

ACLU of Virginia

530 East Main Street, Suite 310 Richmond, Virginia 23219 (804) 644-8022

March 5, 2010

Dear [University President]:

We were dismayed to learn that Attorney General Ken Cuccinelli has written to state colleges and universities asking them to rescind their policies against discrimination on the basis of sexual orientation. We express no opinion of Mr. Cuccinelli's analysis of state law, though we have serious doubts about it. We wish to emphasize, however, that even if you follow his advice and rescind your antidiscrimination policies, you are still bound by the United States Constitution not to discriminate on the basis of sexual orientation.

In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court held that discriminatory laws based on sheer animus toward lesbian and gay persons violate the Equal Protection Clause of the Fourteenth Amendment. Later, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court ruled that consensual, adult sexual relationships are protected by the Fourteenth Amendment, notwithstanding societal views regarding the morality of such relationships.

Consistent with these principles, courts have repeatedly held that public employers may not discriminate on the basis of sexual orientation. *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (harassment of police officer because of his sexual orientation violated equal protection clause); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Ut. 1998) (violated equal protection clause to terminate high school teacher's position as volleyball coach because of her sexual orientation); *Miguel v. Davis*, 51 P.3d 89 (Wash. Ct. App. 2002) (state employer's differential treatment of employees because of sexual orientation it violates right to equal protection); *Glover v. Williamsburg Local School Dist. Bd. Of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (firing teacher because of his sexual orientation violates equal protection clause).

Similarly, courts have held that public schools may not discriminate against students based on sexual orientation. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *O.H. v. Oakland Unified School Dist.*, 2000 WL 33376299 (N.D. Cal. 2000)

Accordingly, regardless of whether you have a written policy prohibiting discrimination against employees and students based on sexual orientation, we urge you not to engage in such discrimination. As always, the ACLU of Virginia stands ready to represent any person who suffers unlawful discrimination based on sexual orientation.

Should you have any questions, please do not hesitate to call me at (804) 644-8022. Thank you for your attention to this matter.

Sincerely,

Rebecca K. Glenberg
Legal Director

cc: Ken Cuccinelli, Attorney General