

In Support of Federal Executive Order 13087

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Executive Summary

The principle that an effective organization makes its personnel decisions on the basis of the capabilities of its employees and job applicants guides the Federal Government in its service to the American people. This principle recognizes that, if factors that have nothing to do with a person's ability to perform on the job are permitted to trump an evaluation of merit, then the full potential of the civil service cannot be reached. This fundamental approach is reflected in the Civil Service Reform Act of 1978, which mandates that federal employment "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301.

On May 28, 1998, President Clinton sought to ensure that the Federal Government observe this basic principle when he signed Executive Order 13,087 amending President Nixon's Executive Order 11,478 (Equal Employment Opportunity in the Federal Government). At the heart of the amended Executive Order is the rule mandated by the United States Congress that *merit* is the guidepost for the Federal Government's decisions as the employer of the largest workforce in the United States.

This directive from the Chief Executive ensures consistency throughout the Federal Government prohibiting personnel practices that are based upon non-job-related characteristics. By setting forth in an Executive Order this clear management standard, the President mandated implementation of Office of Personnel Management policy that sexual orientation is not a job-related factor.

Specifying that "sexual orientation" shall not be a basis for employment decisions serves "to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Romer v. Evans*, 517 U.S. 620, 628 (1995) (Kennedy, J.). Removing the term "sexual orientation" from the Executive Order would deny guidance to those responsible for implementing the Civil Service Reform Act merit principles and leave federal employees and applicants who find themselves passed over for a promotion or denied a job because of their sexual orientation subject to potentially irrational and uneven treatment.

Moreover, by requiring uniform observance of the merit principles in the Federal Government, Executive Order 13,087 helps ensure that workplace disputes based upon allegations of sexual orientation discrimination can be efficiently addressed where they arise. Without Executive Order 13,087, there would not be a clear internal means to resolve such disputes. That does not mean that such disputes would disappear from the workplace; instead, the orderly internal mechanisms for addressing them would be – or be perceived as – unavailable and disputes likely would spill over into other forums. The end result would be costly and complex litigation.

Thus, Executive Order 13,087 helps to articulate the Civil Service Reform Act merit principles standard under which the Federal Government treats people as individuals, and judges employees and job applicants on their job performance, and not on non-

job-related factors. Executive Order 13,087 provides a practical tool for managing the reality that gay people are at risk for discrimination in federal employment. It ensures that workplace disputes related to sexual orientation will be efficiently addressed within the agency where they arise, rather than in court, where the battles are more costly and more unpredictable.

I. EXECUTIVE ORDER 13,087 SETS A MANAGEMENT STANDARD FOR IMPLEMENTING FEDERAL LAW PROHIBITING PERSONNEL DECISIONS THAT ARE MADE ON THE BASIS OF NON-MERIT RELATED FACTORS

As Chief Executive Of The Federal Workforce, The President Of The United States Is Charged By Congress To Issue Orders Implementing Personnel Management Standards That Advance Merit Principles

Upholding the merit system is at the core of managing the Federal government. As Congress mandated in the Civil Service Reform Act of 1978, “[Federal employment] selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.” 5 U.S.C. § 2301(b).

Congress placed the burden of implementing the merit system on the Chief Executive of the Federal workforce by conferring upon the President of the United States the explicit authority to “issue rules, regulations, or directives ... consistent with the provisions of this title and which the President ... determines [are] necessary to ensure that personnel management is based on and embodies the merit system principles.” 5 U.S.C. § 2301(c).

On this basis, President Clinton issued Executive Order 13,087, amending President Nixon’s Executive Order 11,478 (Equal Employment Opportunity in the Federal Government) by adding “sexual orientation” to the non-job-related grounds upon which an employment decision cannot be based. In doing so, President Clinton followed the lead of the Chief Executives who preceded him in issuing an Executive Order governing the management of the Federal workforce. President Nixon, in 1969, issued Executive Order 11,478 (Equal Employment Opportunity in the Federal Government). President Reagan issued Executive Order 12,564 (Drug Free Federal Workplace), in 1986, to provide for drug testing of civilian federal employees. More recently, President Bush issued Executive Order 12,674 (Principles Of Ethical Conduct For Government Officers And Employees) in 1990, which revises the ethical conduct guidelines for civilian federal employees.

The Merit System Principles Enacted By Congress Mandate That Federal Personnel Actions Not Be Based On Irrelevant, Off-Duty, Personal Matters

The Civil Service Reform Act sets forth merit principles to guide federal employment decision making. These principles specifically bar discrimination against certain categories of individuals, see 5 U.S.C. § 2301(b)(2) (race, color, religion, national origin, sex, marital status, age or handicapping condition), and also personnel practices based on non-job-related factors. 5 U.S.C. § 2302(b)(10) (it is a prohibited personnel practice to “discriminate for or against any employee or applicant on the basis of conduct which does not adversely effect the performance of the employee or applicant or the performance of others.”).

It is the prong of the Civil Services Reform Act barring personnel practices based on

non-job-related conduct that Executive Order 13,087 implements. The Executive Order does not create a "protected class," and specifically includes the language "to the extent permitted by law" in describing the equal opportunity it affords to gays. Thus, the Executive Order does not create any affirmative action right for any individual. Quite simply, the Executive Order ensures that sexual orientation is viewed as a non-merit factor; it provides that personnel actions that are based on the sexual orientation of a civilian federal employee or job applicant are unrelated to the individual's job performance.

Congress intended for the federal agencies to observe the merit principles for the good of the American public. Thus, Congress passed the Civil Services Reform Act to "furnish guidance to federal agencies in carrying out their responsibilities in administering public business," and "to enable federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system." See Civil Service Reform Act of 1978, Findings and Statement of Purposes, Sec. 3, Pub.L. 95-454, 92 Stat. 1112. A leading purpose of the Civil Service Reform Act was to replace the "'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *United States v. Fausto*, 484 U.S. 439, 444 (1988) (Scalia, J.). Consistent with the management tradition of the Chief Executive of the United States, the Executive Order imposes a uniform managerial standard that indicates that sexual orientation is irrelevant to job performance and federal personnel practices.

The Executive Order Is Necessary To Carry Out The Federal Government's Merit Principles

The Office of Personnel Management ("OPM") – which is charged with overseeing national values embodied in law, including the merit system principles – has consistently interpreted the Civil Service Reform Act to require that sexual orientation be viewed as an irrelevant factor with respect to employment matters. Thus, since 1980 it has been OPM's policy that the Civil Service Reform Act prohibited federal personnel practices that considered sexual orientation as a basis for employment determinations. See Memo from Alan K. Campbell, Director, Office of Personnel Management, to Heads of Departments and Independent Establishments (May 12, 1980) (pursuant to 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."). This policy statement remained in effect throughout the terms of President Reagan, President Bush and President Clinton. See "Office of Personnel Management Reiterates Prohibition Against Sexual Orientation, Bias," 32 Government Employee Relations Report, No. 1551, at p. 173 (Bureau of National Affairs, Inc. February 7, 1994).

Prior to the issuance of Executive Order 13,087, however, the various government agencies lacked a uniform approach with respect to their obligation not to permit personnel practices that were based on sexual orientation. Implementing sexual orientation nondiscrimination policies on an agency-by-agency basis thus resulted in an uneven patchwork of compliance. Some federal agencies developed comprehensive policies with clear statements governing sexual orientation and internal avenues for redress of grievances. Many other agencies failed to implement clear policies, and anecdotal evidence suggests that some federal employees were told that there was no federal policy to disregard sexual orientation in making employment determinations. With differential treatment comes the potential for

employee morale problems; with no clear internal procedures, employees' only remedy may be to try their luck in court. The Executive Order solves this problem by setting out an unambiguous standard that can be observed uniformly across all federal agencies.

II. THE EXECUTIVE ORDER PROMOTES UNIFORMITY, EQUALITY, FAIRNESS, AND EFFICIENT RESOLUTION OF DISCRIMINATION COMPLAINTS

Specifying "Sexual Orientation" In The Executive Order Ensures Efficient Handling Of Workplace Disputes

The specification of sexual orientation in the Executive Order is necessary to ensure the effectiveness of the promise that merit will be the governing basis for federal employment determinations. As United States Supreme Court Justice Kennedy has explained: "Enumeration [of the groups or persons within the ambit of protection] is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Romer v. Evans*, 517 U.S. at 628. Far from creating a special right, such enumeration is simply a way of ensuring that discrimination is not targeted at groups who are most likely to be subject to it.

The Executive Order Ensures That Workplace Disputes Concerning Sexual Orientation Will Be Addressed Where They Arise Instead Of In The Courts

By ensuring that every agency must meet its obligation to prohibit improper personnel practices, the Executive Order will ensure a clear path to the efficient resolution of workplace disputes that are alleged to be related to an individual's sexual orientation. Executive Order 13,087 does not create a private action permitting individuals to go to court for relief. Nor does the Executive Order create the right for federal employees to seek relief before the Equal Employment Opportunity Commission ("EEOC"). See Statement by the President from the Office of the Press Secretary (May 28, 1998) (news release). Rather, employees who believe themselves to have been subject to a personnel decision that was based on a factor that is unrelated to their job performance, may utilize internal agency procedures or file a complaint with the Office of Special Counsel ("OSC").

The Office of the Special Counsel is an independent agency which, in furtherance of the merit principles of the Civil Service Reform Act, is principally charged with the investigation of complaints of alleged prohibited personnel practices. The OSC initially analyzes all allegations of prohibited personnel practices and determines whether an investigation is merited and in many cases invites the complainant to participate in mediation. Because the EEOC also has jurisdiction over allegations of discrimination based on race, color, religion, sex, national origin, age, or handicapping condition, the OSC follows a general policy of deferring complaints involving such discrimination to the EEOC. Allegations of discrimination based on sexual orientation (like marital status and political affiliation), however, are not within the jurisdiction of the EEOC. Because such allegations may nevertheless indicate prohibited personnel practices, they are subject to investigation by the OSC.

Without a clear course of resort to the OSC under the Civil Service Reform Act, persons who feel themselves to be victims of prohibited personnel practices based on their sexual orientation would likely go to court to challenge the action. By permitting the ordinary government processes to work, the Executive Order may preempt garden variety court actions to enforce state created rights. See *Bush v. Lucas*, 462

U.S. 367 (1983) (Stephens, J.) ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures – administrative and judicial – by which improper action may be redressed"). Moreover, by making mediation available in many cases, the OSC process may result in quick resolution of workplace issues. As the OSC's Annual Report for Fiscal Year 1999 demonstrates, a large number of complaints to OSC on diverse allegations were resolved either because the OSC found no basis for action or because of satisfactory resolution of the complaint. See "A Report to Congress From the United States Office of Special Counsel for Fiscal Year 1999," at 9 (out of 1,413 matters in which OSC had jurisdiction, 1,380 were closed either because the OSC found no basis for action or because of satisfactory resolution of the complaint).

The Executive Order Treats Federal Employees and Applicants As Individuals And Not As A Special Class

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. at 633. By articulating a uniform policy that sexual orientation is an irrelevant characteristic with respect to federal employment decisions, the Executive Order will result in the better implementation of federal agencies' merit principles. Those federal employees and job applicants who believe they have suffered an adverse personnel practice because of their sexual orientation may address their concerns within their own agencies. Orderly internal handling of concerns related to sexual orientation will aid in the mandate that federal agencies comply with the merit system. Thus, the amended Executive Order ensures that federal employment determinations are made on the basis of merit and not extraneous factors that do not affect job performance.

Executive Order 13,087 was issued pursuant to the President's responsibility as Chief Executive of the Federal Government. It articulates a uniform standard of application for the merit system principles in Federal employment decisionmaking. By managing the possibility that Federal employees may be subject to personnel practices that are unrelated to their ability to perform effectively on the job, the Executive Order ensures that workplace disputes related to sexual orientation will be addressed uniformly and forthrightly within the Federal government, and minimize the possibility of unpredictable litigation.

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