

PUBLICATION

LGBTQ Employees Remain Closeted at Work While Legal Protection Remains Unclear

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As a married gay man, I feared "coming out" to my coworkers at my previous places of employment. My fear centered around how would my coworkers react once they found out I was gay. Would they still talk to me, would they say things behind my back, would they call me names? I soon realized that I was not alone in feeling this way. A recent Human Rights Campaign study reported that half of LGBTQ employees surveyed remain closeted at their workplace. The report found that more than 50 percent of the LGBTQ workers surveyed reported hearing jokes about lesbian and gay people at least once in a while and more than 25 percent reported they have felt unhappy or depressed at work. (Source: HRC: A Workplace Divided – Understanding the Climate for LGBTQ Workers Nationwide). The report highlights the challenges facing LGBTQ individuals in the workplace, particularly when federal law is not explicitly clear surrounding the issue of whether LGBTQ employees are protected from discrimination in the workplace. As a result, 20 states, including D.C., have enacted state laws prohibiting discrimination on the basis of sexual orientation and gender identity in the workplace.

Title VII of the Civil Rights Act prohibits discrimination based on race, color, national origin, religion, and sex. Because Title VII does not explicitly prohibit discrimination based on sexual orientation and gender identity, federal courts are left to decide whether protection is afforded under the umbrella of "sex discrimination." The Supreme Court has held that discrimination based upon sexual orientation can be sex discrimination when it is based upon sexual stereotyping (i.e., a woman being too masculine for example) but has not gone so far as to include sexual orientation or gender identity in Title VII's definition of "sex." The federal appellate courts are split on the issue. The Second (New York, Connecticut and Vermont) and Seventh (Illinois, Indiana and Wisconsin) Circuit Court of Appeals have concluded that discrimination on the basis of sexual orientation is a form of sex discrimination protected under Title VII. The Eleventh (Florida, Georgia and Alabama) and Fifth Circuits (Texas, Louisiana and Mississippi) have held that sexual orientation is not enumerated in the statute, and therefore, not a protected class under Title VII.

As for discrimination on the basis of gender identity, the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee) held that transgender discrimination amounts to gender stereotyping and inherently sex discrimination which violates Title VII. Most recently, a Southern District of Texas court concluded that an individual's status as a transgender woman placed her under the protections of Title VII. This holding was the first of its kind in any district court within the Fifth Circuit.

While the debate goes on within the court system, what can employers do now to ensure equality in their workplace with LGBTQ employees and limit their exposure to a possible discrimination suit?

- First, and foremost, employers should have inclusive policies and procedures within their company. Companies should have an EEO Policy Statement prohibiting discrimination based upon the protected classes listed in Title VII, but also consider a broader definition of "sex" to include protection based upon sexual orientation and gender identity.
- Train managers to recognize and prevent situations where a coworker is harassing another because of their LGBTQ status. Jokes about any protected class should never be tolerated in the workplace.

Consistently enforcing anti-discrimination policies in the workplace helps employees, including LGBTQ employees, feel safe and secure in their work environment.

- Train employees on the importance of inclusion and diversity in the workplace. Everyone is different in his/her own way. It is important for employees to understand that in order to have a productive work environment.
- Create an employee resource group for LGBTQ employees and their allies. For example, Baker Donelson has a group called [Affinitas](#) for its LGBTQ employees and "straight allies." The group is designed to promote LGBTQ equality in the workplace and in the community. Creating a group like this may relieve some of the fears and concerns LGBTQ employees reported having in the recent survey.

Taking these steps will ensure that LGBTQ employees will not have to remain in the closet in the workplace much longer.