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**EMPLOYMENT RIGHTS OF GAYS IN EDUCATION:**

**A LEGAL PERSPECTIVE**

**Southern College Personnel Association**

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## EMPLOYMENT RIGHTS OF GAYS IN EDUCATION: A LEGAL PERSPECTIVE

### I. Cases upholding employment rights of gays

#### Morrison v. State Board of Education (California, 1969).

Marc Morrison's teaching license was revoked by the state of California for alleged "immoral" conduct with another male in Morrison's apartment. Morrison was neither arrested nor convicted of any criminal offense. The California Supreme Court ruled that his license should be returned. The Court stated that "an individual can be removed from the teaching profession only upon showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher."

The Morrison Court pointed out that the state could not arbitrarily impair one's right to live a private life. A person's homosexual status alone cannot warrant dismissal. The school must establish that one's out-of-class conduct effects one's "fitness to teach."  
(461 P. # 2d 375 (Cal. 1969)).

#### Burton v. Cascade School District (Oregon, 1975).

Peggy Burton, teacher, was dismissed "because of her immorality of being a practicing homosexual." Burton did not openly engage in homosexual acts, but did admit that she was gay. The U.S. Court of Appeals, 9th Circuit, awarded her money damages and attorney fees, but refused to reinstate her. The Court held that the Oregon law permitting teachers to be fired on grounds of "immorality" was unconstitutionally vague. (353 F. Supp. 254 (D. Ore. 1973), aff'd., 512 F. 2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975)).

#### Board of Education of Long Beach v. Jack M. (California, 1977).

Jack M., elementary school teacher, was arrested for soliciting a male and masturbating in a public restroom. He was never convicted. At the trial to determine his dismissal, the principal testified that Jack was fit and competent as a teacher, but that she was afraid the incident might recur. Another school principal testified that Jack's actions did indicate unfitness because he could not serve as a good role model; and that his conduct would create uneasiness among students, parents, and staff. A psychiatrist testified that Jack would not be harmful to children.

The trial court ruled for Jack, ordering reinstatement with back pay. The California Supreme Court affirmed, stating that one's arrest for sexual offense alone does not warrant dismissal. The Court reiterated the "fitness to teach" test.  
(566 P. 2d. 602 (Cal. 1977)).

Aumiller v. University of Delaware (Delaware, 1977).

Richard Aumiller, an untenured lecturer and Director of University Theatre, was dismissed after he was quoted about his homosexuality in three newspaper articles. The university never alleged that Aumiller was unfit to teach, but claimed that he had used his position to advocate gay rights.

The District Court ordered Aumiller reinstated, awarded him back pay and \$10,000 in compensatory damages. In addition, the university president was ordered to pay \$5,000 in punitive damages. The Court stated that dismissal solely for one's statements is a violation of one's 1st Amendment right to free speech. (434 F. Supp. 1273 (D. Del. 1977)).

II. Cases denying gays employment rights

McConnell v. Anderson (Minn., 1971).

McConnell applied for a job as librarian at the University of Minnesota. Prior to his approval, McConnell applied for a marriage license to marry another male. His appearance at the courthouse was covered by the media. The University refused to hire McConnell, claiming that his conduct was "not in the best interest of the university." The U.S. Court of Appeals, 8th Circuit, upheld the university, stating that its actions were not arbitrary. The Court stated that this was a case in which the applicant seeks "to pursue a activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer." (451 F. 2d 193 (8th Cir. 1971)).

Moser v. State Board of Education (Calif., 1972) and Mountain View School District of Los Angeles v. Metcalf (Calif., 1974).

In both of these cases, teachers were convicted of committing sex offenses in a public restroom. Courts held that this sort of conduct was evidence of one's unfitness to teach.

Board of Education, El Monte School District of Los Angeles v. Calderon (Calif., 1974).

Teacher was arrested for, but acquitted of, engaging in oral copulation in a public restroom. Court ruled that the school board could still determine the truthfulness of the charges even if Calderon was acquitted. And, if the board believed that this conduct was evidence of one's unfitness to teach, it could dismiss him.

Gish v. Board of Education of Paramus (New Jersey, 1976).

Gish, a teacher, joined the Gay Activists Alliance and made public appearances in support of gay rights. The school board ordered Gish to undergo a psychiatric exam. He refused and was fired. The Court held that Gish's support of gay rights "displayed evidence of deviation from

normal mental health which might effect his ability to teach, discipline, and associate with students." Therefore, the order was not unreasonable and did not violate Gish's 1st or 14th Amendment rights. (366 A. 2d 1337 (N.J.), cert. denied, 434 U.S. 879 (1976)).

Gaylord v. Tacoma School District (Washington, 1977).

Gaylord, a teacher, was dismissed after he admitted that he was homosexual. No proof was ever presented indicating that he had actually engaged in homosexual behavior. Furthermore, Gaylord did not openly advocate his sexual preference. Court upheld dismissal on grounds that public knowledge of Gaylord's homosexuality would be harmful to his performance as a teacher.

(559 P. 2d 1340 (Wash.), cert. denied, 434 U.S. 879 (1977)).

III. Case ruling both for and against gay rights

Acanfora v. Board of Education of Montgomery County (Maryland, 1974).

Acanfora, a teacher, was transferred and later dismissed after making public statements on homosexuality. The Court of Appeals held that:

- 1) homosexuality is a constitutionally protected interest, and
- 2) mere public knowledge that a teacher is homosexual is not sufficient to justify dismissal.

But, Acanfora's dismissal was upheld because he failed to disclose his homosexuality on his application.

(359 F. Supp. 848 (D. Md. 1973), aff'd on other grounds, 491 F. 2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974)).

IV. Bibliography

Case Note on Burton v. Cascade School District, Vol. 1976, Brigham Young U.L. Rev., 530+, 1976.

Comment, "Remedial Balancing Decisions and the Rights of Homosexual Teachers: A Pyrrhic Victory", Vol. 61, Iowa L.J., 1080+, 1975-76.

Fleming, Thomas, "Teacher Dismissal For Cause: Public and Private Morality," J. of Law and Education, Vol. 7, No. 3, 423+, July 1978.

LaMorte, Michael W., "Legal Rights and Responsibilities of Homosexuals in Public Education," J. of Law and Education, Vol. 4, No. 3, 449+, July 1975.

Siniscalco, Gary R., "Homosexual Discrimination in Employment," Vol. 16, Santa Clara L. Rev., 495+, 1975-75.

Willett, Robert E., "Unfitness to Teach: Credential Revocation and Dismissal For Sexual Conduct," Vol. 61, Cal. L. Rev., 1442+, 1973.

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**SCPA 1978**

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**Organizations which have gone on record against laws prohibiting non-commercial consensual sexual relations in private between adults:**

1970 American Anthropological Association  
1970 Lutheran Church in America  
1973 American Bar Association  
1974 National Federation of Priests' Councils  
1975 National Organization of Women  
No  
Date American Association for the Advancement of Science  
No  
Date American Psychiatric Association  
No  
Date American Psychological Association  
No  
Date National Association of Student Personnel Administrators  
Young Women's Christian Association  
No  
Date National Council of Churches of Christ

**States with no restrictions on adult consensual sex acts:**

California	Hawaii	Maine	North Dakota	Washington
Colorado	Illinois	Nebraska	Ohio	West Virginia
Connecticut	Indiana	New Hampshire	Oregon	Wyoming
Delaware	Iowa	New Mexico	South Dakota	

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**National Professional Associations which have adopted specific policies against employment discrimination of homosexuals:**

- \* 1969 California Federation of Teachers
- 1970 American Anthropological Association
- \* 1973 American Psychiatric Association (also issued positive statement of homosexuals as teachers)
- \* 1974 American Federation of Teachers
- \* 1974 National Education Association
- 1974 National Federation of Priests' Council
- 1975 American Association for the Advancement of Science
- 1975 American Civil Liberties Union
- 1975 American Psychological Association
- 1975 American Public Health Association
- \* 1976 American Association of University Professors
- \* 1976 National Council of Teachers of English
- \* 1977 American Library Association
- \* 1977 American Personnel & Guidance Association
- \* No  
date United Federation of Teachers

**Other organizations and agencies which have adopted policies of non-discrimination in employment of gays:**

- 1972 Society of Friends
- \* 1972 Washington D.C. Board of Education
- 1973 Young Womens' Christian Association
- 1974 American Jewish Committee
- 1974 Archbishop of Boston, Humberto Cardinal Medieros
- 1974 Episcopal Diocese of Michigan
- 1974 North American Jewish Students; Network
- \* 1975 Board of Education, City School District of New York
- 1975 National Organization of Women
- 1975 United Church of Christ
- 1975 United States Civil Service Commission
- No  
Date National Council of the Churches of Christ

\* Direct relationship to education.

**Y. EMPLOYMENT RIGHTS: A LEGAL PERSPECTIVE**

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**Corporations which state that they do not discriminate in hiring or advancement based on sexual orientation:**

**American Telephone and Telegraph Company  
International Business Machines Company  
Bank of America  
Proctor and Gamble  
McDonald's Corporation  
Honeywell  
American Airlines  
Eastern Airlines  
Citicorp  
Columbia Broadcasting System  
American Broadcasting Company  
National Broadcasting Company**

**Organizations with no official position or policy statement related to the employment rights of homosexuals:**

**American Astronomical Society  
American Board of Surgery  
American Group Psychotherapy Association  
American Mathematical Society  
American Psychoanalytic Association  
National Alliance of Businessmen  
National Association of Resident's Interns  
National Society of Professional Engineers**