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Work Session:

Title: *Good News Employee Association v. Hicks:* The Collision Between Religiously Motivated Speech on Homosexuality and Employer Harassment Policies

By

Presenter: Vicki Laden

Presenter's Title: Supervising Deputy City Attorney

Presenter's Office: Office of the City Attorney
City of Oakland

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GOOD NEWS EMPLOYEE ASSOCIATION V. HICKS: THE COLLISION BETWEEN RELIGIOUSLY MOTIVATED SPEECH ON HOMOSEXUALITY AND EMPLOYER HARASSMENT POLICIES

VICKI LADEN, SUPERVISING DEPUTY CITY ATTORNEY,
CITY OF OAKLAND, CALIFORNIA

I.

"Free Speech Police" in Oakland?

"Speech Police, Riding High in Oakland." So began George Will's editorial in the June 24, 2007 *Washington Post*. It continues:

"Marriage is the foundation of the natural family and sustains family values. That sentence is inflammatory, perhaps even a hate crime."

"At least it is in Oakland, California. That city's government says those words, italicized here, constitute something akin to hate speech and can be proscribed from the government's open e-mail system and employee bulletin board."

It goes on to state that "the ineffable U.S. Court of Appeals for the Ninth Circuit has ratified this abridgement of First Amendment protections."

What prompted George Will to denounce the "free speech police in Oakland?" A lawsuit filed by the Good News Employees Association (GNEA) against the City and its officials that was resolved in favor of the City. But the three member Ninth Circuit panel that decided the case in favor of the "speech police" was hardly composed of liberals: two were appointees of none other than George W. Bush. Nor was the district court that ruled against GNEA closer to the fringe. That judge: nominated by both Presidents Reagan and H.W. Bush.

How did Oakland earn Will's ire? By enforcing its harassment policy and taking down a homophobic leaflet posted outside the cubicle of a long-time City building inspector who is a lesbian and had complained.

II.

Job Protections for Lesbian and Gay Employees

Individuals can be fired on the basis of sexual orientation in thirty-three states. Despite the absence of statutory job protection, many, if not most, U.S. businesses provide job protections and equal benefits to gay and lesbian employees, and the number climbs each year. One hundred ninety-five Fortune 500 companies earned the top rating from the advocacy group, Human Rights

Campaign, up from 138 businesses the preceding year.[1] Ninety-eight percent of the major businesses surveyed provided job protection based on sexual orientation. Strong support for job protections exists in the public sector. Twenty states and the District of Columbia, and at least 171 cities and towns ban discrimination based on sexual orientation.[2] Oakland, which extends equal benefits to domestic partners and requires its contractors to offer such benefits, is one of them.

California's Fair Employment and Housing Act, California Government Code Section 12940, has expressly prohibited discrimination based on sexual orientation for many years. But California's statutory protection against harassment goes further than most. Of particular significance for this discussion, it imposes a duty on employers to "take all reasonable steps to prevent discrimination and harassment from occurring," a provision that if violated supports a separate cause of action. Though narrower than the affirmative defense provided by *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton* 524 U.S. 775, 807 (1998), California courts permit employers to avert liability for a supervisor's harassment if using employer-provided internal remedies to report and rectify harassment would have prevented at least some of the employee's claimed damages from occurring. *State Dept. of Health Services v. Superior Court*, 31 Cal.4th 1026, 1040 (2003).

Like most California employers, Oakland complies with its obligation to take all reasonable steps to prevent harassment by enforcing a policy that prohibits not only legally cognizable harassment—harassment that is severe and/or pervasive—but conduct that, by itself, is insufficient to constitute actionable harassment but may nonetheless contribute to the creation of a hostile environment. So, for example, Oakland's policy, Administrative Instruction 71, prohibits stereotyping, epithets, slurs, expressions of contempt or hostility, mimicry, denigration, disparagement, jokes, ridicule, derogatory or demeaning comments (even if not directed at a specific person), and more severe treatment, if based on a person's protected characteristic or status (race, gender, sexual orientation, gender identity, etc.). An employee who uses the word "fag" may be disciplined even though a single use of the word would not be actionable.

III.

The Events that Lead to the Lawsuit

The conflict that resulted in the lawsuit began on National Coming Out Day, October 11, 2002, when City Councilperson Danny Wan sent out a celebratory message, using the City's internal e-mail to which elected officials have access. Hostile responses to Wan's e-mail prompted gay and lesbian

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[1] Human Rights Campaign, Corporate Equality Index 2008: A Report Card on Gay, Lesbian, Bisexual and Transgender Equality in Corporate America, September 2007. www.hrc.org/workplace. The average rating of Fortune 500 companies was 81%.

[2] American Civil Liberties Union, Working in the Shadows: Ending Employment Discrimination for LGBT Americans, September 2007. www.aclu.org.

employees at the City to form a support group. African-American employees and Latino employees had previously formed support groups.

Just prior to the election in November, 2002, Regina Rederford and Robin Christy, two employees at the Community and Economic Agency (CEDA), circulated a flyer titled, "Family Values Voter Information" at CEDA. The flyer discussed the position of candidates on issues such as domestic partners' benefits, "public schools teaching homosexuality as an acceptable lifestyle," and "marriage only one man and one woman." They gave the flyer to co-workers and placed it in the women's bathroom, where it was discovered by a lesbian building inspector, Judith Jennings. Jennings felt uncomfortable because the leaflet, in her view, suggested that people should not vote for anyone who believed homosexuality to be acceptable. She complained about it to her supervisor. After her complaint someone placed an anti-abortion, anti-gay e-mail written in Spanish on her desk. Three weeks later, on January 3, 2003, she discovered a new flyer on the bulletin board just outside her cubicle. That flyer, written by Rederford and Christy, who had founded the "Good News Employee Association" (GNEA) in reaction to Councilperson Wan's e-mail and the formation of the gay and lesbian employee group, gave rise to the lawsuit.

The title of the flyer was, "Preserve Our Workplace with Integrity," and it invited the City's employees to contact the two GNEA members if they "would like to be a part of preserving integrity in the Workplace." The flyer stated:

> **Good News** Employee Association is a forum for people of **Faith** to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values.
>
> If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ _____ or Robin Christy @ _____.

The documents and testimony produced in the course of litigation supported the City's construction of the leaflet. Both employees testified that the meaning of their leaflet was "self-evident." The "Natural Family," a term with its own web-site, "is defined as a man and a woman, and their children by birth or adoption." Plaintiffs testifed that the phrase "Natural Family" was capitalized to exclude lesbian and gay families; "Marriage" meant a "union between a man and a woman." They explained that the term "Family Values" was used to convey their belief that homosexuality "is wrong." "Preserve Our Workplace with Integrity" meant "to keep [the workplace] from spoiling, to keep it from rotting, to keep it from deteriorating…The workplace can go down in morality and ethically and in other ways." Homosexuality can make people sick and this sickness can "spill over" into the workplace, where they "recruit by propagating the idea." According to Rederford, "Preserving integrity in the workplace" meant that "[i]ntegrity in the workplace could be, yeah, avoiding sodomy in the workplace." When asked what "With respect for the natural family, marriage and family values" meant, she replied that it meant to put the "natural family…on a pedestal. I mean, you honor it. You honor the natural family. I mean, it's the foundation of civilization." She testified that gay and lesbian employees were like "weeds" in the workplace.

Q. Does Judith Jennings' lesbianism affect the workplace at all? Does her being a lesbian have an effect on the workplace?

A. To preserve. The word preserve.

Q. ---to preserve the integrity of the workplace. And you want to—you don't want the weeds to start to get in there and grow. You want to protect the workplace from some of the immoral things going on out there. The negative impact that those can have in the workplace?

A. Yeah, I was actually talking about individual weeds, but they would manifest and spread to the whole garden.

Open about her sexual orientation, Jennings was upset when she discovered the GNEA flyer posted near her desk, above the copy machine she used. She considered her female partner to be her "family." Jennings asked Rederford, with whom she worked regularly, about the flyer. Rederford told her that GNEA was a group to support the "natural family." Thinking that she might try to persuade GNEA members that homosexuality was normal, she told Rederford that she wanted to go to a GNEA meeting. Rederford responded by telling Jennings that Hitler had been gay, as were many of his cohorts. At her deposition Rederford testified that homosexuality was part of the Nazi creed. Distressed by the flyer and her conversation with Rederford, Jennings contacted the City Attorney's Office to file a complaint against what she perceived to be anti-gay harassment.

The City investigated the flyer. Copies were posted near Jennings, in a coffee room, and in the women's bathroom. Supervisors felt that the leaflet's display was having a negative impact on Jennings' ability to perform her job. After reviewing the investigation, and concluding that the leaflet violated the City's harassment policy, as well as city and state laws, the City asked a supervisor to remove the flyers. Neither employee who posted the flyers was disciplined. Rather, supervisors explained why the leaflets had been removed and invited the employees to submit a new flyer without discriminatory language.

IV.

The Lawsuit

Assisted by the Pro-Family Law Center and the United States Justice Center, which had challenged San Francisco's gay marriage initiative, Rederford and Christy brought suit against the City, a former City Manager and a CEDA manager who had ordered the flyer's removal. Plaintiffs' complaint included ten causes of action, including three alleging violations of First Amendment Clauses: Free Exercise, Assembly and Free Speech. Because plaintiffs failed to properly serve the City, it was dismissed from the suit. The two officials who remained defendants asserted qualified immunity[3].

[3]The two-step analysis for the application of qualified immunity is as follows: (1) whether the plaintiffs have established a constitutional violation, and (2)

Defendants sought dismissal of plaintiffs' Free Exercise Clause claim because the complaint failed to allege that the City's actions actually interfered with plaintiffs' free exercise of religious beliefs: the City had only restricted posting of the flyer, which contained no discussion of religion. Even had the plaintiffs alleged an actual impairment of their free exercise of religion, the City argued that the claim would warrant dismissal for failure to allege a sufficiently substantial impairment to outweigh the City's interest in preventing discrimination and harassment. Moreover, the City's policy, undergirding its action, was neutral and not based on religious criteria. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist*, 233 F. Supp. 2d 647 (D.N.J. 2002). Judge Vaughn Walker, a Republican appointee who had formerly sued the "Gay Olympics" on behalf of the U.S. Olympic Committee during his career as a corporate lawyer, dismissed all but one of plaintiffs' claims. *Good News Empl. Assn. v. Hicks*, 2004 U.S. Dist. LEXIS 30371 (N.D.Cal. 2004).

As to the plaintiffs' Free Exercise claim, the court reasoned that plaintiffs hadn't alleged interference with their religious beliefs. It agreed that the Free Exercise Clause doesn't relieve individuals of the obligation to comply with valid and neutral laws; the City's policy was "valid and neutral." In refusing to dismiss the Free Speech claim, however, the court found that the flyer touched on a matter of public concern. While concluding that the City had a strong interest in preventing discrimination against its gay and lesbian employees, the court expressed skepticism that the content of the leaflet would make disruption in the workplace likely.

Following discovery defendants sought dismissal of plaintiffs' Free Speech claim. A government employee's challenge to the conduct of a government employer is subjected to the *Pickering* test. *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968). Under *Pickering* the First Amendment is only implicated if the speech touches on a matter of public concern. *Waters v. Churchill*, 511 U.S. 661 (1994). If it does, courts apply a balancing test: the "employee's interest in expressing herself…must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The City argued that the flyer was posted in response to the City's decision to allow gay and lesbian employees use of the City's e-mail to announce meetings while restricting plaintiffs' use, an internal workplace dispute. Even were the plaintiffs' speech to involve a public concern, the City maintained that the plaintiffs had only a minimal interest in posting the flyer: they could disseminate their views outside the workplace, on breaks or at lunch. They were offered the opportunity to post by e-mail or flyer the name of the organization and time and location of the GNEA meeting, without discriminatory comment. Because the City's prohibition had a restricted scope, the employees' interest in speech was concomitantly reduced.

The City asserted that by contrast, its interest in restricting discriminatory speech about its lesbian and gay employees was strong, far outweighing plaintiffs'

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whether defendants' actions violated "clearly established statutory or constitutional rights of which a reasonable person would have been aware." *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004).

interest in posting the flyer. Under California's Fair Employment and Housing Act, Government Code Section 12940(d), it is unlawful "[f]or any employer…to print or circulate or cause to be printed or circulated any publication…that expresses, directly or indirectly, any limitation, specification, or discrimination as to…sexual orientation, or any intent to make any such limitation, specification or discrimination. Section 12940(j) prohibits discrimination and harassment based on sexual orientation. "Harassment of an employee…by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." The Supreme Court recognized in *Harris v. Forklift Systems*, Inc., 510 U.S. 17, 22 (1993) that a "discriminatorily abusive work environment…can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

The City further argued that it had a strong interest in maintaining a harmonious work environment, avoiding interference with work, and preserving workplace relationships necessary to serve the public. Since "[i]nterference with work, personnel relationships, and the speaker's job performance can detract from the public employer's functioning [,]avoiding such interference can be a strong state interest." *Pool v. Vanrheen*, 297 Fl3d 899, 909 (9th Cir. 2002)(quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). In *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000), the Seventh Circuit held that the interest of a firefighter in distributing anti-gay literature and engaging in other speech protesting homosexuality based on his religious beliefs was outweighed by the government's interest as an employer in government efficiency and workplace morale.

On February 14, 2005 the Court granted summary judgment on plaintiffs' Free Speech claim, holding that the individual defendants were shielded by qualified immunity. 2005 U.S. Dist. LEXIS 5270 (N.D.Cal. 2005). It described the remaining issue in Pickering—"whether defendants have [shown] that their interests as employers outweigh plaintiffs' interests in making the speech"—as "close." Plaintiffs' interest in speech was "slight," given the limitation on speech was "quite limited: plaintiffs were prohibited from posting a particular flyer on an office bulletin board." Other avenues for dissemination of views remained open. But the court viewed the City's interest as "modest." Jennings was, in the court's view, only "disturbed" by the leaflet, leading it to question whether "the particular sensitivity of a single coworker amounts to cognizable workplace disruption under *Pickering.*" ("…a *Pickering* disruption writ small).

The court ultimately resolved the *Pickering* test in the City's favor, concluding that plaintiffs' interest in "this particular channel of communication is vanishingly small." The City's response to Jennings' complaint, removal of the flyer without any adverse employment action against plaintiffs, was a "narrowly tailored and proportionate response to the actual workplace disruption, or, perhaps better described, distraction." The City had an "administrative interest" in "avoiding situations that distract employees from their jobs," that supported removal of the leaflet.

V.

The Ninth Circuit Appeal

The Ninth Circuit panel that heard oral argument consisted of two judges appointed by President George W. Bush and one Democratic appointee. An exchange between plaintiffs' attorney and Judge Clifton, appointed by Bush, follows:

> Judge Clifton: Oh, and they're free to say, we support the current statute which is in fact the current statute of California as interpreted by the courts and adopted by the people. So I'm not saying there's something wrong with the position. But you could state it in a way that doesn't suggest that people who don't fit within that framework that they don't have integrity. I guess the word, integrity, is the one I sit there staring at that flyer and say, well what exactly is being suggested by this flyer. That if you aren't married to someone of the opposite gender, you lack integrity?
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> Plf. Atty.: The flyer addressed those questions of sexual morality and my clients' view that does raise questions of integrity in the workplace, whether or not the workplace is going to be a place where this particular speech is going to be one-sided. And they met that challenge with–
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> Judge Clifton: Well, now, it doesn't seem to say that we shouldn't talk about it. Indeed, this is a forum where they want to talk about it. So presumably if they want to talk about it, they want to hear from the views that express support for the concept of changing the state statute. I look at this and I say the suggestion, maybe we don't want so many of those people that aren't adhering to the standards that we want to apply, that we have too many of those people in this workplace, then something's wrong with the workplace. Part of preserving integrity in the workplace, was there any suggestion that integrity is lost other than the notion that if we have too many of those people in the workplace, we're going to go bad?

Issued soon after oral argument, the Ninth Circuit's Memorandum Opinion upheld dismissal of the plaintiffs' Free Speech claim. 223 Fed. Appx. 734 (9th Cir. 2007). It agreed that the interference with plaintiffs' free speech rights had been "minimal" and the City had a "more substantial interest in maintaining the efficient operation of their office than appellants had in their speech." Rejecting plaintiffs' challenge to the City's policy as "unconstitutionally vague and broad," it found the "entire paragraph of examples" illustrating its reach ensured that employees would have "little difficulty" understanding the scope of its prohibitions.

On June 4, 2007 GNEA, Rederford and Christy filed a Petition for Writ of Certiorari. (No.06-1619). The Petition is pending.

VI.

Other Cases

The City is hardly the first employer to face a First Amendment (or Title VII) challenge from employees who have pitted First Amendment and Title VII protections of speech and religious beliefs against employer policies to prevent discrimination and harassment based on sexual orientation. Cases in which these interests collide include the following:

Peterson v. Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004)

Peterson, a "devout Christian" with a duty "to expose evil when confronted with sin," posted biblical passages condemning homosexuality in his work cubicle in response to posters displayed by the company as part of its Workplace Diversity campaign. The passages were in type large enough to be visible to co-workers. The first pictures showed photographs of Hewlett-Packard employees above captions, "Black," "Blonde," "Old, "Gay" and "Hispanic." Posters in the second series included photographs of the same employees and a description of the employees' personal interests, as well as the slogan, "Diversity is Our Strength." Deeming the biblical passages offensive to other employees and in violation of the company's harassment policy, Peterson's supervisor removed them. Over the course of several days Peterson met with H-P managers. He explained that the passages "were intended to be hurtful. And the reason [they were] is you cannot have correction unless people are faced with truth." He wanted his gay and lesbian co-workers to read the passages, "repent and be saved." Peterson offered to remove the passages if H-P removed the posters depicting gay employees. After being given time off to reconsider his position, Peterson returned and again posted the passages, refusing to remove them. H-P terminated him for insubordination.

The Ninth Circuit found that he had adduced no proof he was fired for his religious beliefs, rather than for insubordination and violation of the anti-harassment policy. It rejected plaintiff's Title VII failure to accommodate claim: "[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." "While Hewlett-Packard must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination, it need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." The religious accommodation proposed by plaintiff, taking down all the posters, "would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce."

Downs v. Los Angeles Unified School Dist., 228 F.3d 1003 (9th Cir. 2000), *cert. den.*, 532 U.S. 994 (2001).

Downs was a high school teacher. The school district issued a memorandum titled "Gay and Lesbian Awareness Month" to all schools and

offices in the district. It referred to a Board of Education resolution designating June as a time to focus on gay and lesbian issues and specified that the district's policy included the expectation that each student would have equal access to quality education and that the schools would foster a climate that reduced violence or threats motivated by hate and bigotry. The district provided the school with posters and materials designed to aid in eliminating hate and creating a safe school environment for all students. Pursuant to the memo, staff created a school bulletin board on which faculty and staff could post materials related to Gay and Lesbian Awareness Month in addition to the materials provided by the district.

Downs opposed the recognition of Gay and Lesbian Awareness Month at the school. He created a competing bulletin board on which he posted Bible-based materials expressing the view that homosexuality was immoral and wrong. The school administration directed him to take down the materials after members of the school community complained that they were "disrespectful," "offensive," "upsetting," "objectionable" and "derogatory."

The court held that when the school district speaks through bulletin boards that are not "free speech zones," but instead are vehicles for conveying a message from the school district, the district may formulate that message without the constraint of viewpoint neutrality. Thus, the district did not violate Downs' First Amendment rights by removing the offensive material.

Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994)

Vernon was the Assistant Chief of Police of the Los Angeles Police Department (LAPD). An article appeared in Los Angeles Magazine critically commenting on his involvement in the church. A council member convinced the police commissioner to investigate whether plaintiff's religious beliefs improperly affected the operations of LAPD. The council member said that he had evidence suggesting that plaintiff's faith was interfering with his work performance, and specifically, that plaintiff had attempted to thwart the progress of gay and lesbian officers in the department. The investigation was confined to plaintiff's on-duty conduct and made no specific inquiry into his religious beliefs. None of the allegations concerning plaintiff's on-duty conduct could be substantiated and the investigation was terminated.

Vernon filed a section 1983 claim alleging that the pre-investigation and investigation activities violated his constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment as well as Article I of the California Constitution. The court upheld the district court's finding that Vernon failed to establish that his right to freely exercise his religion was substantially burdened by the government's actions. It found inadequate his allegation that government action "chilled" his religious behavior; he had not demonstrated "concrete harm" resulted from the investigation.

Nor did the City's actions violate the Establishment Clause. First, "governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose." Second, neither the pre-investigation statements nor the investigation itself could reasonably be construed to send as its primary message the disapproval of Vernon's religious beliefs. Finally, the investigation did not result in an "excessive government entanglement" with religion because its scope was limited, it had a justifiable

secular purpose, and it did not require the government to make religious versus secular determinations or engage in ongoing monitoring activity.

Knight v. Connecticut Dept. of Public Health, 275 F.3d 156 (2nd Cir. 2001)

Knight, a "born-again Christian," was a nurse consultant for Connecticut's Department of Public Health whose duties included supervising the provision of medical services by Medicare agencies to home health care patients. While visiting the home of a same-sex couple, one of whom was in the end stages of AIDS, Knight and the two men began discussing religion. When one man stated he did not believe he would be punished for being gay, Knight warned, "Although God created us and loves us, He doesn't like the homosexual lifestyle." After the visit, the men filed complaints against the Department with the Commission on Human Rights.

The Department suspended plaintiff without pay for several weeks for misconduct. Assuming the religious speech touched on a matter of public concern, the Second Circuit turned to the second prong of the *Pickering* test. Because Knight's job required a great deal of public contact, the state had a significant interest in regulating speech related to that contact. Permitting religious speech when working with clients would be disruptive, and such a disruption outweighed Knight's free speech interests. Furthermore, religious speech while on government business raised legitimate Establishment Clause concerns which permitted the state to slightly burden speech.

Plaintiff also claimed the state must allow her to use religious speech with clients as a reasonable accommodation under Title VII; the court rejected her proposal as unreasonable.

Greer v. Amesqua, 212 F.3d 358 (7th Cir. 2000)

Greer, a firefighter with a lengthy disciplinary record, was a pastor and a "crusader" against homosexuality. One newspaper article described his personal mission as to "wipe homosexuality from our midst." While on the job, he disseminated a pamphlet to fellow firefighters that referred to homosexuality as a "filthy scourge" and blamed gays for disease and child molestation. As a result of that incident, he received a three-month suspension without pay and a warning that any further transgression could result in termination. He subsequently distributed a "news release" to newspapers accusing the fire chief of having a "radical lesbian agenda." As a result he was terminated.

Among other causes of action, plaintiff claimed the department violated his First Amendment rights by terminating him based on his news release. Applying *Pickering*, the court found the speech addressed a matter of public concern. However, under the second prong of the test, the court noted that the plaintiff had never pursued internal avenues for questioning the department's handling of the incident, and his news release imparted little new information about the incident other than his unsubstantiated suspicions. The Department's interests in disciplining plaintiff and maintaining order were substantial and trumped Greer's First Amendment interests.

Akridge v. Wilkinson, 351 F.Supp.2d 750 (S.D.Oh. 2004)

Akridge, an ordained minister, worked as a Protestant chaplain at a prison. A gay inmate wanted to lead a musical group that would perform during services. At first Akridge was unaware the inmate was gay. The inmate then accused plaintiff of discriminating against him because "I'm gay." Concluding from the inmate's use of the present tense that he was sexually active and unrepentant, Akridge responded that the inmate's homosexuality was "reason enough for [him] not to lead the band." The inmate filed a complaint with prison officials alleging discrimination based on his sexual orientation. Plaintiff informed his supervisor that he had banned the inmate from leading the choir because he was a "practicing homosexual." Among other things, he stated that he would not "condone something the Bible was against." Management gave plaintiff a direct order to reinstate the inmate. Refusing, plaintiff was docked two days pay.

Akridge claimed retaliation based on First Amendment protected speech. The court found plaintiff's statements were not a matter of public concern. Rather, they occurred in the limited context of a decision he made within the scope of his employment and were made to further a private purpose, his own agenda as prison chaplain. Even if the statements touched on a matter of public concern, the prison could prohibit them. The prison had a policy of nondiscrimination based on sexual orientation. Had management denied the inmate the opportunity to participate in the choir, it would have interfered with his free exercise of religion. No evidence indicated that the gay inmate's participation would interfere with the free exercise rights of other inmates. Plaintiff's insubordination, rather than his speech, had resulted in the imposition of discipline.

Lumpkin v. Jordan, 1994 WL 669852 (N.D.Cal.), *aff'd*, *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997)

Defendant, San Francisco's mayor, appointed Lumpkin, a Baptist minister, to the Human Rights Commission. *The San Francisco Chronicle* quoted Lumpkin as saying: "It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin." Those remarks sparked public controversy concerning plaintiff's membership on the Commission. The mayor issued a press release refusing to release plaintiff from the commission. Subsequently, a television interviewer asked Lumpkin if he believed homosexuality were an "abomination." Plaintiff replied, "Sure, I believe, I believe everything the Bible sayeth." The following exchange ensued:

Interviewer:	Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?
Plaintiff:	That's what it sayeth.
Interviewer:	Do you believe that?
Plaintiff:	That's-I said that's what the Book sayeth.
Interviewer:	Do you believe that?

After some silence plaintiff responded that God had delivered this pronouncement. After learning of the interview, the mayor removed plaintiff from his post.

The court rejected all of Lumpkin's First Amendment claims. It concluded that the mayor could reasonably have interpreted plaintiff's televised remarks as undermining the purpose of the Commission. In particular, Lumpkin's failure to renounce violence was highly disruptive to the City and Commission. His free exercise claim had no greater merit: the mayor's interest in preventing his goals from being undermined outweighed plaintiff's right to religious expression. The Establishment Clause was not violated: it would not be objectively reasonable for Lumpkin's removal to be construed as endorsing or disapproving religion.

EEOC v. The News and Observer Publishing Co., 180 F.Supp.2d 763 (E.D.N.C. 2001)

Wilkins was hired as Direct Sales Manager for a newspaper. At the time he was hired, his direct supervisor was aware of his religious background: a master's degree in Divinity, involvement in various religious organizations, he had served as a pastor.

Wilkins' job performance was good during his first year of employment and he received a merit pay increase. During the year he voiced his religious beliefs to his supervisor. He expressed the view that homosexuality was a moral perversion and sinful. An "ex-gay," he believed that a homosexual who desired to change could do so and lead a "normal, healthy, heterosexual existence through repentance for past behavior, future obedience to God, and the changing power of Christ." He wrote a letter to the editor of the paper describing his views and later gave a speech at a convention discussing them. The newspaper published a feature article describing his views.

Meanwhile, Wilkins' relationship with his supervisor deteriorated. He seemed "determined not to do" what his supervisor asked and ignored meetings. He was suspended for being disrespectful. His supervisor and her superior discussed with him needed improvement. He was ultimately fired because management had not seen any effort to accept responsibility and progress. The termination occurred several weeks after the newspaper article came out.

The U.S. Equal Employment Opportunity Commission sued, alleging the newspaper had discharged him because he publicly voiced sincerely-held religious beliefs. The court disagreed, finding that the EEOC failed to adduce sufficient evidence that the newspaper's explanation for Wilkins' discharge was pretextual. The timing of the termination could not establish pretext in the absence of evidence showing a causal connection between the employee's religious beliefs and his termination.

Altman v. Minnesota Department of Corrections, 251 F.3d 1199 (8th Cir. 2001)

Christian employees of the Minnesota Department of Corrections claimed their employer's mandatory gay sensitivity training conflicted with their religious beliefs. Though they attended the training, they staged a silent protest, reading their Bibles and copying scripture. Following the program the trainers complained about the employees' conduct and they received written reprimands,

rendering them ineligible for promotion for two years. The Eighth Circuit held that summary judgment for the employer had been improper because plaintiffs presented some evidence that non-religious employees who had been similarly inattentive had not been disciplined.

Bodett v. CoxCom, Inc., 366 F. 3d 736 (9th Cir. 2004)

Bodett, an evangelical Christian, told a lesbian employee she supervised that homosexuality was a sin. She prayed with the employee, had her attend church with her and brought her to a "Women of Faith Conference." During a performance review Bodett advised the employee that she'd be disappointed if she were dating another woman, but happy if she were dating a man. When a manager asked the lesbian employee why she was seeking a transfer to another office, she disclosed her discomfort with how she'd been treated. After Bodett admitted to making the statements, she was terminated. The Ninth Circuit upheld Bodett's termination for violating the employer's anti-harassment policy. Bodett had offered no evidence that termination resulted from animus toward her religious beliefs.

Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069 (D. Col. 2004).

AT&T's diversity policy included the following sentence in its "Philosophy" statement: "Each person at AT&T Broadband is charged with the responsibility to fully recognize, respect and value the differences among all of us." Buonanno refused to sign it because he viewed the policy as requiring him to "value" the beliefs of gay and lesbian employees, whose "lifestyle" he believed the Bible repudiated as sinful. He stated that he could not "value"—hold in esteem or ascribe worth to—such behavior or beliefs without compromising his own religious beliefs, although he was willing to comply with the principles underlying the Diversity Philosophy and not discriminate against or harass others. The employee sought explanations from the company concerning the purpose of the sentence to which he objected but did not receive an explanation. He refused to sign the policy and was terminated. The district court rejected his claim that he'd been fired for refusing to follow his employer's religious beliefs but found that the company could have accommodated his religious beliefs without suffering undue hardship. If AT&T had explained to plaintiff that "value" in this context meant "respect for difference" rather than "hold in esteem," he would have been able to sign it. Nor would it have been an undue burden to permit him to sign a statement that he "fully recognized, respected and valued that there are differences among all of us."[4]

[4] Employment is not the only arena in which clashes have ignited between religious beliefs concerning homosexuality and protection against discrimination and harassment, nor have such clashes been limited to religious beliefs concerning homosexuality. In California, where fair housing laws prohibit discrimination based on marital status, the California Supreme Court refused to provide an exemption to a religious landlady who did not want to rent to an unmarried, heterosexual couple, holding that the law did not impose a "significant burden" on her religious beliefs. Conflicts involving religiously motivated beliefs about homosexuality in cases arising outside of the employment context include: *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263 (11th Cir. 2003)(denial of access to public advertising for conference promoting

VII.

A Burden on Religious Beliefs?

Although judges have largely been unsympathetic to claims that neutral laws and policies intolerably burden religious beliefs, several academic commentators, including those with strong roots in the "equality" movement, have urged acknowledgement of such an impact. So, for example, Chai Feldblum, a faculty member at the Georgetown University Law Center, believes that judges have erred in downplaying the burden on religious liberty of those whose religious beliefs are "anti-equality."[5] Courts in those cases have drawn what she believes may be a false distinction between conduct and belief, finding that employers can compel "equality" or "anti-harassment" conduct without impairing or infringing on sincerely held religious beliefs. Feldblum argues that conduct can and does impinge on beliefs. That proposition, after all, undergirded arguments by law schools that permitting military recruiters at their schools conflicted with and undermined their expressive beliefs. While recognizing that it may be "dangerous" to acknowledge that a civil rights law may burden the liberty of those regulated, Feldblum explains that such an admission does not lead to depriving gays and lesbians of protection against harassment and discrimination. Just as the government had an interest in prohibiting racial discrimination that was sufficiently compelling to justify a burden on religious beliefs, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), so government has a strong interest in curbing discrimination based on sexual orientation.

VIII.

Conclusion: Strengthening Protections to Promote Public Discourse

As Yale Law Professor Jack Balkin has pointed out, employees are "captives," dependent on their jobs and largely unable to avoid speech that attacks or demeans them—including speech not specifically directed at them. Balkin argues that workplace "captives" deserve higher protection from such speech than do those in the home, whose "privacy" receives far higher legal protection from intrusion.[6] Indeed, the central importance of the workplace, and particularly, social interactions among heterogeneous groups of workers, to social

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"correction" of homosexuality); *Brown v. Hot, Sexy & Safer Prods., Inc*., 68 F.3d 525, 533 (1st Cir. 1995)(education); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 77 (D. Me. 2004)(city refusal to contract pursuant to its equal benefits ordinance); *Barnes-Wallace v. Boy Scouts of Am*., 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (county lease of park to Boy Scouts); *Dignity Twin Cities v. Newman Ctr. & Chapel*, 472 N.W. 2d 355 (Minn. Cit. App. 1991) (refusal to rent to gay group); *Gay Rights Coal. Of Georgetown Law Ctr. v. Georgetown University*, 536 A.2d 1 (D.C. 1987)(denial of equal benefits to gay student organizations).

[5] Chai R. Feldblum, Gay Rights and Religion, *72 BROOK. L. REV. 61 (2006).*

[6] J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev 2295 (1999).

development and democratic life, has been the subject of increasing attention.[7] The workplace is alone in assembling individuals who might not choose to interact and compels cooperative interaction, contributing to "public discourse."[8] Strengthening protections against discrimination and harassment in the workplace adds institutional support to the process of integration.

Acknowledging that protection from anti-gay and lesbian speech may burden the "religious liberty" of individuals whose sincerely held religious beliefs condemn homosexuality should not lead to eroding employment protections for lesbian and gay employees. Not only are such protections necessary for "equality" and protection of identity, they serve an important function in preserving the workplace's central role in the public discourse necessary for democratic life.

[7] Cynthia Estlund, Working Together: How Workplace Bonds Strengthen a Diverse Democracy (2003).

[8] Diversity, however, may not add to the bottom line. Cynthia Eastlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, *26 Berkeley J. Emp. & Lab. L. 1 (2005)*