

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, Postal Service and the District of Columbia

“Ensuring a Merit-Based Employment System: An Examination of the Merit Systems
Protection Board and the Office of Special Counsel.”

July 12, 2007

Testimony of Lara Schwartz, Human Rights Campaign

My name is Lara Schwartz, and I am legal director at the Human Rights Campaign, the nation’s largest advocacy organization working for the civil rights of gay, lesbian, bisexual, and transgender Americans. On behalf of the Human Rights Campaign and our grassroots force of more than 700,000 members and supporters, I thank you for the opportunity to testify before this Subcommittee.

Merit-based employment is a core American value, yet discrimination based upon sexual orientation continues to be pervasive in this country, where gay and lesbian workers can be fired in 31 states because of who they are, and not their job performance. The federal government—our nation’s largest employer— ought to set an example of fairness, and take a stand against discrimination. In fact, federal workers are protected from sexual orientation discrimination by a 1978 law, 5 U.S.C. § 2302(b)(10). For decades, this law has protected gay and lesbian civilian employees from workplace discrimination. Until recently, the Office of Special Counsel, or OSC, has consistently enforced this law, even providing website and written materials to inform federal employees of their rights.

However, the current Special Counsel, Scott Bloch, has not only ceased to enforce the statute, he has actually contradicted its previously undisputed legal interpretation and

claimed, without basis, that the law does not apply to sexual orientation at all. As a result, federal civilian employees are being denied the employment protections to which they are legally entitled. As set forth more fully in my testimony below, Mr. Bloch's actions with regard to sexual orientation discrimination in federal employment are legally groundless, and contrary to well-settled law. Mr. Bloch's refusal to enforce the law has had real consequences: claims of discrimination are being ignored in spite of compelling evidence.

The statutory provision at issue, 5 U.S.C. § 2302(b)(10), makes it unlawful to discriminate against a federal employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." Enacted more than 25 years ago as part of the Civil Service Reform Act of 1978, this provision has since been uniformly interpreted by the Executive Branch (including both Republican and Democratic Administrations) to prohibit discrimination against federal workers on the basis of their sexual orientation, whether that discrimination is based solely on the employee's sexual 'orientation' or 'status,' or on sexual 'conduct'.

The government explicitly recognized that the statute covers sexual orientation in 1980, when then-Director of the U.S. Office of Personnel Management Alan Campbell wrote a memorandum to the heads of all executive agencies advising that, under 5 U.S.C. § 2302(b)(10), "applicants and employees are to be protected against inquiries into, or actions based upon, non job-related conduct, such as religious, community, or social affiliations, or sexual orientation." (Emphasis added). This position was reaffirmed in 1994 by then-OPM Director James King, in a letter to Congressman Barney Frank. It has since been reaffirmed by all of Mr. King's successors as OPM Director: Janice LaChance

(President Clinton's appointee), Kay Coles James (President Bush's first OPM director) and Linda Springer (the current OPM director). Indeed, OPM issued government-wide guidance in 1999 in a publication that remains available today on OPM's web-site, "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights." In that guidance, OPM stated that it "has interpreted this statute [2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality or heterosexuality." *See* <http://www.opm.gov/er/address2/Guide04.asp> .

The Justice Department issued similar guidance, in a written opinion issued more than 20 years ago by Theodore Olson, who was then an Assistant Attorney General in the Reagan Administration, heading DOJ's Office of Legal Counsel. In that opinion, Mr. Olson reviewed the statutory language of 2302(b)(10), as well as an extensive body of judicial decisions issued by the Courts of Appeals in the 1960's and 1970's that had led OPM's predecessor, the U.S. Civil Service Commission, to conclude that applicants and employees may not be found unsuitable for federal government employment solely because they were homosexual. On the basis of those legal precedents, he concluded that "it is improper to deny employment or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance."¹

Prior to Mr. Bloch's tenure as Special Counsel, OSC also interpreted this provision to prohibit discrimination based on sexual orientation. In one well-publicized case, settled by OSC in June 2003, OSC's investigation revealed that a manager had declined to select the best-qualified applicant for a position because, the manager was overheard to have said, he was a "flaming queer." In that case, OSC obtained monetary

¹ *See* 7 Op.O.L.C. 58 (1983).

damages for the job applicant and the manager was removed from her supervisory position for a year and suspended without pay for 45 days.

Within weeks of his taking office in January 2004, Mr. Bloch abruptly ordered the removal of all references to OSC's jurisdiction to enforce sexual orientation discrimination protections from OSC's web-site and printed materials, including information about the recently-settled case. He did so without conducting a legal analysis, consulting OPM or any other executive branch agency, or providing an explanation. He claimed that his office would conduct a "legal review" of OSC's jurisdiction to enforce sexual orientation discrimination claims—even though the issue had been clearly settled for over twenty years. When several members of Congress objected, the White House issued a statement that federal policy prohibits discrimination based upon sexual orientation. As set forth more fully below Mr. Bloch remained determined to roll back civil rights for federal employees.

Mr. Bloch has attempted to justify his actions, finally providing the reasoning behind his decision at a hearing conducted on May 24 2005.² He stated that the civil rights laws, including Title VII, do not make sexual orientation a "protected class" like race, gender, or age. This reasoning was inapposite because Title VII is not the statute applicable to sexual orientation discrimination in federal employment. Mr. Bloch also stated that § 2302(b)(10) prohibits discrimination based on "conduct" and does not mention discrimination based on sexual "orientation." Determining without reference to a single statute, regulation, or case that there was a distinction between "conduct" and "sexual orientation" in non-discrimination law, Mr. Bloch stated that OSC would exceed

² Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia-- "Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel" May 24, 2005.

the bounds of its statutory jurisdiction if it were to investigate and prosecute cases alleging discrimination based on sexual orientation.

The distinction that Mr. Bloch appears to be drawing between discrimination based on sexual “conduct” and discrimination based on sexual “orientation” is unsupported by any precedent or logic. When a federal agency denies an applicant a job or otherwise discriminates against an employee because he or she is gay, the discrimination is inevitably rooted in disapproval of their conduct. It is inconceivable that such discrimination would be rooted in some abstract disapproval of a person’s orientation. There is no meaningful real world distinction to be drawn between discrimination based on sexual “conduct,” and discrimination based on sexual “orientation.” In this context, “orientation” is inextricably intertwined with “conduct.” See *Steffan v. Perry*, 41 F.3d 677, 689 (D.C. Cir. 1994)(*en banc*) (Silberman, J.)(upholding the rationality of the military’s ‘don’t ask, don’t tell’ policy on the grounds that “homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct,” and observing that “[a]lthough there may well be individuals who could, in some sense, be described as homosexuals based solely on inchoate orientation, certainly in the great majority of cases those terms are coterminous.”).

Second, Mr. Bloch’s analysis relies upon a Merit Systems Protection Board opinion that does not support his conclusion, and is in fact completely irrelevant to the question.³ That decision interprets 5 U.S.C. § 2302(b)(1), not 5 U.S.C. § 2302(b)(10).⁴ Indeed, after conducting extensive legal research, we are unaware of any decision by any

³ *Morales v. Department of Justice*, 77 M.S.P.R. 482 (1998)

⁴ See *id.*

court, or by the MSPB, holding directly or indirectly that OSC has no jurisdiction under 5 U.S.C. § 2302(b)(10) to enforce claims of sexual orientation discrimination.

Mr. Bloch has repeatedly attempted to confuse the issue by claiming that prior OSC enforcement actions were based not on 5 U.S.C. § 2302(b)(10), but on an Executive Order issued by President Clinton in 2000, and re-affirmed by President Bush in public statements made in 2004.⁵ Mr. Bloch's claim that OSC previously based its jurisdiction on the Executive Order is blatantly false, and despite repeated requests that he refrain from making such misstatements and correct the erroneous press release that remains on OSC's web-site, he has refused to do so. Indeed, the material he ordered removed from the web-site earlier in 2004, including the press release attached hereto as Ex. 4, explicitly cited 5 U.S.C. § 2302(b)(10) as the basis for OSC's jurisdiction.

Mr. Bloch's refusal to enforce the law has had real-world consequences. For instance, he refused to investigate the complaint of Michael Levine, a 32-year veteran of the Forest Service, who alleged that he was subjected to a 14-day suspension in retaliation for engaging in whistle-blowing, and based on sexual orientation discrimination. Mr. Levine provided a witness's statement that the person who suspended him used an anti-gay slur—substantial evidence of workplace bias. However, in a letter dismissing his claim, the OSC wrote that because there was no evidence of discrimination for *conduct*, there was no basis for an investigation.

⁵ See OSC Press Release, Feb. 27, 2004 ("It appears that, beginning five years ago, this Office based jurisdiction in this area on the amendment to Executive Order 11487 made by Executive Order 13087. But Executive Order 11487, as further amended by Executive Order 13152, expressly states that it 'does not confer any right or benefit enforceable in law or equity against the United States or its representatives.' Further, Executive Order 11487, as amended, expressly places responsibility for its enforcement and implementation in the EEOC, not in OSC. This raises questions as to my power to enforce this Executive Order and reinforces my decision to conduct a full legal review of this policy.")

As an organization advocating for workplace protections for all Americans, we are gravely concerned that Mr. Bloch has apparently single-handedly stripped thousands of federal workers of protections that Congress conferred upon them decades ago, and that the President claims to support. During Mr. Bloch's tenure, the OSC has ceased to enforce a much-needed law. Although it is clear that Mr. Bloch's actions lack any legal justification, this situation provides additional evidence that a federal law is needed to ensure that *every* American has redress for workplace discrimination. When one executive officer can play fast and loose with employee rights, the system is not working.

Fortunately, many employers have come to recognize that basing employment decisions on merit rather than sexual orientation is a wise business policy, enabling them to attract the best talent and to demonstrate a commitment to fairness. That is why nearly ninety percent of Fortune 500 corporations have non-discrimination policies covering sexual orientation. The federal government should not lag behind the top employers in its policies and practices. With the nation's important work to do, and taxpayer dollars being spent on the workforce, it is imperative that the government be a model of employment practices. By attempting to strip workplace protections from federal employees, Mr. Bloch has not only flouted the law and harmed the federal workforce, but denied the American people a work force that is equal to any corporate staff.

I thank this Subcommittee for the opportunity to present our concerns with Mr. Bloch's performance. It is imperative that federal non-discrimination protections be restored. For three years, Mr. Bloch has refused to do so in spite of rebukes from the President and Congress. On behalf of the Human Rights Campaign, I strongly encourage

this Subcommittee either to compel Mr. Bloch and the OSC to follow the law, or to ensure that Mr. Bloch is replaced with a Special Counsel who will do so.

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Disclosure of federal grants: No federal grants received in either of the two previous fiscal years.

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Experience

Human Rights Campaign,

Legal Director, 3/2006-
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Washington, DC. Lead legislative legal staff in nation's largest lesbian, gay, bisexual and transgender (LGBT) advocacy organization. Lead legal team in opposing federal constitutional amendment and jurisdiction-stripping legislation. Direct interdepartmental team advocating for a fair judiciary. Develop and promote federal tax and benefits policy and legislation. Promote federal legislation protecting LGBT community from violent bias crimes. Brief congressional staff and members on legal issues affecting the LGBT community. Draft op-ed pieces, speeches, policy papers, press releases, reports, and briefings. Work with civil rights coalitions on legislation, advocacy, and education. Respond to press inquiries, appear publicly on behalf of organization, and participate in debates and conferences.

American University, Washington College of Law,

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Co-taught seminar "Sexual Orientation and the Law."

Gilbert Heintz & Randolph, LLP, associate 1/2001-6/2002

Washington, DC. Practiced litigation and complex dispute resolution regarding legislative redistricting, voting rights, state constitutional law, race and disability discrimination, and multi-party insurance coverage actions. Advised state government officials regarding legislative redistricting issues. Prepared presentations to local government officials regarding compliance with the Voting Rights Act.

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Washington, DC. Defended corporations in SEC investigations. Briefed and settled Fourth Circuit case under Americans with Disabilities Act.

Honorable Ronald Lee Gilman, U.S. Court of Appeals for the Sixth Circuit, Judicial Clerk. 9/1998-9/1999