

2019

TOWARD EQUAL RIGHTS FOR LGBT EMPLOYEES: LEGAL AND MANAGERIAL IMPLICATIONS FOR EMPLOYERS

Michael T. Zugelder

Old Dominion University Strome College of Business

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Zugelder, Michael T. (2019) "TOWARD EQUAL RIGHTS FOR LGBT EMPLOYEES: LEGAL AND MANAGERIAL IMPLICATIONS FOR EMPLOYERS," *Ohio Northern University Law Review*: Vol. 43 : Iss. 1 , Article 5.

Available at: https://digitalcommons.onu.edu/onu_law_review/vol43/iss1/5

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Toward Equal Rights for LGBT Employees: Legal and Managerial Implications for Employers

MICHAEL T. ZUGELDER*

American lesbian, gay, bisexual, and transgender (LGBT) workers have made great strides toward equal employment rights, and the trend toward equal rights is clear. Still, 52% of LGBT workers can be denied employment or fired simply for being LGBT. This state of the law makes the U.S. lag behind many of its major trading partners, who have already established equal employment in their national laws. While there are a number of routes U.S. law may soon take to end LGBT employment discrimination, private firms, especially those with international operations, will need to determine the best course to take. Major U.S. employers are increasingly embracing equal employment rights for LGBT workers. This article will discuss the legal and managerial implications of this important issue and advocate for LGBT equal employment as the best practice for private U.S. firms.

I. INTRODUCTION

Equal employment opportunity for lesbian, gay, bisexual, and transgender (LGBT) employees is increasingly commonplace throughout the world.¹ However, although the Supreme Court of the United States has now found a constitutional basis for protecting same-sex couples' marriage and spousal benefits, legal protection of employment rights for LGBT employees in the United States has been a matter left, until fairly recently, for state and local governments to sort out.² According to a 2015 Gallup survey, an estimated 3.8% (or roughly twelve million Americans) identify themselves as LGBT.³ A 2016 study by The Williams Institute at UCLA

* Professor of Business Law, Strome College of Business, Old Dominion University. JD, University of Toledo College of Law.

1. See Knowledge Center: Lesbian, Gay, Bisexual, Transgender Workplace Issues, CATALYST (May 26, 2015), <http://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues> (specifically referencing workplace data) [hereinafter *LGBT Workplace Issues*]; Council Directive 2000/78, 2000 O.J. (L 303) 17 (EC).

2. Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015); see *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN FOUND. (Aug. 25, 2016), http://hrc.org/state_maps [hereinafter *Map of State Laws*].

3. Frank Newport, *Americans Greatly Overestimate Percent Gay, Lesbian in U.S.*, GALLUP (May 21, 2015), <http://www.gallup.com/poll/183383/americans-greatly-overestimate-percent-gay-lesbian.aspx>.

found that 0.6% (or approximately 1.4 million) of U.S. adults identify as transgender.⁴ For decades, most Americans have favored equal employment rights for LGBT workers.⁵ A recent report shows that large majorities in every state favor equal rights.⁶ In fact, most Americans believe employment discrimination against LGBT workers is now illegal.⁷ Still, protection only extends to 48% of the LGBT population, in part by executive orders (for federal workers) and by laws in twenty states and localities.⁸ Although American law demonstrates a decided trend toward LGBT employment equality, the gap is not yet closed.⁹

The situation is made more confusing by a uniquely troubling aspect of the LGBT equal rights struggle—the periodic eruption of newly minted state laws specifically legalizing LGBT discrimination.¹⁰ Some of these state laws even roll back and invalidate preexisting progressive local measures that had provided protections to LGBT workers.¹¹ These reactive state efforts, many under the guise of protecting freedom of religion or conscience, vary greatly in both reach and rationale and further confound the picture of LGBT rights at this level.¹²

The initial federal legislative response to the challenge of equal LGBT rights was contradictory to LGBT rights or incremental in support at best.¹³ However, a more cohesive federal effort to afford equal employment opportunity is becoming evident.¹⁴ The repeal of “Don’t Ask, Don’t Tell” ushered in equal rights for the LGBT community to serve openly in the military.¹⁵ The Court’s invalidation of the Defense of Marriage Act,¹⁶ a judicial action supported by many employers, mandated equal application of

4. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. (June 2016), <http://williamsinstitute.law.ucla.edu/category/research/census-lgbt-demographics-studies/>.

5. Angeliki Kastanis, *Webinar: LGBT Discrimination and Workplace Protections*, WILLIAMS INST. (May 12, 2015), <http://williamsinstitute.law.ucla.edu/datablog/webinar-lgbt-discrimination-and-workplace-protections/>.

6. *Id.*

7. *Id.*

8. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb. 28, 2016) [hereinafter *Non-Discrimination Laws*]; see *Map of State Laws*, *supra* note 2.

9. See Kastanis, *supra* note 5.

10. See Everdeen Mason et al., *The Dramatic Rise in State Efforts to Limit LGBT Rights*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/graphics/national/lgbt-legislation/>.

11. See *id.*

12. See *id.*

13. See 10 U.S.C.S. § 654 (LEXIS through Pub. L. No. 114-221) (repealed 2010).

14. See *infra* text accompanying notes 15-20.

15. Don’t Ask, Don’t Tell Repeal Act of 2010, which repealed the Don’t Ask, Don’t Tell Act of 1993, allows the LGBT community to serve openly in the military. See 10 U.S.C.S. § 654; Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3515 (2010).

16. See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

federal benefits to gay couples.¹⁷ Through its decision in *Obergefell v. Hodges*,¹⁸ which upheld marriage equality throughout the country, the Supreme Court has encouraged analogous employment protection.¹⁹ Executive actions applied to federal employers, agencies, and contractors have consistently broadened the mandate of equal employment in the public sector.²⁰

While forty years of Congressional efforts failed to add sexual orientation to the classes protected from employment discrimination, nearly half of the Federal Circuits, as well as the Equal Employment Opportunity Commission (EEOC), now hold the view that employment discrimination based on employees' deviation from gender stereotypes violates the prohibition against sex discrimination found in the Civil Rights Act of 1964.²¹ Increased judicial decisions and administrative efforts to promote private sector employment equality are likely forthcoming. This will set the stage for another Supreme Court decision, but this time the Court will address the issue of whether LGBT employees are entitled to equal employment rights under Title VII of the Civil Rights Act of 1964.²²

The lack of uniformity in U.S. law stands in contrast to the efforts already made by sixty-one other countries to protect against employment discrimination based on sexual orientation.²³ This includes twenty-seven countries of the European Union, Canada, Australia, and others.²⁴ Some of these countries nationally forbid employment discrimination based on both sexual orientation and sexual identity.²⁵ U.S. firms with overseas employees must recognize these new mandates.²⁶

One remarkable aspect of the LGBT struggle for employment equality has been the progressive role of private sector employers in affording workplace equality rather than waiting for a governmental solution.²⁷ Early on, and increasingly so, many of the largest U.S. private sector and multinational employers have embraced workplace equality for LGBT individuals through established internal policies and external efforts.²⁸

17. See *LGBT Workplace Issues*, *supra* note 1.

18. 135 S. Ct. at 2606-08; *Map of State Laws*, *supra* note 2.

19. See *Obergefell*, 135 S. Ct. at 2606-08.

20. See Exec. Order No. 13,087, 3 C.F.R. 191 (1999).

21. See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 280 (2014).

22. See *id.* at 314.

23. *LGBT Workplace Issues*, *supra* note 1.

24. Council Directive 2000/73, art. 1, 2000 O.J. (L 303) 18, 19 (EC); *LGBT Rights in Canada*, EQUALDEX, <http://www.equaldex.com/region/canada> (last visited Oct. 11, 2016); *LGBT Rights in Australia*, EQUALDEX, <http://www.equaldex.com/region/australia> (last visited Oct. 11, 2016).

25. *LGBT Rights in Australia*, *supra* note 24; *LGBT Rights in France*, EQUALDEX, <http://www.equaldex.com/region/france> (last visited Oct. 11, 2016).

26. See Council Directive 2000/73, 2000 O.J. (L 303) 17 (EC).

27. See *LGBT Workplace Issues*, *supra* note 1.

28. See *id.*

This article will examine the evolution of employment rights of LGBT employees in the U.S.²⁹ Part II provides a brief history of domestic and spousal benefits equality law.³⁰ Federal support for equal LGBT employment by Congress, the courts, and through executive and administrative action will also be considered.³¹ Part III discusses the current status and trends for and against employment protections by state and local governments.³² Part IV reviews the continuing movement seen in the private sector towards the adoption of comprehensive policies that mandate full LGBT workplace equality.³³ In light of this changing environment, Part V discusses managerial implications and makes recommendations for employers to consider, and Part VI offers concluding remarks.³⁴

II. FEDERAL SUPPORT FOR LGBT EMPLOYMENT EQUALITY

A. Constitutional Grounds

(1) Domestic Rights

Before the Supreme Court's decision in *Lawrence v. Texas*,³⁵ many state laws made it a crime for unmarried couples to cohabit, and others specifically criminalized gay couples.³⁶ In *Hollingsworth v. Perry*,³⁷ the Court considered a California Supreme Court decision that invalidated a California measure banning gay marriage.³⁸ The Court let the California Supreme Court decision stand, citing lack of jurisdiction.³⁹ At that time, only nine states and the District of Columbia allowed same-sex marriage.⁴⁰ However, by the time the Court finally decided the issue, the number of states recognizing same-sex marriage had increased to thirty-seven.⁴¹

In *Obergefell v. Hodges*, the Supreme Court ultimately held that the Constitution guaranteed the right of gay couples to marry, and that all the guarantees of Equal Protection and Due Process preempted state laws and

29. See *infra* Parts II, III.

30. See *infra* Part II.

31. See *infra* Part II.

32. See *infra* Part III.

33. See *infra* Part IV.

34. See *infra* Parts V, VI.

35. 539 U.S. 558 (2003).

36. See *Lawrence*, 539 U.S. at 578.

37. 133 S. Ct. 2652 (2013).

38. *Hollingsworth*, 133 S. Ct. at 2668.

39. *Id.*

40. See *State by State History of Banning and Legalizing Gay Marriage, 1994-2015*, PROCON.ORG (Feb. 16, 2016, 1:44 PM), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857>.

41. *Id.*

state constitutional provisions depriving that right.⁴² *Obergefell* was preceded by the Court's decision in *U.S. v. Windsor*.⁴³ Here, the Court found that section three of the federal Defense of Marriage Act (DOMA), which made all spouse-based federal benefits unavailable to gay and lesbian couples, was unconstitutional.⁴⁴ While the right to same-sex marriage and federal spousal benefits is settled law throughout the country, concerns have been mounting about the possible use of new state laws, modeled after the Religious Freedom Restoration Act of 1993 (RFRA),⁴⁵ to discriminate against LGBT individuals based on religious beliefs.⁴⁶ A case concerning such state laws may ultimately reach the Court.

(2) Constitutional Support for Other Rights

Aside from federal LGBT employees, who are now generally protected from employment discrimination by executive orders and administrative rules (discussed later),⁴⁷ public employment discrimination by state and local governments against LGBT individuals could be subjected to the same type of rational basis constitutional scrutiny used in decisions like *Romer v. Evans*.⁴⁸ There, the Court found that Colorado's attempt to invalidate locally supported gay rights violated Equal Protection.⁴⁹

However, for the Court to make a similar decision concerning private sector employment rights for LGBT individuals, it would need a case arising not under the Constitution, but under existing federal legislation that requires equal employment rights for LGBT individuals.⁵⁰ Possible sources for such a case will be discussed next.⁵¹

B. Federal Legislative Efforts

(1) DOMA and its Demise

Congressional actions to further LGBT rights have been mostly absent and even adverse to LGBT interests.⁵² In reaction to the recognition of gay marriage rights in a handful of states and localities, it passed DOMA, which

42. *Obergefell*, 135 S. Ct. at 2607-08.

43. *Windsor*, 133 S. Ct. at 2694-96.

44. See Defense of Marriage Act, § 3.

45. See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 3, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

46. Mason et al., *supra* note 10.

47. See *infra* Part II.D-E.

48. 517 U.S. 620, 635-36 (1996).

49. *Id.*

50. Reed, *supra* note 21, at 314.

51. See *infra* Part II.B.

52. See Jerrad Howard, *Windsor and Hollingsworth: Shifting Tides in the Battle for Marriage Equality*, 78 BENCH & B. 4, 4-6 (2014).

emphatically declared that for federal purposes, marriage could only be between a man and woman.⁵³ Consequently, spouse-based federal benefits would be denied to gay couples, and states that did not yet recognize gay marriage were free to refuse the recognition of gay marriages that were valid in other states.⁵⁴ Given that the Clinton administration had already issued Executive Order 13087, prohibiting discrimination against gays by certain federal agencies, some assert that President Clinton signed DOMA only to avert a constitutional amendment against gay marriage.⁵⁵ Later, the Obama administration would take a different tact with a series of its own pro-LGBT executive orders that provided protection for federal employees and others.⁵⁶ When the *Windsor* and *Obergefell* cases challenged DOMA's constitutionality in the Supreme Court, the Obama Administration directed the Department of Justice to not defend the law.⁵⁷

(2) “Don’t Ask, Don’t Tell” and its Repeal

During decades of political gridlock, efforts to protect LGBT employees from employment discrimination have largely failed.⁵⁸ While the Senate managed to repeal the “Don’t Ask, Don’t Tell” law, and thus provided gay and lesbian individuals with the right to openly serve in the military, the rule itself was only a marginal improvement from an outright ban on military service by gay and lesbian individuals.⁵⁹ However, beyond the military, Congress has been unable to provide statutory equal employment rights.⁶⁰

(3) Proposed Legislation to Amend Title VII

After over forty years of congressional efforts, Congress has still failed to amend Title VII of the Civil Rights Act to include sexual orientation as a protected class.⁶¹ The originally proposed “Employment Non-Discrimination Act” (ENDA), as well as subsequent attempts, failed to gain sufficient support to pass; the LGBT community criticized these attempts

53. Defense of Marriage Act, §§ 2-3.

54. *See id.*

55. *See Defending DOMA: Bill Clinton’s Shifting Justifications for Signing the Defense of Marriage Act*, N.Y. MAG. (Feb. 26, 2012), <http://nymag.com/news/frank-rich/bill-clinton-doma-2012-3/#print>; *see also* Exec. Order No. 13,087, 3 C.F.R. 191.

56. *See* Exec. Order No. 13,672, 3 C.F.R. 282, 282-83 (2014); *see also* Exec. Order No. 13,583, 3 C.F.R. 266, 266-69 (2011).

57. *Obama: DOMA Unconstitutional, DOJ Should Stop Defending in Court*, HUFFINGTON POST (Feb. 23, 2011, 12:21 PM), http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html.

58. *See* Reed, *supra* note 21, at 314.

59. *See* Don’t Ask, Don’t Tell Repeal Act of 2010, § 2(f)(1)(A).

60. *See* Reed, *supra* note 21, at 314.

61. Reed, *supra* note 21, at 281-83.

for their numerous compromises, especially regarding the exclusion of transgender employees.⁶² In 2016, legislators in both chambers introduced bills supporting the newly proposed “Equality Act,” which would require equal LGBT rights in matters of employment, housing, access to public places, federal funding, credit, and education.⁶³ The Human Rights Campaign (HRC), an LGBT advocate, believes passage of such a measure may now be possible.⁶⁴ To support this position, HRC cited its 2016 poll that shows 78% of the country supports federal non-discrimination workplace protections—a number that even exceeds support for marriage equality.⁶⁵ Still, only time will tell whether popular support for LGBT economic equality can overcome the gridlock and inaction of a divided and politically polarized Congress.⁶⁶

C. Judicial View of Stereotype Nonconformance Discrimination

Two cases served to provide a basis for the Supreme Court to find liability for sex discrimination under Title VII of the Civil Rights Act.⁶⁷ First, in *Price Waterhouse v. Hopkins*,⁶⁸ a female accountant alleged employment discrimination against an accounting firm because members of the firm viewed her to be overly masculine.⁶⁹ Second, in *Oncale v. Sundowner*,⁷⁰ an oil rig employee brought a claim of sexual assault and workplace harassment against employees of the oil rig, who had been motivated by their belief that the male employee possessed overly feminine characteristics.⁷¹ The Court’s decisions have led a number of lower courts to view allegations of employment discrimination based on an employee’s nonconformance to gender stereotypes as claims of discrimination “on the basis of sex,” and based on this, courts have found that Title VII covers

62. Employment Non-Discrimination Act, S. 2238, 103d Cong. (1994); see Employment Non-Discrimination Act, H.R. 3685, 110th Cong. (2007); Reed, *supra* note 21, at 282-85.

63. Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

64. *Why the Equality Act?*, HUMAN RIGHTS CAMPAIGN FOUND., <http://www.hrc.org/resources/why-the-equality-act> (last visited Oct. 11, 2016).

65. *Id.*

66. See David Crary, *Why It Matters: Outcome of Presidential Race Has Implications for LGBT Rights*, PORTLAND PRESS (Oct. 12, 2016, 9:37 PM), <http://www.pressherald.com/2016/10/12/why-it-matters-outcome-of-presidential-race-has-implications-for-lgbt-rights/>; see also Jennifer Bendery, *LGBT Rights Take Center Stage in Arizona Congressional Race*, HUFFINGTON POST (Oct. 12, 2016, 5:39 PM), http://www.huffingtonpost.com/entry/matt-heinz-martha-mcsally-arizona_us_57fe8778e4b0e8c198a59568.

67. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

68. 490 U.S. 228 (1989).

69. *Id.* at 231-32, 235.

70. 523 U.S. 75 (1998).

71. *Id.* at 76-77.

such claims.⁷² The First, Second, Third, Fifth, Sixth, Seventh, and Ninth federal circuits, as well as a number of District Court decisions within those Circuits, have issued decisions establishing this principle as well.⁷³ This extension of coverage has in turn presented the opportunity to extend Title VII protections to LGBT employees.⁷⁴

Since President Obama signed executive orders directing EEOC enforcement actions for LGBT discrimination (discussed below), there have been an increasing number of cases in federal litigation that appear to adopt the view that Title VII does indeed cover LGBT discrimination.⁷⁵ These cases rely, in part, on the Supreme Court's established stereotype approach.⁷⁶ Some federal courts disagree, suggesting a future split in the circuits and a review by the Supreme Court to settle the matter.⁷⁷ Executive actions and recent EEOC efforts on behalf of LGBT employees will be discussed next.

D. Executive Orders Prohibiting Federal LGBT Discrimination

Executive orders and strategic plans for diversity and inclusion in federal hiring have provided protection for LGBT individuals working in most federal jobs and for federal contractors.⁷⁸ Protection began in 1998 when President Clinton issued Executive Order 13087, which added sexual orientation to the categories protected against discrimination for employees in the competitive civil service.⁷⁹ This included most civilian positions in the federal government and civilian military; however, military forces were under a DOD "Don't Ask, Don't Tell" policy, later replaced by full LGBT protection.⁸⁰ This Executive Order also covered U.S. Postal Service employees.⁸¹

72. See EEOC Decision No. 0120132452 (Office Fed. Operations), 2014 WL 6853897, at *4 (Nov. 18, 2014).

73. See *id.*, 2014 WL 6853897, at *4.

74. See Joanna L. Grossman, *The EEOC Rules That Transgender Discrimination Is Sex Discrimination: The Reasoning Behind That Decision*, VERDICT (May 1, 2012), <https://verdict.justia.com/2012/05/01/the-eeoc-rules-that-transgender-discrimination-is-sex-discrimination>.

75. See *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, EQUAL EMP. OPPORTUNITY COMM'N (July 8, 2016), https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm [hereinafter *EEOC Fact Sheet*].

76. See *id.*

77. See Reed, *supra* note 21, at 290-94; see also Laura Durso & Sarah McBride, *How the Supreme Court Shake-Up Will Impact the Future of LGBT Rights*, THINKPROGRESS (Feb. 15, 2016), <https://thinkprogress.org/how-the-supreme-court-shake-up-will-impact-the-future-of-lgbt-rights-23f86d783d96#.uwlmuy5qy>.

78. See *EEOC Fact Sheet*, *supra* note 75; see also Exec. Order No. 13,087, 3 C.F.R. 191; Exec. Order No. 13,583, 3 C.F.R. 266; Exec. Order No. 13,672, 3 C.F.R. 282.

79. Exec. Order No. 13,087, 3 C.F.R. 191.

80. See *id.*

81. See *id.*; see also HR Compl. (CCH) P 8727, 2015 WL 8494202 (stating applicability to U.S. Postal Service employees).

In 2010, President Obama made new appointments to the EEOC and authorized the agency to begin processing discrimination claims based on sexual orientation and identity.⁸² In 2011, President Obama issued Executive Order 13583: “Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce.”⁸³ This Executive Order announced and published a strategic plan and agency specific guidance for hiring employees free of discrimination based on sexual orientation.⁸⁴ All executive branch agencies and departments were required to follow these guidelines in coordination with the EEOC.⁸⁵ In 2014, President Obama issued Executive Order 13672, which amended President Clinton’s previous executive order by prohibiting discrimination based on sexual identity for the competitive civil service.⁸⁶ The same executive order also amended an executive order issued by President Johnson concerning federal contractors by adding both sexual origin and identity to the classes of protected employees of those employers.⁸⁷

E. EEOC Enforcement of Title VII on Behalf of LGBT Individuals

For decades, the EEOC took the position that Title VII did not provide protection for LGBT employees.⁸⁸ Within the last five years, however, the EEOC has unequivocally adopted the opposite position—employment discrimination against LGBT employees in either the public or private sector constitutes sex discrimination prohibited by the Act.⁸⁹ Since the adoption of its 2012 Strategic Enforcement Plan, the EEOC has gone on to support claims of LGBT employment discrimination.⁹⁰ As stated in its published overview about enforcement protection for LGBT workers:

82. See *EEOC Fact Sheet*, *supra* note 75; see also Exec. Order No. 13,087, 3 C.F.R. 191; Exec. Order No. 13,583, 3 C.F.R. 266.

83. Exec. Order No. 13,583, 3 C.F.R. 266.

84. *Id.*

85. See *id.*; see also *EEOC Fact Sheet*, *supra* note 75 (stating that the EEOC views the Strategic Enforcement Plan as including “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions . . .”).

86. Exec. Order No. 13,672, 3 C.F.R. 282.

87. See *id.* (amending Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965)).

88. See Reed, *supra* note 21, at 280 (alteration in original) (“[I]n the mid-1970s and continuing through the year 2000 . . . the [EEOC] routinely dismissed LGBT persons’ employment discrimination claims on the grounds that Congress ‘had only the traditional notions of ‘sex’ in mind’ when it passed Title VII.”).

89. See *EEOC Fact Sheet*, *supra* note 75; see also Exec. Order No. 13,087, 3 C.F.R. 191; Exec. Order No. 13,583, 3 C.F.R. 266; *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMP. OPPORTUNITY COMM’N (2016), https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [hereinafter *What You Should Know*] (emphasis in original) (“EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on *gender identity or sexual orientation*.”).

90. See *EEOC Fact Sheet*, *supra* note 75.

EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any . . . contrary laws. Through investigation, conciliation, and litigation of charges by individuals against private sector employers, as well as hearings and appeals for federal sector workers, the Commission has taken the position that existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias. The Commission has obtained approximately \$6.4 million in monetary relief for individuals, as well as numerous employer policy changes, in voluntary resolutions of LGBT discrimination charges under Title VII since data collection began in 2013. A growing number of court decisions have endorsed the Commission's interpretation of Title VII.⁹¹

Some claims have been based on *Price Waterhouse*'s theory concerning employer use of sexual stereotypes.⁹² However, the EEOC has also made a broader interpretation of the Act—any case of LGBT discrimination is simply discrimination based on sex and is covered by Title VII.⁹³

(1) Sexual Identity Discrimination Cases

*Macy v. Holder*⁹⁴ was the first case the EEOC reviewed for employment discrimination based on sexual identity.⁹⁵ In *Macy*, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) denied a transgender woman a position.⁹⁶ Macy filed an EEOC discrimination claim with the ATF; the claim was based on both sex discrimination via stereotype nonconformity, and on discrimination caused by her sexual identity as a transgender woman.⁹⁷ The ATF refused to consider the sexual identity claim, and Macy then appealed the decision to the EEOC.⁹⁸ The EEOC ruled that discrimination based on sexual identity states a sufficient separate claim of sex discrimination under Title VII.⁹⁹ Relying in part on the Eleventh Circuit

91. *What You Should Know*, *supra* note 89.

92. See EEOC Decision No. 0120132452 (Office Fed. Operations), 2014 WL 6853897, at *4 (“[We] note that, since *Price Waterhouse*, every court of appeals has recognized that disparate treatment for failing to conform to gender-based expectations is sex discrimination . . .”).

93. *What You Should Know*, *supra* note 89.

94. EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

95. *Id.*, 2012 WL 1435995, at *1.

96. See *id.*, 2012 WL 1435995, at *1.

97. *Id.*, 2012 WL 1435995, at *3.

98. *Id.*, 2012 WL 1435995, at *3.

99. EEOC Decision No. 0120120821, 2012 WL 1435995, at *5.

Court of Appeals' decision in *Glenn v. Brumby*,¹⁰⁰ which found in favor of a dismissed transgender public employee, the EEOC agreed that consideration of gender stereotypes will inherently be part of what drives discrimination against a transgender individual.¹⁰¹ The EEOC concluded that intentional discrimination against a transgender individual because that person is transgender is by definition "based on sex," and such discrimination therefore violates Title VII.¹⁰²

(2) Sexual Orientation Discrimination Cases

Three years later, the EEOC reviewed its first sexual orientation discrimination case in *Baldwin v. Department of Transportation*.¹⁰³ In this case, a part-time air traffic controller filed an EEO complaint against the Federal Aviation Administration (FAA) for being passed over for promotion to a full-time position because he was gay.¹⁰⁴ The FAA found the filing untimely and also held that Title VII would not reach discrimination based on sexual orientation.¹⁰⁵ On review, the EEOC reversed on both grounds, and as to Baldwin's claim of discrimination based on sexual orientation under Title VII, the EEOC held:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination - whether [the employer] has relied on sex-based considerations or taken gender into account when taking the challenged employment action¹⁰⁶

(3) Increasing LGBT Claims and Suits

A growing number of EEOC enforcement actions for LGBT discrimination against private employers have begun to appear in federal courts throughout the country.¹⁰⁷ For example, a transgender employment

100. 663 F.3d 1312 (11th Cir. 2011).

101. EEOC Decision No. 0120120821, 2012 WL 1435995, at *7.

102. *Id.*, 2012 WL 1435995, at *11.

103. EEOC Decision No. 0120133080 (Office Fed. Operations), 2015 WL 4397641, at *1 (July 15, 2015).

104. *Id.*, 2015 WL 4397641, at *1.

105. *Id.*, 2015 WL 4397641, at *2.

106. *Id.*, 2015 WL 4397641, at *4.

107. See *EEOC Fact Sheet*, *supra* note 75.

termination action was brought and settled in *EEOC v. Lakeland Eye Clinic*.¹⁰⁸

Recent transgender cases include an action arising from the termination of a transgender worker in *EEOC v. R.G. & G.R. Funeral Homes Inc.*,¹⁰⁹ as well as in *Broussard v. First Loan Tower LLC*.¹¹⁰ The EEOC has also pursued Title VII discrimination claims based on employers' refusals to accommodate transgender employees with equal access to common restrooms corresponding to gender identity.¹¹¹ One such suit was recently settled in *EEOC v. Deluxe Financial Services Corp.*¹¹² The Commission has since issued its own guidance, stating that denial of access to restrooms corresponding to gender identify constitutes an incidence of discrimination under Title VII.¹¹³

Pending cases based on sexual orientation include a case of hostile environment and constructive discharge of a gay worker in *EEOC v. Scott Medical Health Ctr. P.C.*,¹¹⁴ as well as a case involving a claim of hostile environment harassment and termination in *EEOC v. Pallet Companies*.¹¹⁵ The Commission will still pursue same-sex hostile environment claims based on *Oncale* stereotyping.¹¹⁶ In *EEOC v. Boh Bros. Const. LLC*,¹¹⁷ a jury returned a \$451,000 verdict for a worker harassed by his employer who viewed him as "not manly enough."¹¹⁸ The EEOC has also intervened in federal cases by submitting supporting amicus briefs in suits brought by private sector employees claiming discrimination based on sexual orientation and identity discrimination.¹¹⁹

(4) Likely Source for Supreme Court Review?

Given that the LGBT community is relatively small when compared to other protected classes, the number of claims is likewise a fractional part of Title VII claims.¹²⁰ Still, the number of charges filed for sexual orientation and/or identity discrimination has accelerated since the Commission began

108. No. 8:14-cv-2421-T35AEP, 2015 WL 3823094 (M.D. Fla. Apr. 13, 2015).

109. 100 F. Supp. 3d 594 (E.D. Mich. 2015).

110. 135 F. Supp. 3d 540 (E.D. La. 2015).

111. See *EEOC v. Deluxe Financial Services Inc.*, No. 0:15-cv-2646ADM/SER, 2016 WL 1614048 (D. Minn. Jan. 15, 2016).

112. *Id.*

113. See *EEOC Fact Sheet*, *supra* note 75.

114. See Brief of Defendant at 1, *EEOC v. Scott Medical Health Center*, No. 2:16-cv-00225 (W.D. Pa. 2016); see also *EEOC Fact Sheet*, *supra* note 75.

115. No. 1:16CV00595, 2016 WL 3951772 (D. Md. June 28, 2016).

116. See *EEOC Fact Sheet*, *supra* note 75.

117. 731 F.3d 444 (5th Cir. 2013).

118. *Id.* at 457.

119. *EEOC Fact Sheet*, *supra* note 75.

120. See *What You Should Know*, *supra* note 89.

tracking these charges in 2013. In 2015, 1,412 charges were filed, representing a 28% increase over 2014.¹²¹

While there is no indication that the Commission's efforts to charge and sue under Title VII for LGBT employees is waning, there are several caveats to an assumption that the Commission's enforcement efforts will result in the end of private sector LGBT employment discrimination on a national basis. First, while federal courts consider EEOC interpretations of the Civil Rights Act persuasive and give great weight to them, they are not legally binding.¹²² Second, many (if not most) of the twelve circuits have yet to embrace the Commission's view that Title VII currently prohibits LGBT employment discrimination.¹²³ In fact, in *Muhammad v. Caterpillar*,¹²⁴ the Court of Appeals for the Seventh Circuit specifically refused to adopt the Commission's view and dismissed a Title VII action brought for sexual orientation harassment.¹²⁵ Finally, politics can play an important role in the Commission's enforcement strategy and turn it away from the current course.¹²⁶

Still, a split in the circuits over the Commission's position that Title VII currently covers LGBT discrimination may be the quickest way for a LGBT discrimination case to reach the Supreme Court.¹²⁷ Meanwhile, employers should take note that the Commission intends to process LGBT discrimination charges, press for settlements, and bring litigation under Title VII.¹²⁸

III. STATE AND LOCAL LAWS: PROGRESS AND REGRESS

A. Clear Trend Toward LGBT Protection

As is frequently the case when it comes to progressive efforts to prevent discrimination, the first of those efforts on behalf of the LGBT community arose from state and local laws.¹²⁹ In 1975, Pennsylvania was the first state to ban public sector employment discrimination based on sexual

121. *Id.*

122. *What You Should Know About EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, EQUAL EMP. OPPORTUNITY COMM'N, https://www1.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm?renderforprint=1 (last visited Oct. 12, 2016) [hereinafter *Regulations*].

123. *See Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination under Title VII*, EQUAL EMP. OPPORTUNITY COMM'N, https://www1.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm?renderforprint=1 (last visited Oct. 12, 2016).

124. 767 F.3d 694 (7th Cir. 2014).

125. *Muhammad*, 767 F.3d at 699.

126. *See Regulations*, *supra* note 122.

127. *See* EEOC Decision No. 0120132452 (Office Fed. Operations), 2014 WL 6853897, at *4.

128. *See Regulations*, *supra* note 122.

129. THE POLITICS OF GAY RIGHTS 271 (Craig A. Rimmerman et al. eds., 2000).

orientation.¹³⁰ In 1982, Wisconsin was first to prohibit sexual orientation discrimination in both public and private employment, and in 1993, Minnesota was first to ban discrimination based on both sexual orientation and identity in all employment.¹³¹ Since then, twenty states and the District of Columbia have followed Minnesota's lead by banning discrimination against LGBT workers in all employment.¹³² New Hampshire and Wisconsin have yet to prevent identity discrimination.¹³³ Ten other states limit protection to public employment.¹³⁴ In addition, by 2015, some 225 cities and counties had passed measures forbidding LGBT discrimination in all employment, though most are within states that already provide such protection.¹³⁵

While a trend toward state and local protection continues, the current state of the law leaves a significant number of LGBT workers with either incomplete protection or no protection at all.¹³⁶ The Movement Advancement Project estimates that 52% of the LGBT community lives in states that do not prohibit employment discrimination based on sexual orientation or identity.¹³⁷ While the Court's decision in *Obergefell* established the right of a same-sex couple to marry, that same couple, who are legally married today, can still be fired tomorrow simply for being gay.¹³⁸ Worse, the *Obergefell* gay marriage decision has triggered a new wave of anti-LGBT measures at the state level, many of them attempting to deny localities the right to protect LGBT individuals from discrimination, including employment discrimination.¹³⁹

B. Recent Regressive State Measures

A confounding problem with the nation's struggle over LGBT rights springs from new reactionary state measures that seek to excuse or authorize discrimination against LGBT rights.¹⁴⁰ While the legal effect of *Obergefell*

130. *Id.* at 272.

131. William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L. J. 91, 91 (2007); see *Human Rights Protections in Minnesota*, OUTFRONT MINN., <https://www.outfront.org/library/humanrights> (last visited May 17, 2016).

132. *Non-Discrimination Laws*, *supra* note 8.

133. *Id.*

134. *Map of State Laws*, *supra* note 2.

135. *Id.*

136. *Non-Discrimination Laws*, *supra* note 8.

137. *Id.*

138. See *id.*; see also *Obergefell*, 135 S. Ct. at 2607-08.

139. See, e.g., Stephen Peters, *New HRC Report Reveals Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUMAN RIGHTS CAMPAIGN FOUND. (Feb. 22, 2016), <http://www.hrc.org/blog/new-hrc-report-reveals-unprecedented-onslaught-of-state-legislation-targeting-transgender-americans> [hereinafter Peters, *New HRC Report*].

140. See *id.*

and its predecessors has established the right for gay and lesbian individuals to marry and enjoy all federal benefits that arise from marriage, a side effect has been an apparent backlash in conservative states.¹⁴¹ Through a continuing salvo of proposed anti-LGBT legislation, these state laws have effectively authorized individuals and organizations to discriminate against the rights of LGBT individuals in employment, education, housing, and public accommodations.¹⁴²

In 2016, a HRC report showed 125 anti-LGBT bills under consideration in the nation's state legislatures, though none had become law.¹⁴³ In 2016, lawmakers filed over 175 new anti-LGBT bills.¹⁴⁴ Rationales included protection of religious freedom, personally-held beliefs, public health and safety, and personal privacy.¹⁴⁵ Some had no apparent rationale other than LGBT animus.¹⁴⁶

(1) Religious Based State Laws

Protection of religious beliefs as an excuse to violate the civil rights of minorities is nothing new to American law.¹⁴⁷ In the current case, many of the proposed anti-LGBT measures are patterned after the federal Religious Freedom Restoration Act (RFRA).¹⁴⁸ Ironically, Congress enacted that law to limit federal interference with the religious practices of Native Americans and other minorities.¹⁴⁹ When the Supreme Court ruled in *City of Boerne v. Flores*,¹⁵⁰ that the statute could not be applied to invalidate state and local laws, twenty-one states passed their own "little" RFRA laws.¹⁵¹ Later, the Court held in *Burwell v. Hobby Lobby Stores, Inc.*¹⁵² that private entities could use the federal RFRA to raise religious objections to prevent enforcement of provisions of the Affordable Care Act,¹⁵³ prompting many

141. See *id.*; see also *Obergefell*, 135 S. Ct. at 2607-08.

142. See Peters, *New HRC Report*, *supra* note 139.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. 'Religious Liberty' and the Anti-LGBT Right, S. POVERTY L. CTR. (Feb. 11, 2016), <https://www.splcenter.org/20160211/religious-liberty-and-anti-lgbt-right> [hereinafter *Religious Liberty*].

148. See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488.

149. *City of Boerne*, 521 U.S. at 511-13.

150. 521 U.S. at 507.

151. *City of Boerne*, 521 U.S. at 515-16; see *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 15, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

152. 134 S. Ct. 2751 (2014).

153. See *generally* Patient Protection and Affordable Care Act, Pub. L. No. 148, 124 Stat. 119 (2010).

states to either amend their little RFRA's or propose new ones.¹⁵⁴ This adaption allowed businesses, organizations, and individuals to object to state and local laws on religious grounds.¹⁵⁵ Unfortunately, these measures effectively legalized the right to discriminate against the LGBT community.¹⁵⁶

State laws like these are suspect on a number of constitutional grounds, including equal protection and federal preemption.¹⁵⁷ Beyond this, they have had the practical effect of damaging the adopting state's economy and reputation.¹⁵⁸ These obvious drawbacks have caused some state governors to veto these measures.¹⁵⁹ In vetoing a proposed little RFRA, in part, to avert threatened boycotts by major corporations, Governor Nathan Deal of Georgia declared, "I do not think that we have to discriminate against anyone to protect the faith-based community in Georgia."¹⁶⁰ Governor Terry McAuliffe of Virginia gave a more pointed assessment as he vetoed Virginia's proposed little RFRA law: "It's unconstitutional. It is discriminatory. It demonizes folks. It brings fear and persecution. We can't tolerate that."¹⁶¹

(2) State Laws Using Other Rationales

Some states have passed health care provider "conscience" laws similar to a Tennessee measure that allows state-licensed counselors to refuse services to members of the LGBT community if they are inconsistent with the counselors' "sincerely held principles."¹⁶² This adaption not only effectively legalized discriminatory denial of care, but it also violates the ethical code of a profession that requires the delivery of care even if it is inconsistent with one's personal beliefs.¹⁶³

154. See *Religious Liberty*, *supra* note 147.

155. *Id.*

156. *Id.*

157. See generally Mark Joseph Stern, *North Carolina's New Anti-LGBTQ Law Is Vicious, Shameful, and Unconstitutional*, SLATE (Mar. 24, 2016, 11:39 AM), http://www.slate.com/blogs/outward/2016/03/24/north_carolina_s_anti_lgbtq_law_is_unconstitutional.html.

158. See *infra* Part IV.

159. See, e.g., Kathleen Foody, *Georgia Gov. Nathan Deal Vetoes Religious Exemptions Bill*, ASSOCIATED PRESS (Mar. 28, 2016, 11:22 AM), <http://www.usnews.com/news/us/articles/2016-03-28/georgia-governor-vetoes-religious-exemptions-bill>; see also *Virginian-Pilot Editorial: Be Grateful for That Veto Pen*, VIRGINIAN PILOT (Apr. 22, 2016), http://pilotonline.com/opinion/editorial/virginian-pilot-editorial-be-grateful-for-that-vetopen/article_c84b1b9a-aace-51bc-b0e2-b605755267fe.html [hereinafter *Be Grateful for That Veto Pen*].

160. Foody, *supra* note 159.

161. *Be Grateful for That Veto Pen*, *supra* note 159.

162. H.B. 1840, 109th Gen. Assemb., 2d Sess. (Tn. 2016).

163. See Steve Almasy, *Tennessee Governor Signs 'Therapist Bill' Into Law*, CNN (Apr. 27, 2016, 6:38 PM), <http://www.cnn.com/2016/04/27/politics/tennessee-therapist-bill/>.

While more states and many more municipalities protect transgender individuals from discrimination, it is unclear how many provide a right to access bathrooms or lockers consistent with their sexual identity.¹⁶⁴ Recently, several states have attempted to deny that right by proposing laws referred to as “bathroom bills.”¹⁶⁵ These bills limit access to bathrooms based on the individual’s sex at birth.¹⁶⁶ This time, the rationale for discrimination is the privacy rights or safety of cisgender individuals.¹⁶⁷ Lawmakers often submit these bills without supporting evidence of a safety hazard or an explanation of why privacy could not be preserved by simple logistics or structural accommodations.¹⁶⁸ These laws run counter to several federal circuit court decisions and federal agency directives that address the issue and seek safety for transgender individuals, who face documented harassment, humiliation, and physical harm when using bathrooms inconsistent with their gender identity.¹⁶⁹ Federal authorities include the Court of Appeals for the Eleventh Circuit’s decision in *Glenn v. Brumby*,¹⁷⁰ which held that denial of access by a public employee violated Equal Protection.¹⁷¹ In *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*,¹⁷² the Fourth Circuit recently upheld the Department of Education’s position that the denial of access by identity for a public school student violated Title IX of the Civil Rights Act.¹⁷³ There are a number of agency directives, including those of the Occupational Safety and Health Administration (OSHA), the Office of Personnel Management (OPM), and the EEOC that all now require employers to provide transgender employees with access by identity.¹⁷⁴

164. See *Map of State Laws*, *supra* note 2.

165. See Peters, *New HRC Report*, *supra* note 139.

166. See *id.*

167. *Id.*

168. See *id.*

169. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted* *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016).

170. 663 F.3d 1312 (11th Cir. 2011).

171. See *Glenn*, 663 F.3d at 1321.

172. 822 F.3d at 709.

173. See *id.* at 715.

174. *Best Practices: A Guide to Restroom Access for Transgender Workers*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited May 23, 2016); *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited May 10, 2016); see *Fact Sheet: Bathroom Access Rights for Transgender Employees under Title VII of the Civil Rights Act of 1964*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited Nov. 11, 2016).

Some recent state measures have taken a broader discriminatory aim.¹⁷⁵ North Carolina's HB 2, also touted as a "bathroom bill," appears to be more of an omnibus attack—excluding LGBT individuals from all protection against sex discrimination.¹⁷⁶ It closes the state's administrative process for discrimination claims and invalidates all LGBT protections afforded by localities (including preexisting measures),¹⁷⁷ the latter provision in apparent conflict with the Court's decision in *Romer v. Evans*.¹⁷⁸

A case concerning such anti-LGBT state laws may ultimately reach the Court and provide another avenue for the Court to declare that the LGBT community is entitled to equal protection. Such a decision may have some implications for employers if it builds upon prior decisions protecting LGBT domestic rights. However, until then, and absent (1) a decision finding that LGBT individuals are protected by Title VII; or (2) congressional action expressly including the LGBT community as a protected class, employment protection will be left to this mixed bag of legal support and regress by the states, which, on balance, is incomplete and confusing to employers and employees alike.¹⁷⁹ The uncertain status of legal protection makes the private sector's great voluntary strides toward equal treatment all the more important.¹⁸⁰

IV. PRIVATE SECTOR FIRMS LEAD THE WAY

Unlike the increasing number of countries that have established a nationwide legal mandate of nondiscrimination towards LGBT employees in the workplace, private firms in the U.S. have to make their own decisions about the issue in the face of conflicting law.¹⁸¹ At the same time, firms have come to appreciate the value of inclusion of sexual minorities in both the employee pool and customer base.¹⁸² The result has been that many large firms now exceed U.S. law in providing protection from discrimination, and the private sector as a whole has been moving at an increasing pace toward inclusion of LGBT employees.¹⁸³

175. See H.B. 2, 2015-2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

176. See *id.*

177. See *id.*

178. See *Romer*, 517 U.S. at 623-24.

179. See *infra* Part IV.

180. See *infra* Part IV.

181. See David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV. (Sept.-Oct. 1996), <https://hbr.org/1996/09/making-differences-matter-a-new-paradigm-for-managing-diversity>.

182. See *id.*

183. See *id.*

A. Strong Opposition to Regressive Laws

A remarkable aspect of the struggle for LGBT employment rights is the efforts shown by major U.S. employers who have long surpassed government requirements.¹⁸⁴ Some have even acted to oppose discrimination by the government.¹⁸⁵ In 2013, 200 major corporations signed an amicus brief in support of DOMA's repeal because it forced employers that already recognized same-sex benefits to use multiple systems to administer benefits across the country.¹⁸⁶

More recent public comment has also shown the corporate criticism of various anti-LGBT efforts at the state level.¹⁸⁷ HRC reports that more than 130 leading CEOs and business leaders from across the country signed an open letter that called on the North Carolina legislature to repeal anti-LGBT legislation at its earliest opportunity.¹⁸⁸ Bank of America, which is based in Charlotte and is the state's largest corporate employer, said, "[s]uch laws are bad for our employees and bad for business."¹⁸⁹ Spokeswoman Katie Cody of American Airlines, which operates its second-largest hub in Charlotte, expressed a similar objection: "[l]aws that allow such discrimination go against our fundamental belief of equality and are bad for the economies of the state in which they are enacted."¹⁹⁰ Other firms, including Deutsche Bank and PayPal, cancelled expansion plans in the state, and groups like the NCAA and the NBA have suggested they will relocate tournament games in protest of anti-LGBT government actions.¹⁹¹ The Georgia anti-LGBT religious freedom bill was opposed by hundreds of major corporations, including Disney, Unilever, and Salesforce; all of these

184. See generally Erik Eckholm, *Corporate Call for Change in Gay Marriage Case*, N.Y. TIMES (Feb. 27, 2013), http://www.nytimes.com/2013/02/28/business/companies-ask-justices-to-overturn-gay-marriage-ban.html?_r=0.

185. See generally *id.*

186. *Id.*

187. Stephens Peters, *More Than 100 Major CEOs and Business Leaders Urge North Carolina to Repeal Anti-LGBT Law*, HUMAN RIGHTS CAMPAIGN FOUND. (Mar. 31, 2016), <http://www.hrc.org/blog/more-than-100-major-ceos-business-leaders-demanding-north-carolina-repeal-r>.

188. *Id.*

189. James B. Stewart, *Corporations No Longer Sit Idly By on Discrimination*, N.Y. TIMES (Mar. 31, 2016), http://www.nytimes.com/2016/04/01/business/corporate-north-carolina-perks-up-against-discrimination.html?_r=0 (alteration in original).

190. Gary D. Robertson & Emery P. Dalesio, *Major Businesses Stand Against NC Anti-Discrimination Law*, TAUNTON DAILY GAZETTE (Mar. 24, 2016, 5:03 PM), <http://www.tauntongazette.com/article/20160324/NEWS/160327250> (alteration in original).

191. Mark Berman, *PayPal Abandons Plans to Open Facility in Charlotte Because of LGBT Law*, WASH. POST (Apr. 5, 2016, 11:10 AM), <https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/paypal-abandons-plans-to-open-facility-in-charlotte-due-to-lgbt-law/>; see Shane Ferro, *Deutsche Bank Won't Expand in North Carolina Because of Anti-LGBT Law*, HUFFINGTON POST (Apr. 12, 2016, 10:55 AM), http://www.huffingtonpost.com/entry/deutsche-bank-north-carolina_us_570d00d9e4b0836057a25437.

companies threatened to reconsider planned investments or terminate operations in the state unless the measure was vetoed.¹⁹²

B. Employer Support for LGBT Employees

In addition, HRC's Corporate Equality Index (CEI) provided robust evidence of increasing corporate progressiveness, showing the dramatic strides taken toward equal treatment of LGBT employees in the workplace.¹⁹³ Since 2002, the HRC has used an annual CEI survey to rate companies that are part of the Fortune 1000, Fortune 500, and Forbes 200 on key criteria to assess protection from discrimination and provision of benefits.¹⁹⁴ A perfect 100% rating is achieved only if the firm: prohibits discrimination based on both sexual orientation and identity, requires firm contractors and vendors to do the same, maintains firm-wide competency and training programs, provides health and medical insurance and other transgender-inclusive benefits for partners, establishes a standing resource group, and demonstrates positive, external engagement in support of the LGBT community.¹⁹⁵

C. More Employers with a Perfect Score

The number of companies achieving a 100% index rating has grown at an accelerated pace.¹⁹⁶ When the Index began in 2002, only thirteen companies satisfied all of the CEI survey criteria to receive a 100% rating.¹⁹⁷ In 2012, the number was 189, and in 2016 it was 407.¹⁹⁸ The data in the HRC report also shows high marks and remarkable progress, particularly in addressing gender identity.¹⁹⁹ Of the 851 rated firms, 89% provided employment protections on the basis of sexual orientation, and 87% did so based on sexual identity (up from 5% in 2002).²⁰⁰ 95% of the firms with global operations have those policies worldwide.²⁰¹ 87% require

192. Jackie Wattles, *Georgia's Anti-LGBT Bill: These Companies Are Speaking out the Loudest*, CNN (Mar. 25, 2016, 11:21 AM), <http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill/>.

193. DEENA FIDAS & LIZ COOPER, HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2016: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 2 (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI-2016-FullReport.pdf>.

194. *Id.* at 6.

195. *Id.* at 11-13.

196. *Id.* at 2.

197. *Id.*

198. FIDAS & COOPER, *supra* note 193, at 4.

199. *Id.*

200. *Id.* at 18.

201. *Id.* at 20.

the same nondiscrimination of their contractors and vendors.²⁰² 60% now have transgender-inclusive health care (up from 0% in 2002).²⁰³ 84% have inclusive diversity training; 85% maintain LGBT employee resource groups, and 57% demonstrate significant external public commitment in support of the LGBT community.²⁰⁴

The 2016 CEI also shows that a high percentage of top scoring firms were found in the fields of accounting/consulting, airline, automotive, banking/financial services, computer hardware/software, entertainment, food and beverage, hotel/resort, insurance, internet services, manufacturing, law, pharmaceuticals, and retail.²⁰⁵

Firms that have consistently received high marks emphasize that nondiscrimination and inclusive treatment are not only the right thing to do, but are also the best business practices as well.²⁰⁶ A sample of these includes investment firm JPMorgan Chase & Co., which issued this statement:

We're proud to receive a perfect score on the Corporate Equality Index for a 14th [sic] straight year. This honor recognizes JPMorgan Chase's longstanding support of the LGBT community. By fostering a diverse and inclusive environment in our firm, we can approach challenges and opportunities with myriad viewpoints, enabling us to best serve our global client base.²⁰⁷

Communications giant Qualcomm expressed similar sentiments:

We are honored and very proud of having achieved a score of 100 on the 2016 Corporate Equality Index for three consecutive years. Qualcomm is stronger because of our inclusive work environment where employees see one another's uniqueness as assets and strengths. Embracing diversity is not just the right thing to do, it makes business sense. Our policies and practices reflect this commitment, and we are delighted to be recognized for these efforts by the Human Rights Campaign.²⁰⁸

202. *Id.* at 21.

203. FIDAS & COOPER, *supra* note 193, at 24.

204. *Id.* at 26, 29, 32.

205. *Id.* at 5.

206. See generally *Corporate Equality Index: 2016 Statements from Employers that Rated 100 Percent*, HUMAN RIGHTS CAMPAIGN FOUND., <http://www.hrc.org/resources/corporate-equality-index-2016-statements-from-employers-that-rated-100-perc> (last visited Mar. 31, 2016) [hereinafter *Corporate Equality Index Statements*].

207. *Id.*

208. *Id.*

From PayPal Holdings, this statement:

At PayPal we are committed to advancing, cultivating and preserving a culture of inclusion and diversity because it makes us a stronger, more successful company, and because it is the right thing to do. We are honored to be listed as a Best Place to Work for LGBT Equality, as we work towards creating a more inclusive environment inside and outside of our company. We must always strive to foster an environment where the richness of ideas, backgrounds, and perspectives are cultivated to create impact.²⁰⁹

The law firm of Sedgwick LLP likewise expressed its commitment:

Sedgwick is pleased to have received a perfect score on the Human Rights Campaign's Corporate Equality Index for the eighth consecutive year, an accomplishment we celebrate as an affirmation of the firm's continuous efforts to embrace and improve inclusion and diversity in the workplace. Sedgwick is a proud advocate of inclusion and diversity on behalf of all of our employees, including our lesbian, gay, bisexual and transgender community, and we continuously see the reward of that commitment in the many strengths, experiences and perspectives that our employees bring to the table on behalf of our clients. We are grateful to HRC for its review of our firm and for its leadership in promoting equal rights in the workplace.²¹⁰

D. Fewer Firms Lag Behind: A Minority of Nonsupport

While many large firms continue to make a commitment to inclusion, some major firms still have not made the commitment to fully support LGBT employment rights and have received a low CEI compliance score.²¹¹ Among these were Dick's Sporting Goods, Dillards, Dollar Tree, Publix, and Sherwin Williams, each at 20%, and even lower were Twenty-First Century Fox Goodyear, Halliburton, Harley Davidson, Maecco, Phillip Morris, Tenneco, and U.S. Steel at 10%.²¹² However, a remarkable aspect of this listing is its brevity, when compared with recent CEI rankings.²¹³ Increasingly, such companies are the exception to the rule of comprehensive

209. *Id.*

210. *Id.*

211. FIDAS & COOPER, *supra* note 193, app. at 53, 60, 63-64, 66-68, 92, 96.

212. *Id.*

213. *Id.* at 2.

support for LGBT employment rights by the major U.S. companies in the private sector.²¹⁴

V. IMPLICATIONS AND RECOMMENDATIONS

Although the law governing LGBT employment rights in the U.S. remains unsettled, it is moving more rapidly than any time before toward mandating equal workplace treatment.²¹⁵ Employers must be cognizant of the changing governing law from all government levels where they conduct business.²¹⁶ Besides the state and local laws that now direct employers to treat LGBT workers equally, employers are more likely than ever to face charges and litigation from the EEOC's energized enforcement agenda.²¹⁷

However, consideration of legal sanctions alone would be shortsighted.²¹⁸ As the statements of many large U.S. employers reflect, the positive returns gained from a diverse workforce and inclusive workplace can be significant.²¹⁹ One is better staffing opportunities.²²⁰ Another is an improved fit with customers, suppliers, and the public at large, which increasingly adheres to the view that LGBT employees are entitled to equal employment opportunities.²²¹ Documented benefits for employers establishing an inclusive workplace include improved morale, customer relations, and business opportunities.²²²

Employers across America should follow the steps that an increasing number of America's largest employers are taking, as reflected by the HRC's CEI index.²²³ Anti-discrimination policies should be updated to prohibit discrimination against the LGBT community.²²⁴ Those policies should be disseminated and enforced.²²⁵ Supervisor training should be improved to educate management on how to be aware of and responsive to LGBT discrimination and harassment.²²⁶ Critical to this is a clear and consistent message that all managers are responsible for ensuring that every

214. *Id.* at 4.

215. *Id.* at 2, 18.

216. FIDAS & COOPER, *supra* note 193, at 18.

217. *What You Should Know*, *supra* note 89.

218. *See generally Corporate Equality Index Statements*, *supra* note 206.

219. *Id.*

220. *Id.*

221. *Id.*

222. M.V. LEE BADGETT ET AL., WILLIAMS INST., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 1 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf>.

223. *Corporate Equality Index Statements*, *supra* note 206.

224. *What You Should Know*, *supra* note 89.

225. FIDAS & COOPER, *supra* note 193, at 18.

226. *Id.* at 12.

employee is treated with respect and able to work in an environment that is free of discrimination and harassment.²²⁷

However, employers can do more, and many have become far more proactive.²²⁸ Benefits such as health insurance and family leave can be transgender-inclusive just as they are extended to same-sex spouses and domestic partners.²²⁹ Externally, employers can require vendors and suppliers to practice similar non-discrimination.²³⁰ Employers can affirmatively advocate for LGBT employment rights and use their economic power to oppose contrary government policies.²³¹

A major challenge to employer efforts may come from employees and others whose personal beliefs and value-based biases define the LGBT community as deviant or immoral.²³² Those beliefs are the type that, in part, continue to fuel the anti-LGBT state measures previously discussed.²³³ While employers need to understand that such individual biases may be difficult to overcome, they also need to appreciate both the increasing legal risk of tolerating LGBT discrimination and the net organizational benefits they will accrue from education, training, and enforcement of policies furthering equal employment rights for all employees.²³⁴

VI. CONCLUSION

This article has reviewed the complex issue of workplace discrimination based on sexual orientation and identity. Although the law may change soon, the current lack of nationwide federal legislation and case law mandating equal employment of LGBT workers and the trending (but still inconsistent) state and local laws all stand in contrast to the more progressive national approaches taken by the EU and other nations.²³⁵ Those laws are highly relevant to American companies employing workers in those countries.²³⁶ In the U.S., the challenge of how to respond to current and future employees who identify as LGBT has fallen directly upon the private companies.²³⁷ As evidenced by clear trends, especially with the larger national and multinational firms, the predominant policy has been to

227. *Id.* at 12, 26.

228. *Id.* at 22.

229. *Id.* at 22, 24.

230. FIDAS & COOPER, *supra* note 193, at 11, 21.

231. Robertson & Dalesio, *supra* note 190.

232. DEENA FIDAS, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF THE CLOSET AND THE REWARDS OF INCLUSION 3 (2015), <http://www.hrc.org/resources/the-cost-of-the-closet-and-the-rewards-of-inclusion>.

233. Wattles, *supra* note 192.

234. BADGETT ET AL., *supra* note 222, at 6.

235. *See supra* Part I.

236. *See supra* Part I.

237. *See supra* Part I.

protect the rights of sexual minorities in the workplace beyond the measure called for by domestic U.S. law.²³⁸ Such policies will be beneficial for both employers and employees in increasingly global legal environments.²³⁹ Employers should also understand that, aside from being good for business and the right thing to do, fair and equal treatment of LGBT employees has never been more popular with the American people and may soon be the law of the land.²⁴⁰

238. *See supra* Part IV.

239. *See supra* Part V.

240. *See supra* Part V.