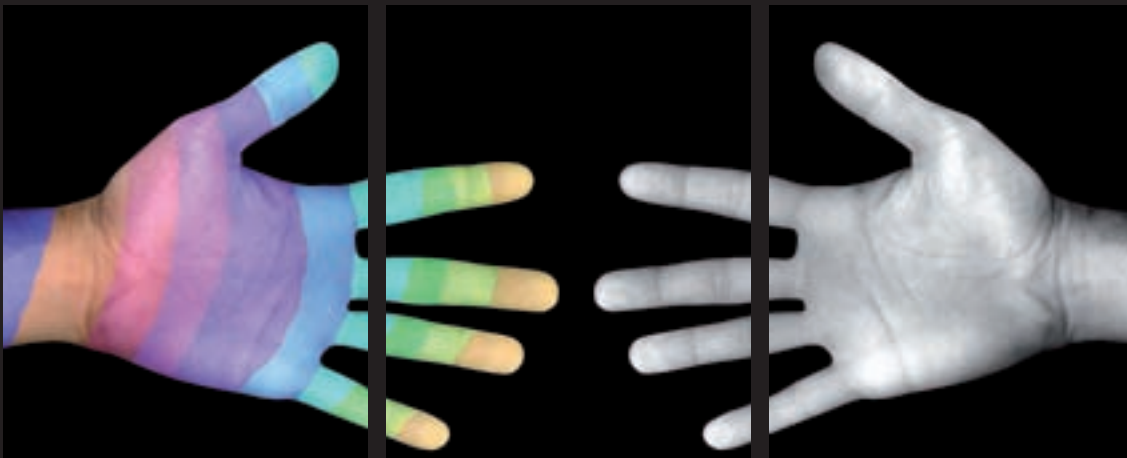


# Attracting, Advancing and Retaining LGBT Lawyers

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## Attracting, Advancing and Retaining LGBT Lawyers

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# Chapter 1: Workplace discrimination and bias persist

## The birth of the modern LGBT civil rights movement

On the evening of 28 June 1969, police officers in New York City had no idea what their actions were about to ignite.

Police raids of unlicensed nightclubs in and around the neighbourhood known as Greenwich Village were common in the 1960s, and the police officers raiding the Stonewall Inn that night likely expected little resistance from the patrons. At that time, the Stonewall Inn was an unlicensed club, popular with gay men, and, like other unlicensed clubs in the area at that time, it had been raided before without incident. During the raid on 28 June, however, something different happened: patrons fought back. Club-goers refused to show identification or consent to searches, officers grew more aggressive, and the crowds both inside and outside the club grew hostile, pelting the police with taunts and garbage until the police had to barricade themselves inside the club until reinforcements arrived. Subsequent protests and demonstrations by gay men, lesbians and transgender individuals marked the days that followed, attracting attention from the media, and even some tourists joined in the fray.<sup>1</sup>

While gay rights protests had occurred in major cities before these events (dubbed the 'Stonewall Riots'), they tended to be orderly and non-confrontational.<sup>2</sup> Post-Stonewall protests, however, grew more rebellious, and following those June nights in 1969, the modern gay liberation movement was born.

Annual marches commemorating Stonewall – now known as Pride events, held in cities around the world – and demonstrations, protests and parades by 1970s-era groups such as the Gay Liberation Front and Lavender Menace emphasised gay pride, power and liberation. The work of these and other groups raised the profile of the gay rights movement to previously unknown heights, but pride was by no means their only focus. Gay liberation activists sought what their counterparts in other liberation movements did: equal treatment in society and under the law. While Pride activities brought the LGBT community to the attention of mainstream America, the more conventional reform efforts of activists and groups such as Lambda Legal (also formed during the turbulent 1970s) focused more on advancing the civil rights of LGBT individuals.

## Backlash against the Pride movement: Early legal failures in the fight for workplace equality

During the 1970s and 80s, groups opposed to the gay rights movement, which sometimes used the provocative and flamboyant activities at Pride events as evidence of the 'deviance' of members of the LGBT community, promoted discriminatory treatment of LGBT individuals in the workplace. For example, singer Anita Bryant organised the 'Save Our Children' campaign to encourage voters to repeal a Dade County, Florida, anti-discrimination

law, and the group's success inspired similar anti-LGBT-rights movements in other cities around the country.<sup>3</sup> Other conservative groups, such as Focus on the Family, Concerned Women for America and the American Family Association, also lobbied against LGBT equality.

As a result of lobbying efforts by these and other groups, a backlash against the LGBT rights movement grew. In several areas across the country, teachers and coaches in public schools were fired because they were, or were suspected to be, gay or lesbian. LGBT workers from virtually every industry faced discrimination on the job, ranging from harassment to firings, and litigants bringing suit for discrimination were often unsuccessful.

For example, in the late 1970s, plaintiff Jerry Blum brought suit under Title VII of the US Civil Rights Act of 1964,<sup>4</sup> claiming the reason given for his firing was pretextual and he was actually fired for being gay and Jewish.<sup>5</sup> The Fifth Circuit upheld the lower court's denial of relief, stating that Mr. Blum was fired for cause and, in any event, "Discharge for homosexuality is not prohibited by Title VII or Section 1981 [of the Civil Rights Act]."<sup>6</sup> In a similar case, Darrell Williamson, a gay African-American man, brought suit claiming he was fired because of his race, but the district court granted summary judgment for the defendant employers because the court found Williamson actually believed he was discriminated based on sexual orientation, not race.<sup>7</sup> The Eighth Circuit affirmed, finding neither Title VII nor Section 1981 prohibited discrimination based on sexual orientation.<sup>8</sup>

Even into the 1980s, LGBT individuals fired from their jobs for being gay and/or discussing their sexual orientation at work found no sympathy in the courts.<sup>9</sup> Although

some lower courts eventually began showing a willingness to hold employers responsible for discrimination against LGBT employees, appellate courts, constrained by precedent, continued to find that the employees had no cause of action for discrimination based on sexual orientation.<sup>10</sup>

### **The tide begins to turn: Employment protections emerge**

LGBT rights groups continued to push for protection against workplace discrimination: although initially thwarted in the courts, LGBT activists and their straight allies turned to legislative relief. Although the process was slow – and is still ongoing – cities and states around the country have passed ordinances and laws prohibiting employment discrimination based on sexual orientation.<sup>11</sup> Additionally, although there is currently no US federal law explicitly protecting LGBT employees from workplace discrimination, the pending Employment Non-Discrimination Act (ENDA), if enacted into law, would protect lesbian, gay, bisexual and transgender individuals from employment discrimination.<sup>12</sup>

LGBT individuals gained a critical foothold in anti-discrimination law when the Supreme Court ruled, in 1998, that federal sexual harassment laws prohibited same-sex harassment.<sup>13</sup> This groundbreaking case meant that LGBT individuals no longer faced the roadblock previous courts had established when they held that harassment by a person of the same sex as the victim did not constitute sexual harassment under Title VII.<sup>14</sup>

Once the Supreme Court demolished the barrier preventing claims of same-sex sexual harassment from succeeding, courts grew more receptive to the idea of protecting LGBT individuals from workplace discrimination. For example, in 1999,

plaintiff James Quinn, a gay man working as a police officer in Nassau County, New York, brought suit for sexual harassment based on sexual orientation, claiming that co-workers tormented him with anti-gay comments and jokes, and that his supervisor was aware of the situation and did nothing to stop it.<sup>15</sup> After the defendants were found liable, the trial court denied all but one of the defendants' motions for judgments as a matter of law, finding that a hostile work environment directed against LGBT individuals on the basis of sexual orientation can serve as the basis of an Equal Protection claim, and that individuals have a right "to be free from sexual orientation discrimination causing a hostile work environment in public employment."<sup>16</sup>

Similarly, plaintiff Antonio Sanchez brought suit for sexual harassment under Title VII and corresponding state law, claiming his co-workers harassed him for his effeminate appearance and lack of conformity to male stereotypes, taunting him with homophobic slurs and calling him 'she'.<sup>17</sup> The Ninth Circuit reversed the trial court's decision that there was no hostile work environment, stating that Sanchez was harassed "because of sex" and precedent protecting women from being harassed for not conforming to female gender roles "applies with equal force to a man who is discriminated against for being too feminine."<sup>18</sup>

In still other cases that provided additional protections for LGBT individuals, courts upheld the dismissal of employees who proselytised at work and conveyed their religious beliefs against homosexuality to co-workers and/or clients.<sup>19</sup> These courts found that the anti-gay religious speech had harmful side-effects – i.e., the speech created a hostile work environment – and accommodation of the speech

was unreasonable, given that the harm outweighed the benefits to the speakers.

### **The fight against workplace discrimination continues**

Workplace equality for LGBT individuals is now seen as one of the benchmarks of a desirable workplace, and companies pay close attention to the public recognition they receive on the issue, such as rankings in the HRC Foundation's Corporate Equality Index. While there has been great progress in the 40 years since the Stonewall Riots, the challenge to eliminate workplace discrimination against LGBT individuals remains.

Persistent stereotypes abound regarding LGBT individuals. Gay men and men who are not gender conforming – regardless of their sexual orientation – still hear comments about "hairdressers and decorators", says D'Arcy Kemnitz, executive director of the National LGBT Bar Association. This type of workplace bias is often hidden because so many people do not want to talk about it, says Kemnitz. "But these presumptions about LGBT people still exist out there." Lesbians, non-gender-conforming women and transgender individuals can face similar types of harassment.

Some LGBT lawyers have expressed the opinion that bias against LGBT individuals may be more pervasive outside urban markets and large law firms. The situation LGBT individuals face in smaller markets, smaller firms and offices outside major metropolitan areas may be more difficult simply because there are fewer people and there may be less diversity generally in those markets, which can result in a greater prevalence of stereotyping and discrimination.

Perhaps the most visible sign of continuing discrimination against LGBT

individuals in the workplace is the US military's 'Don't Ask, Don't Tell' policy,<sup>20</sup> which prohibits LGBT men and women from serving openly in the armed forces. This policy effectively prohibits LGBT lawyers from serving in the Judge Advocate General Corps and other legal offices of the military. Additionally, because of deeply-embedded stereotypes about gender-appropriate behaviour and appearance, non-gender-conforming men and women serving in the military can face harassment and accusations that they are gay, which, whether or not true, can negatively affect their military career because of the 'Don't Ask, Don't Tell' policy.

LGBT law students are confronted with the military's anti-LGBT bias each year during on-campus recruiting. Through a law known as the Solomon Amendment,<sup>21</sup> the federal government can deny federal grants and contracts to any institute of higher education that prohibits the military from recruiting on campus. Law schools, therefore, must either allow the military to recruit on campus or risk losing all federal grant money, not just for the law school, but for the university with which it is affiliated, as well. Because of the Solomon Amendment, the military is essentially excused from complying with the non-discrimination policies many law schools have in force that protect their LGBT students, despite the fact that other employers are asked to comply with the policies in order to be allowed to recruit on campus.

LGBT individuals who have brought suit for employment discrimination have experienced a patchwork of successes and failures over the years. Although there are more legal protections against employment discrimination now than ever before, not every court has found in favour of the LGBT individual experiencing

discrimination. While LGBT individuals have made great strides in the social and employment arenas since the Stonewall Riots, full equality has yet to be achieved and challenges still remain.

### References

1. Carter, D., *Stonewall: The Riots that Sparked the Gay Revolution*, St. Martin's Press, 2004, pp144-45.
2. See, for example, the 'Annual Reminder' gay rights pickets held in Philadelphia every 4 July from 1965 to 1969, attended by members of gay rights organisations such as Mattachine Society, Janus Society and Daughters of Bilitis. Attendees had to adhere to a strict dress code, which specified that all female participants had to wear dresses. Loughery, J., *The Other Side of Silence – Men's Lives and Gay Identities: A Twentieth-Century History*, Henry Holt and Company, New York, 1998.
3. Chauncey, G., *Why Marriage: The History Shaping Today's Debate Over Gay Equality*, Basic Books, 2005, pp38-39.
4. Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers (generally, domestic employers who are not religious institutions) on the basis of race, colour, religion, sex or national origin. See 42 U.S.C. § 2000e-2.
5. *Blum v. Gulf Oil Co.*, 597 F.2d 936 (5th Cir. 1979).
6. *Id.* at 938 (citing *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (Title VII), *DeGraffenreid v. General Motors Assembly Division*, 558 F.2d 480, 486 n.2 (8th Cir. 1977) (Section 1981)).
7. *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1979); *cert. denied*, 493 U.S. 1089 (1990).
8. *Id.* at 70 (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam)).

9. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1983), *cert. denied*, 471 U.S. 1009 (1984).
10. *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (suit brought under 42 U.S.C. § 1983; district court found in favor of plaintiff), *rev'd* 976 F.2d 623 (10th Cir. Kan. 1992) (reversing decision and entering summary judgment for employer on basis of qualified immunity), *cert. denied* 508 U.S. 952 (1993).
11. See, e.g., N.Y. Civ. Rights Law § 40-c (2003); Conn. Gen. Stat. 46a-81C (1995); R.I. Gen. Laws 28-5-7 (1995); Minn. Stat. 363.03 (1994), *renumbered as* Minn. Stat. § 363A.08; Vt. Stat. Ann. § 495 (1994); N.J. Stat. Ann. 10:5-12 (1993); Haw. Rev. Stat. 378-2 (1993); Wis. Stat. 111.19-111.36 (1993); D.C. Code § 1-2512 (1992), *renumbered as* § 2-1402.11; Cal. Gov't Code § 12920 (1992).
12. Employment Non-Discrimination Act of 2009, House Bill H.R.281, introduced 19 June 2009 by Rep. Barney Frank (D-MA), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02981:>, and H.R.3017, introduced 24 June 2009 by Rep. Barney Frank, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3017:>. The corresponding Senate bill was introduced by Sen. Jeff Merkley (D-OR) on 5 August, 2009
13. *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).
14. See, e.g., *Garcia v. Elf Atochem No. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994), (harassment by a male supervisor against a male subordinate does not state a claim under Title VII); *Oncala v. Sundowner Offshore Servs.*, 83 F.3d 118 (5th Cir. 1996) (same); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (same-sex harassment claims cannot lie where all parties are heterosexual, i.e., a homosexual man could sexually harass a heterosexual man, or vice versa, but a heterosexual man could not sexually harass another heterosexual man).
15. *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999).
16. *Id.* at 350.
17. *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).
18. *Id.* at 874 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).
19. *Knight v. Conn. Dep't of Health*, 275 F.3d 156 (2d Cir. 2001) ("harmful side effects of the use of religious [anti-gay] speech with a client 'outweighs its benefits to the speaker-employee,' so that 'the employer is justified in taking adverse action against the employee.'") (citing *McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997)); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employee who was fired after refusing to remove his cubicle décor that included biblical passages condemning homosexuality was not discriminated against for religious beliefs, but was fired for violating the company's anti-harassment policy).
20. Officially titled 'Policy Concerning Homosexuals in the Armed Forces', this law is codified at 10 U.S.C. § 654.
21. This law is codified at 10 U.S.C. § 983.