



CHAPTER 1

LAWS AND LEGAL PROTECTIONS

After many years of public advocacy, strategic litigation and hard work, lesbians, gay men, bisexuals, transgender people, people living with HIV and their allies have achieved a variety of legal protections against workplace discrimination based on sexual orientation, gender identity and HIV status. There are now federal laws in place that protect people living with HIV from discrimination in any workplace with 15 or more employees, but LGBT people have far less sweeping protections, as we will see below.

FEDERAL LAWS

Sexual Orientation and Gender Identity

There is currently no federal law that explicitly forbids sexual orientation and gender identity discrimination in private-sector (nongovernment) jobs. In some cases, LGBT employees may be protected by the federal sexual harassment and antidiscrimination provisions in Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based on race, color, religion, sex or national origin. Federal law also prohibits

age discrimination against workers over the age of 40, workers with disabilities, pregnant women and those who belong to or refuse to join a labor union.

A growing number of federal courts around the country are recognizing that Title VII's prohibition on workplace sex discrimination bars discrimination against transgender employees. Most courts that have reached this understanding recognize discrimination against transgender employees as a prohibited form of sex stereotyping. Judges are coming to understand the difference between sexual orientation and gender identity and expression, and have been more inclined to interpret Title VII to prohibit discrimination on the basis of gender identity or expression than sexual orientation. Passage of the Employment Non-Discrimination Act (see *The Long Fight for Federal Employment Protections* on page 7) would make gender identity protection explicit and unmistakable in federal law, as well as cover sexual orientation protection.

In contrast to workers in the private sector, all federal employees are protected against sexual orientation discrimination under Executive Order 13087. Federal law also prohibits public employment discrimination based on sex, including sex stereotypes. If you experience discrimination for failure to conform to stereotypes about your gender, you may have a viable claim under federal law.

Public employees enjoy certain constitutional protections against discrimination

because the Equal Protection Clause of the Fourteenth Amendment prohibits the government (and government employers) from purposely discriminating against someone without justification. Public employees have also used the First Amendment's right to free speech to protect the right to come out publicly. And Lambda Legal has successfully used the First Amendment to defend the right of teachers to discuss LGBT issues in the classroom and to uphold the rights of public employees to associate with gay men and lesbians.

HIV

The Americans with Disabilities Act and the Rehabilitation Act of 1973 are the two major federal laws that protect people with disabilities, including people living with HIV. The ADA prohibits discrimination against people because they are disabled or perceived to be disabled in any workplace with at least 15 employees, other than federal agencies. The Rehabilitation Act prohibits disability dis-

crimination by federal agencies or contractors or by employers that receive federal funding. The Rehabilitation Act provides protections similar to those provided by the ADA.

Under the ADA, employers who do not want to hire a person because he or she is disabled cannot refuse to do so unless the individual's disability would truly prohibit him or her from being able to perform the essential functions of the job. In 1998, the U.S. Supreme Court found that a person with asymptomatic HIV was covered by the ADA. This is the view of the vast majority of courts that have considered the issue, although a few have found that particular individuals living with HIV were not disabled. The ADA also outlines specific rules about providing confidentiality and privacy for job applicants and employees with HIV. For instance, applicants do not have to disclose their HIV status to a prospective employer unless it affects their current ability to perform the job. Prior to offering a job, an employer cannot test applicants for HIV. Once an employer makes a

WHAT IS U.S. LAW TODAY?

Employers may not discriminate against employees because of race, color, religion, sex, national origin, pregnancy, disability, age (over 40) or union membership at any stage of the employment relationship — from job advertisements, application reviews and interviews to working conditions, promotions, performance evaluations and references. The law is still developing, but according to

a number of court decisions, LGBT employees are protected from sex discrimination in some circumstances that involve gender-based acts and stereotypes.

The Equal Employment Opportunity Commission was established under the Civil Rights Act of 1964. The EEOC created sexual harassment regulations, that have been used occasionally to protect LGBT people from gender-based sexual harassment.

THE LONG FIGHT FOR FEDERAL EMPLOYMENT PROTECTIONS

In 1974, Representative Bella Abzug of New York introduced the first federal bill to ban sexual orientation discrimination in employment, housing and public accommodations. It did not pass.

Since that time, the Employment Non-Discrimination Act (ENDA), has gone through various incarnations and re-introductions, none of which has become law. In seeking political compromise, past versions have failed to include gender identity or expression protections or have exempted small workplaces, religious organizations and nonprofit organizations like the Boy Scouts. Some versions have discarded the uniform right to equal benefits for equal work.

In an era of greater awareness and empowerment, transgender activists and their allies insist that protections on the basis of gender identity can no longer be ignored or sacrificed in this battle. Notably, in 2006 three states that passed sexual orientation nondiscrimination laws (Illinois, Maine, Washington) also included gender identity. Today, advocates insist that ENDA legislation must forbid employers with 15 or more employees from discriminating on the basis of sexual orientation or gender identity or because they believe that an employee associates with LGBT people.

TIMELINE OF FEDERAL PROTECTIONS

1935

EMPLOYMENT DISCRIMINATION BASED ON UNION MEMBERSHIP BANNED

1963

SEX-BASED WAGE DISCRIMINATION BANNED

1964

EMPLOYMENT DISCRIMINATION BASED ON RACE, COLOR, RELIGION, SEX AND NATIONAL ORIGIN BANNED

1967

EMPLOYMENT DISCRIMINATION AGAINST PEOPLE AGE 40 AND OVER BANNED

1973

EMPLOYMENT DISCRIMINATION AGAINST FEDERAL EMPLOYEES WITH DISABILITIES BANNED

1974

BILL TO BAN SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT IS INTRODUCED BUT NOT PASSED

1981

EMPLOYMENT DISCRIMINATION AGAINST PREGNANT WOMEN BANNED

1986

EMPLOYMENT PROTECTIONS FOR IMMIGRANTS PASSED

1991

EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES BANNED

1996

ENDA MOVES TO THE SENATE FLOOR FOR A VOTE BUT DOES NOT PASS

conditional offer (conditioned on passing a physical exam, for example), employers can test a prospective employee for HIV, but only if the test is given uniformly to all prospects.

An employer can ask about a prospective employee's health, but can't use the answers to screen out people with disabilities unless the screening is based on inability to perform job-related functions. After an employee is hired, an employer can usually only ask questions about disability or health if the inquiry is "job-related and consistent with business necessity." All information and records obtained about an applicant's or employee's medical condition must be kept confidential by the employer.

Another useful federal safeguard for employees living with HIV is the right to reasonable accommodations. Depending on the circumstances, an employer's reasonable accommodations could include approving a flexible schedule, making the office wheelchair accessible or agreeing to other adjustments that allow a disabled employee,

including one with HIV, to perform the essential functions of a job.

As required by the ADA, what accommodation is "reasonable" and must be provided depends on the specific job, the employee's medical needs and the employer's size. An employer has the right to ask for information to make sure the employee is disabled and in need of reasonable accommodations and may not have to provide an accommodation that is too expensive or administratively difficult.

STATE AND LOCAL LAWS

A number of cities, counties and states have passed laws that can help protect LGBT people and people living with HIV. Unlike the federal ENDA, which would specifically address employment discrimination, many of the state, city and county laws encompass a wider range of protections, including housing and public accommodations. (Public accommodations are private entities who own, lease or operate facilities such as restaurants, retail stores, private

AT WILL EMPLOYMENT

In most states, most workers are employed "at will." Generally, they can be fired for any reason, with or without notice, except for a discriminatory or illegal reason (i.e., race or sex) as defined by federal, state or local law. Legal avenues for at will employees are limited.

If you do not have an employment contract and you don't

belong to a union, you are most likely an employee at will. An employment contract or employee handbook may include specific information about how to make a work-related complaint, but promises made in an employee handbook are not always enforceable. On the other hand, employment protections that your union obtains in a collective bargaining agreement are, by nature, enforceable.

WHAT IS A PUBLIC EMPLOYEE?

A public employee is a person who is employed by a municipal, county, state or federal agency or state college or university. On the whole, LGBT people who are public employees have broader

protections than those working in the private sector. Indeed, with the exception of the military and possibly intelligence positions, it is widely recognized that sexual orientation discrimination in a government workplace lacks a rational basis and is unconstitutional.

schools, doctors' offices, homeless shelters and day care centers, among others.)

In 1982, Wisconsin was the first state to outlaw employment discrimination based on sexual orientation. Nine years later, the next state — Hawai'i — enacted this protection, and now more than one-third of all states protect employees from sexual orientation discrimination. Some states also prohibit employment discrimination based on gender identity or expression. To find out if your state has laws prohibiting discrimination based on sexual orientation and gender identity or expression, visit www.lambdalegal.org for the most up-to-date information.

While federal discrimination law applies only to employers with 15 or more employees, state laws generally cover smaller employers. Many of these state provisions cover perceived sexual orientation and gender identity, so that people discriminated against because they are perceived to be gay or transgender can state a claim, even if they are not gay or transgender or not out. There also may be state or local laws that protect political activity or expression, including coming out. Colorado and North Dakota also forbid employers from discriminating against employees based on their lawful actions

outside of work, so this can cover LGBT employees, as well. Finally, some states and municipalities have prohibitions against marital status discrimination that may cover employees who are trying to obtain recognition of their same-sex relationships.

State nondiscrimination laws ban discrimination in hiring, promotion and firing and expressly prohibit harassment based on sexual orientation (and sometimes gender identity and expression), but they may not require that employers provide equal benefits to their employees. A number of local government entities have tried to address that harm by making equal health benefits available to domestic partners of public employees. In 1997, the city and county of San Francisco became the first jurisdiction in the United States to enact an Equal Benefits Ordinance that requires city contractors to provide the same benefits to employees who have domestic partners as they provide to employees who are married. According to the Human Rights Campaign, as of March 2006, one state (California) and 12 cities and counties had passed an equal benefits law.

Many states prohibit disability discrimination, and some states expressly prohibit discrimination against anyone with HIV. In

addition, some cities offer specific protections for workers with HIV. In some cases, these laws provide greater protection for people living with HIV than the federal protections provided by the Americans with Disabilities Act and Rehabilitation Act.

All state laws have some exceptions. For example, many religiously affiliated employers are exempt from laws that prohibit discrimination against LGBT people although publicly funded religious organizations are sometimes held to a higher standard by the courts. Some state laws also include exemptions for domestic workers and various categories of nonprofit or tax-exempt organizations (i.e., social or fraternal clubs, charitable organizations operated by political organizations and youth service organizations).

While state laws prohibiting employment discrimination only cover some LGBT people, protections granted by large cities and counties widen the scope. Close to half of all people in the United States live in an area that bars employment discrimination based on sexual orientation. According to the Human Rights Campaign's annual "State of the Workplace" report from 2006, 162 counties and cities had outlawed sexual orientation discrimination in public and private employment and 82 counties and cities had outlawed discrimination based on gender identity or expression in the workplace. According to the National Center for Transgender Equality, more than 30 percent of the U.S. population lives in an area that bars employment discrimination based on gender identity or expression.

OTHER LAWS THAT MAY PROTECT YOU

If you live in an area without explicit legal rights for LGBT employees or you are not a

public employee, there may be ways you can protect yourself or respond to unfair treatment in the workplace by using other laws in place. For example, if your employer has a contract or collective bargaining agreement protecting you from discrimination for sexual orientation or gender identity and expression, you may have legal protections under labor contract law.

In addition, you may have other avenues of legal recourse because some forms of discrimination may violate state codes of professional conduct or ethics. Certain tort and common law theories, such as infliction of emotional distress, defamation, breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy and interference with contract or prospective business advantage, may also apply. An employee suffering harassment on the job may also be able to seek redress for emotional injuries through workers' compensation. And an employee who is fired after colleagues see her with her same-sex partner outside of work may be able to sue for invasion of privacy. Some courts have also applied other state nondiscrimination laws, including disability protections, to transgender employees as well. In general, remember that the laws — particularly in the field of transgender rights — are evolving, and employers are not always following advances in the courts.

Lambda Legal secures legal precedents and interpretations of the law that improve the working lives of LGBT people, people living with HIV and their allies. We also help people understand what these laws mean in everyday life. The following chapters describe some practical and proactive actions that individual employees and groups can take to create workplaces free from discrimination.