinsey study remains widely regarded as the most thorough and reliable study of its kind. *See* Patrick Rogers, *How Many Gays Are There*, *NEWSWEEK*, Feb. 15, 1993, at 46; Thomas A. Stewart, *Gay in Corporate America*, *FORTUNE*, Dec. 16, 1991, at 43. *But see* RICHARD A. POSNER, *SEX AND REASON* 18-19 (1992) (arguing that the Kinsey figure is an overestimate).

However, there is no reliable way to estimate the percentage of lesbians and gay men in the workforce or in particular professions. JAMES D. WOODS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 6 (1993). The percentage of lesbians and gay men seems to vary among professions. *Id.*

13. *See supra* note 10, and accompanying text for revised policy and first legal ruling on that policy. Regarding the previous policy, for which litigation is continuing, compare *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993) (overturning dismissal of midshipman for homosexuality) with *Walmer v. Dep't. of Defense*, 835 F. Supp 1307 (D. Kan 1993) (denying preliminary injunction to lesbian Army officer who had been discharged). For an argument that the issue of homosexuals in the military is shifting from Congress to the courts, see William B. Rubinstein, *The Difficulty of Changing Overnight*, *THE RECORDER*, Aug. 18, 1993, at 8.

14. 10 U.S.C.A. § 654. *See* Rubinstein, *supra* note 13, at 8 (arguing that the new policy on homosexuals in the military offers "little substantial change" and that judicial precedent in this area "offers essentially no protection").

15. Keith Meinhold served in the Navy for twelve years prior to his discharge in 1992. *Meinhold v. United States Dep't. of Defense*, 808 F. Supp. 1455, 1456 (C.D. Cal 1993). As a Naval airborne sonar analyst and instructor, he regularly received commendable evaluations. *Id.* Meinhold's sexual orientation was common knowledge among his co-workers. *Id.* After Meinhold stated on national television that he was gay, he was "deprived of his career . . . not because he engaged in prohibited conduct, but because he labeled himself as gay." *Id.* *See also* *Meinhold v. United States Dep't. of Defense*, 808 F. Supp. 1453 (C.D. Cal. 1992).

16. Colonel Margarethe Cammermeyer was the chief nurse for Washington's National Guard. Jan Stevens, *Gay Ex-Colonel Won't Bash Military: Tells UC Davis Crowd of Ouster, Hopes for Reinstatement*, *SACRAMENTO BEE*, Feb. 4, 1993, at B1. She had served for twenty-six years and had won a Bronze Star during a tour of duty in Vietnam. *Id.* Cammermeyer revealed

Military personnel are not the only employees who face employment discrimination on the basis of their sexual orientation. The Dallas Police Department's longstanding policy of not employing homosexuals has been successfully challenged in court.¹⁸ Nevertheless, in violation of the court's ruling the Dallas City Council has decided to retain the Police Department's ban on hiring gays and lesbians.¹⁹ Discrimination occurs in the private sector as well. In 1991 Cracker Barrel restaurants announced a new policy of not employing lesbians or gay men, claiming that homosexual employees are incompatible with the family-oriented values the restaurant seeks to promote.²⁰ Even highly-placed corporate employees are not exempt from such treatment. For example, a Shell Oil executive, Jeffrey Collins, was fired when co-workers discovered that he was gay.²¹

In addition to immediate termination, employment discrimination against homosexuals can take other forms. Open or suspected homosexuals may face a "glass ceiling" and not receive promotions that their heterosexual counterparts enjoy.²² Similarly, they might

that she was a lesbian when applying to a war college for which she needed top-secret clearance. *Id.* Subsequently, she was discharged and is now suing for reinstatement. *Id.* Her suit was put on hold while the ban on homosexuals in the military was being debated. *Id.*

17. Reverend Dusty Pruitt was a captain in the United States Army. *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *aff'd*, 113 S. Ct. 655 (1992). Her service record was outstanding and she was selected to be promoted to the rank of major. *Id.* When Pruitt disclosed that she was a lesbian in a Los Angeles Times interview, her promotion was reconsidered and she was ultimately discharged. *Id.* Pruitt, as well as Meinhold and Cammermeyer, faced no allegations of misconduct. Rather, they were all discharged simply for being homosexual and acknowledging that fact. *Id.*; see *supra* notes 15-16 and accompanying text.

18. *England v. Texas*, 846 S.W.2d 957 (Tex. Ct. App. 1993).

19. Anne Belli, *City Loses Ruling over Gay Officers: Lesbian Claims Victory in Employment Case*, DALLAS MORNING NEWS, Feb. 11, 1993, at 33A.

20. Reed Johnson, *Sellin' Good Ol' Southern Homophobia*, THE DETROIT NEWS, Aug. 29, 1991. Cracker Barrel's policy led to the firings of as many as twelve employees. *Id.* The first, George Petty, a twenty-one year old waiter, was informed on his termination notice that "as a homosexual he does not fit into the traditional values that we believe [sic] in and try to project as a company." *Id.*

This policy has been challenged through shareholder proxy proposals and the challenge is presently being litigated. *New York City Employees' Retirement Sys. v. SEC*, 63 Fair Empl. Prac. Cas. (BNA) 1358 (S.D.N.Y. 1994) (reviewing shareholder challenge in context of related litigation regarding SEC action).

21. *Collins v. Shell Oil Co.*, 56 Fair Empl. Prac. Cas. (BNA) 440, No. 610983-5, Alameda County Super. Ct. (June 13, 1991).

22. Stewart, *supra* note 12, at 45-46; see also Fair Empl. Prac.: Summary of Latest Dev. (BNA) 121, 126 (Oct. 25 1993) (discussing the continuing problem of the "lavender ceiling" at Xerox and other corporations).

lose access to the mentoring and support needed for advancement.²³ Also, when firms lay off employees, lesbians and gay men may find themselves targeted.²⁴ Additionally, potential employees who are "out" may not be hired for that reason.²⁵ Those who are already employed may be required to keep a low profile.²⁶ Yet, by shielding their personal lives from their employers and co-workers they may find themselves unable to develop valuable and often necessary social contacts.²⁷ Moreover, even "closeted" homosexuals may often be suspected merely because they are in their thirties or older and have never been married.²⁸ Lastly, both "closeted" and "open" gays may face pervasive, although often subtle, harassment.²⁹

Lesbian and gay male employees may also receive fewer employment benefits than their heterosexual counterparts. Fringe benefits, such as health insurance, account for approximately thirty-seven percent of payroll costs.³⁰ Typically, such insurance provides spousal coverage for heterosexual employees.³¹ Employer-provided health insurance, however, generally does not cover same-sex partners.³² A recent survey found only forty-eight private companies in the United States extend such coverage.³³ Moreover, companies

23. Jane Goldman, *Coming out Strong*, CAL. LAW., Sept. 1992, at 31, 34; Stewart, *supra* note 12, at 45-46.

24. Goldman, *supra* note 23, at 34.

25. *Id.* at 36. The comments of the hiring partner at one California law firm are particularly revealing:

When I go to law schools and I look at people's resumes, if they've got heavy gay or lesbian activities on them, I'm not interested. It's signaling something that makes you different. . . . I think to myself, 'Why did you decide to single yourself out like that?' I want them to see themselves as lawyers, as people who are going to be out trying to hustle clients that are corporate America.

The hiring partner who made this statement is a lesbian who is partly closeted at work. *Id.*

26. Woods, *supra* note 12 (researching and discussing the ways in which gay men disguise their homosexuality in the workplace and the pressures they feel to do so).

27. *Id.* at 167-70; Goldman, *supra* note 23, at 34.

28. Woods, *supra* note 12, at 177; Stewart, *supra* note 12, at 44.

29. Woods, *supra* note 12, at 15-17; Goldman, *supra* note 23, at 34; Stewart, *supra* note 12, at 44; Bill Turge, *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992 at 36.

30. Woods, *supra* note 12, at 10; see also Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WISC. WOMEN'S L. J. 1, 27 (1986) (suggesting the percentage of personnel costs accounted for by benefits may exceed forty percent).

31. Woods, *supra* note 12, at 10; Cox, *supra* note 30, at 2-3, 32.

32. Woods, *supra* note 12, at 10; Cox, *supra* note 30, at 2, 27-40; see also Simon & Daly, *supra* note 7, at 53-55 (discussing the policies of companies which extend health benefits to same-sex partners).

33. Judy Sarasohn, *A Nod to Domestic Partners': Covington & Burling Blazes Trail, Offering Health Coverage to Gay Couples*, LEGAL TIMES, Feb. 28, 1994, at 1 (reporting survey

which do extend full benefits to their homosexual employees may encounter governmental attempts to coerce them to alter such policies.³⁴ Additionally, government-mandated benefits, such as the Family and Medical Leave Act of 1993,³⁵ benefit married employees but exclude employees with same-sex partners.³⁶

The judicial success of homosexual employees in challenging the discriminatory employment practices of private employers varies widely and depends largely upon where the incident occurred. In the case of Jeffrey Collins, the Shell executive, a California court found against Shell Oil and awarded Collins \$5.3 million.³⁷ Since the decision, California has enacted legislation providing broader protection against discrimination on the basis of sexual orientation.³⁸ Because Cracker Barrel does not operate in any of the eight states which provide such protection,³⁹ the employees Cracker Barrel terminated have no legal recourse.⁴⁰ Presently, approximately 50 percent of United States residents are protected from employment

by Hewitt Associates, an employee benefits consulting firm).

34. For example, local officials in Williamson County, Texas denied a tax break to Apple Computer Inc. because Apple provides health insurance to same-sex domestic partners. Scott Pendleton, *Domestic Partners Win Company Benefits*, CHRISTIAN SCI. MONITOR, Dec. 9, 1993, at 10. The County Commission later reversed its position. *Id.*; Elizabeth Hudson, *Apple Wins Tax Break for Texas Plant: Commissioners Reverse Decision Linked to Company's Policy on Gays*, WASH. POST, Dec. 8, 1993 at A3. The opposition was motivated by moral objection to homosexuality and the desire to keep lesbians and gay men out of Williamson County. Pendleton, *supra*, at 10 (reporting comments of Commissioner who voted against tax breaks); *County Reverses Stand, Invites Apple to Build*, ST. PETERSBURG TIMES, Dec. 8, 1993, at A1 (quoting director of local organization opposing Apple's policy).

35. Pub. L. No. 103-3, 107 Stat. 6 (effective Feb. 5, 1993).

36. *Id.* at § 101(13) (defining spouse as including only legally recognized opposite-sex marital partners); *Id.* at § 102(a)(C) (entitling employees to take time off in order to care for a spouse).

37. *Collins v. Shell Oil Co.*, 56 Fair. Emp. Prac. Cas. (BNA) 440, No. 610983-5, Alameda County Super. Ct. (June 13, 1991). The high award reflects Collins's high income as well as fraud and malice on the part of the defendant in fabricating reasons for Collins's dismissal. *Id.*

38. CAL. LAB. CODE §§ 1101, 1102, 1102.1 (West Supp. 1992). See Jane Gross, *California Governor, in Reversal, Signs a Bill on Gay Rights in Jobs*, N.Y. TIMES, Sept. 26, 1992, at A1.

39. The eight states are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin. CAL. LAB. CODE §§ 1101, 1102, 1102.1 (West Supp. 1992); CONN. GEN. STAT. ANN. § 46a-81(c) (1991); HAW. REV. STAT. §§ 368-1, 378-2 (1991); MASS. ANN. LAWS, ch. 151B, § 3(6) (Law. Co-op. Supp. 1993); MINN. STAT. ANN. § 363.03 (West Supp. 1994); N.J. STAT. ANN. § 10:5-4 (West Supp. 1993); VT. STAT. ANN. tit. 3, § 961(6) (Supp. 1993); WIS. STAT. ANN. § 111.36 (1989).

40. Bob Cohn, *Discrimination: The Limits of the Law*, NEWSWEEK, Sept. 14, 1992, at 38. See *supra* note 20 and accompanying text for a brief account of the policy. The legal challenges to Cracker Barrel's policy are being fought by shareholders of the company not the employees. *New York City Employees' Retirement Sys. v. SEC*, 63 Fair. Emp. Prac. Cas. (BNA) 1358, at *1-5, *27-28.

discrimination on the basis of sexual orientation, while the other 50 percent go unprotected.⁴¹ This disparity of protection can exist because no *federal* law protects homosexuals from discrimination in employment (or any other context) on the basis of sexual orientation.⁴²

B. The European Union

Much of the preceding discussion applies equally to the nations of the EU. Lesbians and gay men in the EU also encounter glass ceilings, harassment, and other disadvantages related to employment.⁴³ According to a recent survey in Great Britain, half of the homosexual people interviewed stated they experienced harassment in the workplace.⁴⁴ This harassment ranged from malicious gossip to ostracism to death threats.⁴⁵ Consequently, two-thirds of those interviewed currently hide their homosexuality from their colleagues, while only eleven percent have always been open at work about their sexual orientation.⁴⁶ Many British homosexuals feel compelled to lead "double lives" in order to advance professionally.⁴⁷ The necessity of such a course of action can be seen by the example of a senior local government employee in Great Britain, who explained that had he not been "closeted" he would not have "earned [the] respect" which allowed him to eventually reveal his sexual orientation.⁴⁸

Other surveys yield similar results. A survey among homosexual workers in Italy found that one-fourth had been dismissed because of their homosexuality, while approximately half said they suffered discrimination.⁴⁹ In Ireland, a survey found that 58 percent of lesbians and gays felt they would face discrimination at work if it was

41. Leonard, *supra* note 8, at 576 (estimating the percentage of the homosexuals in the work force who are protected by state or local legislation or by employer policy).

42. *Id.*

43. See ANYA PALMER, *LESS EQUAL THAN OTHERS: A SURVEY OF LESBIANS AND GAY MEN AT WORK*, 1-20 (1993) (reporting on discrimination against lesbians and gay men in Great Britain).

44. *Id.* at 10-13.

45. *Id.*

46. *Id.* at 14-17.

47. See *id.* See also Fiona Bawdon, *Gay Lawyers are Left out in the Cold*, *THE TIMES*, Dec. 1, 1992 at 35 (citing employees' fears that hostility to homosexuality will cost them in the job market).

48. Palmer, *supra* note 43, at 6.

49. See *id.* at 3 (discussing the results of the survey).

known that they were homosexual.⁵⁰ Although hiding may be necessary, it will also disadvantage homosexual employees by costing them social contacts.⁵¹

Lesbians and gay men in the EU also face sexual harassment at work. Pervasive harassment may render the harassed worker unable to function efficiently, and so it may result in constructive dismissal.⁵² The high frequency with which homosexuals experience such harassment in the workplace demonstrates the severity of the problem.⁵³

Of course, lesbians and gay men in the EU also face explicit discrimination. As in the United States, military employment in the EU provides a stark example. In Great Britain homosexuals are prohibited from serving in the military.⁵⁴ As a result of this policy, in the three years from 1987 through 1989, 196 servicepersons were discharged from the British military forces because of their homosexuality.⁵⁵ More recently, in November of 1993, Brett Burnell, a twenty-year-old sonar operator in the British navy became the eighth person that year to be discharged for being homosexual.⁵⁶

Other EU nations pursue similar policies with regard to military employment. Italy and Greece also ban homosexuals from serving in the military.⁵⁷ Although homosexuals may serve in Belgium, Denmark, France, Germany, The Netherlands, and Spain,⁵⁸ military employment opportunities for homosexuals within the EU remain severely limited.⁵⁹

Even in countries which do not fully ban homosexuals from the military, discrimination is still a problem. "In France homosexuality is not banned, but army officers . . . are forced to keep their

50. Mary Cummins, *Guide to be Published on Employees' Rights*, IRISH TIMES, Apr. 4, 1993, at 4.

51. See *supra* note 27.

52. See Palmer, *supra* note 43, at 10 (offering an example which follows this pattern).

53. *Id.*

54. Edward Pilkington, *Britain a Prime Offender in EC on Anti-Gay Laws*, THE GUARDIAN, May 5, 1993, at 2.

55. Kees Waaldijk, *The Legal Situation in the Member States*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 71, 112 (Kees Waaldijk & Andrew Clapham eds., 1993).

56. Simon Garfield, *The Wrong Sort to Serve in the Navy*, THE INDEPENDENT, Nov. 29, 1993, at 18. Burnell plans to challenge his dismissal through the courts. *Id.*; Alexandra Freen & Michael Evans, *Sailor Fights Dismissal in Gay Dispute*, THE TIMES, Nov. 29, 1993.

57. Waaldijk, *supra* note 55, at 70, 71.

58. Garfield, *supra* note 56, at 18.

59. Waaldijk, *supra* note 55, at 112.

relationships quiet if they wish to advance their careers.”⁶⁰ They face this difficulty despite legislation prohibiting “discrimination in employment” which affirmatively protects the rights of lesbians and gay men to pursue a military career.⁶¹ In Germany homosexuals may serve in the military, but may not be promoted to officer rank.⁶² Thus, in several EU member states, as in the United States, the government itself discriminates against homosexuals.⁶³ “[I]n those countries in which homosexuals are considered to be unfit for military service[,] [t]his can impede the person’s job chances . . . not only with the [armed service] itself but also afterwards if they have been dismissed from the [armed services] because of homosexual behaviour (on or off duty).”⁶⁴

Employment discrimination against homosexuals by the governments of EU member states is not limited to the military. Lesbians and gay men also face discrimination in other public sector employment. For example, in 1980 the government of Belgium dismissed a lesbian, Eliane Morrisens, from her position as an instructor at a technical college.⁶⁵ Because her dismissal was upheld on grounds other than her sexual orientation, the question of whether the state could subject public employees to dismissal solely because of their sexual orientation was not definitively answered.⁶⁶ Since then, the Belgian courts have not revisited this issue.

Further examples of employment discrimination against homosexuals in the EU can be found. In Great Britain, a gay maintenance man was fired after his employers learned that he had been robbed outside of a gay bar.⁶⁷ Ironically, one reason the dismissal in that case was upheld was that “a considerable proportion of employers would take the view that the employment of homosexuals should be

60. Hans de Jongh, *Dutch Set European Example on Gays-in-Military Debate*, Reuters, Jan. 28, 1993, available in LEXIS, Nexis Library, REUTERS File.

61. Article L.122-45 of the Code of Labour Law, as amended by the Law of 12 July 1990. See Waaldijk, *supra* note 55, at 113.

62. *Id.* Policy approved in Bundesverwaltungsrecht, 8 Nov. 1990, 1 WB 61/90.

63. See Lammy Betten, *Rights in the Workplace*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 335, 342 (Kees Waaldijk & Andrew Clapham eds., 1993) (pointing to laws and actions of EU member states which discriminate on basis of sexual orientation).

64. *Id.* at 342-43.

65. Waaldijk, *supra* note 55, at 111-12.

66. *Id.*

67. *Saunders v. Scottish National Camps Association Ltd*, [1980] IRLR 174, *aff'd* [1981] IRLR 277 (referring only to the plaintiff's involvement in a “homosexual incident”); Waaldijk, *supra* note 55, at 107-08 (specifying robbery outside a gay bar).

restricted."⁶⁸ Thus, the legality of employment discrimination against homosexuals in Great Britain is partially based upon its widespread acceptance.

Only two of the nations of the EU, France and the Netherlands have legislation which protects homosexuals from public sector employment discrimination.⁶⁹ In Ireland and in parts of Great Britain, administrative regulations prohibit discrimination on the basis of sexual orientation for public sector employment.⁷⁰ Until 1991, however, Great Britain denied to lesbians and gay men employment in civil service positions which "involved access to highly classified information."⁷¹

Private sector employees in the EU enjoy even fewer protections from discrimination on the basis of sexual orientation. As in the public sector, France and the Netherlands are the only EU member states which have legislation prohibiting private employment discrimination on the basis of sexual orientation.⁷² Currently, the Netherlands is considering making this protection more explicit.⁷³ As is true in the United States, much of the population of the EU has no legal remedy against employment discrimination on the basis of sexual orientation. In fact, only 24 percent of all residents of EU

68. *Saunders v. Scottish National Camps*, [1980] IRLR 174, 175, *aff'd* [1981] IRLR 277.

69. In France, the applicable law is Article L.122-45 of the Code of Labour Law, *as amended* by Law of 12 July 1990. In The Netherlands, the applicable laws are Article 90quater of the Penal Code, *as amended* by Law of 14 November 1991, *Staatsblad* 623 and Article 429quater of the Penal Code, *as amended per 1 February 1992* by Law of 14 November 1991, *Staatsblad* 623. Waaldijk, *supra* note 55, at 105-06, 110.

70. Waaldijk, *supra* note 55, at 111.

71. *Id. Compare* *Buttino v. Federal Bureau of Investigation*, No. C-90-1639-SBA (N.D. Cal. settlement reached 12/10/93) (containing a provision which states that the United States Department of Justice will no longer discriminate on the basis of sexual orientation in granting security clearances). *See* *Lawyers for FBI, Gay Ex-Agent to Go to Court with Settlement*, 31 Gov't. Empl. Rel. Rep. (BNA) No. 1545, at 1638 (Dec. 27, 1993). Although the FBI will not discriminate against homosexuals in its hiring and firing as a result of this settlement, the CIA and other agencies continue to enforce discriminatory policies. Jim Doyle, *FBI Agrees to End Policy Against Gays: Deal Includes Hiring of Lesbian but not Ex-Agent who Filed*, S.F. CHRON., Dec. 11, 1993 at A1.

72. Waaldijk, *supra* note 55, at 105-06.

73. *Id.* at 106. Presently, the protection against discrimination can only be found by reading two penal code provisions in conjunction and covers only those employed by for-profit businesses. Article 90quater of the Penal Code, *as amended per 1 February 1992* by Law of 14 November 1991, *Staatsblad* 623; Article 429quater of the Penal Code, *as amended* by Law of November 1991, *Staatsblad* 623. *See* Waaldijk, *supra* note 55, at 106.

member states receive protection from private employment discrimination.⁷⁴

In both the private and the public sectors, lesbians and gay men in the EU frequently do not receive employment-related benefits to which their heterosexual counterparts are entitled. Pension benefits frequently favor married couples while excluding same-sex couples.⁷⁵ Similarly, national health insurance in France covers opposite-sex cohabitants, in addition to legally recognized spouses, but excludes same-sex cohabitants.⁷⁶ Other benefits, such as leave from work during the sickness or upon the death of a spouse, also do not apply to lesbians and gay men.⁷⁷ Moreover, seeking benefits such as bereavement leave may result in more severe forms of discrimination. As an example, Matthew, a British sales representative who took time off from work when his partner of twelve years died in an airplane accident, subsequently faced a series of demotions from his employer of fourteen years.⁷⁸ The result of discrimination in the context of employee benefits is that "many homosexuals receive less pay than their heterosexual colleagues receive for the same work."⁷⁹

III. MEASURES AT THE REGIONAL LEVEL

A. United States

Only 23 percent of lesbians and gay men in the United States live in states which prohibit private employment discrimination on the basis of sexual orientation.⁸⁰ This figure rises, however, when

74. This percentage was calculated by comparing the populations of France, Portugal, and the Netherlands to the total population of the EU. See *WORLD ALMANAC 1994*, *supra* note 11, at 742-819. Although Portugal does not have legislation prohibiting either public or private employment discrimination against homosexuals, the country's Ministry of Justice has suggested that Portugal's constitution provides such protection. See *infra* notes 104-07 and accompanying text.

75. Evert Van Der Veen & Adrienne Dercksen, *The Social Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 131, 150 (Kees Waaldijk & Andrew Clapham eds., 1993).

76. See Jacqueline Rubellin-Devichi, *France: The Child First and Foremost and Other Family Law Developments*, 29 *J. FAM. L.* 359, 362-63 (1991) (discussing the judgments by the Cour de Cassation which so held).

77. See Van Der Veen & Dercksen, *supra* note 75, at 150.

78. Palmer, *supra* note 43, at 7-8.

79. Russell Child, *The Economic Situation in the Member States in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 163, 170 (Kees Waaldijk & Andrew Clapham eds., 1993).

80. Approximately 54,000,000 people live in the eight states which have legislation protecting lesbians and gay men from discrimination. *WORLD ALMANAC*, *supra* note 11, at 364.

municipal ordinances are taken into account. Most major cities in the United States provide some protection to homosexuals from employment discrimination.⁸¹ As a result, as much as half or more of the United States's working population may be covered by such laws.⁸²

The states which provide such protections are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin.⁸³ Minnesota enacted its legislation in 1993,⁸⁴ while only Wisconsin had such legislation prior to five years ago.⁸⁵ The number of cities, counties, and other municipalities scattered across the country which provide additional protection from employment discrimination on the basis of sexual orientation was 119 as of February 1994.⁸⁶ However, only 76 of these 119 ordinances apply to private employment practices in addition to practices in the public sector.⁸⁷ Moreover, only 51 of the ordinances apply to private employment in states other than the eight which already prohibit such discrimination statewide.⁸⁸

Although this localized approach to the problem of employment discrimination protects many people who would otherwise be subject to discriminatory practices, it also creates a variety of problems. First, approximately half of the population continues to go unprotected from this form of discrimination. Some major regions of the country, particularly the South, provide almost no protection.⁸⁹ Also, states

See supra note 39 for a list of the eight states which provide such protection. In total, approximately 248,709,900 people live in the United States. *Id.*

81. Leonard, *supra* note 8, at 576 (pointing to New York, Los Angeles, Chicago, Philadelphia, San Diego, Phoenix, Atlanta, Austin, Baltimore, Boston, Cincinnati, Columbus, Denver, Honolulu, Milwaukee, Minneapolis, New Orleans, Oakland, Pittsburgh, Portland, Sacramento, San Francisco, San Jose, Seattle, and Tucson); *see also* National Gay & Lesbian Task Force, *Lesbian, Gay and Bisexual Rights in the U.S.: A Chart of States, Cities, Counties and Federal Agencies Whose Civil Rights Laws, Ordinances, and Policies Bar Discrimination Based on Sexual Orientation*, Feb. 1994 [hereinafter NGLTF Chart] (listing those cities which provide protection to homosexuals).

82. Leonard, *supra* note 8, at 576.

83. For a list of the statutes providing this protection, *see supra* note 39.

84. LAWS 1993, c.22 §§ 8-15 (codified at MINN. STAT. ANN. § 363.03).

85. WISC. STAT. ANN. § 111.36 (1989).

86. NGLTF Chart, *supra* note 81. Seven of these 119 ordinances are presently the subjects of legal challenges. *Id.*

87. *See id.* (listing which ordinances apply to public employment only and which apply to both public and private employment).

88. *See id.*

89. *See id.* Within thirteen southern states (Alabama, Arkansas, Georgia, Florida, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia), only six municipalities offer protection from private employment discrimination against homosexuals. *See* NGLTF Chart, *supra* note 81. Approximately 1.4 million people out

and municipalities may find themselves in conflict over whether such protection does or should exist. This conflict may be essentially a legal issue, involving questions of preemption and jurisdiction, as in California.⁹⁰ In other instances, it may become a heated and divisive political issue, as was and still is the case in Cincinnati and Colorado.⁹¹

Even in areas where some form of protection from employment discrimination is provided, there may be no protection for homosexuals from discrimination resulting from unequal employee benefits. Only a handful of municipalities provide benefits, such as health insurance, to same-sex partners of employees.⁹² However, the law does not entitle same-sex partners to such benefits.⁹³ Rather, "these benefits are extended [by law] to nuclear families alone."⁹⁴ While the recognition of same-sex marriages or partnerships by the state could alleviate this situation, only Hawaii has shown any inclination to provide such recognition.⁹⁵

B. European Union

In ten of the EU member states, there is still no legislation to protect homosexuals from private employment discrimination.⁹⁶ In

of 80 million, less than two percent, receive such protection. *Id.*

90. *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33 (Cal. Ct. App. 1993), *rev. denied* June 1993 (stating that California's Fair Employment and Housing Act preempts municipal ordinances); *see Leonard, supra* note 8, at 576 (discussing how enactment of California state legislation superseded local ordinances which provide greater remedies).

91. *Equality Foundation v. City of Cincinnati*, 838 F.Supp. 1235 (S.D. Ohio 1993) (discussing the controversy in its decision to enjoin the enforcement of a voter-initiated amendment to Cincinnati City Charter which would deny to homosexuals any protection from discrimination); *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (discussing the controversy in its decision to enjoin the enforcement of a voter-initiated amendment to the state constitution which would deny to homosexuals any protection from discrimination).

92. For example, New York City offers such benefits. Peter Freiberg, *WASH. BLADE*, Nov. 5, 1993; *see Cox, supra* note 30, at 37-39 (discussing the few municipalities which have enacted or considered such ordinances).

93. *See Hinman v. Dept. of Personnel*, 213 Cal. Rptr. 410 (1985) (denying health insurance benefits to partners of homosexual state employees).

94. *Cox, supra* note 30, at 2.

95. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (requiring a state to demonstrate a compelling interest under strict scrutiny before excluding same-sex couples under equal protection analysis); William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1427 (explaining that although a favorable ruling has been obtained in *Baehr*, no effort to gain statewide recognition for same-sex marriage has been fully successful yet).

96. The two exceptions are France and The Netherlands. *See supra* notes 69, 73 and accompanying text.

Belgium, an antidiscrimination law first introduced in 1985 has not yet been enacted.⁹⁷ Similar proposals failed to pass in Great Britain and Ireland.⁹⁸

Similarly, the constitutions of the member states provide scant protection in this area. The applicability of constitutional provisions to private actors is in many cases “unclear.”⁹⁹ The “equal treatment” clause of the Danish Constitution has been interpreted to prohibit discrimination in the public sector against homosexuals on the basis of their sexual orientation.¹⁰⁰ The same is true of the Dutch Constitution¹⁰¹ and, perhaps, of the new Constitution of Germany which was enacted in 1992.¹⁰² These constitutional provisions, however, apply only to the government and not to private actors, including private employers.¹⁰³

Portugal is the only EU member state with a constitution that applies fully to private actors.¹⁰⁴ Accordingly, the “antidiscrimination” clause of the Portuguese Constitution¹⁰⁵ has been interpreted by the country’s Ministry of Justice to prohibit private employment discrimination on the basis of sexual orientation.¹⁰⁶ Yet apparently, this constitutional prohibition has not yet been tested.¹⁰⁷ Thus, within the EU only France, the Netherlands,

97. Waaldijk, *supra* note 55, at 106.

98. *Id.* at 80.

99. Ian Forbes & Geoffrey Mead, *Comparative Racial Discrimination Law: Measures to Combat Racial Discrimination in Employment in the Member States of the European Community*, 14 COMP. LAB. L.J. 403, 410 (1993).

100. DEN. CONST. pt. VII § 70. See Waaldijk, *supra* note 55, at 78, 110 (discussing the Danish Constitution and the conclusion by the Danish Minister of Justice in 1989 that it prohibits public sector discrimination against homosexuals).

101. NETH. CONST. ch. I art. 1; see Waaldijk, *supra* note 55, at 77-78 (discussing the equal protection clauses of the Dutch and German constitutions). Article 1 of the Dutch Constitution may also apply to private actors. *Id.* at 78 n.19. However, since The Netherlands has legislation prohibiting employment discrimination against homosexuals, *supra* note 73 and accompanying text, the question is somewhat moot.

102. F.R.G. CONST. art. 12. See Waaldijk, *supra* note 55, at 77-78 (discussing the equal protection clauses of the Dutch and German constitutions).

103. Waaldijk, *supra* note 55, at 77-79, 106 (pointing out that the Dutch constitution may be invoked against a private organization or individual).

104. PORT. CONST. pt. I, § I, art. 18(1). See Waaldijk, *supra* note 55, at 78 n.19. (explaining that the Portuguese Constitution is an exception to the rule that the national constitutions of the EU member states can only be invoked against the government and not against private entities).

105. PORT. CONST. pt. I, § 1, art. 13.

106. Waaldijk, *supra* note 55, at 78 n.19; cf. Forbes & Mead, *supra* note 99, at 424-25 (discussing the application of Article 18 of the Portuguese Constitution to racial discrimination).

107. See Waaldijk, *supra* note 55, at 78 n.19 (explaining that this conclusion was reached in a report of the Ministry of Justice of Portugal, rather than by a court of law).

and perhaps Portugal protect lesbians and gay men from employment discrimination in the private sector.

Employment discrimination resulting from unequal benefits also varies among countries. In Denmark same-sex couples may register their partnership with the government.¹⁰⁸ This registration entitles them to certain employment benefits otherwise available only to married employees and their spouses.¹⁰⁹ No other nation of the EU has enacted this type of legislation.¹¹⁰ Similar legislation has been introduced in France and the Netherlands.¹¹¹ Some municipalities in the Netherlands presently permit the registration of same-sex partnerships.¹¹² In 1994 the town of Vitoria became the first municipality in Spain to allow lesbians and gay men to register their partnerships.¹¹³ The legal impact of these registration provisions, however, remains uncertain.¹¹⁴

The uneven provision of benefits and legal protection from discrimination among the EU member states creates an arbitrary disparity of rights. Whether gay men and lesbians within the EU can be subject to discrimination on the basis of their sexual orientation becomes a matter of chance, the outcome of which depends upon where they live. For this reason, full protection for homosexuals in the area of employment requires action by the EU as a whole.

IV. LEGISLATION AT THE HIGHEST LEVEL

A. United States

Federal protection can result either from constitutional provisions or from legislation. The United States Constitution, as it has been interpreted to date, provides no protection to individuals from

108. Danish Registered Partnership Act, Act No. 372, 7 June 1989 (Den.). See also Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 INT'L. J. L. & FAM. 282, 284-87 (1993) (asserting the significance of such a measure in ending discrimination against lesbians and gay men).

109. See Henson, *supra* note 108, at 283-87. According to Henson, the law "give[s] each partner the same rights to . . . social service entitlements as married partners have." *Id.* at 284.

110. *Id.* at 287 (noting that Denmark's legislation was the first of its kind and that Sweden is the only other country to enact similar legislation).

111. Waaldijk, *supra* note 55, at 97.

112. *Id.*

113. *Town Gives Gay Couples Equal Rights*, Press Association Newsfile, Mar. 5, 1994 available in LEXIS, Nexis Library, PANEWS File.

114. See Waaldijk, *supra* note 55, at 97 (arguing that the local Dutch provisions are purely symbolic and of no legal significance in the absence of national legislation).

discrimination on the basis of their sexual orientation.¹¹⁵ Specifically, the Equal Protection Clause does not treat homosexuals as a protected class and thereby extend heightened protection from discrimination to them.¹¹⁶ Moreover, constitutional provisions do not provide direct protection against discrimination by private employers.¹¹⁷ Federal legislation designed for the particular purpose of protecting individuals from discrimination on the basis of their sexual orientation has been pending in Congress,¹¹⁸ as it has been for over nineteen years.¹¹⁹ Such legislation has little chance of passing in the near future.¹²⁰ Therefore, for the present any federal protection from discrimination based on sexual orientation must be sought in already existing legislation.

1. *Federal Legislation and Employment Discrimination.*

Federal legislation in the United States which addresses the issue of private employment discrimination consists of Title VII of the Civil Rights Act of 1964 (Title VII),¹²¹ as amended by the Pregnancy Discrimination Act of 1978¹²² and the Government Employee Rights Act of 1991,¹²³ the Age Discrimination in Employment Act of 1967 (ADEA),¹²⁴ the Equal Pay Act of 1973 (EPA),¹²⁵ the Rehabilita-

115. *Bowers v. Hardwick*, 478 U.S. 1039 (1986).

116. *E.g.* *High Tech Gays v. Def. Ind. Sec. Clearance Off.*, 895 F.2d 563, 571 (9th Cir. 1990) (citing *Hardwick*); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same), *cert. denied sub nom.* *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. U.S.*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied* 494 U.S. 1003 (1990). *But see* *Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993) (emphasizing that the Equal Protection Clause of the Federal Constitution applies to all citizens, not just to members of traditional suspect classes); *Steffan v. Aspin*, 8 F.3d 57, 62-63 (D.C. Cir. 1993) (distinguishing between homosexual activity and homosexuality as a status in analyzing equal protection claims and suggesting that homosexuality as a status may merit heightened scrutiny).

117. *See* JOHN E. NOWATI & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 568 (4th ed. 1991) (explaining that the Equal Protection Clause governs *state* actions).

118. H.R. 431, 103rd Congress, 1st Sess. (1993); H.R. 423, 103rd Congress, 1st Sess. (1993).

119. *See* *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (listing the attempts, which began in 1975, to amend Title VII of the Civil Rights act of 1964 to include sexual orientation).

120. *See Bill Tracking Report* for H.R. 431, 103rd Congress, 1st Sess. (1993), available in LEXIS, Legis Library, BLTRCK File (giving the bill a thirty-five percent chance of passing the House and a twenty-two percent chance of passing the Senate); *Bill Tracking Report* for H.R. 423, 103rd Congress, 1st Sess. (1993), available in LEXIS, Legis Library, BLTRCK File (giving the bill a six percent chance of passing the House and a two percent chance of passing the Senate).

121. 42 U.S.C. § 2000e (1988).

122. 42 U.S.C. § 2000e(k) (1988).

123. 2 U.S.C. §§ 1201-1224 (1991).

124. 29 U.S.C. §§ 621-634 (1988).

tion Act of 1973,¹²⁶ and Title I of the Americans with Disabilities Act of 1990 (ADA).¹²⁷ The government has also taken other measures addressing the specific issue of discrimination in public employment by the federal government.¹²⁸ Moreover, civil rights legislation from the Reconstruction Era provides additional protection from discrimination to both private and public employees.¹²⁹ The existence of such laws establishes the federal government's authority to legislate in this area.

Of all the acts mentioned above, Title VII is the only one under which protection has been sought from employment discrimination based upon sexual orientation.¹³⁰ Indeed, the Rehabilitation Act

125. 29 U.S.C. § 206(d) (1988).

126. 29 U.S.C. §§ 701-96 (1988).

127. 42 U.S.C. §§ 12101-12117 (1991).

128. *E.g.* Exec. Order No. 11478, 3 C.F.R. 803 (1966-1970) (Equal Employment Opportunity in Federal Government) (providing for affirmative equal employment opportunity programs for federal employees and applicants, and procedures for consideration of discrimination complaints in federal employment). *See also* ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW §§ 9.01-9.08 (3d ed. 1993) (discussing the applicability of federal legislation to federal public employment).

129. *Id.* at § 10.01. These provisions include 42 U.S.C. § 1983 (1988) (providing statutory remedies for violation of federal constitution and statutory rights), 42 U.S.C. § 1981 (1988) (permitting public and private employees relief for racial discrimination), and 42 U.S.C. § 1985(3) (1988) (allowing cause of action where employees experience deprivation of equal protection of the law or equal privileges and immunities). The Reconstruction Era provisions do not provide any protection against private discrimination based upon sexual orientation. 42 U.S.C. § 1983 generally applies to public, but not private employment. *See* MODJESKA, *supra* note 128, at § 10.04. 42 U.S.C. § 1981 applies only to racial discrimination. MODJESKA, *supra* note 128, at § 10.06. 42 U.S.C. § 1985(3) "does not reach homosexuals." MODJESKA, *supra* note 128, at § 10.16; *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

Even section 1983 cases involving public employment have provided only mixed results. *E.g.*, *Burton v. Cascade School Dist.*, 512 F.2d 850 (9th Cir. 1973), *cert. denied*, 423 U.S. 839 (1974) (providing partial relief, but not reinstatement, to teacher dismissed for homosexuality); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1970), *cert. denied*, 405 U.S. 1046 (1971) (denying relief to plaintiff who alleged discrimination on basis of sexual orientation); *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992), *cert. denied* 113 S. Ct. 2445 (1993) (granting defendant's motion for summary judgment where plaintiff alleged discrimination on the basis of "homosexual tendencies").

130. The ADEA applies only to discrimination on the basis of age. 29 U.S.C. § 623 (1988) (defining unlawful employment practices as ones which discriminate because of an individual's age). *See also* MODJESKA, *supra* note 128, at § 3.01 (discussing the ADEA). The EPA bans wage discrimination based on sex, 29 U.S.C. § 206(d)(1) (1988), and an argument can be made that this includes discrimination based on sexual orientation. *But see infra* notes 138-64 and accompanying text (explaining the failure of this argument in Title VII cases). Apparently, however, no case applying the EPA to discrimination based on sexual orientation has ever been reported. LEXIS search by author. This may be because wherever state or local law permits such wage discrimination, more severe forms of discrimination, such as termination, are also legally permissible. This situation creates a disincentive which may effectively prevent the

specifically excludes from its coverage discrimination on the basis of homosexuality or bisexuality.¹³¹ Similarly, it excludes transvestism, transsexuality, and other "gender identity disorders" from its coverage.¹³² Likewise, the ADA specifically excludes from coverage discrimination on the basis of homosexuality or bisexuality.¹³³ The ADA also excludes transvestism, transsexuality, other "gender identity disorders," and other "sexual behavior disorders."¹³⁴ Thus, only Title VII remains as a possible prohibition against employment discrimination on the basis of sexual orientation.

2. *Title VII.* Title VII makes it unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin.¹³⁵ When Congress enacted this legislation, it was responding to the civil rights movement, and so it was primarily concerned with racial discrimination.¹³⁶ The prohibitions against sex discrimination, on the other hand, "were added to the Civil Rights Act of 1964 at a late stage in the legislative process and lack a background of debate or legislative history,"¹³⁷ making it impossible to know the true Congressional intent.

Beginning with *DeSantis v. Pacific Telephone and Telegraph Co.*¹³⁸ in 1979, homosexual plaintiffs brought Title VII actions in which they argued that the prohibition against sex discrimination included protection from discrimination on the basis of sexual orientation.¹³⁹ From the outset, these actions were unsuccessful. Previous cases had stated that Title VII did not prohibit discrimina-

bringing of a legal challenge to the wage discrimination. In any event, the EPA applies solely to wage differentials, and not to the full spectrum of discrimination. 29 U.S.C. § 206(d)(1) (1988). See also MODJESKA, *supra* note 128, at § 5.01 (discussing the EPA). The Reconstruction Era legislation also does not reach discrimination on the basis of sexual orientation. See *supra* note 129.

131. 29 U.S.C. § 706(8)(E), as amended by Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4349, effective Oct. 19, 1992.

132. 29 U.S.C. § 706(8)(F), as amended by the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4349, effective Oct. 19, 1992.

133. 42 U.S.C. § 12211(a) (1993).

134. 42 U.S.C. § 12111(b)(1) (1993). It is beyond the scope of this note to fully explain why homosexuality, bisexuality, transvestism, and transsexuality are not "sexual behavior disorders."

135. 42 U.S.C. § 2000e-2(a)(1) (1988).

136. *Holloway v. Arthur Andersen*, 566 F.2d 659, 662 (9th Cir. 1977).

137. *Powell v. Read's*, 436 F. Supp. 369, 371 (D. Md. 1977).

138. 608 F.2d 327 (9th Cir. 1979).

139. *Id.*

tion against homosexuals as such,¹⁴⁰ although that issue was not squarely before the courts in any of these prior cases.¹⁴¹ These cases were cited as precedent when the court dismissed the claims of the *DeSantis* plaintiffs.¹⁴²

Since *DeSantis*, subsequent homosexual plaintiffs have likewise found no remedy from discrimination in Title VII. While United States courts struggle to distinguish between homosexuality, transsexuality, transvestism, and effeminacy,¹⁴³ they consistently deny relief to homosexual Title VII plaintiffs. Although courts have often given a broad interpretation to discrimination "because of . . . sex" in Title VII cases,¹⁴⁴ the interpretation has always narrowed for cases involving homosexual plaintiffs.¹⁴⁵ For example, in *Carreno v. IBEW*¹⁴⁶ a homosexual male sought to recover under Title VII for constructive discharge resulting from hostile work environment and sexual harassment related to his homosexuality.¹⁴⁷ Significantly, the court framed the issue as whether "a homosexual male may recover under Title VII" for harassment, and not whether a male may recover for harassment related to his homosexuality.¹⁴⁸ *Carreno* held that the plaintiff had no claim since the harassment of which he com-

140. *Holloway*, 566 F.2d at 662, n.6; *Voyles v. Ralph K. Davies Med. Center*, 403 F. Supp. at 457; *Smith v. Liberty Mutual Ins. Co.*, 395 F. Supp. 1098, 1101 (1975), *aff'd* 569 F.2d 325 (1978).

141. *Holloway*, 566 F.2d 659, *Voyles*, 403 F. Supp. 456, and *Powell*, 436 F. Supp. 369, involved discrimination based on transsexuality. *Smith*, 395 F. Supp. 1098, involved discrimination based on effeminacy in males.

142. *DeSantis*, 608 F.2d at 329-30.

143. *E.g.*, *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1083 n.3, (7th Cir. 1984) (distinguishing transsexuals from homosexuals); *id.* at 1084 n.7 (failing to correctly distinguish transsexuals from transvestites). For a discussion of the difficulties faced by jurists in addressing sexual matters, particularly homosexuality, see POSNER, *supra* note 12, at 1-7, 341-50 (1992); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

144. *E.g.* *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971) (holding "the scope of [Title VII] is not confined to explicit discrimination based 'solely' on sex. . . . [since] Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); *Meritor Sav. Bank v. Vinson* 477 U.S. 57 (1986) (extending Title VII's prohibition on sex discrimination to cover creation of a hostile work environment).

145. *DeSantis*, 608 F.2d at 329-30 (holding that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended") (footnotes omitted); *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) para. 41,332, at 70,105 (6th Cir. 1992) (asserting that "a 'traditional' interpretation of the word 'sex' was intended by Congress").

146. 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. 1990).

147. *Id.* The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), upheld the view that Title VII prohibits hostile work environment sexual harassment.

148. *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82.

plained occurred "not . . . because he is a male, but rather because he is a homosexual male."¹⁴⁹ Citing *Holloway v. Arthur Andersen*,¹⁵⁰ a case involving transsexuality, and *DeSantis*, the court concluded that Title VII affords no protection from discrimination based on sexual orientation and granted summary judgment to the defendant.¹⁵¹

Similarly, in *Dillon v. Frank*¹⁵² a Title VII sexual harassment claim predicated on the homosexuality of the plaintiff was dismissed. As was the case with *Carreno*, *Dillon* concerned a male plaintiff claiming sexual harassment. Ernest Dillon, who may or may not have been a homosexual, was perceived as one, and suffered widespread verbal and physical abuse.¹⁵³ The court found Dillon's claims "compelling" and "appealing" due to the pervasive "cruel treatment he was subjected to."¹⁵⁴ Despite apparent sympathy towards the plaintiff, however, the court in *Dillon* felt bound to agree with *Carreno*.¹⁵⁵ Citing *DeSantis*, *Smith v. Liberty Mutual Ins. Co.*, a case involving effeminacy, and *Ulane v. Eastern Airlines*, a case involving transsexuality, *Dillon* interpreted "sex" discrimination narrowly, concluding that Title VII does not prohibit discrimination based upon sexual orientation.¹⁵⁶

Finally, *Williamson v. A.G. Edwards and Sons*¹⁵⁷ appears to be the most recent case, and the first case since *DeSantis*, involving a Title VII claim of employment discrimination (other than sexual harassment) on the basis of sexual orientation. The court dealt with this claim in one sentence, stating, "Title VII does not prohibit discrimination against homosexuals."¹⁵⁸ *Williamson* cited only *DeSantis* in support of its conclusion, apparently recognizing that

149. *Id.* at 82-83.

150. 566 F.2d 659, 662 (9th Cir. 1977).

151. *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82-83. Earlier cases, however, had established that courts will recognize and rule favorably on homosexual sexual harassment claims when the harasser is homosexual and makes sexual advances on a heterosexual harassee. *Wright v. Methodist Youth Service*, 511 F. Supp. 310 (N.D. Ill. 1981); *Joyner v. AAA Cooper Transportation*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd* 749 F.2d 732 (11th Cir. 1984).

152. 58 Empl. Prac. Dec. (CCH) para. 41,332 (6th Cir. 1992).

153. *Id.* at 70,102.

154. *Id.* at 70,106.

155. *Id.*

156. *Id.* at 70,102, 70,104-05.

157. 876 F.2d 69 (8th Cir. 1989).

158. *Id.* at 70. It is significant that the court does not say that Title VII does not prohibit discrimination on the basis of sexual orientation. Rather, if *Williamson's* language is given its literal meaning, homosexuals may never claim protection from discrimination under Title VII, regardless of the circumstances surrounding the discrimination.

claims of discrimination based on transsexuality differ from those based on homosexuality.¹⁵⁹ *Williamson* was correct in citing only *DeSantis* as also having reached this conclusion about sexual orientation, since only *DeSantis* among the previous Title VII cases involved a homosexual, as opposed to a transsexual, plaintiff. *Dillon*, by contrast, erroneously claimed “[t]he circuits are unanimous in holding that Title VII does not proscribe discrimination based on sexual . . . orientation.”¹⁶⁰ *Dillon* cites *DeSantis* and *Williamson* for this proposition, along with three additional cases which involve transsexuality, effeminacy, and a heterosexual paramour.¹⁶¹ Thus, according to *Dillon*, only five out of the eleven circuits have even addressed this issue.¹⁶² Furthermore, in three of the cited cases this issue was addressed only in dicta, as the issue was not before the court.¹⁶³ Although two out of two circuits agree on this issue, three have not spoken definitively, and six have not spoken at all. A claim of unanimity, therefore, is dubious.

Unfortunately, a very small number of cases seem to have decided the issue of whether homosexuals may seek protection under Title VII from discrimination on the basis of their sexual orientation. *DeSantis* and *Dillon* were dismissed. *Carreno* and *Williamson* were decided for the defendants on motions of summary judgment. Because the court in *DeSantis* erroneously assumed from the outset that the issue had been previously decided, when in fact it was the first court to address this question,¹⁶⁴ no homosexual plaintiff claiming discrimination on the basis of sexual orientation has even been able to bring a case under Title VII to trial. Thus, federal employment discrimination legislation currently provides no protection from discrimination based upon sexual orientation.

B. European Union

Legal protection from employment discrimination for homosexuals throughout the EU can result from either legislation or judicial

159. *Id.*

160. *Dillon*, 58 Empl. Prac. Dec. (CCH) at 70,104.

161. *Id.* at 70, 104-05.

162. *Id.* at 70,104.

163. See *supra* note 161 and accompanying text (noting that three of the cases cited do not involve homosexuality).

164. See *infra* notes 138-42 and accompanying text.

decisions.¹⁶⁵ Currently, no European Community (EC) legislation specifically protects homosexuals from employment discrimination.¹⁶⁶ Similarly, no judicial decision has announced that protections contained in existing employment discrimination legislation extend to discrimination against homosexual workers within the EU.¹⁶⁷

1. *Existing Legislation.* The European Parliament (EP) has been the most active EU body in condemning discrimination against homosexuals.¹⁶⁸ In 1984 it passed the Resolution on Sexual Discrimination in the Workplace in order to protect the rights of homosexuals.¹⁶⁹ Specifically, this resolution calls for an end to "discrimination against homosexuals with regard to access to employment and working conditions."¹⁷⁰ The EP reaffirmed its position in 1989 when it passed the Resolution on the Community Charter of Fundamental Social Rights.¹⁷¹ Other actions by the EP similarly seek to protect the rights of homosexuals.¹⁷² Unfortunately, these actions by the EP are not binding on the other bodies of the EU or the member states.¹⁷³

The Council of the European Union (Council) and the European Commission (Commission) have not demonstrated an equivalent willingness to protect homosexuals from workplace discrimination.¹⁷⁴ In 1990 the EP asked the Commission if there was anything the EC

165. Arguments that this protection could also be provided through the European Convention of Human Rights, the enactment of a new Community Bill of Rights, or by the application of already recognized human rights, are beyond the scope of this Note. To examine such arguments, see Andrew Clapham & J.H.H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE*, 23-27, 60-67 (Kees Waaldijk & Andrew Clapham eds., 1993); Betten, *supra* note 63, at 352-55, 357-58.

166. Clapham & Weiler, *supra* note 165, at 18.

167. See Betten, *supra* note 63, at 357 (arguing for a test case to apply existing employment discrimination measures to unequal treatment of homosexual workers).

168. Peter Ashman, *Introduction*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE*, 4 (Kees Waaldijk & Andrew Clapham eds. 1993).

169. 1984 O.J. (C 104) 46-48.

170. *Id.* at 48.

171. 1989 O.J. (C 323) 46 (stating the rights of workers generally).

172. Ashman, *supra* note 168, at 4 (reporting on the EP's adoption of a Resolution on the Rights of the Child and promotion of an amendment to draft Community legislation on tendering).

173. See D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES*, 220, 222 (4th ed. 1987) (explaining that the European Parliament is a deliberative and advisory body without true legislative authority).

174. Ashman, *supra* note 168, at 4. See also Clapham & Weiler, *supra* note 165, at 27-30 (providing a non-discriminatory political explanation for this reluctance).

could do to legislate against anti-homosexual discrimination in the workplace.¹⁷⁵ The Commission replied that “[t]he Community has no powers to intervene in possible cases of discrimination practiced by member states against sexual minorities.”¹⁷⁶ While this reply may understate the authority of the EU,¹⁷⁷ it accurately reflects the level of enthusiasm that the Commission and the Council have shown thus far towards the goal of eliminating workplace discrimination against homosexuals.

The EU has the ability, and some would say the duty, to act in this area. Two principle pieces of legislation enacted by the EU address the issue of workplace discrimination. First is the Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Directive 76/207).¹⁷⁸ Passed in 1976, Directive 76/207 provides that “there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”¹⁷⁹ No EU judicial decision has yet decided whether this directive should be interpreted broadly so as to include discrimination on the basis of sexual orientation.¹⁸⁰

In many respects Directive 76/207 is analogous to Title VII in the United States. Both forbid sex discrimination on their face, and both have been expanded to prohibit other forms of discrimination related to sex. For example, the European Court of Justice (ECJ)¹⁸¹ and the United States Supreme Court¹⁸² both ruled that the respective legislation before the court prohibited practices which have a disparate impact on women and men. Sexual harassment was prohibited by legislation in the EC¹⁸³ and by the judiciary in the

175. Eur. Parl. Deb. (3-390) 258, (May 16 1990). See Clapham & Weiler, *supra* note 165, at 27-28 (criticizing the Answer).

176. Clapham & Weiler, *supra* note 165, at 28 (quoting the Answer).

177. *Id.*

178. 1976 O.J. (L 39) 40-42.

179. *Id.* at 40.

180. See Angela Byre, *Equality and Non-Discrimination, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE*, 207, 216-17 (Kees Waaldijk & Andrew Clapham eds., 1993) (arguing for the desirability of putting a “test case” before the European Court of Justice to rule on this and related issues).

181. Case 170/84, *Bilka-Kaufhaus GmbH v. Weber* 1986 E.C.R. 1607. See also Byre, *supra* note 180, at 212-13 (explaining the holding in *Bilka-Kaufhaus*).

182. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

183. 1992 O.J. (L 49) 1-8. For a more complete description of this legislation, see text accompanying notes 187-89, *infra*.

United States.¹⁸⁴ While the fact that Directive 76/207/EEC has been expansively interpreted in the past should be encouraging,¹⁸⁵ it may be counter-balanced by the fact that similarly broad interpretations of Title VII in the United States did not lead to protections for homosexuals.¹⁸⁶

The second major piece of EC legislation with regard to employment discrimination is the Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work (Recommendation 92/131).¹⁸⁷ Recommendation 92/131 asserts that "conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work . . . is unacceptable."¹⁸⁸ Furthermore, the Code of Practice annexed to Recommendation 92/131, which the Commission recommends the member states adopt, declares that "harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour."¹⁸⁹

Unfortunately, Recommendation 92/131 is merely a recommendation and, as such, is not binding on member states.¹⁹⁰ Nevertheless, as recently confirmed by the ECJ decision in *Grimaldi v. Fonds des maladies professionnelles*,¹⁹¹ recommendations may carry persuasive authority. Moreover, Recommendation 92/131 may provide guidance to member states considering this issue.¹⁹²

Although Recommendation 92/131/EEC neither requires member states to provide protection from workplace harassment based on sexual orientation nor addresses the larger issue of employment discrimination, it provides a useful first step. The Commission added the sexual orientation provision after the drafting process had already begun,¹⁹³ and perhaps its decision to include the provision signals a growing willingness on the part of the EU bodies other than the EP to confront issues related to discrimination against homosexuals. This outcome, at the very least, compares favorably to the judicial

184. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

185. See Byre, *supra* note 180, at 212-13 (asserting that these broad interpretations of Directive 76/207/EEC should continue when issues of sexual orientation are before the ECJ).

186. See *supra* note 144-45 and accompanying text.

187. 1992 O.J. (L 49) 1-8.

188. *Id.* at 1.

189. *Id.* at 3.

190. Lasok & Bridge, *supra* note 173, at 130 (4th ed. 1987).

191. Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles* [1989] E.C.R. 4407.

192. Byre, *supra* note 180, at 217.

193. *Id.* at 215.

decisions and the absence of any legislation on this subject in the United States.¹⁹⁴

2. *Bases for Future Legislation.* The Treaty establishing the EC (EC Treaty) directly prohibits only two types of workplace discrimination: discrimination on the basis of nationality in Article 7 and salary discrimination based on gender in Article 119.¹⁹⁵ Other articles of the EC Treaty, particularly Articles 117, 118, 118A and 235, however, grant additional authority to the institutions of the EC to act in the realm of labor law.¹⁹⁶ Directive 76/207/EEC, for example, was enacted pursuant to the authority granted to the Council under Article 235.¹⁹⁷ It would be inconsistent to argue that prohibiting gender discrimination falls under the powers referred to in Article 235, while prohibiting discrimination based upon sexual orientation falls outside of the scope of the Article.¹⁹⁸ Thus, these articles may provide the EC with the mechanism necessary to enact further anti-discrimination legislation, including protection for homosexuals from discrimination in the workplace.

Because one purpose of the EC is to provide for the free movement of workers,¹⁹⁹ legislation in the field of employment discrimination may more easily be undertaken than legislation in other fields relating to the rights of sexual minorities.²⁰⁰ Theoretically,

194. See *supra* notes 118-64 and accompanying text.

195. EC TREATY arts. 7, 119. See also Weiss, *supra* note 9, at 1436.

196. EC TREATY arts. 117-118, 118A, 235. Articles 117 and 118 give the EC authority to act in the area of "working conditions," although these Articles do not include the authority to adopt binding legislation. EC TREATY arts. 117-118. Article 118A, added as part of the Single European Act of 1987, grants authority over the "working environment" and includes the authority to issue binding directives. EC TREATY art. 118A. Article 235 gives the Community the additional powers necessary to obtain any of the objectives of the Community and also includes the authority to enact binding legislation. EC TREATY art. 235. Read broadly, Article 235 could give the EC authority to do nearly anything. See Clapham & Weiler, *supra* note 165, at 29 (arguing that the broad approach the Community has taken regarding Article 235 should be applied in a similar manner to any potential legislation protecting the rights of lesbians and gay men).

197. 1976 O.J. (L 39) 40.

198. Clapham & Weiler, *supra* note 165, at 21. Article 235 states:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

199. EC TREATY arts. 48-51.

200. See Clapham & Weiler, *supra* note 165, at 19.

cally, lesbians and gay men enjoy the same freedom of movement as other workers.²⁰¹ Because of discriminatory practices, however, they may not fully realize their enjoyment of this right. For example, many Irish homosexuals migrate to London, while many British homosexuals migrate to Amsterdam, where the law provides them with greater protection from discrimination.²⁰² EU nations with relatively more discriminatory practices and laws will be less inviting to homosexual workers, thus discouraging them from exercising their right to freedom of movement by pursuing employment opportunities in these nations.²⁰³ In pursuit of its goals as set forth in Article 3, the Community has the power to legislate to remove such discrimination.²⁰⁴

In addition to the ability to enact such legislation, however, the desire of the Council and the Commission to do so is also needed.²⁰⁵ The EU must respond to the problem of anti-homosexual discrimination in the workplace by implementing a Community-wide policy which will replace the current uneven patchwork of national policies.

V. CONCLUSION

One commentator, in discussing developments in labor law, notes the "persistent debate on both continents over whether to enact labor legislation at the state or federal level."²⁰⁶ While the United States has taken a largely federal approach to labor law, exemplified by Title VII and other anti-discrimination legislation, the EC approach has emphasized action by the individual member states.²⁰⁷ Unfortunately, neither approach has resulted in protection for homosexuals from employment discrimination based on their sexual orientation.

201. Hans Ulrich Jessurun d'Oliveira, *Lesbians and Gays and the Freedom of Movement of Persons*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE*, 289, 294 (Kees Waaldijk & Andrew Clapham eds., 1993).

202. Child, *supra* note 79, at 171.

203. Francis Snyder, Han Somsen & Henrik Duedahl Hoyer, *Subsidiarity*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 221, 235 (Kees Waaldijk & Andrew Clapham eds., 1993).

204. *Id.*

205. *See supra* notes 174-77 and accompanying text (discussing the lack of any such desire).

206. Weiss, *supra* note 9, at 1435.

207. *Id.* at 1435-41.

In the United States, many employers can openly discriminate against homosexuals with impunity.²⁰⁸ It is imperative that either the courts, Congress, or both act to remedy this problem.

In the EU, the stakes may even be higher. The impact of EC legislation extends beyond the member states of the EU to other nations of Western, Central, and Eastern Europe.²⁰⁹ Some nations adopt EC legislation pursuant to formal treaties; others seek to “voluntarily emulate EC labor standards,” sometimes with the hope of eventually obtaining membership in the EU.²¹⁰ EU leadership in this role may also produce results in the United States “through the trans-Atlantic influence of concepts, models and structures pioneered in Europe.”²¹¹

More directly, EC legislation protecting individuals from anti-homosexual discrimination in the workplace will provide a legal remedy for gay and lesbian workers who lose their jobs on the basis of their sexual orientation. As the European Parliament has stated with regard to anti-homosexual discrimination, “the elimination of all forms of discrimination between individuals is a prerequisite to the achievement of a more just society.”²¹² Until both the United States and the EU enact legislation to do this, homosexual workers will have recourse only to an uneven, unjust patchwork of local legal protections.

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208. Unfortunately, because no federal legislation prohibits discrimination on the basis of sexual orientation, the chairman of Cracker Barrel has been able to truthfully state, “Cracker Barrel Old Country Store is an equal opportunity employer that adheres to the letter and the spirit of the law regarding non-discrimination in the workplace.” Peter T. Kilborn, *Gay Rights Groups Take Aim at Restaurant Chain That's Hot on Wall Street*, N.Y. TIMES, Apr. 9, 1992, at A12. As William B. Rubinstein, director of the American Civil Liberties Union's National Lesbian and Gay Rights Project, has said, “[Cracker Barrel's policy] is a classic example of why we need some kind of Federal protection against this kind of discrimination.” *Id.* at A12.

209. Weiss, *supra* note 9, at 1432-34.

210. *Id.* at 1433-34.

211. *Id.* at 1434.

212. 1984 O.J. (C 104) 46.

