

# Bender's Labor & Employment Bulletin

April 2018  
VOLUME 18 • ISSUE NO. 4

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## **Policing Infidelity: The Circuit Split on Public Employer's Right to Discipline for Off-Duty Conduct**

By David W. Garland and Amy B. Messigian

### **Introduction**

The Fourteenth Amendment prohibits a state from depriving any person of "life, liberty, or property, without due process of law."<sup>1</sup> The Supreme Court has described two strands of the substantive due process doctrine. One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience.<sup>2</sup> A fundamental right or liberty interest is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."<sup>3</sup> The government may only infringe fundamental liberty interests if the infringement is narrowly tailored to serve a compelling state interest.<sup>4</sup> Conduct that shocks the conscience, on the other hand, is deliberate government action that is "arbitrary" and "unrestrained by the established principles of private right and distributive justice." This strand of substantive due process is concerned with preventing government officials from "abusing their power or employing it as an instrument of oppression."<sup>5</sup>

In 2003, the United States Supreme Court found Texas' consensual anti-sodomy law unconstitutional in the watershed decision of *Lawrence v. Texas*.<sup>6</sup> The Court opined that intimate consensual sexual conduct was protected by substantive due process under the Fourteenth Amendment.

While it may be argued that *Lawrence* pronounced a fundamental right to sexual privacy, many courts have refused to interpret *Lawrence* so broadly, finding instead that *Lawrence* merely invalidated an arbitrary and oppressive anti-sodomy law. This conflict has caused a circuit court split between the Ninth, Fifth and Tenth Circuits in the context of whether a public employer may discipline an employee over his or her off-duty sexual behavior or whether such conduct is off limits unless it is narrowly tailored to serve a compelling state interest. While the Tenth and Fifth Circuits have upheld the discipline of law enforcement officers whose off-duty sexual conduct violated their agencies' codes of conduct, on February 9, 2018, the Ninth Circuit ruled that off-duty sexual conduct is protected by the Constitution in

<sup>1</sup> U.S. Const., amend. 14, § 1.

<sup>2</sup> See *Chavez v. Martinez*, 538 U.S. 760, 787 (2003).

<sup>3</sup> 538 U.S. at 775.

<sup>4</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>5</sup> *Hurtado v. California*, 110 U.S. 516, 527 (1884).

<sup>6</sup> 539 U.S. 558 (2003).

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### A NOTE ON CITATION:

The correct citation form for this publication is:  
18 Bender's Lab. & Empl. Bull. 93 (April 2018)

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ISBN 978-0-8205-5039-8, EBOOK ISBN 978-1-4224-8015-1

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*Perez v. City of Roseville*<sup>7</sup> and is therefore off limits from disciplinary action in the absence of a compelling state interest.

The conflict between the circuits is understandable considering the differing views on the meaning of *Lawrence*. Moreover, the conflict is unlikely to be resolved unless and until the Supreme Court clarifies whether a fundamental right to sexual privacy exists, such that the lower courts know whether to apply strict scrutiny or the more deferential rational basis test to laws or practices that infringe on an individual's sexual privacy.

### The Legal Landscape Before Lawrence

In 1965, the Supreme Court struck down a law barring the use of contraceptives by married couples in *Griswold v. Connecticut*,<sup>8</sup> recognizing for the first time that married couples had a constitutional right to privacy.<sup>9</sup> Several years later, *Eisenstadt v. Baird*<sup>10</sup> expanded the scope of sexual privacy rights to unmarried individuals by striking down a Massachusetts law prohibiting the distribution of contraceptives to unmarried people.<sup>11</sup>

Notwithstanding the pro-privacy rulings in *Griswold* and *Eisenstadt*, in 1986 the Supreme Court rejected a constitutional challenge to sodomy laws in *Bowers v. Hardwick*.<sup>12</sup> The majority opinion emphasized that *Eisenstadt* had only recognized a right to engage in procreative sexual activity and that there was a longstanding history of criminalizing acts of sodomy sufficient to argue against a fundamental right.<sup>13</sup> In dissent, Justice Blackmun focused on the right to privacy and the perceived failure of the majority to "consider the broad principles that have informed our treatment of privacy."<sup>14</sup> Justice Blackmun wrote: "That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends, instead, on

whether the State can advance some justification for its law beyond its conformity to religious doctrine."<sup>15</sup>

### Lawrence v. Texas

The issues in *Bowers* returned to the Supreme Court for reconsideration in *Lawrence v. Texas*.<sup>16</sup> The plaintiffs in *Lawrence*, two gay men, were convicted under the Texas "Homosexual Conduct" law, a same-sex anti-sodomy law, which the plaintiffs argued was unconstitutional under the Fourteenth Amendment.<sup>17</sup>

The Supreme Court ruled 6-3 in favor of the plaintiffs, striking down the Texas statute, overruling *Bowers*, and implicitly invalidating sodomy statutes throughout the United States.<sup>18</sup> The five-member majority found the statute unconstitutional under the due process clause of the Constitution, while Justice Sandra Day O'Connor found the statute unconstitutional under the equal protection clause.<sup>19</sup>

Writing for the majority, Justice Kennedy stated: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."<sup>20</sup> The majority decision also held that the intimate, adult consensual conduct at issue was part of the liberty protected by the substantive component of the Fourteenth Amendment's due process protections.<sup>21</sup> Justice Kennedy wrote that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" and that homosexuals "may seek autonomy for these purposes."<sup>22</sup> Finally, the Court found that moral disapproval did not provide a legitimate justification for Texas' law criminalizing homosexual sodomy.<sup>23</sup>

Despite these broad pronouncements, the Court majority did not expressly state that there was a fundamental right to sexual privacy under the Constitution, as noted by Justice Antonin Scalia in his dissenting opinion, but rather appeared to have engaged in an "unheard-of form of rational-basis review" that went beyond simply determining whether there was a rational basis asserted by the government for the law at issue.<sup>24</sup>

<sup>7</sup> 2018 U.S. App. LEXIS 3212 (9th Cir. Feb. 9, 2018).

<sup>8</sup> 381 U.S. 479 (1965).

<sup>9</sup> 381 U.S. at 485-486.

<sup>10</sup> 405 U.S. 438 (1972).

<sup>11</sup> 405 U.S. at 454-455.

<sup>12</sup> 478 U.S. 186 (1986).

<sup>13</sup> 478 U.S. at 190, 192-194.

<sup>14</sup> 478 U.S. at 207.

<sup>15</sup> 478 U.S. at 211-212.

<sup>16</sup> 539 U.S. 558 (2003).

<sup>17</sup> 539 U.S. at 562-564.

<sup>18</sup> 539 U.S. at 578-579.

<sup>19</sup> 539 U.S. at 578-579.

<sup>20</sup> 539 U.S. at 578.

<sup>21</sup> 539 U.S. at 562, 567, 573-574.

<sup>22</sup> 539 U.S. at 573-574 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

<sup>23</sup> 539 U.S. at 582-583.

<sup>24</sup> 539 U.S. at 586.

### Seegmiller v. LaVerkin City

Five years after *Lawrence*, the Tenth Circuit Court of Appeals considered whether a municipality's decision to privately reprimand a police officer for her off-duty sexual conduct violated the Constitution in *Seegmiller v. LaVerkin City*.<sup>25</sup> Finding the absence of a fundamental right to sexual privacy and determining the reprimand was reasonably related to police department policies, the court found no constitutional violation.<sup>26</sup>

#### Background Facts

Sharon Johnson worked as an officer with the LaVerkin City police department. Johnson had an affair with an officer from another police department during an out of town training seminar. Johnson's husband learned of the affair and falsely reported to Johnson's supervisors that she had been raped while attending the conference. Johnson's immediate supervisor, Police Chief Kim Seegmiller, investigated and learned that the affair had been consensual.<sup>27</sup>

When no disciplinary action was taken against Johnson, her husband made a second false report, specifically that Johnson and Seegmiller had also engaged in a sexual relationship. The City placed Johnson and Seegmiller on administrative leave while it investigated the allegations.<sup>28</sup>

Four days after they were placed on administrative leave, Johnson's husband recanted his allegations and notified the City that they were false. Johnson and Seegmiller were reinstated. However, during its investigation, the Council learned of Johnson's affair at the training conference. Johnson received an oral written reprimand over the incident.<sup>29</sup>

Johnson's reprimand was based on a provision in the law enforcement code of ethics requiring officers to "keep [their] private life unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency."<sup>30</sup> The City found that Johnson had allowed "her personal life [to] interfere with her duties as an officer by having sexual relations with an officer . . . while attending a training session out of town which was paid for in part by LaVerkin City."<sup>31</sup> Johnson was admonished to "avoid the appearance of impropriety" in the future and to "take care to conduct [herself] in the future in a manner that will be consistent with the city policies and the police department policies."<sup>32</sup>

<sup>25</sup> 528 F.3d 762 (10th Cir. 2008).

<sup>26</sup> 528 F.3d at 764.

<sup>27</sup> 528 F.3d at 764-765.

<sup>28</sup> 528 F.3d at 765.

<sup>29</sup> 528 F.3d at 765-766.

<sup>30</sup> 528 F.3d at 766.

<sup>31</sup> 528 F.3d at 766.

<sup>32</sup> 528 F.3d at 766.

### Johnson's Due Process Challenge

Johnson sued the City on several civil rights and tort claims. After the City prevailed at summary judgment, Johnson appealed her substantive due process claim to the Tenth Circuit, alleging she had a fundamental right to sexual privacy which the City had violated by reprimanding her for private, off-duty conduct.<sup>33</sup>

The Tenth Circuit affirmed the district court's grant of summary judgment. First, the court considered whether there was a fundamental right at stake and determined there was not. The court stated that Johnson was required to both "(1) carefully describe the right and its scope; and (2) show how the right as described fits within the Constitution's notions of ordered liberty."<sup>34</sup> The court rejected Johnson's argument that she had carefully described rights that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."<sup>35</sup> While recognizing fundamental liberty interests "relating to marriage, family life, child rearing, and reproductive choices," the court noted that "[not] all important, intimate, and personal decisions are . . . protected [by substantive due process]."<sup>36</sup> Johnson could not show that her specific conduct was a protected right nor could she show a fundamental right to sexual privacy in general.

To the contrary, the court found that *Lawrence* "[counseled] against finding a broad-based fundamental right to engage in private sexual conduct," because the *Lawrence* majority neither described the specific right at issue as a fundamental right nor announced a broader fundamental right to engage in private sexual conduct.<sup>37</sup> Rather, the *Lawrence* majority applied a rational basis review to find the anti-sodomy laws lacking in state interest.<sup>38</sup> To bolster its position, the court cited to decisions in the First, Fifth, Seventh and Eleventh Circuits that similarly concluded *Lawrence* had not categorized the right to sexual privacy as a fundamental right.<sup>39</sup>

<sup>33</sup> 528 F.3d at 769.

<sup>34</sup> 528 F.3d at 769 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>35</sup> 528 F.3d at 769.

<sup>36</sup> 528 F.3d at 770-771.

<sup>37</sup> 528 F.3d at 771.

<sup>38</sup> 528 F.3d at 771.

<sup>39</sup> 528 F.3d at 771 (citing *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir.2008); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 n. 32 (5th Cir.2008); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir.2005); *Lofton v. Sec. of Dept. of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir.2004)).

Finding no fundamental right, the court considered whether the reprimand was unconstitutional under a rational basis review. It noted that rational basis review is highly deferential toward government actions and the burden is on a plaintiff to show the governmental act complained of does not further a legitimate state purpose by rational means.<sup>40</sup> Giving deference to the government, the court concluded that Johnson failed to meet her burden of establishing a constitutional deprivation.<sup>41</sup> The court explained that police departments may, in accordance with their duty to keep peace, place demands on members of the police force that are greater than the public at large and that these demands may include prohibitions on off-duty dating and cohabitation.<sup>42</sup> It was therefore reasonable for the police department to privately admonish Johnson's conduct.

Accordingly, the court affirmed the district court decision to grant summary judgment against Johnson on her substantive due process claim.<sup>43</sup>

### **Coker v. Whittington**

The Fifth Circuit was next to address off-duty sexual conduct by a police officer in *Coker v. Whittington*.<sup>44</sup> Applying the rational basis test, the Fifth Circuit held that the defendant sheriff's department did not violate the constitutional rights of two sheriff's deputies when it fired them for violating its code of conduct by moving in with each other's wife and family before getting divorced from their current wives.<sup>45</sup>

The Fifth Circuit distinguished the conduct at issue in *Coker* from that in *Lawrence*. The court explained that although *Lawrence* "expanded substantive constitutional rights related to personal sexual choices, [it did] not mandate a change in policies relevant to public employment, where . . . employees necessarily shed some of their constitutional rights as a legitimate exchange for the privilege of their positions."<sup>46</sup> Indeed, like the Tenth Circuit, the Fifth Circuit appeared to rely on the fact that the conduct in question related to law enforcement officers, who it found could be held to a higher standard in light of their obligations to the public.<sup>47</sup>

### **Perez v. City of Roseville**

The Ninth Circuit entered the fray in February with its decision in *Perez v. City of Roseville*.<sup>48</sup> In *Perez*, the court held that a probation officer had a fundamental right to sexual privacy under the Constitution that was violated when she was fired because of an extramarital affair with a co-worker.

#### *Background Facts*

Janelle Perez was a married probation officer who had an affair with a married colleague, both of whom had young children. The colleague's wife reported the conduct to the department which conducted an investigation. While the investigation concluded there was no evidence of "on-duty sexual contact between Perez and [the other officer]," the department ultimately determined that Perez should be terminated as a result of the investigation. This decision was due, at least in part, to moral disapproval over Perez's extramarital sexual conduct.<sup>49</sup>

#### *Perez's Due Process Challenge*

Perez filed an action alleging constitutional violations of her right to privacy. After the district court granted summary judgment for the defendants, Perez appealed.

The Ninth Circuit reversed, holding that prior circuit precedent as well as *Lawrence* compelled a finding in favor of Perez. Specifically, the court noted that it had already found a constitutional right not to be fired for off-duty sexual conduct in *Thorne v. City of El Segundo*,<sup>50</sup> which held that such an adverse action had to be supported by proof of a "negative impact on job performance or violation of a constitutionally permissible, narrowly drawn regulation."<sup>51</sup> *Thorne* compelled the Ninth Circuit to analyze the government's actions under "heightened scrutiny" because the actions "intrude on the core of a person's constitutionally protected privacy and associational interests."<sup>52</sup> Undertaking such an analysis, the court concluded that the City failed to "introduce sufficient evidence that Perez's affair had any meaningful impact upon her job performance" such that the City's conduct was constitutionally permissible.<sup>53</sup>

<sup>40</sup> 528 F.3d at 772.

<sup>41</sup> 528 F.3d at 772.

<sup>42</sup> 528 F.3d at 772.

<sup>43</sup> 528 F.3d at 772.

<sup>44</sup> 858 F.3d 304 (5th Cir. 2017).

<sup>45</sup> 858 F.3d at 306-307.

<sup>46</sup> 858 F.3d at 306.

<sup>47</sup> 858 F.3d at 306-307.

<sup>48</sup> 2018 U.S. App. LEXIS 3212 (9th Cir. Feb. 9, 2018).

<sup>49</sup> 2018 U.S. App. LEXIS 3212, at \*8.

<sup>50</sup> 2018 U.S. App. LEXIS 3212, at \*13-14 (citing *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983)).

<sup>51</sup> 2018 U.S. App. LEXIS 3212, at \*25 (citing *Thorne* at 471).

<sup>52</sup> 2018 U.S. App. LEXIS 3212, at \*25 (citing *Thorne* at 470).

<sup>53</sup> 2018 U.S. App. LEXIS 3212, at \*23-34.

Even absent *Thorne*, the court noted it would have been compelled to find for Perez in light of *Lawrence*, which the *Perez* court concluded held that the freedom to engage in intimate sexual conduct protected under the Constitution.<sup>54</sup> The court stated that *Lawrence* precludes government bodies from stigmatizing “private sexual conduct simply because the majority has ‘traditionally viewed a particular practice,’ such as extramarital sex, ‘as immoral.’”<sup>55</sup> Therefore, terminating a police officer for private, off-duty sexual conduct would be unconstitutional absent evidence the conduct “adversely affected the officer’s on-the-job performance or violated a constitutionally permissible, narrowly tailored department policy.”<sup>56</sup>

In reaching its decision, the court recognized that its ruling differed from the Fifth and Tenth Circuits, the latter circuits having applied the deferential rational basis test, but noted that the rational basis test should not be used here in light of *Thorne*.<sup>57</sup> The court also stated that the Fifth and Tenth Circuit decisions “fail to appreciate the impact of *Lawrence v. Texas*, 539 U.S. 558 (2003), on the jurisprudence of the constitutional right to sexual autonomy.”<sup>58</sup> The court explained:

Lawrence did much more than merely conclude that Texas’ anti-sodomy law failed the rational basis test. Instead, it recognized that intimate sexual conduct represents an aspect of the substantive liberty protected by the Due Process Clause. As such, the constitutional infirmity in Texas’ law stemmed from neither its mere irrationality nor its burdening of a fundamental right to engage in homosexual conduct (or even private consensual sexual conduct). Rather, Texas’ law ran afoul of the Constitution’s protection of substantive liberty by imposing a special stigma of moral disapproval on intimate same-sex relationships. As the Court explained, the liberty protected by the Due Process Clause must extend equally to all

intimate sexual conduct between consenting adults, regardless of whether they are of the same sex or not, married or unmarried.

Lawrence makes clear that the State may not stigmatize private sexual conduct simply because the majority has ‘traditionally viewed a particular practice,’ such as extramarital sex, ‘as immoral.’ Thus, without a showing of adverse job impact or violation of a narrow, constitutionally valid departmental rule, the Constitution forbids the Department from expressing its moral disapproval of Perez’s extramarital affair by terminating her employment on that basis.”<sup>59</sup>

### Conclusion

The Ninth Circuit’s ruling in *Perez* has created an active conflict with the Fifth and Tenth Circuits over the meaning of *Lawrence* and whether *Lawrence* recognized a fundamental right of sexual privacy such that any government department rule affecting off duty sexual conduct will be subject to strict scrutiny. Given that *Lawrence* does not expressly set forth a fundamental right to sexual privacy (but did not reject that such a right exists), it is understandable why courts are split, and one would expect such a divide to continue as long as the meaning of *Lawrence* is left to interpretation. It may require another trip to the Supreme Court to answer this question definitively. Until then, public employers may experience some luck of the draw, depending on where they find themselves litigating, and should operate accordingly.

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<sup>54</sup> 2018 U.S. App. LEXIS 3212, at \*26.

<sup>55</sup> 2018 U.S. App. LEXIS 3212, at \*27.

<sup>56</sup> 2018 U.S. App. LEXIS 3212, at \*30.

<sup>57</sup> 2018 U.S. App. LEXIS 3212, at \*25.

<sup>58</sup> 2018 U.S. App. LEXIS 3212, at \*26.

<sup>59</sup> 2018 U.S. App. LEXIS 3212, at \*26-27 (citations omitted).