

# BAY AREA

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## State Laws Unclear on Gay Job Bias

### Controversy expected to end up in Supreme Court

By Reynolds Holding  
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Since Governor Wilson's veto in September of a bill to protect gays and lesbians from job discrimination, several state courts have sent conflicting signals about whether bias based on sexual orientation is allowed in California.

In vetoing AB101, Wilson suggested that legal protections for gays and lesbians are clear. Thus far, however, the courts have shown that the laws regarding job bias based on sexual orientation are anything but clear.

Ultimately, the controversy will be brought before the state Supreme Court, but what the high court will decide is, at best, uncertain.

And that, legal experts say, is why gays and lesbians cannot be sure of their legal rights until state statutes that explicitly address discrimination against homosexuals are on the books in California.

"As long as (gay rights) laws are based on judicial decisions that can be reversed and that some people know about and others don't, you won't have the kind of clear message that says this is what people are required to do," said Matthew Coles, a staff attorney at the American Civil Liberties Union in San Francisco.

The state's patchwork of protections for gays and lesbians is woven from state court decisions and local anti-discrimination ordinances. The court decisions are based mainly on the state's Unruh Act, which prohibits discrimination by landlords and businesses, and the state Labor Code, which bars employers from limiting employees' political activities.

### Courts' Actions

In the past two months, courts have punched holes in some of those protections and stretched others.

■ On October 10, a Los Angeles Superior Court killed that city's ordinance forbidding job discrimination based on sexual orientation. The ruling threatens similar ordinances in other cities.

■ On October 25, the state Court of Appeal in San Francisco ruled that the state Labor Code bars private employers from discriminating against homosexual employees and job applicants. The ruling is a major — and some say questionable — extension of Labor Code protections.

■ On November 27, the state Court of Appeal in Los Angeles ruled that landlords' religious beliefs excused them from Unruh Act prohibitions.

■ On December 17, the state Court of Appeal in San Bernardino struck down a proposed initiative that would have overturned Riverside's gay rights ordinance.

The rulings reveal a court system struggling to make sense of a murky body of law, said Thomas F. Coleman, a Los Angeles lawyer specializing in sexual orientation and marital status issues.

"We're in a very hyperactive time right now," he said. "There is a desert storm in the law. Once the dust settles, we'll see what we have."

So far, dust is settling around an expansive interpretation of state Labor Code provisions adopted 60 years ago. The provisions say only that employers may not interfere with employees' political activities.

But in 1979, the state Supreme Court ruled that open homosexuality is a political activity and cannot be used by a public utility to deny a person a job. In 1986, at the request of then-Assemblyman Art Agnos, Attorney General John Van de Kamp opined that employees who hide their homosexuality are protected as well.

### A Step Further

The Court of Appeal in San Francisco cited that opinion in October when it went a step further and ruled that the Labor Code bars private employers from discriminating against employers or job applicants on the basis of sexual orientation.

The state Supreme Court, which has been asked to review the appeals court ruling, will probably decide whether these interpretations of the Labor Code go too far.

"The concept (that the Labor Code covers discrimination against homosexuals) is up for grabs," said Coles. "We'll have to see if there is coverage. If you were a real legal technocrat, you would say, at the moment, yes. But it is all by judicial decision. And the court that decided (in 1979) that there was coverage was the (liberal Chief Justice) Rose Bird court, by a 4-to-3 decision. This is a very different court."

More troubling to civil rights advocates is the Los Angeles Court of Appeal decision that found a religious exception to the Unruh Act.

The case involves an unmarried couple, Verna Terry and Robert Wilder, who asked Agnes Donahue about an apartment she was offering for rent in Downey, near Los Angeles. When Terry said that Wilder was her boyfriend, Donahue, who is a Catholic, responded, "Oh, I'm really old-fashioned, and I don't approve of that sort of thing. I don't rent apartments to unmarried couples."

The court found that, although Donahue violated state anti-discrimination laws, her religious rights under the state constitution outweighed the state's interest in protecting unmarried couples from discrimination.

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## Request for Rehearing

Terry and Wilder have asked the court to rehear the case. If the rehearing fails, they plan to appeal to the state Supreme Court.

"If this case is affirmed . . . then religiously motivated landlords would be free to discriminate against a lot of people, including gays and lesbians, on the basis of the state constitution," said Coles. "It is definitely possible that the state Supreme Court will uphold the Court of Appeal. This court is more conservative than it ever was before."

What's more, the current high court has made clear that it disdains broad interpretations of the Unruh Act. In a case decided in February, the court said it might disagree with past decisions holding that the 22-year-old law covers

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— MARIA GIL DE LAMADRID,  
LESBIAN RIGHTS ATTORNEY

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types of discrimination, such as sexual-orientation discrimination, that it does not specifically mention.

Even without statewide protections, gays and lesbians in Concord, Riverside, San Francisco, Los Angeles and about 13 other cities have found solace in local ordinances that strictly prohibit discrimination based on sexual orientation. Now those laws are vulnerable as well.

In 1989, voters in Irvine repealed their city's gay rights ordinance. Last month, Concord voters followed suit by passing Measure M. A similar initiative was proposed in Riverside, but the City Council refused to put it on the ballot.

On December 17, the state Court of Appeal upheld the Riverside City Council's decision by ruling that the proposed initiative is unconstitutional. The ruling may seal the fate of Measure M as well, although its supporters say their less harshly worded law can survive two lawsuits aimed against it.

## L.A. Ordinance

However, Los Angeles Superior Court Judge Diane Wayne boosted the backlash against local gay rights laws in October when she ruled that the state Fair Employment and Housing Act pre-empts a Los Angeles ordinance that bars job discrimination based on sexual orientation. Wayne reasoned that legislators passed the state job-discrimination law, which does not cover sexual orientation, to establish statewide standards without local variations.

Many legal experts believe that Wayne is wrong. "I think that decision was totally erroneous, not just from a political point of view, but from a legal perspective," said Maria Gil de Lamadrid, a staff attorney at the National Center for Lesbian Rights in San Francisco.

Nevertheless, officials in cities with similar laws are concerned. "We are taking this very seriously. If the appellate court followed the judge's ruling, our ordinance would be vulnerable," said San Francisco Deputy City Attorney Burk Delventhal, who added that San Francisco will join Los Angeles in a friend-of-the-court brief opposing the decision.

As Coles of the ACLU points out, all of this would have been unnecessary if the governor had signed AB101. In fact, gay rights advocates are already trying to reverse the effect of Wilson's veto by circulating for next year's ballot initiatives that embody the substance of AB101 as well as Unruh Act protections.

"Our position all along has been that there is no clear law, and the answer to our problems is to create a clear law," said Gil de Lamadrid. "At this point, where the law stands depends upon where you are standing."