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**Documenting Discrimination on the Basis of Sexual Orientation
and Gender Identity in State Employment**

Title

Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace

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Chapter 4: Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace

Courts, individual judges, and legal scholars have repeatedly found that sexual orientation and gender identity are not related to a person’s ability to contribute to society, or in the workplace.¹ Courts and scholars have most frequently considered this question when determining whether sexual orientation is a suspect classification for purposes of equal protection analysis. In equal protection analysis, whether the classification at issue bears any relation to an individual’s ability to contribute to society is one of the core factors used in determining whether such classification should be considered “suspect.”²

For example, when considering classifications based on sexual orientation, in 2008, the Connecticut Supreme Court found that “the characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”³ It further noted that the State of Connecticut had even conceded, and that “many other courts admit, that sexual orientation bears no relation to a person’s ability to participate in or contribute to society.”⁴ Moreover the court found that “[i]f homosexuals were afflicted with some sort of impediment to their ability to perform

¹ See *infra* at Table 4-A and 4-B.

² See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (2008), *rev’ing* 49 Conn. 135 (2008) (stating that

“the United States Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on the first two factors, that is, whether the group has been the subject of long-standing and invidious discrimination and whether the group’s distinguishing characteristic bears no relation to the ability of the group members to perform or function in society”).

³ *Id.* at 432 .

⁴ *Id.*

and to contribute to society, the entire phenomenon of ‘staying in the [c]loset’ and of ‘coming out’ would not exist.”⁵ Similarly, a justice on the Montana Supreme Court, in a 2004 concurring opinion, found that

“there is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts ... ‘We the people’ rarely pass up an opportunity to bash and condemn gays and lesbians despite the fact that these citizens are our neighbors and that they work, pay taxes, vote, hold public office, own businesses, provide professional services, worship, raise their families and serve their communities in the same manner as heterosexuals.”⁶

In books and academic journals spanning from the mid-1980s to the present, legal scholars have reached the same conclusion.⁷ While arguments that people LGBT did not belong in the workplace because of mental illness, physical illness, immorality, or criminality were more common before the 1980s⁸ by the mid-1990s, such arguments had completely vanished from academic circles. Indeed, by 1995, legal scholars frequently noted that a number of states and lower courts had concluded that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society.⁹ As Harvard Law Professor Professor Lawrence Tribe concluded in

⁵ *Id.* at 434 (quoting *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 860 F.Supp. 417, 437 (S.D. Ohio 1994)).

⁶ *Snetsinger v. Mont. Univ. Sys.*, 325 Mont. 148, 455-56 (Mont. 2004) (concurring opinion).

⁷ See *infra* at Table 4-B.

⁸ See Conger, J.J. (1975). See also Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives. *American Psychologist*, 30, 620-651 (declassifying homosexuality as a mental illness). See also Stephen Zamansky, *Colorado’s Amendment 2 and Homosexuals’ Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 244-49 (1993).

⁹ See, e.g., Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 354 (1995) (noting that “[a] number of lower court decisions have found that a person’s sexual orientation has no bearing on that person’s ability to contribute to society.”); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571,

1988 in his constitutional law treatise, “homosexuality bears no relation at all to [an] individual’s ability to contribute fully to society.”¹⁰

In the 1960s and 70s, one justification for discriminating against LGBT teachers was concern that such teachers would be bad “role models” for students. Directly addressing this argument in 1985, the editors of the Harvard Law Review wrote that “this is simply not true.... [T]eachers have *no* influence on the future sexual identity of their students.”¹¹ In support, the editors quoted an editorial written in 1978 by President Ronald Reagan, then-Governor of California. In opposing a California voter initiative that would have prohibited LGBT people from serving as public school teachers, Reagan wrote that “homosexuality is not a contagious disease like measles. Prevailing scientific opinion is that an individual's sexuality is determined at a very early age and that a child's teachers do not really influence this.” Humorously, President Reagan concluded that “as to the ‘role model’ argument, a woman writing to the editor of a Southern California newspapers said it all: ‘If teachers had such power over children[,] I would have been a nun years ago.’”¹²

598-620 (1996) (finding that “[a] number of states” have found that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society).

¹⁰ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd Ed. 1988) § 16-33, at 1616.

¹¹ Harv. L. Rev. Assoc., *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1305-1309 (1985) (emphasis added).

¹² Former-President Ronald Reagan, *Two Ill-Advised California Trends*, L.A. HERALD EXAMINER, Nov. 1, 1978, at A-19.

Quite simply, arguments about the ability of LGBT individuals to contribute to society or in the workplace have no legal currency today. As summarized in 1996 by Yale Law School Professor William Eskridge:

“No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society.”¹³

Table 4-A below summarizes cases in which courts and individual judges have found that sexual orientation bears no relation to an individual's ability to contribute to society or the workplace. In addition, Table 4-B summarizes similar findings by legal scholars in law review articles and books published over the past twenty-five years.

¹³ WILLIAM N. ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE* 177 (Free Press 1996).

Table 4-A Determinations by State and Federal Courts that Sexual Orientation is Unrelated to an Individual’s Ability to Contribute to Society

State or Federal	Court	Year	Citation	Analysis
Montana	Montana Supreme Court	2004	<i>Snetsinger v. Mont. Univ. Sys.</i> , 325 Mont. 148, 455-56 (2004) (concurring opinion).	“There is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts... We the people” rarely pass up an opportunity to bash and condemn gays and lesbians despite the fact that these citizens are our neighbors and that they work, pay taxes, vote, hold public office, own businesses, provide professional services, worship, raise their families and serve their communities in the same manner as heterosexuals.” <i>Id.</i> at 455-456.
New York	New York Supreme Court	2006	<i>Hernandez v. Robles</i> , 7 N.Y.3d 338, 388 (2006) (Kaye, C.J., dissenting)	“[0]bviously, sexual orientation is irrelevant to one’s ability to perform or contribute”
California	California Court of Appeals	2006	<i>In Re Marriage Cases</i> , 49 Cal.Rptr.3d 675 (Cal. 2006) (dissenting opinion), <i>review granted and superseded</i> , 149 P.3d 737 (2006), <i>rev’d</i> , 43 Cal.4th 757 (2008), <i>rehearing denied</i> , No. S147999 (June 4, 2008).	“Our state law clearly recognizes that sexual orientation is unrelated to an individual’s ability to contribute to society.” <i>Id.</i> at 756.
California	California Supreme Court	2008	<i>In re Marriage Cases</i> , 43 Cal. 4th 757 (2008).	“Our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society.” <i>Id.</i> at 843. The court quickly concludes that “[t]his rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.” <i>Id.</i> at 843.

Connecticut	Connecticut Supreme Court	2008	<i>Kerrigan v. Comm’r of Pub. Health</i> , 957 A.2d 407 (2008), <i>rev’ing</i> , 49 Conn. 135 (2008).	“[The characteristic that defines the members of this group-attraction to persons of the same sex-bears logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.” <i>Id.</i> at 432. The court further notes “that the defendant conceded, and many other courts admit, that “sexual orientation bears no relation to a person’s ability to participate in or contribute to society.” ... “[i]f homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of ‘staying in the [c]loset’ and of ‘coming out’ would not exist.” <i>Id.</i> at 434 (<i>quoting Equality Foundation</i> , 860 F.Supp. at 437).
Maryland	Maryland Court of Appeals	2009	<i>Conaway v. Deane</i> , 401 Md. 219 (Maryland Court of 2008).	“Homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society.” <i>Id.</i> at 609.
Iowa	Iowa Supreme Court	2009	<i>Varnum v. Brien</i> , 763 N.W.2d 862 (2009).	“[G]ay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to work and raise a child.” <i>Id.</i> at 613. “Even the Iowa Legislature had declared as “the public policy of [the] state that sexual orientation is not relevant” to societal contribution” in employment, public accommodations, housing, education, and credit practices.” <i>Id.</i> at 890-91. The court concludes that “it is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society.” <i>Id.</i> at 892.
Federal District Court	Northern District of California	1987	<i>High Tech Gays v. Def. Indus. Sec. Clearance Office</i> , 668 F. Supp. 1361 (N.D. Cal 1987), <i>rev’d, in part, vacated, in part</i> , 895 F.2d 563 (9 th Cir. 1990), <i>rehearing, en banc, denied</i> , 909 F.2d 375 (9 th Cir. 1990).	“[T]he fact that a person is lesbian or gay bears no relation to the person’s ability to contribute to society. Rather than somehow being enemies of American culture and values, lesbians and gay men occupy positions in all walks of American life, participate in diverse aspects of family life, and contribute enormously to many elements of American culture.” <i>Id.</i> at 1369-70.
Federal District Court	District of Kansas	1991	<i>Jantz v. Muci</i> , 759 F. Supp. 1543, 1548 (D. Kan. 1991), <i>cert. denied</i> , 508 U.S. 952 (1993);.	Homosexuality “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities”

Federal District Court	Eastern District of Wisconsin	1987	<i>BenSHALOM v. Marsh</i> , 703 F. Supp. 1372 (E.D. Wis. 1989), <i>rev'd</i> , 881 F.2d 454 (7 th Cir. 1989).	“[I]t is also clear that a class based on homosexual orientation is defined by a trait that bears no relationship to an individual’s ability to contribute to the good of society.” <i>Id.</i> at 1379.
Federal District Court	Southern District of Ohio	1994	<i>Equal. Found. Of Greater Cincinnati, Inc. v. City of Cincinnati</i> , 860 F.Supp. 417 (S.D. Ohio 1994), <i>rev'd and vacated</i> , 54 F.3d 261 (6 th Cir. 1995), <i>cert. granted, vacated</i> , 518 U.S. 1001 (1996).	“[W]here the characteristic ... is determined by causes beyond the individual’s control and bears no relation to the individual’s ability to perform or to participate in, or contribute to, society and especially where the class has suffered a history of discrimination based on stereotyped notions of that characteristic, any legislation resting on such an irrelevant characteristic likely reflects nothing more than invidious stereotypes beyond the scope of any permissible governmental purpose.” <i>Id.</i> at 437.
Federal District Court	District of Columbia Court of Appeals	1995	<i>Dean v. D.C.</i> , 653 A.2d 307 (1995).	Majority opinion cites “powerful evidence” that gays and lesbians make positive contributions as family units” <i>Id.</i> at 345 (<i>citing Sexual Orientation and the Law</i> , 102 HARV. L. REV., at 1629).
Federal District Court	Eastern District of New York	1997	<i>Able v. U.S.</i> , 968 F.Supp. 850, <i>rev'd</i> , 155 F.3d 628 (2nd Cir. 1998).	Court compares sexual orientation to “[f]actors such as race, alienage, and national origin, for instance, ‘are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened classes are not as worthy or deserving as others.’” <i>Id.</i> at 862 (<i>quoting City of Cleburne</i> , 473 U.S. at 440).
Federal Circuit Court	6th Circuit	1995	<i>Equal. Found. of Greater Cincinnati v. City of Cincinnati</i> , 54 F.3d 261 (6th Cir. 1995), <i>cert. granted, vacated</i> , 518 U.S. 1001 (1996).	Reciting the findings of the trial court, this court reiterates that “[s]exual orientation bears no relation to an individual’s ability to perform, contribute to, or participate in, society.” <i>Id.</i> at 264 n1.
Federal Circuit Court	9th Circuit	1988	<i>Watkins v. U.S. Army</i> , 847 F.2d 1329 (9th Cir. 1988), <i>rehearing, en banc, granted</i> , 847 F.2d. 1362 (1988), <i>opinion withdrawn on rehearing</i> , 875 F.2d 699 (1989).	” Sexual orientation plainly has no relevance to a person’s ‘ability to perform or contribute to society.’” <i>Id.</i> at 1346 (<i>quoting Frontiero</i> , 411 U.S. at 686).

Table 4-B. Determinations by Legal Scholars That Sexual Orientation is Unrelated to an Individual’s Ability to Contribute to Society

Author	Title	Citation / Year	Pages	Discussion
Harris M. Miller II	<i>An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality</i>	57 S. CAL. L. REV. 797 (1984)	834	The “merit to society theory is part of a larger policy approach to equal protection jurisprudence. The argument is that “the function of the [equal protection clause] is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled if they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another.” <i>Id.</i> at 834 (<i>quoting</i> Cass Sunstein, PUBLIC VALUES, PRIVATE INTERESTS, AND THE EQUAL PROTECTION CLAUSE, 1982 SUP.CT.REV. 127, 128, 165). Under this public values theory, because of the history of discrimination and presence of stereotypes, “courts should presume homosexuality classifications to be the product of an illegitimate motive.” <i>Id.</i> at 834.
Harv. L.Rev. Assoc.	<i>The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification</i>	98 HARV. L. REV. 1285 (1985)	1305-1309	<p>“One common justification for dismissing or refusing to hire gay teachers is that public knowledge of a teacher’s homosexuality will disrupt the learning process. That members of the community may hate and fear gays is offered as the nexus between a teacher’s homosexuality and her unfitness to teach.” <i>Id.</i> at 1305-06. This is “simply not true.” “[T]eachers have no influence on the future sexual identity of their students.” The author also notes that the Supreme Court has expressly rejected this type of justification in the context of race.</p> <p>Quotes Former President Ronald Regan, <i>Two Ill-Advised California Trends</i>, L.A. HERALD EXAMINER, Nov. 1, 1978, at A-19 (commentary by Ronald Reagan stating that “[a]s to the ‘role model’ argument, a woman writing to the editor of a Southern California newspapers said it all: ‘If teachers had such power over children I would have been a nun years ago’”).</p>
Lawrence Tribe	AMERICAN CONSTITUTIONAL LAW	2 nd Ed. 1988	§ 16-33, at 161	“[H]omosexuality bears no relation at all to [an] individual’s ability to contribute fully to society”

Author	Title	Citation / Year	Pages	Discussion
Adrienne K. Wilson	<i>Same-Sex Marriage: A Review</i>	17 WM. MITCHELL L. REV. 539 (1991)	559	<p>The “public values theory,” uses “strict scrutiny as a way to ensure that laws implement only public values.” <i>Id.</i> at 559. As such, it is the purpose of the equal protection clause to fend off “unprincipled distributions of resources and opportunities.” <i>Id.</i> at 599.</p> <p>“Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another.” <i>Id.</i> at 559.</p> <p>“Distributions that discriminate against homosexuals can be considered unprincipled and therefore unconstitutionally motivated, thus triggering strict scrutiny.” <i>Id.</i> at 559.</p>
Major Jeffrey S. Davis	<i>Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives</i>	Military Law Review 131 (1992):	93	<p>“The trait of homosexual orientation does not correlate with ability to perform or contribute to society.” <i>Id.</i> at 93. The author notes that “history is replete with accounts of homosexuals who have contributed a great deal to society.” <i>Id.</i></p>
Renee Culverhouse & Christine Lewis	<i>Homosexuality as a Suspect Class</i>	34 S. TEX. L. REV. 205 (1993)	248-249	<p>“Homosexuals today still suffer from misunderstandings concerning their natures and abilities.” <i>Id.</i> at 248. For example, “[c]ourts have considered homosexuals more of a security risk in the employment context than heterosexuals and more likely to damage the military morale-without examining the specific facts of the particular individual’s capabilities and strengths.” <i>Id.</i> at 248.</p> <p>“By lumping homosexuals into one category, regardless of individual ability or qualifications to serve, courts are denying homosexuals justice in the very way our system of government was designed to aid its citizens.” <i>Id.</i> at 249.</p>
Stephen Zamansky	<i>Colorado’s Amendment 2 and Homosexuals’ Right to Equal Protection of the Law</i>	35 B.C. L. REV. 221 (1993)	244-249	<p>“[H]omosexuals are a productive segment of our society.” The American Psychological Association has stated that homosexuality “implies no impairment in judgment, stability, reliability or general social or vocational capabilities.” <i>Id.</i> at 247 (citing RESOLUTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, Jan. 1975).</p>

Author	Title	Citation / Year	Pages	Discussion
Eric A. Roberts	<i>Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation</i>	42 DRAKE L. REV. 485 (1993)	502	“Sexual orientation clearly has little bearing on an individual's ability to contribute to society.” <i>Id.</i> at 502.
Spiro P. Fotopoulos	<i>The Beginning of the End for the Military's Traditional Policy on Homosexuals: Steffan v. Aspin</i>	29 WAKE FOREST L. REV. 611 (1994)	634	“Sexual orientation has been found to bear ‘no relation to ability to perform or contribute to society.’” <i>Id.</i> at 634 (<i>quoting Meinhold v. United States Dep't of Defense</i> , 808 F. Supp. 1455, 1458 (C.D. Cal. 1993)). However, notwithstanding a lack of nexus “between homosexuality and job performance, homosexuals ‘have been the object of some of the deepest prejudice and hatred in American society.’” <i>Id.</i> at 643 (<i>quoting High Tech Gays</i> , 668 F. Supp. at 1369).
Nancy E. Murphy	<i>Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence</i>	30 VAL. U. L. REV. 335 (1995)	354	“A number of lower court decisions have found that a person's sexual orientation has no bearing on that person's ability to contribute to society.” <i>Id.</i> at 354. In <i>Equality Foundation of Greater Cincinnati v. City of Cincinnati</i> , the court found that “sexual orientation in no way affects a person's ability to contribute to society.” <i>Id.</i> at 360, (<i>quoting Equality Foundation</i> , 860 F.Supp. at 437).
E. Gary Spitko	<i>A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process</i>	18 U. HAW. L. REV. 571 (1996)	598 - 620	“Sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society.” “A number of states” have found that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society.
Williams Eskridge	<i>The Case for Same-Sex Marriage</i>	Free Press 1996	177	“No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society.” <i>Id.</i> at 177.
Jon-Peter Kelly	<i>Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution</i>	7 CORNELL J.L. & PUB. POL'Y 203 (1997)	233-239	The author finds that the criterion regarding a group’s ability to contribute to society “barely necessitates discussion.” <i>Id.</i> at 235. “Even vociferous opponents of same-sex marriage seldom make the claim that homosexuals are unable to fully contribute to society as a result of their sexual orientation.” <i>Id.</i> at 235.

Author	Title	Citation / Year	Pages	Discussion
Ann M. Reding	<i>Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights</i>	36 U.C. DAVIS L. REV. 1285 (2003)	1303	“[T]he sexual orientation of individuals does not bear any relation to their ability to perform or contribute to society.” <i>Id.</i> at 1303.
Ronald J. Krotoszynski, Jr. & E. Gary Spitko	<i>Navigating Dangerous Constitutional Straits: A Prolegomenon of the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities</i>	76 U. COLO. L. REV. 599 (2005)	126	“Sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society.” <i>Id.</i> at 637 n126 and accompanying text (<i>quoting</i> E. Gary Spitko, <i>A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process</i> , 18 U. HAW. L. REV. 571, 598-620 (1996)).
L. Camille Hebert	<i>Sexual Orientation Discrimination as Violation of Equal Protection</i>	2 EMPL. PRIVACY LAW § 9:5	n30-31	“It is indeed very difficult to understand how the gender of one's preferred sexual partner could have any bearing on the ability to perform the duties of a job, unless one takes into account that job performance is made more difficult because of the existence of discrimination and prejudice by coworkers and others. But surely the existence of workplace tension because of fellow employees' hatred of gay men and lesbians is no more relevant to determining their ability to contribute to society than is the existence of workplace tension caused by racial bias to the ability of racial minorities to so contribute. In addition, the very fact that employers argue that discrimination on the basis of sexual orientation is justified on this ground suggests that the discrimination aimed at gay men and lesbians is indeed the result of prejudice.” <i>Id.</i> at n31 and accompanying text.