Los Angeles Times

SATURDAY
FEBRUARY 1, 1992

State Justices Set Aside Ruling on Gay Job Bias

■ **Supreme Court:** Case will be taken up after hearing of a drug-testing case that also touches on privacy issues.

By PHILIP HAGER
TIMES LEGAL AFFAIRS WRITER

SAN FRANCISCO—The California Supreme Court, sidestepping for now a widely watched gay-rights dispute, on Friday set aside an appellate ruling that said for the first time that state law bars job bias because of sexual orientation.

Without elaborating, the justices issued a brief order saying they will review the decision reached last October by a state Court of Appeal here that prohibited an employer from forcing job applicants to take a psychological test that asked questions about sexual orientation and other personal beliefs. A final ruling is expected by summer.

Court aides said the justices first want to rule on a separate case, now pending before the court, that raises related questions over the state constitutional right to privacy. At issue in that case is whether the National Collegiate Athletic Assn. can require athletes to submit to drug tests.

In the gay rights case, the appellate court had ruled that the questions violated the right to privacy. The panel also held that state labor laws barred discrimination against homosexuals, thus supporting a contention by Gov. Pete Wilson when he vetoed a gay-rights measure last year.

Had the high court not decided to review the case, the appellate ruling would have become binding immediately. The justices set no date for further action on the case, although it is likely to be deferred until after the court rules in the drug-testing dispute.

The high court's action Friday concerned Sibi Soroka of Lafayette and other applicants who brought suit against a department store chain that required them to take psychological tests for jobs as security guards.

Among other things, applicants were asked whether they believed in God, whether their sex lives were satisfactory and whether they were attracted to members of their own sex.

Gov. Pete Wilson last September vetoed AB 101, a bill that would have specifically protected homosexuals against job discrimination. The governor said the legislation would create burdensome litigation and cited several existing provisions of law that would adequately insure against bias.

Gay groups protested across the state, taunting Wilson at public appearances and holding marches throughout last fall in Los Angeles and San Francisco.

In October, the state Court of Appeal issued a ruling in the Soroka case lending support to the governor's contention that existing law already banned job bias against gays.

The appeal panel held first that the state constitutional right to privacy protects job applicants and holders from being forced to answer questions about religious, sexual and other personal views. The court barred the Target Stores chain from administering psychological tests the court found intrusive.

The panel went on to hold that state labor laws bar private employers from discriminating on the basis of sexual orientation. Questions about sexual orientation, the panel said, are thus discriminatory and represent an attempt to "coerce an applicant to refrain from expressing a homosexual orientation by threat of loss of employment."

The appellate ruling opened the way for state labor officials to begin enforcing provisions of the law that allow them to order employers to cease discrimination, rehire employees improperly dismissed and pay back wages and attorney fees.

Target Stores appealed to the state Supreme Court, urging among other things that the high court first decide in the drug-testing case whether the right to privacy applies to private employers and institutions.

The company did not contest the appellate court's finding that the law bars bias because of sexual orientation. But it said that merely asking questions about sexual orientation did not violate the law—and that to be in violation, there must be proof an employer actually took discriminatory action against an employee.

Laurence F. Pulgram of San Francisco, a lawyer for Soroka, said it was "a shame" the high court had set aside the appellate panel ruling. The lower court, he said, had correctly decided that the right to privacy covered private job applicants and that state labor law bars discrimination based on sexual orientation.

Thomas F. Coleman of Los Angeles, an attorney specializing in employment discrimination, said he was confident labor officials would continue to move against employers who discriminate against gays.

"The law will be enforced, at least until the court says otherwise," he said.

A lawyer for Target Stores, Nancy L. Ober, declined comment on the action.

THE ADVOCATE

JANUARY 14, 1992

Los Angeles Case Further Confuses Job Bias Picture

BY JOHN GALLAGHER

An appeal was filed Dec. 6 to a Los Angeles superior court decision that further complicates the already puzzling mix of legal remedies available to Californians who encounter antigay employment bias.

The decision declared that the city's antidiscrimination ordinance, which forbids antigay bias, was preempted by state antibias laws, which do not. The ruling received little attention when it was issued in August by Los Angeles superior court judge Diane Wayne.

"We're in a very gray area right now," said Thomas F. Coleman, one of the attorneys who filed the appeal. "One area that is directly at issue is the authority of cities and counties to enact gay rights laws, particularly in the field of employment discrimination."

Although Wayne's ruling applies only to Los Angeles, the state appeals court's decision on the challenge to it could set a precedent that would apply to the 11 other municipalities in the state that ban antigay employment discrimination. The local ordinances took on particular importance Sept. 30, when Gov. Pete Wilson vetoed a statewide ban on antigay workplace bias.

Wayne made the ruling on a lawsuit filed by Jim Delaney, a former employee of Superior Fast Freight, a Los Angeles shipping firm. In his lawsuit, Delaney alleged that between 1980 and 1989, he was repeatedly subjected to "outrageous, egregious, and lewd" comments from male and female coworkers, some of whom suggested that he was a prostitute.

JIM MARKS

Gov. Pete Wilson raised the stakes in the court fight by vetoing an antibias bill.
If upheld, the Los Angeles ruling could jeopardize job-protection laws in 11 municipalities.

Delaney said he complained to his supervisors about the harassment in February 1989 but said they did not investigate his complaints. Delaney then threatened his supervisors with violence and was fired in September 1989. Delaney sued the firm under the city ban on antigay employment discrimination, but attorneys for the firm said that Delaney's claims had no merit.

In dismissing Delaney's lawsuit, Wayne ruled that because the state legislature had not forbidden antigay employment discrimination, municipalities could not either. Jon Davidson, a gay rights attorney for the Southern California chapter of the American Civil Liberties Union, said that Wayne's ruling "knocked out every potential civil liberty the guy could have had. She was going to see to it that there were no local protections for gays and lesbians."

Davidson said he frequently cites the Los Angeles ordinance to "threaten employers to change practices that are discriminatory" but acknowledged that the city's enforcement of it has been lax. Roger Coggan, director of legal services for the Los Angeles Gay and Lesbian Community Services Center, added, "You only need to look at one of the largest employers in the city—the Los Angeles police department—to see that there is no political will to put teeth into the law." Activists have long accused the department of antigay employment practices.

Larry Brinkin, a member of the San Francisco human rights commission, which handles complaints of gay employment discrimination, said he expected Wayne's ruling to be reversed. Last year, a superior court in San Francisco heard a similar case and upheld the validity of San Francisco's antidiscrimination ordinance in a decision that was "diametrically opposed" to Wayne's, he said.

Nonetheless, activists agreed that Wayne's ruling further complicates the tenuous employment-discrimination protection that exists for gay and lesbian Californians in the wake of Wilson's veto of the bias ban. Although 20 bias complaints have been filed under an Oct. 29 appeals court decision that allows people who have been subjected to antigay employment discrimination to file complaints under state industrial relations law, the ruling was appealed to the state supreme court during the same week that Delaney's attorneys filed their appeals of Wayne's ruling.

"There is temporary statewide protection that could last indefinitely for employees," Coleman said. "But one never knows when it could end." ▼

Frontiers

January 3, 1992

L.A.'s Gay Rights Law Invalidated

Gay rights activists have assailed the ruling of a Los Angeles Superior Court judge that calls into question the city's 12-year-old ordinance prohibiting discrimination based on sexual orientation.

After Gov. Pete Wilson's Sept. 30 veto of AB 101, the state's gay rights bill, Los Angeles City Councilman Joel Wachs and City Atty. James Hahn joined other politicians in the state in announcing they would vigorously enforce local gay rights laws.

But "what wasn't widely known" as revealed in a Dec. 6 article in the *Los Angeles Times*, was that Superior Court Judge Diane Wayne in August ruled the ordinance invalid when she dismissed the sexual harassment suit of a bisexual man, Jim Delaney, against his former employer, Superior Fast Freight. At the time, Wayne declared that only the state can pass legislation to protect individuals.

According to Delaney's attorney, Thomas F. Coleman, who filed an appeal of Wayne's ruling Dec. 6, in making her decision Wayne noted that the California Fair Employment and Housing Act allows discrimination based on sexual orientation.

Delaney's suit charges that as a bisexual man he was the victim of sexual harassment by both men and women, the most egregious of which was suggestions by a male co-worker that Delaney perform sexual favors for him, including oral copulation. The suit charges that although Delaney continuously complained to his employer, nothing was done. Finally, according to Coleman, Delaney suffered an emotional breakdown and subsequently threatened his employer. He was subsequently fired in September 1989.

Wayne, who is married to L.A. District Attorney Ira Reiner, ruled that Delaney's case was "without merit."

Meanwhile, noting that, if upheld, Wayne's decision could invalidate all 16 local civil rights ordinances which protect lesbians and gay men, LIFE Lobby Co-chair John Duran said Wayne's ruling "further demonstrates the double-talk in Governor Wilson's veto message. It reaffirms the need for an AB 101 to provide uniform protections for all Californians."

But Wachs, who said he was "shocked" that the ordinance has been declared invalid, expressed confidence the case would be heard on appeal.

—Minette Nipson

L.A. ruling imperils other gay-rights laws

By Robert D. Davila
Bee Staff Writer

A little publicized ruling in a Los Angeles lawsuit threatens to invalidate ordinances in Sacramento, Davis and 10 other California cities that ban job discrimination on the basis of sexual orientation.

Aside from the implications for cities, the case is being watched closely in the wake of Gov. Wilson's controversial veto last year of Assembly Bill 101, which would have protected gays and lesbians statewide from employment discrimination.

Next Tuesday, the Sacramento City Council will consider a recommendation by the city attorney to seek a reversal of the ruling last summer by a Los Angeles Superior Court judge, said Deputy City Attorney Diane B. Balter.

"We have to move on it, because the filing deadline is this month," Balter said. "If the trial court in Los Angeles is upheld, it could invalidate our ordinance as well as those of the other cities."

In Davis, the issue surprised the city's Human Relations Commission, staff liaison Elvia Garcia said Wednesday. "The commission hasn't discussed it one way or the other," she said. "It's something we'd definitely want to put on our next agenda."

Sacramento Mayor Anne Rudin said that she expects the council will vote to join legal briefs filed by opponents of the decision. "I'm counting on the council to do what is right," the mayor said.

The Sacramento ordinance prohibits discrimination on the basis of sexual orientation in employment, public accommodations and other areas. The Davis law contains similar provisions.

Director Eric Vega of the Sacramento Human Rights/Fair Housing Commission said that he was not aware of any lawsuits filed under the local ordinance since it was adopted in 1986.

But the law is important because "it's a matter of basic civil rights – a matter of all people having protections from arbitrary discrimination," Vega said. "There's some question in the legal community as to what those protections are regarding sexual orientation."

Ordinances prohibiting job discrimination against gays and lesbians exist also in Los Angeles, Long Beach, Laguna Beach, West Hollywood, Santa Monica, San Diego, Oakland, San Francisco, Berkeley and Hayward.

Last August, Los Angeles Superior Court Judge Diane Wayne dismissed a lawsuit by a man who alleged his co-workers and supervisors harassed him on the job because he is gay. The judge ruled that the city's ordinance against job discrimination is invalid because it is pre-empted by the state Fair Employment and Housing Act.

The fair employment and housing law, however, does not cover discrimination on the basis of sexual orientation.

Wayne's decision applies only to the city of Los Angeles. If upheld on appeal, however, it would apply to Sacramento and other cities as well.

In 1990, a San Francisco Superior Court judge upheld the validity of that city's employment discrimination ordinance in a similar case, said Thomas F. Coleman, the plaintiff's attorney in the Los Angeles case.

But the Los Angeles ruling leaves the issue unsettled, Coleman said. "It raises the question of whether cities and counties can protect gay rights," he said. "That's especially important in view of the governor's veto of AB 101."

Coleman appealed last December to the 2nd District Court of Appeal in Los Angeles. The city of Los Angeles has filed a "friend of the court" brief supporting the appeal, Coleman said, and officials in Sacramento, San Francisco, Long Beach, Santa Monica, West Hollywood and San Diego have indicated their cities will join the documents.

The appellate court is expected to hear oral arguments later this year.

Meanwhile, the Los Angeles court decision adds to confusion surrounding legal protections for gays and lesbians from employment discrimination.

Last October, a state appeals court in San Francisco ruled that the state labor code prohibits private employers from discriminating against gays and lesbians. Last week, however, the California Supreme Court set aside that ruling while it considers an appeal in the case.

Earlier this week, a statewide coalition of activists abandoned a campaign to put on the November ballot a proposition that would ban job and housing discrimination against gays and lesbians in California. Leaders said they instead would support efforts to enact another gay-rights bill this year.

The Sacramento Bee
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Thursday, February 6, 1992