Employment Discrimination and the Transsexual
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EMPLOYMENT DISCRIMINATION AND THE TRANSSEXUAL[1.]

Transsexuals who lose their jobs because of their medical condition traditionally do poorly when they seek relief through the courts. With a few exceptions, a transsexual who is fired for having Gender Identity Disorder and following a recognized course of medical treatment [2.], will not be able to win back his job by seeking relief under federal or state statutes. The vast majority of litigation in the area of transsexual employment discrimination occurs when a pre-operative transsexual starts to live in the social role of a female and goes to work in that social role. A pre-operative transsexual is a transsexual who has not yet had the Sex Reassignment Surgery (SRS); a post- operative transsexual is a transsexual who has had SRS.

For purposes of this paper a transsexual will be defined as a person who has Gender Identity Disorder which is a "persistent discomfort about one's assigned sex or a sense of belonging to the other sex . . . [and] . . . a desire to be . . . of the other sex" [3.]. A recent case explained transsexualism in this manner, "Medically, the term is generally considered to be a condition where physiologically normal [emphasis added] individuals experience discontent being of the sex to which they were born and have a compelling desire to live as persons of the opposite sex. The discomfort is usually accompanied by a desire to utilize hormonal, surgical and civil procedures to live the sex role opposite to which they were born. They are thus persons whose anatomic sex at birth differs from their psychological sexual identity. A transsexual is not homosexual in the true sense as the latter seek sexual gratification from members of their own sex as members of that sex, whereas transsexuals' erotic attractions are generally with persons of their own anatomic sex, but viewing themselves as members of the opposite desired sex. Not to be confused with transsexuals are transvestites, who are persons content with their own sex and are heterosexual, but who dress as members of the opposite sex for sexual arousal [4.]." As to sexual orientation the author disagrees; about half of all transsexuals are sexually attracted to members of their newly assigned sex.

This paper will look at the case histories under various legal theories both federal and state, critique the analysis and interpretation used by the courts in applying those statutes, and offer possible short and long term strategies for protecting the right of a transsexual to follow a recognized medical treatment and remain employed. For a transsexual the importance of being able to remain employed has been recognized as one of the most difficult of the problems he faces in resolving his gender dysphoria. ". . . . the reason we have chosen the title 'Law and Employment Policy' is because employment is one of the biggest problems that our community, the transgendered community, does have [5.]."

FEDERAL LAWS

Equal Protection

Claims for equal protection [6.] for transsexuals are difficult to uphold because the courts generally use a rational basis analysis [7.]. The constitutional validity of a law that excludes transsexuals from protection afforded other groups may be subject to a challenge under the equal protection clause of the Fifth or Fourteenth Amendments [8.]. There are three levels of review used by the courts to analyze equal protection claims: "strict scrutiny," "intermediate scrutiny," and "rational basis." [9.] Strict scrutiny [10.], the highest tier of review, is applied whenever a governmental regulation imposes on fundamental individual rights [11.] or certain classes of individuals which comprise a suspect class. [12.] The lowest level of review in analyzing equal protection claims is the rational basis test [13.], which is used when the challenge does not qualify for stricter review [14.] Intermediate scrutiny is applied to cases where the statute imposes on rights that are not considered fundamental [15.], and where a class of people can not be considered a "suspect class." [16.] Since a court's determination of the applicable standard of review is often dispositive with respect to the underlying issues, the standard of review applied by a court is of the utmost importance. [17.] In order for a court to apply a strict scrutiny analysis it would have to find that transsexuals are a suspect class and that transsexuals have an immutable characteristic that is an "accident of birth [18.]."

An unsuccessful attempt was made in Holloway v. Arthur Anderson and Company [19.], to apply an equal protection argument for transsexuals. Holloway argued that if Congress had chosen to expressly exclude transsexuals from the coverage of Title VII that there would be a violation of equal protection. The court held that they could not "conclude that transsexuals are a suspect class," because transsexuals are, "not necessarily a 'discrete and insular minority'." Nor, "has it been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth' like race or national origin. [20.]" Based on that conclusion the court held that they only needed to apply a rational basis analysis to the exclusion of transsexuals from Title VII. The court then went on to apply a rational basis analysis to Title VII holding that "it can be said without question that the prohibition of employment discrimination between males and females . . . is rationally related to a legitimate governmental interest. [21.]" The court never did analyze what the legitimate governmental interest in excluding transsexuals from the term sex in Title VII's prohibitions was. The court did indicate in dicta that "transsexuals claiming discrimination because of their [genetic] sex, male or female, would clearly state a cause of action under Title VII [22.]." This reasoning was latter accepted in James v. Ranch Mart Hardware, Inc. [23.], where James alleged that a genetic female who became a male would not have been fired. Ranch Mart will be discussed under the section 'Transsexualism as a Disability'.

The Holloway court's conclusory treatment of whether or not transsexuals are a suspect class ignores a great body of medical research into what causes transsexualism; the underlying rational of the court must have been that one chooses to be a transsexual. No one wakes up one day and chooses to change her sex. Sex reassignment surgery is viewed as medically necessary to return the pre-operative transsexual to the sex that she identifies with. The medical community has reached a consensus in treating transsexualism: radical surgery is the only successful treatment. [24.] There are several studies that give credence to the theory that transsexualism is biological in its etiology. In the most recently announced study a neurobiologist at the Netherlands Institute for Brain Research in Amsterdam announced the results of an 11 year study. Dr. Swaab performed autopsies of transsexual brains. His studies showed that the male to female transsexual brains had a BSTc (the central subdivision of the bed nucleus of the stria terminalis) that was much smaller than a typical male and was in fact approximately the same size as would be expected of a typical woman. Dr. Swaab has stated that his research "shows that transsexuals are right. Their sex was judged in the wrong

way at the moment of birth because people look only to the sex organs and not to the brain." [25.] Dr. Swaab chose to study the BSTc because researchers know that it plays a pivotal role in sexual behavior. Although five of the six transsexuals studied had been castrated and all had undergone estrogen treatment to feminize their bodies, the researchers didn't think that these procedures affected the size of the brain region. "We know from animal experiments that in adulthood you cannot change the size of the nucleus using sex hormones," said Swaab. "You can do that only in development." [26.] A comparison with brains of men who had their testes removed as a treatment for prostate cancer showed that these non-transsexuals had a BSTc in the normal male size range; a study comparing pre- and postmenopausal women's brains, meanwhile, showed that the drop in estrogen levels following menopause also did not change the size of the BSTc structure. These findings led Dr. Swaab to believe that the BSTc size is programmed during fetal and neonatal development, perhaps as a result of an interaction between sex hormones and the developing brain and is probably not the result of parental or social pressures after birth.

If transsexuals were determined to be members of a suspect class then legislation that discriminates against them would be subject to a strict scrutiny analysis. The Supreme Court has identified three factors that aid in determining whether a class qualifies as a suspect class, a history of purposeful discrimination [27.], gross unfairness [28.], and political powerlessness [29.].

Transsexuals have been purposefully discriminated against. One need to go no further than to look at the cases cited in this paper which deal with transsexual employment discrimination. Additionally one may refer to Senator Jesse Helm's remarks in requesting the exclusion of transsexuals from the American's with Disabilities Act [30.]. If there were no purposeful discrimination against transsexuals there would be no need to have a yearly law conference on transsexual employment discrimination [31.].

Next the Court will consider whether the discrimination against transsexuals is 'grossly unfair.' "In giving content to this concept of gross unfairness, the Court has considered (1) whether the disadvantaged class is defined by a trait that 'frequently bears no relation to ability to perform or contribute to society,' Frontiero, 411 U.S. at 686, 93 S.Ct. at 1770 (plurality); (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable." [32.] There is plainly no contention by anyone that transsexuals cannot perform or contribute to society. The keyboard artist Wendy Carlos is a transsexual [33.]. There are several transsexual lawyers in the United States [34.]. In a rather remarkable development, even England's Royal family has been helped by a transsexual, it was discovered that the Queen Mother's hip surgeon was a transsexual. Clearly transsexuals are capable of performing and contributing to society.

The irrelevance of transsexualism to the quality of a person's contribution to society also suggests that classifications based on transsexualism reflect prejudice and inaccurate stereotypes the second factor to be considered in determining "gross unfairness." The final factor to be considered is the immutability of the characteristic.

As said earlier in this paper no one ever chooses to be a transsexual. For a discussion on the immutability of transsexualism see the discussion supra on Dr. Swaab's research on transsexual brains. Perhaps, paraphrasing a question a recent court asked in determining the immutably of homosexuality, it might be equally appropriate to ask non-transsexuals if they would like to change their sex [35.].

If the courts will allow the most recent studies to be considered as evidence that transsexualism is actually an immutable characteristic it might be possible to expand the constitution's equal protection to cover transsexuals. [36.] As one studies the phenomenon of transsexualism one begins to realize that these

individuals really are trapped in the wrong body and were actually the opposite sex that they were assigned at birth. For all the foregoing reasons transsexuals meet all three of the requirements for their discrimination to be considered 'grossly unfair.'

Finally in determining whether a group is a suspect class the Supreme Court will consider whether the group in question is politically powerless. Political power may be measured in many different ways. To date there are no known transsexual legislators. There are no known transsexual judges. Transsexuals have been specifically excluded from local legislation [37.] and national legislation [38.]. Therefore transsexuals are a politically powerless group.

In summary transsexuals have a history of purposeful discrimination against them, they have experienced grossly unfair discrimination and they are politically powerless. Transsexuals should be considered a suspect class and any law applied in a discriminatory fashion to them should be reviewed under the strict scrutiny standard. The reality is that the court is reluctant to find more suspect classes and unless the political make-up of the Court changes it is not likely that the Court will find that transsexuals are a suspect class.

The Court may however be more willing to find that transsexuals are a quasi-suspect class and invoke an intermediate scrutiny for legislation that discriminates against transsexuals. Intermediate scrutiny is not as difficult for a government entity to meet but it is not as easy a standard to meet as the mere rationality test [39.]. The Court has only applied the intermediate standard of review to classifications based on gender [40.] and illegitimacy [41.]. The great difficulty in an intermediate scrutiny analysis is that the Court has never specifically said that it is using intermediate scrutiny analysis and it is a bit circular in nature.

Legislation which discriminates between transsexualism and other forms of medically diagnosed treatable diseases violates the Equal Protection Clause and triggers intermediate scrutiny because legislation like the Americans with Disabilities Act and the Rehabilitation Act of 1973 legislate different treatment to people with medically diagnosed and medically treated diseases and place transsexuals into a different class (ie those not covered by the statutes) solely on a basis wholly unrelated to the object of those statutes. In applying the Equal Protection Clause the "Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). [42.]

In a rational basis analysis a legislative classification need only have a rational relationship to any legitimate governmental interest in order to comply with the equal protection guarantee; there is a strong presumption of validity of classification by the government. Although the courts do give a great deal of deference to the legislature "courts should strike down laws under the rationality test when it is clear that there is no purpose for a classification other than denying a benefit (even if it is not a fundamental right) to a group (even a non-suspect classification) when the denial of the benefit can serve no possible purpose other than the desire to discriminate against a group which is disfavored by the legislature. [43.]" In 1989 the U.S. Senate

amended the ADA to specifically exclude transsexuals. The discussion of that amendment is on pages 24-28. Based on the fact that the only basis for the exclusion of transsexuals was that it served the purpose of discriminating against a group that Senator Helms disfavored it would be possible to make a good argument that the amendment is unconstitutional even under a rationality test.

An example of the type of gross discrimination a transsexual must encounter before her discrimination will be found unlawful is Doe v. United States Postal Service [44.]. In Doe the court denied a motion by the USPS to dismiss for failure to state a claim where Doe had alleged, among other claims, that the Postal Service had violated her equal protection right to employment with the federal government. Doe was a pre-operative transsexual (male to female) who claimed that the USPS denied her a promised job when she informed the USPS of her intention to undergo Sex Reassignment Surgery. Doe was offered a temporary (six months) Senior Clerk Typist position. She was interviewed and presented herself as a male, which she was at that time. [45.] After Doe learned that the USPS would withdraw their offer of employment she offered to serve the entire employment term as a male and the USPS refused to reinstate the offer, based solely on their opposition to her intention, after her employment was up, to undergo SRS. On the issue of whether Doe had alleged that the USPS had violated her equal protection right to a job with the federal government the USPS asserted that "it is rationally related to a legitimate governmental interest for 'an employer to treat a transsexual in the manner the Postal Service did here. [46.]'" But the court found that "No government interest has been identified . . . and this issue is properly a question to be decided. [47.]" Doe was highly unusual in that it is rare that a transsexual is able to go back to living in the birth assigned sex once that individual has transitioned to the corrected sex.

Sex, More Than Chromosomes

Transsexuals have often argued that they should be included in the term sex in the remedial employment discrimination statutes that prohibit discrimination based on sex. Their argument has been that what most people consider a rather simple determination, what sex are you, is actually very complicated and should be determined by more than chromosomal factors [48.]. The courts have not been persuaded by this argument.

A good example of the way courts have treated the "sex is more than chromosomes" argument is found in Ulane v. Eastern Airlines, Inc. [49.] Karen Ulane was [50.] a pilot for Eastern Airlines who was hired as a male in 1968. She worked for the airline until 1980. In 1980 she took a leave of absence from her job, underwent sex reassignment surgery, then reported back to work. Eastern fired her shortly after she went back to work. The court in Ulane refused to understand that sex is more than chromosomes and wrote that "if the term 'sex' as it is used in Title VII is to mean more than biological male or female, the new definition must come from Congress [51.]." The court was unpersuaded by the lower court opinion of Judge Grady [52.] that formed the basis for the appeal in Ulane.

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. . . . After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex. [53.]

The appeals court refused to approve the lower courts finding that sex could be defined by the scientific community, "We do not believe that the interpretation of the word 'sex' as used in the statute [Title VII] is a

mere matter of expert testimony or the credibility of witnesses produced in court [54.]."

A different approach was used by a transsexual who brought a Title VII action in Sommers v. Budget Marketing, Inc. [55.] Sommers' alleged that she had been discriminated against because of her status as a female with the anatomical body of a male and that the fact that she had not yet had sexual conversion surgery should not prevent her from being classified as female. Budget moved for dismissal on the grounds that Title VII does not cover transsexuals and the court treated Budget's request as a summary judgment request. Budget claimed that they dismissed Sommers because she misrepresented herself as an anatomical female on her job application. Budget further alleged that the misrepresentation led to a disruption of the company's work routine in that a number of female employees said they would quit if Sommers were allowed to use female restroom facilities [56.].

The court dismissed Sommers claim under Title VII and held that "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in the absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."

However, it is interesting that the court was troubled by Sommers' dilemma:

We are not unmindful of the problems Sommers faces. On the other hand, Budget faces a problem in protecting the privacy interests of it's female employees. According to affidavits submitted to the district court, even medical experts disagree as to whether Sommers is properly classified as male or female. The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers' own use?

Perhaps some reasonable accommodation could be worked out between the parties. [57.]

The problem with the courts' analysis in "sex is more than chromosomes" cases are that the courts are applying too narrow a construction to the interpretation of a remedial statute. An analogy may be helpful to illustrate to the courts why transsexuals should be covered in the term "sex" in Title VII. If a non-sabbatarian changes his religion to become a sabbatarian [58.] and is fired for making that change the courts have not had any trouble finding that he was discriminated against on the basis of religious discrimination. [59.] In the sabbatarian cases the courts have not focused on the question of whether or not Title VII was passed to protect a particular religion, no matter how radical or on the fringe it might be, but have focused on the general protection for religion. The courts should not focus on whether or not the change is specifically protected, but on whether the category is protected. There is much more to sex than xx or xy chromosomes.

Since 1977, when the court decided Holloway, there have been some studies from the scientific community that suggest transsexualism may have some of its roots in genetics [60.]. As our understanding of the concept of sex is broadened by the scientific community we need to apply that broader understanding to the coverage of sex in remedial statutes like Title VII. Most of the cases dealing with transsexuals and Title VII have been decided by summary judgment against the transsexual with the courts making rather conclusory statements that, since there is no legislative history to support Congress' intent to have the term sex cover transsexuals, therefore transsexuals are not covered under Title VII. What the courts should instead be doing is allowing the case to go to trial to decide if the underlying discrimination is based on sex, as sex is now understood, or is for another reason.

There is one recent case [61.] where a transsexual's Title VII claim was able to withstand a motion to

dismiss. Barbara James was a pre-operative transsexual who was discharged from Ranch Mart Hardware, Inc. for being an anatomical male working and dressing as a woman. Ranch Mart asked for a judgment on the pleadings, or in the alternative, a motion to dismiss. The court held that, "Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII." [62.] The court also held that James "cannot state an actionable claim under Title VII for discrimination based upon her sex as a female. . . . [because] Congress did not intend to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual. [63.]" But James made a unique claim. She alleged that "even though defendant terminated her (a male, working and living as a female), it would not have terminated one of its female employees, living and working as a male." [64.] On this claim the court denied Ranch Mart's motion to dismiss and went on to say, "Whether plaintiff can prove this allegation remains to be seen." [65.] As it turned out James was unable to bear the burden of proof in her claim [66.].

Transsexualism as a Disability

Since transsexualism is a medical condition that has a recognized course of treatment and since transsexuals were being terminated, or not hired, because of their medical condition it seems logical that transsexualism could be construed as a handicap and come under the protection of the remedial statutes that protect handicapped individuals. The lone bright star in federal statutes for transsexuals seeking relief for employment discrimination under the disability laws was the Rehabilitation Act of 1973, however that relief was short lived.

One case that found in favor of a transsexual as a handicapped person was Doe v. United States Postal Service [67.]. This is the same case that was discussed under the equal protection analysis. Doe advanced several different claims, among them was a claim that as a transsexual she was handicapped and was covered by the Rehabilitation Act of 1973. The court upheld the handicap claim, of Doe, against a motion by the USPS to dismiss for failure to state a claim upon which relief could be granted. The court found that, "the language of the Rehabilitation Act and of the accompanying regulations is broadly drafted, indicating a legislative intent not to limit the Act's coverage to traditionally recognized handicaps. [68.]" The USPS counter argument was that since a transsexual's condition may be alleviated by hormones and gender reassignment surgery the impairment was short-term and therefore not covered by the Act. However the court said that "the mere fact that treatment may be available does not automatically remove an afflicted individual from the scope of this statute." [69.] In 1992 Congress amended the Rehabilitation Act to exclude transsexuals [70.]. To understand the reasons for the exclusion of transsexuals it is necessary to look at the legislative history of the American's With Disabilities Act of 1990.

In 1990 Congress passed the American's with Disabilities Act (ADA). The ADA contains an explicit section [71.] stating that transsexualism and gender identity disorders are not, without a physical causation, considered disabilities. This section was put in at the request of Senator Jesse Helms. [72.] The exclusion clause adopted into the Rehabilitation Act is identical to the clause in the ADA. Recall that the court upheld in Doe v. United States Postal Service [73.] the equal protection argument made by Doe. Recall also that the USPS advanced no rational argument for denying Doe employment other than that she was a transsexual. The assertion by Senator Helms that the ADA would cover a transsexual is correct.

There has never been a case that has challenged the constitutionality of the exclusion clause but there should be. Recall that in a rationality test for an equal protection challenge to legislative action that the courts should strike the exclusion down where it is clear that there is no purpose for the classification other than denying a benefit to a group when the denial of the benefit can serve no purpose other than to discriminate

against a group which is disfavored by the legislature [74.]. Here, based on the exchange between Senator Helms and Senator Harkin, it is abundantly clear that transsexuals were classified into a group (see Fns 70 and 71) for the sole purpose of denying a benefit to them and the denial of that benefit serves no purpose other than to discriminate against a group that is disfavored by Senator Helms.

It may be argued that transsexuals should be excluded because employers should not have to accept employees whose presence might disrupt the workplace but that concern can be easily taken care of. Employers need only make a reasonable accommodation; a concept that is well defined by the handicap antidiscrimination statutes and the case law decided under those statutes. On the other hand it may be argued that transsexualism is a perversion like the other categories it is listed with in the exclusion clause. But of the disorders listed in the exclusion clause only transsexualism is a disorder that, by its very nature, leads to a recognized course of medical treatment. A transvestite may be a transvestite and not seek medical treatment. A transsexual, by definition, will seek medical treatment to alleviate her condition. It seems disingenuous to include transsexuals in a grouping of disorders that normally do not seek medical treatment. Can there be any logical reason for inclusion of transsexuals in such a group?

A possible argument for a rational basis for not considering transsexuals as disabled is the stigmatizing effect that being declared "disabled" may have on the group. This benign argument may seem appealing. It ostensibly takes in to account the feelings of transsexuals and claims to have the transsexual's best interests at heart. The same logic has been advanced regarding the issue of affirmative action. Those who are the beneficiaries of affirmative action will actually be hurt by it because they will be singled out for special treatment and those not getting the special treatment will think that they couldn't actually meet the job requirements without help. The issue of whether the transsexual exclusion clause is constitutional could be decided either way. State government laws have given transsexuals little more protection.

STATE DISABILITY LAWS

Some cases dealing with state non-discrimination laws have found against the transsexual. In Sommers v. Iowa Civil Rights Commission [75.], the Iowa Supreme Court upheld an Iowa Civil Rights Commission's interpretation of the Iowa Civil Rights Act statute [76.], prohibiting discharge of an employee because of that employee's sex or disability, because the statute did not prevent discrimination against transsexuals [77.]. The court was not persuaded by Sommers' argument that sex should include transsexuals or that transsexualism was an impairment that substantially limited her ability to work. In ruling on Sommers' disability claim the court concluded that "transsexualism is more likely to have an adverse effect because of attitudes of others toward the condition [78.]" than the condition itself limiting her ability to work. This is the same plaintiff involved in Sommers v. Budget Marketing, Inc. [79.] There have been other local cases that have found for the transsexual's disability claim.

In Underwood v. Archer Management Services, Inc. [80.], the court held that a post-operative transsexual employee, who alleged she was dismissed because her employer felt that she retained some masculine traits, stated a claim of personal appearance discrimination under the D.C. Human Rights Act [81.]. However, the court dismissed Sommers claims of discrimination on the basis of sex and sexual orientation. The court said, in ruling on Sommers claim for sex discrimination, that federal cases interpreting Title VII were to be used as authority in interpreting the D.C. statute [82.].

In dismissing the sexual orientation discrimination claim, the court noted that "the DCHRA defines 'sexual orientation' to mean 'male or female homosexuality, heterosexuality and bisexuality, by preference or practice. [83.]" The court went on to state, "courts have firmly distinguished transsexuality from homosexuality. [84.]"

A recent Washington state supreme court case, Doe v. Boeing [85.], held that while transsexualism is an abnormal condition the particular plaintiff was not handicapped under the applicable Washington statute because she was not discharged because of her condition. Doe, a pre-operative male to female transsexual, alleged that she was handicapped under Washington's Law Against Discrimination [86.] because she was gender dysphoric and that Boeing failed to reasonably accommodate her handicap. Boeing defended the action saying that Doe was not handicapped under Washington law and that Boeing had reasonably accommodated her by allowing her to dress in unisex clothing. Boeing claimed that the real reason Doe was fired was because she violated Boeing's directives not to appear excessively feminine at work until after her sex reassignment surgery.

The court held there must be findings of fact on two elements before it can be determined if a person is handicapped under Washington's Law Against Discrimination, "both the presence of a handicapping condition and evidence that this condition was the reason for the discharge. [87.]" In ruling on the first element, the court held that though Doe's gender dysphoria was an abnormal condition there was no evidence that Doe had been discharged because she was a transsexual. The court concluded that Doe had been discharged because she had failed to comply with Boeing's dress code policy on pre-operative transsexuals [88.]. Therefore since Doe did not meet the second element the court held that "Doe is not handicapped for the purposes of pursuing an unfair practice claim under RCW 49.60.180. [89.]"

In ruling on the Doe case the Washington Supreme Court held that "the scope of an employer's duty to accommodate an employee's condition is limited to those steps reasonably necessary to enable the employee to perform his or her job. [90.]" Since Boeing allowed Doe to dress in unisex clothing and since her own doctor had testified that unisex clothing was an acceptable style to comply with her medical need to live in her new gender role the court concluded, "that Boeing had reasonably accommodated Doe's abnormal condition. [91.]"

But there is a state case from Florida that illustrates how state disability laws can be successfully applied in cases of transsexual employment discrimination.

In Smith v. City of Jacksonville, (Case No. 88-5451 Fla. Div. Admin. Hearings 1991) Belinda Joelle Smith [92.], a pre- operative male to female transsexual, was discharged as a correctional officer because the city felt that as a known transsexual Smith would not be able to command the respect of her co-employees and intimates and would discredit the City. The Civil Service Board upheld the City's decision to dismiss Smith.

On appeal, the Administrative Hearings Officer recommended that the Human Relations Commission order reinstatement, award back pay and attorney's fees and costs. The Hearings Officer ruled that Smith had been subjected to unlawful employment discrimination in violation of the Florida Humans Rights Act [93.]. The issue before the Hearings Officer was whether transsexualism constitutes a handicap under Florida law. The Hearing Officer concluded that:

based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with gender dysphoria is within the coverage of the Human Rights Act of 1977 in that such individual "does not

enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties . . . [94.]"

The Hearing Officer also concluded that "apart from [an] actual handicap, Smith was handicapped because of the attitudes with which she was confronted by her employer. [95.]"

The protection transsexual's may get from state disability laws is very dependent on the wording of the statute. State laws passed based on the Rehabilitation Act of 1973 before the 1993 transsexual exclusion amendment should protect transsexuals. As shown by these cases, where there hasn't been a specific exclusion, transsexuals may be covered by state disability laws.

SHORT TERM STRATEGY

The lower federal courts and the United States Congress have effectively closed off any chance a transsexual has of making a case under federal law but there are some states where transsexuals have been able to obtain relief under state rehabilitation laws. In the end however the best course would be to not have to litigate the issue in the first place. Since the vast majority of discharges occur when the pre-operative transsexual begins to live and work in the opposite sex the best option available for the transsexual would be to first educate the employer before showing up to work in the new gender role. One way to educate the employer would be to show the employer how they can accommodate the transsexual and maintain an efficient workplace.

A good educational resource is a handbook published by the International Foundation for Gender Education (IFGE) titled "Why Is S/He Doing This To Us?". This handbook was approved by the Employment Law Committee of the First International Conference on Transgender Law and Employment Policy, held in 1992 in Houston, Texas. The IFGE handbook is written in laymen's terms and takes the reader through the transsexual phenomenon; answering questions from "Just what is it we are dealing with here?" to "What do we do about the bathroom issue?". When an employer is faced with a completely new and unique situation she needs practical advice on how to deal with it. Its no wonder that many employers have opted to discharge the employee rather than try to reinvent the wheel, a wheel they don't even understand. Even in Doe v. Boeing, Boeing had a policy in place to deal with transsexuals. The only reason Doe was fired was because she violated that policy. One of the reasons for Boeing's policy was to help employees accept the transsexual on a gradual basis.

Besides educating the employer the employees need to be educated so that an efficient workplace may be maintained. An educational resource for co-workers is a handbook published by the International Conference on Transgender Law and Employment Policy titled, "What Is S/He Doing?". The handbook uses a story vignette to explain transsexualism with explanations inserted at various points in the narrative. Again one of the major sticking points in the transsexual transition, what bathroom will s/he use, is covered. Through education and cooperation a transsexual stands a better chance of retaining her job than trying to win it back through litigation. But not all employers are willing to be reasonable.

LONG TERM STRATEGY

There are two long term strategies available for the transsexual. One is to seek to overturn on constitutional grounds the laws that specifically exclude her from coverage. The other is to seek to have laws passed to protect the transsexual. Currently the transsexual community is following the second course and in the end that may be the more rewarding avenue.

A transsexual political action committee has been formed, It's Time America. The committee was formed after the third International Conference on Transgender Law and Employment Policy. Committee members and the executive Director of the conference have been to Congress to lobby for inclusion in ENDA (Employment Non-Discrimination Act) an Act meant to cover sexual orientation that currently specifically excludes transsexuals.

Six states [96.] and the District of Columbia [97.] have passed laws protecting persons from employment discrimination based on sexual orientation. Most of these statutes include "gender" as a protected class and some of them include both "gender" and "sex" as protected classes. There is usually a preamble to the statute saying that it is the intent of the statute to apply to all persons, in order to ensure equal opportunity for every citizen.

However, the Underwood [98.] case clearly highlights the need to specifically include transsexuals in the definitions of sexual orientation legislation [99.]. Transsexuals are not included within the traditional definitions of sex, gender or sexual orientation.

An excellent example of how sexual orientation can be defined to include transsexuals is the Minnesota non- discrimination statute [100.]. Subdivision 45 defines sexual orientation as:

"Sexual orientation" means having or being perceived as having an emotional, physical or sexual attachment to another person without regard to the sex of that person or having an orientation for such attachment, or having or being perceived as having a self image or identity not traditionally associated with ones biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.

In 1993, the Transgender Employment Law and Policy Committee agreed that the Minnesota statute should be used as the model language for use in the Federal Civil Rights legislation, other states and municipalities.

CONCLUSION

The courts have not been good avenues for transsexuals to seek relief from when they have been fired for being a transsexual. The current federal laws and most state laws are too restrictive for transsexuals to use to protect their jobs. A transsexual's two best hopes are to try to obtain their employer's voluntary cooperation and to get the laws changed to specifically include transsexuals.

---------- FOOTNOTES ----------

[1.] This paper is dedicated to the three transsexuals the author has known who have taken their own lives in the past year. May they find the peace they could not find in life.

[2.] see Standards of Care, Harry Benjamin International Gender Dysphoria Association, Inc., Revised draft 1/90, ".4.9.1 Standard 9. Genital sex reassignment [also known as Sex Reassignment Surgery] shall be preceded by a period of at least 12 months during which time the patient lives full-time in the social role of the genetically other sex."

[3.] As defined by The American Psychiatric Assn Diagnostic and Statistical Manual of Mental Disorders . 302.3 , 4th ed. 1994.

[4.] Maffei v. Kolaeton Industry, Inc., Nos. 124783/94, 95-178, 1995 WL 168807, at *3 (N.Y.Sup. March 14, 1995) quoting "Relief" for Transsexuals, 4 Yale Law & Policy Review 125 (1985); The Law of Transsexualism, 4 Conn. L.R. 288 (1975); Transsexuals in Limbo, 31 Maryland L.R. 236 (1971).

[5.] Phyllis Frye, Friday Luncheon Speech, Proceedings of the First International Conference on Transgender Law and Employment Policy page 27, (1992).

[6.] A claim for equal protection would be based on transsexuals, as a group, being treated differently from similarly situated groups.

[7.] In analyzing a statute to see if it violates the Equal Protection Clause of the Constitution the Court will look at the classification created and see if the individuals who are similarly situated will be treated similarly. It will apply a "mere rationality" test if the classification is not one of the limited "suspect" classes.

[8.] "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[9.] Arguably there is another level of review developed to fit in between intermediate review and the rational basis test. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (characterizing its analysis of a denial for a zoning permit for a mentally retarded home as the rational basis test, but applying a "heightened" level of scrutiny).

[10.] The regulation must be necessary to promote a compelling governmental interest and must be the least restrictive alternative. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (applying the "most rigid scrutiny" to determine the constitutionality of military regulations which discriminate based on race).

[11.] The Supreme Court has recognized that fundamental rights include the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and the right of access to the courts, Griffin v. Illinois, 351 U.S. 12 (1956).

[12.] Three main suspect classes exist. Regulations that discriminate based on race are subject to strict scrutiny. See Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to statute prohibiting interracial marriage); Brown v. Board of Ed., 347 U.S. 483 (1954) (applying strict scrutiny to state laws requiring separate but equal education between whites and non-whites). Statutes that discriminate based on national origin are subject to strict scrutiny. See Hernandez v. Texas, 347 U.S. 475 (1954) (applying strict scrutiny to discrimination against Mexican Americans with regards to jury duty). Finally, statutes that discriminate based on alienage are also subject to strict scrutiny. See In re Griffiths, 413 U.S. 717 (1973) (applying strict scrutiny to state statutes that denied resident aliens the opportunity to practice law).

[13.] As long as the regulation furthers a legitimate purpose, the regulation will be upheld as constitutional. "In general, a government regulation will be presumed to be valid under equal protection analysis as long as the classification drawn by the regulation "rationally furthers some legitimate, articulated state purpose.'" Ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989) (quoting McGinnis v. Royster, 410 U.S. 263, 270 (1973)).

[14.] See, e.g., Hetherton v. Sears, Roebuck & Co., 493 F. Supp. 82, 87 (D. Del. 1980) (stating that all other classifications will be reviewed under the standard of minimum rationality), aff'd, 652 F.2d 1152 (3rd Cir. 1981).

[15.] See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas law that allowed school districts to deny free public education to illegal-alien children).

[16.] Those classes that are not "suspect classes" are labeled "quasi-suspect." See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982). Intermediate scrutiny applies to classifications based on gender. See Reed v. Reed, 404 U.S. 71 (1971). It also applies to classifications based on illegitimacy. See Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Trimble v. Gordon 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).

[17.] This determination is not dispositive in every instance. For instance, in Steffan the court applied the rational basis test and held that the Navy's regulation was unconstitutional. Although the court came to the correct conclusion, a stricter standard of review should have been used.

[18.] Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973).

[19.] 566 F2d 659 (9th Cir. 1977).

[20.] Holloway at 663.

[21.] Holloway, at 663-64.

[22.] Holloway, at 664.

[23.] No. 94-2235-KHV, 1994 WL 731517 (D. Kan. December 23, 1994).

[24.] Is He or Isn't She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology, 21 Washburn L. J. (1982), at 359.

[25.] Josie Glausiusz, Transsexual Brains. 1995: The Year in Science, Discover magazine, January, 1996 p. 83.

[26.] Id.

[27.] McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding that because race is an irrelevant characteristic, statutory distinction based explicitly on racial grounds cannot be regarded as having a constitutionally acceptable legislative purpose); Graham v. Richardson, 403 U.S. 365, 368 (1971) (finding that aliens are clearly a suspect class). For other examples see Cleburne v. Cleburne Living Center, 473 U.S. 432, 441; Massachusetts Bd. of Retirement v. Murgia, 411 U.S. 307, 313; San Antonio School Indep. District v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero, 411 U.S. at 684-85.

[28.] "The second factor that the Supreme Court considers in suspectclass analysis is difficult to capsulize and may in fact represent a cluster of factors grouped around a central idea--whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it 'invidious.'" Watkins v. United States Army, 875 F.2d 699, 724 (9th Cir. 1989). The determination of whether the discrimination is 'grossly unfair' is important because the discrimination experienced by some groups is warranted. The Watkins court offered burglars as an example of a group toward which animus is warranted, but suspect classification is not. It is therefore crucial to this inquiry to establish that the discrimination experienced by groups deserving of suspect classification is of a kind which exhibits a gross unfairness. Id.

[29.] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (stating that "prejudice against discrete and insular minorities," which inhibits their protection by the political process calls for heightened judicial scrutiny). See also Cleburne, 473 U.S. at 441; Plyer, 457 U.S. at 216 n.14; Rodriguez, 411 U.S. at 28.

[30.] See fn 72

[31.] The International Conference on Transgender Law and Employment Policy has been held yearly from 1992 until the present in Houston, Texas.

[32.] Watkins at 724.

[33.] Wendy Carlos recorded one of the best selling classical albums of all time in the 70's, "Switched on Bach", made

when she was a man named Walter Carlos. She has recorded a new album called "Switched on Bach 2000." Wendy was also the composer of the sound track used in the movie "The Shining."

[34.] The prime example of a transsexual attorney is Phyliss Frye who is responsible for putting on the Conference for Transgender Law and Employment Policy.

[35.] Watkins at 724.

[36.] For a more through exploration of the difference between sex and gender as they apply to transsexuals see Transsexualism as Metaphor: The Collision of Sex and Gender, 43 Buffalo Law Review 835 (1995).

[37.] Conversation with State Representative George Eighmey about the exclusion of transsexuals from legislation introduced in the Oregon legislature in 1995 where the author served as a legislative intern to Rep. Eighmey.

[38.] Conversation with Phyliss Frye regarding ENDA the Employment Nondiscrimination Act introduced in the last and current Congressional sessions. See also the specific exclusion of transsexuals in the ADA and Rehabilitation Act of 1973.

[39.] John E. Nowak & Ronald D. Rotunda, Constitutional Law at 576 (4th ed. 1991).

[40.] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) stating that the government has the "burden of showing exceedingly persuasive justification for the [gender] classification" and that the government'sinterest must be substantially related to the achievement of those objectives."

[41.] Lalli v. Lalli, 439 U.S. 259, 265 (1978) reasoning that although illegitimacy is not subject to strict scrutiny, legislation which discriminates upon that basis is nevertheless invalid if it is not substantially related to permissible state interests.

[42.] Reed v. Reed, 92 S.Ct. 251, 253-54, 404 U.S. 71, 75-76 (1971).

[43.] Nowak at 589.

[44.] No. CIV.A.84-3296, 1985 WL 9446 (D.D.C. June 12,1985).

[45.] Doe had Sex Reassignment Surgery about six months after the events in question.

[46.] Doe at *4.

[47.] Doe at *4.

[48.] "experts now generally agree that there are at least seven variables that interact to determine the ultimate sex of an individual, to wit: 1) Chromosomes (XX female, XY male; 2) Gonads (ovaries or testes); 3) Hormonal secretions (androgens for males or estrogens for females); 4) Internal reproductive organs (uterus or prostate); 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self- identity. [See, Note, 80 Northwestern L.R. 1037 (quoting from N. Benjamin, The Transsexual Phenomenon, p. 14 [1966]. Maffei v. Kolaeton, Nos. 124783/94, 95-178. ,1995 WL 168807, at *3 (N.Y.Sup. March 14, 1995).

[49.] 742 F.2d 1081 (7th Cir. 1984).

[50.] Karen Ulane died in a crash of a DC-3 in late 1989.

[51.] Ulane at 1087.

[52.] Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1984).

[53.] Ulane v. Eastern Airlines, Inc., 581 F.Supp. 821, 823 (N.D. Ill. 1984).
[54.] Ulane, 742 F.2d 1081, 1087 (7th Cir. 1984).

[55.] 667 F.2d 748 (8th Cir. 1982).

[56.] Which bathroom a pre-operative transsexual is to use is one of the most often cited problems facing an employer. If the transsexual uses the bathrooms assigned to her new sex individuals using that bathroom may feel a sense of unease because they still think of her as being he. Yet if the transsexual uses the bathroom of her chromosomal sex she may face harassment or worse from individuals who have an illogical hatred of anyone who is different.

[57.] Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982).

[58.] A sabbatarian is "one who observes the seventh day of the week, Saturday, as the Sabbath." Webster's Encyclopedic Unabridged Dictionary of the English Language, First Edition 1989.

[59.] Cummins v. Parker Seal Co., 516 F.2d 544, U.S. Ct. of Appeals 6th Cir (1975). Blalock v. Metal Trades, Inc., 775 F.2d 703, U.S. Ct. of Appeals 6th Cir. (1985). Mann v. Milgram Food Stores, 730 F.2d 1186, U.S. Ct. of Appeals 8th Cir. (1984).

[60.] Kim E. Stuart, J.D., The Uninvited Dilemma: A Question of Gender, 146-147 (1991), quoting research done by a West German, Wolf Eicher, PH.D., on the reversed responses of a group of male to female and female to male transsexuals to HY antigens which are normally found in the chromosomal male cellular structure. Normal genetic males are HY positive and normal genetic females are HY negative. Dr. Eicher's study found that male to female transsexuals were HY negative and female to male transsexuals were positive the exact opposite of the predicted results.

[61.] James v. Ranch Mart Hardware, Inc., No. 94-2235-KHV, 1994 WL 731517 (D. Kan. December 23, 1994).

[62.] James at *1.

[63.] Id. at *1 and quoting Sommers v. Budget Marketing, Inc., 667 F. 2d 748, 749 [27 FEP Cases 1217] (8th Cir. 1982).

[64.] Id. at *1.

[65.] Id. at *1.

[66.] James v. Ranch Mart, Inc., No. 94-2235-KHV, 1995 WL 148366, (D. Kan. Feb. 22, 1995)
[67.] No. CIV.A..84-3296, 1985 WL 9446 (D.D.C. June 12, 1985).

[68.] Doe v. United States Postal Service, No. 84-3296,at *2 (D.D.C. June 12, 1985).

[69.] Id. at *2

[70.] "(F) For the purposes of sections 501, 503, and 504, the term 'individual with a disability' does not include an individual on the basis of-

(i) transvestism, transsexualism, pedophilia,

exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;", Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4349 (1992).

[71.] . 511 Definitions (b) Certain conditions
Under this Act, the term "disability" shall not include-
(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

[72.] On Thursday September 7, 1989 the Senate was considering the ADA and the following dialogue took place;
Mr. HELMS.
Mr. President, for the record, I wish to ask the distinguished manager a few questions about this bill, the Americans With Disabilities Act of 1989.
In the bill, the definition of "individuals with disabilities" includes anyone with a physical or mental impairment limiting one of life's major activities, and anyone regarded as having such an impairment.
The report lists many mental and physical disorders and therefore it must have been the intent of S. 933's authors that it be an all-encompassing bill; is that correct?
Mr. HARKIN.
Well, the Senator's question was, Did we intend for the bill to be all- encompassing?
Mr. HELMS.
Yes.
Mr. HARKIN.
Within the definition the Senator just read, that is correct.
Mr. HELMS.
I thought the Senator would say that, so I will be specific. Does the list of disabilities include pedophiles?
Mr. HARKIN.
What?
Mr. HELMS.
P-e-d-o-p-h-i-l-e-s?
Mr. HARKIN.
I can assure the Senator no.
Mr. HELMS.
How about schizophrenics?
Mr. HARKIN.
Schizophrenics, yes.

. . . .
Mr. HELMS.
Homosexuals?
Mr. HARKIN.
No; absolutely not.
Mr. HELMS.
The Senator is certain about that?
Mr. HARKIN.
I am absolutely certain.
Mr. HELMS.
Transvestites?
Mr. HARKIN.
Absolutely not.
Mr. HELMS.
People who are HIV positive or who have active AIDS disease?
Mr. HARKIN.
Just a moment, I may have misspoken.
Let us back up to transvestite. I said no, but I am told by staff that one court at one time held that a transvestite was mentally impaired, and I further understand the Senator from North Carolina added an amendment to the fair housing amendments last year that took care of that, and it was accepted.
Mr. HELMS.
Where does that leave us with respect to this bill?
Mr. HARKIN.
I do not know. Just a minute.
If the Senator would like to offer an amendment, we will accept it. If can I ask the Senator, if it could be drafted the same way you did last year on the Fair Housing Act.
135 Cong.Rec. S10765-01 (1989).

[73.] No. CIV.A..84-3296, 1985 WL 9446 (D.D.C. June 12, 1985).

[74.] See Fn43.

[75.] 337 N.W. 2d 470 (Iowa 1983).

[76.] Iowa Code . 601A.6 (1981).

[77.] "We hold that in the context of employment transsexualism is not a disability . . . " Sommers, 337 N.W. 2d 470, 474 (Iowa 1983).

[78.] Sommers at 476

[79.] 667 F.2d 748 (8th Cir. 1983).

[80.] 857 F.Supp. 96 (D.C. Cir. 1994).

[81.] D.C. Code Ann. . 1-2512(a) (1992 & Supp. 1993).

[82.] "From time to time in the course of this opinion, therefore, we shall cite as authority federal cases arising under the federal act in interpreting similar provisions of the DCHRA." Underwood at 98.

[83.] Underwood at 98.

[84.] Underwood at 98.

[85.] 846 P.2d 531 (Wash. 1993).

[86.] Wash. Rev. Code .. 49.60.010 - 49.60.320(1992); Wash. Admin. Code . 162-22 (1992) (handicapped persons).

[87.] Doe at 535.

[88.] "Inasmuch as Boeing did not discharge Doe based on her abnormal condition but on her refusal to conform with directives on acceptable attire." Doe at 536.

[89.] Doe at 536.

[90.] Doe at 537.

[91.] Doe at 537.

[92.] Belinda Smith died in 1994 in a freak boating accident off the coast of Florida.

[93.] Fla. St. 1983, Chapter 760, Discrimination in the Treatment of Persons.

[94.] Smith v. City of Jacksonville, Case # 88-5451, Recommended Order pages 23-24, (Florida, Div. of Administrative Hearings, October 2, 1991).

[95.] Smith at 24.

[96.] Connecticut, Conn. Gen. Stat Ann. .4a-60a (West Supp. 1995); Hawaii, Haw. Rev. Stat. Ann. . 378-2 (1994); Massachusetts, Mass. Ge. Laws Ann. ch. 151B . 4 (West Supp. 1995); Minnesota, Minn. Stat. Ann. . 363.03 (West Supp. 1995); New Jersey, N.J. Stat. Ann. .10:5-4 (West 1993 Supp. 1995); Vermont, Vt. Stat. Ann. tit. 3, . 961 (West Supp. 1995); Wisconsin, Wis. Stat. Ann. .111.36

(West Supp. 1995).

[97.] See supra note 47.

[98.] 857 F.Supp. 96 (D.C. Cir. 1994).

[99.] See discussion page 18.

[100.] Minn. Stat. Ann. . 363.01 (West 1994).