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Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits

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**EVIDENCE OF PERSISTENT AND PERVASIVE
WORKPLACE DISCRIMINATION
AGAINST LGBT PEOPLE:
THE NEED FOR FEDERAL LEGISLATION
PROHIBITING DISCRIMINATION
AND PROVIDING FOR
EQUAL EMPLOYMENT BENEFITS**

*Jennifer C. Pizer, Brad Sears,
Christy Mallory & Nan D. Hunter**

Lesbian, gay, bisexual, and transgender (LGBT) people have experienced a long and pervasive history of employment discrimination. Today, more than eight million people in the American workforce identify as LGBT, but there still is no federal law that explicitly prohibits sexual orientation and gender identity discrimination against them.

This Article begins by surveying the social science research and other evidence illustrating the nature and scope of the discrimination against LGBT workers and the harmful effects of this discrimination on both employees and employers. It then analyzes the existing legal protections against this discrimination, which include constitutional protections for public sector workers, court interpretations of Title VII's

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ban on sex discrimination, state and local antidiscrimination laws, and corporate policies. This Article determines that, while these laws and policies provide important protection, the current system is incomplete, confusing, and inadequate. This Article next considers empirical research showing that employers do not offer employees with a same-sex spouse or partner the same access to family benefits that they offer to employees with a different-sex spouse, and it examines court decisions finding that a denial of equal benefits is unlawful employment discrimination.

Based on this research and legal analysis, the Article concludes that a federal law like the Employment Non-Discrimination Act (ENDA), a bill pending in Congress that would prohibit sexual orientation and gender identity employment discrimination, is needed. To serve its purpose consistently, however, the bill's current exemption of employee benefits should be removed. To be sure, ending all forms of unequal treatment based on sexual orientation or gender identity is warranted and feasible, and doing so will have positive effects for both employees and employers.

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I. INTRODUCTION

In the American workforce, more than eight million people (or 4 percent of the U.S. workforce) identify as lesbian, gay, bisexual, or transgender (LGBT).¹ Courts and historians repeatedly have acknowledged that LGBT workers have faced a long and pervasive history of employment discrimination.² The first federal bill to prohibit discrimination in employment based on sexual orientation was introduced into Congress in 1973. Since then, similar bills have been introduced into nearly every Congress. Recently, they have included explicit protection against gender identity discrimination as well. The current bill is called the Employment Non-Discrimination Act (ENDA).³

During this nearly four-decade-long period, public support for such protections has increased steadily;⁴ businesses voluntarily have adopted policies prohibiting discrimination against LGBT employees; states and local governments have added sexual orientation and/or gender identity to their nondiscrimination laws and

1. See GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. Applying that percentage to the American workforce means approximately 200,000 federal employees, more than 410,000 state employees, and more than 575,000 municipal government employees, for a total of more than one million public sector workers who identify as LGBT. The Williams Institute derived these figures in 2009 using data from the 2000 Census and the 2002 National Survey of Family Growth. The figure for the private sector is more than five times that size, at nearly seven million. See BRAD SEARS ET AL., THE WILLIAMS INST., DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 1-1 (2009) [hereinafter DOCUMENTING DISCRIMINATION], available at <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/>. In addition to LGBT people, this Article also refers to lesbian, gay, and bisexual (LGB) people and lesbian and gay (LG) people.

2. *Id.* at 6-1 to 6-25.

3. As of this writing, the same bill text is pending in the Senate as S. 811, 112th Cong. (2011), with forty-one cosponsors, and in the House of Representatives as H.R. 1397, 112th Cong. (2011), with 160 cosponsors. *Bill Summary & Status, 112th Congress (2011-2012), H.R.1397*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01397:@@x> (last visited Feb. 17, 2012); *Bill Summary & Status, 112th Congress (2011-2012), S.811, All Congressional Actions*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00811:@@X> (last visited Feb. 17, 2012). It has not yet been heard in committee in either chamber during this Congress, and no hearing dates have been set.

4. KARLYN BOWMAN & ADAM FOSTER, AM. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 11 (2008), available at <http://www.aei.org/files/2008/06/03/20080603-Homosexuality.pdf>.

policies; and the proscription against sex discrimination in the federal employment nondiscrimination statute, Title VII of the Civil Rights Act of 1964 (“Title VII”),⁵ has been interpreted by courts in ways that offer some important protections to LGBT workers. Federal and state constitutional guarantees have been enforced in ways protective of LGBT public sector employees as well.

Despite these legal developments and changes in public opinion toward LGBT people since ENDA was first introduced, consideration of the best available data and analysis of current law lead us to conclude that the need still exists for a federal law prohibiting sexual orientation and gender identity discrimination such as ENDA that requires equal access to employee benefits. Our survey of social science research and other evidence of discrimination in Part II shows that employment discrimination based on sexual orientation and/or gender identity continues, with harmful effects for both employees and employers. In Part III, we find that the incompleteness, inconsistency, and lack of clarity of the existing legal protections have resulted in a system that is more confusing and less effective than would be possible with an explicit federal statute prohibiting sexual orientation and gender identity discrimination.⁶ In Part IV, we examine empirical research demonstrating that employees with a same-sex spouse or partner do not receive the same access to benefits that those with a different-sex spouse receive. We also review recent court decisions holding that denial of equal benefits is unlawful employment discrimination. Based on these findings, we conclude not only that a federal law prohibiting sexual orientation and gender identity discrimination such as ENDA is still needed but also that it should be expanded to ensure equal access to employee benefits.

II. OVERVIEW OF RESEARCH AND OTHER EVIDENCE DOCUMENTING EMPLOYMENT DISCRIMINATION AGAINST LGBT EMPLOYEES

Research conducted over the past four decades yields compelling evidence that employment discrimination against LGBT people exists and that it has a range of negative effects on LGBT

5. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2006).

6. *See id.*

employees. The key findings of this body of research, which are discussed in more detail in the following parts, are:

- LGBT people and their heterosexual coworkers consistently report having experienced or witnessed discrimination based on sexual orientation or gender identity in the workplace.⁷
- As recently as 2008, the General Social Survey found that of the nationally representative sample of LG people, 37 percent had experienced workplace harassment in the last five years, and 12 percent had lost a job because of their sexual orientation.⁸
- As recently as 2011, 90 percent of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.⁹
- Numerous reports of employment discrimination against LGBT people have been found in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books.¹⁰
- State and local governments and courts have acknowledged that LGBT people have faced widespread discrimination in employment.¹¹
- Discrimination and harassment in the workplace can have a negative impact on the wages and mental and physical health of LGBT people.¹²

7. BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

8. DOCUMENTING DISCRIMINATION, *supra* note 1.

9. *Id.*

10. *E.g., id.*

11. SEARS & MALLORY, *supra* note 7, at 9.

12. *E.g.*, Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2003).

We conclude that recent research findings show that discrimination against LGBT people in the workplace is persistent and pervasive and that a federal law prohibiting sexual orientation and gender identity discrimination in the workplace, such as ENDA, is still very much needed.

*A. Social Science Studies of Workplace
Conditions for LGBT Employees*

1. Surveys of LGBT Employees and Their Non-LGBT Coworkers

In the last decade, several surveys using probability samples representative of the U.S. population have shown that a large proportion of LGBT people experience discrimination in the workplace because of their sexual orientation and/or gender identity. The 2008 General Social Survey (GSS), conducted by the National Opinion Research Center at the University of Chicago, has been a reliable source for monitoring social and demographic changes in the United States since 1972. The 2008 GSS marks the first time that survey participants were asked about their sexual orientation and included a module of questions about the experience of coming out, relationship status and family structure, workplace and housing discrimination, and health insurance coverage.¹³ Eighty sexual minority respondents completed all or some of the module questions, including fifty-seven LGB-identified respondents and twenty-three respondents who were non-LGB identified but reported having had same-sex sexual partners in the past.¹⁴ The results presented in this report are based only on the responses provided by LGB-identified individuals.

Results from the 2008 GSS include:

- Forty-two percent of the nationally representative sample of LGB-identified people had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives, and

13. GARY J. GATES, THE WILLIAMS INST., SEXUAL MINORITIES IN THE 2008 GENERAL SOCIAL SURVEY: COMING OUT AND DEMOGRAPHIC CHARACTERISTICS, at i (2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Sexual-Minorities-2008-GSS-Oct-2010.pdf>.

14. *Id.* at 1.

27 percent had experienced such discrimination during the five years prior to the survey.¹⁵

- Harassment was the form of sexual orientation-based discrimination most frequently reported by respondents who were open about being LGB in the workplace (35 percent reported ever having been harassed, 27 percent had been harassed within the five years prior to the survey), followed by losing a job (16 percent reported ever having lost a job, 7 percent had lost a job within the five years prior to the survey).¹⁶
- One third (33 percent) of LGB employees were not open about being LGB to anyone in the workplace.¹⁷
- Only 5.8 percent of bisexuals were generally open about their sexual orientation to their coworkers.¹⁸
- Of respondents who reported that they were open in the workplace about being LGB, 56 percent had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives, and 38 percent had experienced employment discrimination within the five years prior to the survey.¹⁹
- In comparison, of LGB respondents who reported that they were not open in the workplace about being LGB, 10 percent had experienced at least one form of sexual orientation-based discrimination within the five years prior to the survey.²⁰
- Twenty-five percent of LGB-identified respondents who were employed by federal, state, or local government reported having experienced employment discrimination because of their sexual orientation during the five years prior to the survey.²¹

Results from other surveys using probability samples representative of the U.S. population include:

15. SEARS & MALLORY, *supra* note 7, at 4.

16. *Id.*

17. GATES, *supra* note 13, at 5.

18. SEARS & MALLORY, *supra* note 7, at 4.

19. *Id.*

20. *Id.*

21. *Id.*

- Eighteen percent of LGB respondents to a survey conducted in 2000 had experienced employment discrimination in applying for and/or keeping a job because of their sexual orientation.²²
- Ten percent of LGB respondents to a survey conducted in 2007 were fired or denied a promotion because of their sexual orientation.²³
- Fifty-eight percent of LGB respondents to a survey conducted in 2009 reported hearing derogatory comments about sexual orientation and gender identity in their workplaces.²⁴

Because there are few nationally representative surveys that gather data on employment discrimination against LGBT people, it is useful to look at results from national and local non-probability surveys for a more complete picture of the experiences of LGBT employees. Consistent with the nationally representative surveys, recent national and local non-probability surveys reveal a pattern of discrimination against LGBT workers.

Results from recent non-probability national surveys of LGBT people show the following:

- In 2005, 39 percent of LGBT respondents to a national survey had experienced employment discrimination at some point during the prior five-year period.²⁵
- In 2009, 19 percent of LGBT staff and faculty surveyed at colleges and universities across the country reported that they had “personally experienced exclusionary, intimidating, offensive,” “hostile,” and/or “harassing” behavior on campus—in the single year prior to the interview alone.²⁶

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. LAMBDA LEGAL & DELOITTE FIN. ADVISORY SERVS. LLP, 2005 WORKPLACE FAIRNESS SURVEY 4 (2006), available at <http://data.lambdalegal.org/pdf/641.pdf>.

26. SEARS & MALLORY, *supra* note 7, at 5.

- In 2009, 44 percent of LGBT respondents to a national survey reported having faced some form of discrimination at work.²⁷
- In 2010, 43 percent of LGB people surveyed in Utah reported that they had experienced discrimination in employment; 30 percent had experienced some form of workplace harassment on a weekly basis during the previous year.²⁸
- In 2010, 27 percent of LG people surveyed in Colorado reported that they had experienced employment discrimination.²⁹
- In 2010, 30 percent of LGBT people surveyed in South Carolina reported that they had experienced employment discrimination based on their sexual orientation or gender identity.³⁰

LGBT respondents were asked more specific questions about the type of discrimination they had experienced in nine non-probability studies. Results range among the studies indicating that:

- Eight percent to 17 percent were fired or denied employment on the basis of their sexual orientation;
- Ten percent to 28 percent were denied a promotion or given a negative performance evaluation;
- Seven percent to 41 percent were verbally or physically abused, or had their work space vandalized; and
- Ten percent to 19 percent reported receiving unequal pay or benefits.³¹

Even higher percentages of transgender people report experiencing employment discrimination or harassment. When

27. OUT & EQUAL WORKPLACE ADVOCATES, SEVEN OUT OF TEN LGBT ADULTS, GIVEN THE CHOICE, PREFER JOBS IN STATES THAT RECOGNIZE SAME-SEX MARRIAGES 2-3 (2009), available at <http://outandequal.org/documents/2009Out&EqualWorkplaceSurvey.pdf>.

28. CLIFFORD ROSKY ET AL., THE WILLIAMS INST., EMPLOYMENT DISCRIMINATION AGAINST LGBT UTAHNS I (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rosky-Mallory-Smith-Badgett-Utah-Emp-Discrim-Jan-11.pdf>.

29. ONE COLO. EDUC. FUND, A CONVERSATION WITH COLORADANS 6 (2010), available at http://www.one-colorado.org/wp-content/uploads/2010/10/SurveyResults_BigBook.pdf.

30. S.C. EQUAL., A SURVEY OF SOUTH CAROLINA'S LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY (2010), available at <http://www.scequality.org/public/files/docs/SurveyFinal.pdf>.

31. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 559-60 (2009).

transgender respondents were surveyed separately in six non-probability studies conducted between 1996 and 2006, the percentages reporting employment discrimination based on gender identity ranged from 20 percent to 57 percent.³² Among the studies, rates of discrimination by type were within the following ranges:

- Thirteen percent to 56 percent were fired;
- Thirteen percent to 47 percent were denied employment;
- Twenty-two percent to 31 percent were harassed; and
- Nineteen percent were denied a promotion.³³

Results from more recent non-probability surveys are consistent with results from the older studies:

- A 2009 survey of transgender individuals in California revealed that 70 percent of respondents reported having experienced workplace discrimination related to their gender identity.³⁴
- In 2010, 67 percent of transgender respondents to a survey of LGBT Utah residents reported that they had experienced discrimination in employment; 45 percent had experienced workplace harassment on a weekly basis during the previous year.³⁵
- In 2010, 52 percent of transgender respondents from Colorado reported that they had experienced discrimination in employment.³⁶
- As recently as 2011, 78 percent of respondents to the largest survey of transgender people to date reported experiencing at least one form of harassment or mistreatment at work because of their gender identity; more specifically, 47 percent had been discriminated against in hiring, promotion, or job retention.³⁷

32. *Id.* at 560.

33. *Id.*

34. TRANSGENDER LAW CTR., STATE OF TRANSGENDER CALIFORNIA (2009), available at <http://www.transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf>. A 2003 survey of transgender individuals in California by the same researchers yielded similar results. SHANNON MINTER & CHRISTOPHER DALEY, NAT'L CTR. FOR LESBIAN RIGHTS & TRANSGENDER LAW CTR., TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES § I(A) (2003).

35. ROSKY ET AL., *supra* note 28, at 1.

36. ONE COLO. EDUC. FUND, *supra* note 29.

37. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL

- Of Massachusetts respondents to the 2011 survey (above), 76 percent had experienced harassment, mistreatment, or discrimination in employment. More specifically, 20 percent had lost a job, 39 percent were not hired for positions they had applied for, and 17 percent were denied promotions.³⁸

These findings are consistent with the survey responses of the heterosexual coworkers of LGB people who reported witnessing sexual orientation discrimination in the workplace. Across these studies, 12 percent to 30 percent of heterosexual respondents reported having witnessed anti-gay discrimination in employment.³⁹

2. Controlled Experiments

In controlled experiments, researchers create scenarios that allow comparisons of the treatment of LGB people with treatment of heterosexuals. A review of published literature found nine studies that used controlled experiments to measure discrimination based on sexual orientation in employment or public accommodations.⁴⁰ Eight of the nine studies found evidence of discrimination.⁴¹

In the studies that were focused on employment, researchers have sent out matched resumes or job applicants to potential employers with one resume or applicant indicating they are LGB and the other not. For example, in the most recently published study of this type, researchers sent 1,769 pairs of resumes to employers in seven states who had advertised openings for white-collar, entry-level jobs.⁴² The resumes in each pair were matched in all respects, except that one resume indicated that the applicant had been involved with a gay campus organization, and the other did not.⁴³ Based on the number of interviews offered to the fictitious candidates, the study concluded that a heterosexual man would have to apply to fewer than

TRANSGENDER DISCRIMINATION SURVEY 51 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

38. JODY L. HERMAN, THE WILLIAMS INST., THE COST OF EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER RESIDENTS OF MASSACHUSETTS 1 (2011), available at <http://www.glad.org/uploads/docs/news/ma-trans-employment-discrimination.pdf>.

39. SEARS & MALLORY, *supra* note 7, at 8.

40. Badgett et al., *supra* note 31, at 560; András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586 (2011).

41. Badgett et al., *supra* note 31, at 590–93; Tilcsik, *supra* note 40, at 586.

42. Tilcsik, *supra* note 40, at 599–601.

43. *Id.*

nine different jobs to receive a positive response, while a gay man would have to apply to almost fourteen jobs.⁴⁴ The study also found that discrimination was generally higher in states without sexual orientation-nondiscrimination laws and among employers who “emphasized [in the job advertisement] the importance of stereotypically male heterosexual traits.”⁴⁵

B. Courts, Legislatures, and Administrative Agencies Have Acknowledged and Described Continuing Patterns of Discrimination Against LGBT People

Evaluating the research summarized above, as well as other evidence of discrimination, courts, legislatures, administrative agencies, and scholars have reported continuing patterns of discrimination against LGBT people.

1. Findings by Courts and Legal Scholars

Numerous courts and legal scholars have acknowledged and documented the history and patterns of discrimination against LGBT people in this country. Every state and federal court that has substantively considered whether sexual orientation classifications should be presumed to be suspect for purposes of equal protection analysis—whatever they decided on that ultimate question—has recognized that LGBT people have faced a long history of discrimination.⁴⁶ For example, in 2010, when considering whether an amendment to the California Constitution limiting marriage to different-sex couples (Proposition 8) violated the U.S. Constitution, the U.S. District Court for the Northern District of California found that “[g]ays and lesbians have been victims of a long history of discrimination” and that “[p]ublic and private discrimination against gays and lesbians occurs in California and in the United States.”⁴⁷

In 2009, the California Supreme Court determined that government classifications based on sexual orientation, including marriage restrictions, should be subject to heightened scrutiny under the equal protection clause of the California Constitution in part

44. *Id.* at 605–06.

45. *Id.* at 586, 606.

46. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); SEARS & MALLORY, *supra* note 7, at 6, 8.

47. *Perry*, 704 F. Supp. 2d at 981.

because “sexual orientation is a characteristic . . . that is associated with a stigma of inferiority and second-class citizenship, manifested by the group’s history of legal and social disabilities.”⁴⁸ Similarly, in 1995, the Sixth Circuit concluded, “Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.”⁴⁹ To date, at least twenty state and federal courts assessing whether classifications based on sexual orientation should receive heightened equal protection scrutiny under the federal or a state constitution have concluded, in more than two dozen judicial opinions, that LGBT people have faced a history of discrimination.⁵⁰ Dozens of legal scholars have reached the same conclusion.⁵¹

Additionally, in July 2011, the Ninth Circuit cited the history of discrimination against gay and lesbian people in its decision to lift its stay of a district court ruling that had held the military’s “Don’t Ask, Don’t Tell” policy of excluding openly gay service members unconstitutional under the First Amendment and the Due Process Clause of the U.S. Constitution.⁵²

2. Findings by Federal, State, and Local Governments

The federal government, as well as many state and local governments, similarly have concluded that LGBT people have faced widespread discrimination in employment. For example, the executive branch of the federal government in 2011 acknowledged a long history of systematic discrimination against gay men and lesbians. In February 2011, U.S. Attorney General Eric Holder issued a statement that President Obama had determined that classifications based on sexual orientation should receive heightened

48. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008).

49. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995) (quoting trial court findings), *vacated*, 518 U.S. 1001 (1996).

50. *See* DOCUMENTING DISCRIMINATION, *supra* note 1, at 6-1 to 6-12; *Perry*, 704 F. Supp. 2d at 981; *see also In re Balas*, 449 B.R. 567, 574–76 (Bankr. C.D. Cal. 2011) (noting the history of discrimination against LGBT people in concluding that heightened scrutiny should apply to a rule prohibiting the filing of a joint bankruptcy petition by a married same-sex couple, and concluding that the rule violated the couple’s federal equal protection rights).

51. DOCUMENTING DISCRIMINATION, *supra* note 1, at 6-1, 6-13 to 6-25.

52. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011); Order, Nos. 10-56634, 10-56813, 2011 WL 2982102 (9th Cir. July 15, 2011).

equal protection scrutiny in part because of a “documented history of discrimination” against LGB people.⁵³ In a letter to Congress conveying the president’s reasoning, Attorney General Holder explained that the executive branch would take this position, in particular, in pending cases considering the constitutionality of the Defense of Marriage Act (DOMA),⁵⁴ “[f]irst and most importantly, [because] there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities.”⁵⁵

Accordingly, the Department of Justice (DOJ) submitted a brief in July 2011 in *Golinski v. U.S. Office of Personnel Management*, a case then pending in the U.S. District Court for the Northern District of California, explaining the Obama administration’s conclusion that DOMA unconstitutionally discriminates based on sexual orientation.⁵⁶ In its analysis, the DOJ pointed to a “long and significant history of purposeful discrimination” against LGBT people by federal, state, and local governments, and by private parties.⁵⁷

In at least eight states, an executive order, statute, and/or an official document of a law-making body includes a specific finding of employment discrimination based on sexual orientation or gender identity; in at least five other states, government commissions that have undertaken studies of employment discrimination have issued findings of sexual orientation and gender identity discrimination in their reports.⁵⁸ For example, the legislative findings set forth in New York’s Sexual Orientation Non-Discrimination Act include the statement, “[M]any residents of this state have encountered prejudice on account of their sexual orientation, and . . . this prejudice has severely limited or actually prevented access to employment,

53. Eric H. Holder, Jr., U.S. Attorney Gen., Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

54. 1 U.S.C. § 7 (2006).

55. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker of U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

56. Defendants’ Memorandum in Support of Motion to Dismiss Plaintiff’s Second Amended Complaint, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. C 3:10-00257-JSW), 2011 WL 2284300.

57. SEARS & MALLORY, *supra* note 7, at 9.

58. *Id.* at 9.

housing, and other basic necessities of life, leading to deprivation and suffering.”⁵⁹ And, in 2007, the Iowa Civil Rights Commission said in support of an amendment adding sexual orientation and gender identity to the state’s antidiscrimination statute:

We no longer wish to see our children, neighbors, co-workers, nieces, nephews, parishioners, or classmates leave Iowa so they can work, prosper, live or go out to eat. Our friends who are gay or lesbian know the fear and pain of hurtful remarks, harassment, attacks, and loss of jobs or housing simply because of their sexual orientation or gender identity.⁶⁰

3. Administrative Complaints and Other Documented Examples of Discrimination

a. Administrative complaints

Data from states that currently prohibit workplace discrimination on the basis of sexual orientation and/or gender identity demonstrate the continuing existence of discrimination against LGBT people and those perceived to be LGBT. For example, a 1996 study of data collected from state and local administrative agencies on sexual orientation employment discrimination complaints showed 809 complaints filed with state agencies in nine states that prohibited sexual orientation discrimination by statute or executive order.⁶¹ In 2002, the U.S. Government Accountability Office compiled a record of 4,788 state administrative complaints alleging employment discrimination on the basis of sexual orientation or gender identity filed between 1993 and 2001.⁶² And in 2008 and 2009, the Williams Institute conducted two studies of administrative complaints alleging sexual orientation and/or gender identity discrimination filed with state and local enforcement

59. 2002 N.Y. Laws ch. 2, § 1.

60. Press Release, Iowa Civil Rights Comm’n, Iowa Civil Rights Commission History of Policy: A Chronological Listing of Important Statements of Support by ICRC 2000–2007, at 4 (2007), available at http://www.iowa.gov/government/crc/docs/Policy_Statements.doc.

61. Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AM. REV. PUB. ADMIN. 175, 182–83 (1996).

62. JAMES REBBE ET AL., U.S. GEN. ACCOUNTING OFFICE, SEXUAL ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS (2002), available at <http://www.gao.gov/new.items/d02878r.pdf>.

agencies. The 2008 study gathered all complaints of sexual orientation and gender identity employment discrimination filed in the twenty states that then had sexual orientation and/or gender identity nondiscrimination laws. The study gathered a total of 6,914 complaints filed from 1999 to 2007.⁶³

The 2009 study focused on employment discrimination against public sector workers and contacted the then 20 states and 203 municipalities with sexual orientation and gender identity nondiscrimination laws and ordinances. The responding states and municipalities provided a record of 460 complaints filed with state agencies from 1999 to 2007, and 128 complaints filed with local agencies from as far back as 1982 by state and local government employees.⁶⁴ Because several state and local governments did not respond, or did not have complete records, this number most likely underrepresents the number of such complaints actually filed during that period.

Two other Williams Institute studies demonstrate that when the number of complaints is adjusted for the population size of workers who have a particular minority trait, the rate of complaints filed with state administrative agencies alleging sexual orientation discrimination in employment is comparable to the rate of complaints filed alleging race or sex discrimination.⁶⁵ Another Williams Institute study used a similar methodology to compare filing rates of sexual orientation discrimination complaints by public sector workers and by private sector workers.⁶⁶ The study found that sexual orientation filings were slightly lower, but similar, for

63. M.V. LEE BADGETT ET AL., THE WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 1999–2007 (2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Ramos-Emply-Discrim-1999-2007-Nov-08.pdf>.

64. DOCUMENTING DISCRIMINATION, *supra* note 1, at 11-10 to 11-17.

65. The earlier study conducted in 2001, using the same methodology, found that in six of ten states surveyed, the incidents of sexual orientation filings fell between the incidence of sex and race discrimination filings. In two other states, the prevalence of sexual orientation filings exceeded that of both race and sex and in only two states did sexual orientation filings fall below race and sex filings. See William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65–68 (2001).

66. BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 2003–2007 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-DiscriminationComplaintsReport-July-2011.pdf>.

employees in the public sector when compared to filings by employees in the private sector.⁶⁷

b. Other documented examples of discrimination

The 2009 Williams Institute report on discrimination in the public sector found more than 380 documented examples of workplace discrimination by state and local government employers against LGBT people from 1980 through 2009.⁶⁸ These examples had been culled from court opinions, administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books. The examples came from forty-nine of the fifty states and every branch of state government. Many of the workers in the examples had been subject to verbal harassment. The following is a very limited sampling of what LGBT people reported having been called in the workplace: an officer at a state correctional facility in New York, “pervert” and “homo”; a lab technician at a state hospital in Washington, a “dyke”; and an employee of New Mexico’s Juvenile Justice System, a “queer.” And there were countless instances of the use of “fag” and “faggot” in the report. The reported incidents frequently also included physical violence. For example, a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her declaring that God wanted her to die.⁶⁹ Many employees reported that, when they complained about this kind of harassment and requested help, they were told that it was of their own making, and no action was taken.⁷⁰

c. Indications of underreporting

The record of discrimination in court cases, administrative complaints, and other documents should not be taken as a complete record of discrimination against LGBT people by state and local

67. *Id.* at 1.

68. *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 12.

69. *Id.* at 13.

70. *Id.*

governments.⁷¹ First, the researchers reported that not all of the administrative agencies and organizations that enforce antidiscrimination laws responded to their requests.⁷² Second, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge, and willingness to consider sexual orientation- and gender identity-discrimination complaints.⁷³ Similarly, legal scholars have noted that courts and judges often have been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, which reduces the number of court opinions and administrative complaints.⁷⁴ Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public and the settlement is for a large amount, it is likely to go unreported in the media or academic journals.⁷⁵ Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of “outing” themselves further in their workplace. Thus, for example, a study published in 2009 by the Transgender Law Center reported that only 15 percent of those who said they had experienced some form of discrimination said they had filed a complaint.⁷⁶ Indeed, numerous studies have documented that many LGBT people are not “out” in the workplace due to fear of discrimination. This issue is discussed further in the next part.⁷⁷

*C. Research Documents That Workplace Discrimination
Negatively Affects the Income and Health of LGBT People*

Social science research has documented not only the pervasiveness of sexual orientation and gender identity discrimination but also the negative effects of such discrimination on LGBT people. Because of discrimination, and fear of discrimination, many LGBT employees hide their identities, are paid less, and have fewer employment opportunities than non-LGBT employees do. Research studies also have documented that such discrimination, as

71. *Id.* at 13–14.

72. *Id.* at 14.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See *infra* Part II.C.1 for a review of research showing that many LGBT people are not out in the workplace.

the expression of stigma and prejudice, exposes LGBT people to increased risk of poorer physical and mental health.

1. Concealing LGBT Identity in the Workplace

Numerous studies have documented that many LGBT people conceal their sexual orientation and/or gender identity in the workplace, which has been linked by research to poor workplace and health outcomes. Results from recent studies include:

- More than one-third of LGB respondents to the GSS reported that they were not out to anyone at work, and only 25 percent were generally out to their coworkers.⁷⁸
- Bisexual respondents to the GSS were much less likely to be out generally to their coworkers than gay and lesbian respondents were (6 percent vs. 38 percent respectively).
- A 2009 non-probability survey conducted across the U.S. found that 51 percent of LGB employees did not reveal their LGBT identity to most of their coworkers.⁷⁹
- A 2011 study found that 48 percent of LGBT white-collar employees were not open about their LGB identity at work.⁸⁰

Surveys have found that fear of discrimination is the reason many LGB employees choose to hide their LGB identity at work. Results from recent studies include:

- A 2005 non-probability national survey found that, of LGB respondents who were not out at work, 70 percent reported that they concealed their sexual orientation because they feared their employment would be at risk or that they would be harassed in the workplace.⁸¹
- A national probability survey conducted in 2009 found that 28 percent of closeted LGB employees who were not out in the workplace concealed their sexual identity because they felt that it may be an obstacle to career

78. GATES, *supra* note 13, at 5.

79. HUMAN RIGHTS CAMPAIGN FOUND., DEGREES OF EQUALITY 11 (2009), available at http://www.hrc.org/files/assets/resources/DegreesOfEquality_2009.pdf.

80. SYLVIA ANN HEWLETT & KAREN SUMBERG, CTR. FOR WORK-LIFE POLICY, THE POWER OF "OUT" 1 (2011).

81. LAMBDA LEGAL & DELOITTE FIN. ADVISORY SERVS. LLP, *supra* note 25, at 4.

advancement, and 17 percent believed they might be fired. Thirteen percent of closeted LGB respondents and 40 percent of transgender respondents were not open about their sexual orientation or gender identity in the workplace because they feared for their personal safety.⁸²

- Over 26 percent of LGB respondents and 37 percent of transgender respondents to a 2010 survey of LGBT people in Utah reported that they feared discrimination by their current employer.⁸³

The fear these respondents reported of being exposed to discrimination is in line with data showing that people who are out in the workplace are more likely to experience discrimination than people who conceal their sexual identity at work do.

But even in the absence of actual discrimination, staying closeted at work for fear of discrimination can have negative effects on LGBT employees, as recent studies have ascertained:

- A 2007 study of LGB employees found that those who most feared that they would be discriminated against if they revealed their sexual orientation in the workplace had less positive job and career attitudes, received fewer promotions, and reported more physical stress-related symptoms than those who were less fearful of discrimination.⁸⁴
- A survey of 2,952 LGBT white-collar employees published in 2011 showed that, compared with employees who were out at work, employees who were not out were more likely to feel isolated and uncomfortable “being themselves,” were 40 percent less likely to trust their employer, and were less likely to achieve senior management status (28 percent who were not out had achieved senior management status, compared with 71 percent who were out).⁸⁵
- Among the white-collar employees who felt isolated at work, closeted employees were 73 percent more likely to

82. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 79, at 15.

83. ROSKY ET AL., *supra* note 28, at 1.

84. Belle Rose Ragins et al., *Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work*, 92 J. APPLIED PSYCHOL. 1103, 1114 (2007).

85. HEWLETT & SUMBERG, *supra* note 80, at 10.

say they planned to leave their companies within three years.⁸⁶

- Closeted respondents were more likely to feel stalled in their careers and unhappy with their rate of promotion. Those LGBT employees who were frustrated with their career advancement were three times more likely to say they planned to leave their company within the next year.⁸⁷
- The white-collar employee respondents who were out were more likely to think that LGBT people are treated unfairly because of their LGBT identity than those who were not out (20 percent of those not out, compared with 5 percent of those who were out).⁸⁸

2. Wage and Employment Disparities

Twelve studies conducted over the last decade show that gay male workers are paid significantly less on average than their heterosexual male coworkers with the same productivity characteristics, leading researchers to attribute the disparity to different treatment of workers by sexual orientation.⁸⁹ The wage gap identified in these studies varies between 10 percent and 32 percent of the heterosexual men's earnings.⁹⁰ Lesbians generally earn the same as or more than heterosexual women, but less than either heterosexual or gay men.⁹¹

While no detailed wage and income analyses of the transgender population have been conducted to date, six non-probability surveys of the transgender population conducted between 1999 and 2005 found that 6 percent to 60 percent of respondents reported being unemployed and 22 percent to 64 percent of the employed population earned less than \$25,000 per year.⁹² Transgender respondents to a

86. *Id.* at 11.

87. *Id.*

88. *Id.*

89. *Testimony on H.R. 2015, The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the H. Comm. on Educ. & Labor and the H. Subcomm. on Health, Emp't, Labor & Pensions*, 110th Cong. 4 (2007) (statement of M.V. Lee Badgett), available at <http://williams.institute.law.ucla.edu/wp-content/uploads/Badgett-HR2015-testimony-Sept-2007.pdf>.

90. *Id.*

91. *Id.*; see *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 11; DOCUMENTING DISCRIMINATION, *supra* note 1, at 10-1 to 10-3.

92. Badgett et al., *supra* note 31, at 587-89.

2011 national survey were unemployed at twice the rate of the general population, and 15 percent reported a household income of under \$10,000 per year.⁹³ The unemployment rate for transgender people of color was nearly four times the national unemployment rate.⁹⁴ In response to a 2010 survey, 25 percent of transgender respondents in Colorado reported a yearly income of less than \$10,000.⁹⁵

3. Impacts on Mental and Physical Health

Research shows that experiencing discrimination can affect an individual's mental and physical health.⁹⁶ The "minority stress model" suggests that prejudice, stigma, and discrimination create a social environment characterized by excess exposure to stress, which, in turn, results in health disparities for sexual minorities compared with heterosexuals.⁹⁷

In considering experiences both inside and outside of the workplace, studies of LGB populations show that LGB people suffer psychological and physical harm from the prejudice, stigma, and discrimination that they experience. The ill effects of a homophobic social environment have been recognized by public health authorities including the U.S. Department of Health and Human Services in *Healthy People 2010*⁹⁸ and *Healthy People 2020*,⁹⁹ which set goals and objectives designed to improve the health of people in the United States through health promotion and disease prevention.¹⁰⁰ *Healthy People 2010* identified the gay and lesbian population among the

93. GRANT ET AL., *supra* note 37, at 2–3.

94. *Id.* at 3.

95. ONE COLO. EDUC. FUND, *supra* note 29, at 6.

96. David R. Williams et al., *Racial/Ethnic Discrimination and Health: Findings from Community Studies*, 98 AM. J. PUB. HEALTH S29, S29 (2008).

97. COMM. ON LESBIAN, GAY, BISEXUAL & TRANSGENDER HEALTH ISSUES & RESEARCH GAPS & OPPORTUNITIES, INST. OF MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 211–22 (2011) [hereinafter INST. OF MED.], available at <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>; Meyer, *supra* note 12, at 674–75.

98. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010: UNDERSTANDING AND IMPROVING HEALTH (2d ed. 2000).

99. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2020 (2010), available at http://www.healthypeople.gov/2020/TopicsObjectives2020/pdfs/HP2020_brochure_with_LHI_508.pdf.

100. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 98, at 16; U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 99.

groups to be targeted for reduction of health disparities.¹⁰¹ In explaining the reason for the inclusion of the gay and lesbian population as one of the groups requiring special public health attention, the Department of Health and Human Services noted, “The issues surrounding personal, family, and social acceptance of sexual orientation can place a significant burden on mental health and personal safety.”¹⁰² The Institute of Medicine of the National Academies, an independent body of scientists that advises the federal government on health and health policy matters, reiterated the point in its 2011 report *The Health of Lesbian, Gay, Bisexual and Transgender People*, in which it said, “LGBT people . . . face a profound and poorly understood set of . . . health risks due largely to social stigma.”¹⁰³

Research about mental and physical health outcomes of LGBT people has yielded findings that support the minority stress model.¹⁰⁴ For example, a 2009 survey conducted by the Massachusetts Department of Public Health of state residents found that 83 percent of heterosexual respondents indicated they were in excellent or very good health compared to 78 percent of gay men or lesbians, 74 percent of bisexual respondents, and 67 percent of transgender respondents.¹⁰⁵ A number of studies have demonstrated links between minority stress factors and physical health outcomes, such as immune function, AIDS progression, and perceived physical well-being.¹⁰⁶ For example, studies have examined the impact of concealing one’s sexual orientation as a stressor.¹⁰⁷ Thus, HIV-positive but healthy gay men were followed for nine years to assess factors that contribute to progression of HIV (e.g., moving from

101. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 98, at 16.

102. *Id.*

103. INST. OF MED., *supra* note 97, at 14.

104. *Id.* at 1–2, 7, 20–21.

105. MASS. DEP’T OF PUB. HEALTH, THE HEALTH OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) PERSONS IN MASSACHUSETTS 9 (2009), *available at* <http://www.mass.gov/eohhs/docs/dph/commissioner/lgbt-health-report.pdf>.

106. Steve W. Cole et al., *Accelerated Course of Human Immunodeficiency Virus Infection in Gay Men Who Conceal Their Homosexual Identity*, 58 PSYCHOSOMATIC MED. 219 (1996) [hereinafter Cole et al., *Accelerated Course*]; Steve W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 HEALTH PSYCHOL. 243 (1996) [hereinafter Cole et al., *Elevated Physical Health Risk*]; Philip M. Ullrich et al., *Concealment of Homosexual Identity, Social Support and CD4 Cell Count Among HIV-Seropositive Gay Men*, 54 J. PSYCHOSOMATIC RES. 205 (2003).

107. Cole et al., *Elevated Physical Health Risk*, *supra* note 106; Ullrich et al., *supra* note 106.

asymptomatic HIV infection to a diagnosis with an AIDS defining disease, such as pneumonia).¹⁰⁸ The researchers showed that HIV progressed more rapidly among men who concealed their gay identity than among those who disclosed it.¹⁰⁹ This was true even after the investigators controlled for the effects of other potentially confounding factors, like health practices, sexual behaviors, and medication use.¹¹⁰ More recent studies, conducted in the context of availability of more effective HIV medications than were available to the men in the 1996 study, found, similarly, that concealment of one's gay identity was associated with a lower CD4 count, a measure of HIV progression.¹¹¹

High levels of perceived discrimination or fear of discrimination among LGBT people also have been linked to higher prevalence of psychiatric disorders, psychological distress,¹¹² depression,¹¹³ loneliness, and low self-esteem.¹¹⁴ And experiences of anti-gay verbal harassment, discrimination, and violence have been associated with lower self-esteem, higher rates of suicidal intention,¹¹⁵ anxiety, anger, post-traumatic stress, other symptoms of depression,¹¹⁶

108. Cole et al., *Accelerated Course*, *supra* note 106, at 219.

109. *Id.* at 224–25.

110. *Id.* at 226.

111. Eric D. Strachan et al., *Disclosure of HIV Status and Sexual Orientation Independently Predicts Increased Absolute CD4 Cell Counts over Time for Psychiatric Patients*, 69 PSYCHOSOMATIC MED. 74, 74–75, 75 tbl.1 (2007); Ullrich et al., *supra* note 106, at 205.

112. See, e.g., David M. Huebner et al., *Do Hostility and Neuroticism Confound Associations Between Perceived Discrimination and Depressive Symptoms?*, 24 J. SOC. & CLINICAL PSYCHOL. 723, 723 (2005); Mays & Cochran, *supra* note 12, at 1869.

113. See, e.g., Robyn A. Zakalik & Meifen Wei, *Adult Attachment, Perceived Discrimination Based on Sexual Orientation, and Depression in Gay Males: Examining the Mediation and Moderation Effects*, 53 J. COUNSELING PSYCHOL. 302 (2006).

114. See, e.g., Jesus Ramirez-Valles et al., *Confronting Stigma: Community Involvement and Psychological Well-Being Among HIV-Positive Latino Gay Men*, 27 HISP. J. BEHAV. SCI. 101 (2005).

115. David M. Huebner et al., *Experiences of Harassment, Discrimination, and Physical Violence Among Young Gay and Bisexual Men*, 94 AM. J. PUB. HEALTH 1200, 1200–01 (2004); Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 346, 349–50 (2009).

116. Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING & CLINICAL PSYCHOL. 945, 946 (1999).

psychological distress,¹¹⁷ mental disorder, and deliberate self harm.¹¹⁸

Discrimination in the employment context specifically has been found to negatively affect the well-being of LGBT people. Results from studies focused on discrimination in the workplace include:

- According to a 1999 study, LGB employees who had experienced discrimination had higher levels of psychological distress and health-related problems.¹¹⁹ They also were less satisfied with their jobs and were more likely to contemplate quitting and to have higher rates of absenteeism.¹²⁰
- A 2010 study indicated that, although generally there are no differences between LGBT workers and non-LGBT workers in job performance,¹²¹ if LGBT employees are afraid of discrimination or preoccupied with hiding their LGBT identity, their cognitive functioning may be impaired.¹²²
- A 2009 national survey found that many LGBT employees reported feeling depressed, distracted, and exhausted, and avoided people and work-related social events as a result of working in an environment that was not accepting. Some employees reported that the lack of acceptance in their workplace had caused them to look for other jobs or to stay home from work.¹²³
- Conversely, a 2008 study found that supervisor, coworker, and organizational support for LGB employees had a positive impact on employees in terms

117. Ian H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 38, 41–42 (1995).

118. James Warner et al., *Rates and Predictors of Mental Illness in Gay Men, Lesbians and Bisexual Men and Women: Results from a Survey Based in England and Wales*, 185 BRIT. J. PSYCHIATRY 479, 483 (2004).

119. Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. COUNSELING PSYCHOL. 218, 229 (1999).

120. *Id.*

121. Eden B. King & José M. Cortina, *The Social and Economic Imperative of Lesbian, Gay, Bisexual, and Transgendered Supportive Organizational Policies*, 3 INDUS. & ORGANIZATIONAL PSYCHOL. 69, 74 (2010).

122. Juan M. Madera, *The Cognitive Effects of Hiding One's Homosexuality in the Workplace*, 3 INDUS. & ORGANIZATIONAL PSYCHOL. 86, 87 (2010).

123. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 79, at 11, 13.

of job satisfaction, life satisfaction, and outness at work.¹²⁴

In sum, despite the variations in methodologies, contexts, and time periods of the studies reviewed here, the accumulated evidence demonstrates a compelling national picture consistent with the case law and other incident reports: sexual orientation- and gender identity-based discrimination remain indisputably common in many workplaces across the country and in both the public and private sectors. Further, an emerging body of research shows that this discrimination has negative effects upon LGBT employees in terms of physical and emotional health, wages and opportunities, job satisfaction, and productivity. In the next part we examine whether current federal, state, and local prohibitions are sufficient to address the ongoing discrimination that LGBT people face in the workplace.

III. THE LEGAL LANDSCAPE

While current federal, state, and local laws—and an increasing number of companies by their own policies—prohibit employment discrimination on the basis of sexual orientation and gender identity to some extent, these protections are incomplete at the federal level, inconsistent or nonexistent at the state and local levels, and often unenforced or unenforceable when they exist at the local level or simply as a matter of corporate policy. No federal statute explicitly prohibits employment discrimination based on sexual orientation or gender identity. The prohibition against sex discrimination in Title VII,¹²⁵ however, has been interpreted to protect all employees—including LGBT employees—against many forms of adverse treatment. These include harassment based on perceptions that an employee does not conform to gender stereotypes¹²⁶ and sexual harassment.¹²⁷ In addition, there appears to be a growing recognition

124. Ann H. Huffman et al., *Supporting a Diverse Workforce: What Type of Support Is Most Meaningful for Lesbian and Gay Employees?*, 47 HUMAN RESOURCE MGMT. 237 (2008).

125. 42 U.S.C. § 2000e (2006).

126. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Ellsworth v. Pot Luck Enters., Inc.*, 624 F. Supp. 2d 868 (M.D. Tenn. 2009); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

127. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Equal Emp't Opportunity Comm'n v.*

that adverse action against an employee or prospective employee based on the individual undergoing gender reassignment is actionable sex discrimination.¹²⁸

Only sixteen states and the District of Columbia include both sexual orientation and gender identity in their employment nondiscrimination laws.¹²⁹ Five more states expressly ban employment bias based on sexual orientation but not based on gender identity.¹³⁰ Some state laws against sex discrimination have been interpreted to prohibit gender identity discrimination as a form of sex discrimination, as Title VII has been held to do. In addition, as of 2009, more than two hundred cities and counties also covered one or both forms of discrimination.¹³¹

Public sector employees have more protection than those in the private sector. Under the U.S. Constitution, public sector employees may be protected against at least some forms of discrimination on the basis of sexual orientation and gender identity.¹³² A presidential executive order protects civil service employees of the federal government from discrimination based on sexual orientation,¹³³ and a presidential directive protects them from discrimination based on gender identity.¹³⁴ Some state constitutions have been interpreted to

Dillard's, Inc., No. 6:07-cv-1496-Orl-19GJK, 2009 U.S. Dist. LEXIS 23605 (M.D. Fla. Mar. 23, 2009).

128. See Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

129. In chronological order, these jurisdictions are: Minnesota (1993); Rhode Island (1995, 2001); New Mexico (2003); California (1992, 2003); the District of Columbia (1977, 2005); Illinois (2005); Minnesota (2005); Hawaii (1991, 2005, 2006, 2011); New Jersey (1992, 2006); Washington (2006); Iowa (2007); Oregon (2007); Vermont (1992, 2007); Colorado (2007); Connecticut (1991, 2011); Nevada (1999, 2011); and Massachusetts (1989, 2011). See *State Nondiscrimination Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE (Jan. 20, 2012), http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf. Of these jurisdictions, California, Connecticut, the District of Columbia, Massachusetts, New Jersey, Nevada, Rhode Island, and Vermont first passed sexual orientation laws and later passed gender identity/expression laws. *Id.* Hawaii enacted a series of laws that now cover sexual orientation and gender identity in employment, housing, and public accommodations. *Id.* The statutory citations are set forth *infra* note 215.

130. These states are: Wisconsin (1982); New Hampshire (1997); Maryland (2001); New York (2002); Delaware (2009). See *State Nondiscrimination Laws in the U.S.*, *supra* note 129; *infra* note 215.

131. See *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, 11–12.

132. DOCUMENTING DISCRIMINATION, *supra* note 1, at 3-1 to 3-41.

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

134. The White House, Memorandum for the Heads of Executive Departments and Agencies (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-

protect LGBT state and municipal government employees.¹³⁵ In eleven states, governors' executive orders offer additional protections to LGBT state employees.¹³⁶ However, only about 15 percent of the LGBT workforce is employed by federal, state, or local government agencies.¹³⁷ The great majority of LGBT employees, who must look to federal, state, or local laws that apply to the private sector, find that current coverage is even less complete.

In the discussion that follows, the facts of the included cases illustrate recurring forms of workplace discrimination. We intentionally include only cases decided since 1989, in order to focus on the problems that remain, despite significantly improved public opinion toward LGBT people.¹³⁸ The problems that we identify can help inform federal or state legislators considering additional statutory protections and employers considering new policies.

A. At the Federal Level—Title VII

Since the Supreme Court decided *Hopkins v. Price Waterhouse*,¹³⁹ Title VII law has recognized that an employee who suffers job discrimination because of others' judgments that the employee does not conform to gender stereotypes can assert a viable claim. There is much overlap between discrimination on the basis of sexual orientation and gender identity and discrimination on the basis of gender atypicality.

Professor Andrew Koppelman has noted that everyday experience teaches "that the stigmatization of the homosexual has something to do with the homosexual's supposed deviance from

Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/.

135. DOCUMENTING DISCRIMINATION, *supra* note 1, at 6-1 to 6-7.

136. See the discussion of state executive orders, *infra* Part III.B.2.

137. See DOCUMENTING DISCRIMINATION, *supra* note 1, at 1-2 to 1-6. There are approximately 8,121,430 LGB employees in the U.S. workforce. Of those employees, approximately 206,100 are employed by the federal government, 417,740 are employed by state governments, and 584,860 are employed by local governments (for an approximate total of 1,208,700), meaning 14.9 percent of LGB workers are employed in the public sector. The survey data on which these numbers are based do not include data on the number of people who identify as transgender. *Id.* Other studies have estimated that approximately .3 percent of the U.S. population identifies as transgender. GATES, *supra* note 1, at 1. As such, these numbers conservatively estimate the size of the LGBT workforce.

138. BOWMAN & FOSTER, *supra* note 4, at 11.

139. 490 U.S. 228 (1989).

traditional sex roles.”¹⁴⁰ Koppelman reviewed extensive experiential, sociological, psychological, historical, and legal evidence on this question and concluded: “The two stigmas, sex inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.”¹⁴¹

Professor Francisco Valdes also has analyzed the relationships between gender norms and sexual orientation bias.¹⁴² Like Koppelman, Valdes devoted substantial attention to sociological and historical research and concluded that “social and sexual gender typicality was and is associated clinically and normatively with heterosexuality, while social or sexual gender atypicality was and is associated with homosexuality (and bisexuality).”¹⁴³ Numerous other scholars have pointed to the same phenomenon.¹⁴⁴ As Professor Valdes wrote, “discrimination putatively based on sexual orientation is in concept and practice tightly intertwined with gender discrimination.”¹⁴⁵

For transgender persons who have changed their gender identification from one sex to the other, the overlap between gender identity discrimination and sex discrimination is even more obvious than it is for lesbian, gay, and bisexual persons. As one author has

140. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993, 996 (N.D. Cal. 2010) (explaining that the different-sex requirement for marriage that now excludes lesbian and gay couples was due to the separate gender roles formerly imposed on spouses, and that sex and sexual orientation are necessarily interrelated concepts), *aff'd sub nom. Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

141. Koppelman, *supra* note 140, at 235.

142. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 87–90 (1995).

143. *Id.* at 135.

144. In addition to Koppelman and Valdes, see for example, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J. L. GENDER & SOC'Y 41 (2008); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); and Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000).

145. Valdes, *supra* note 142, at 335.

noted, “discrimination against transgender . . . employees is per se a form of sex-stereotyping discrimination The issue of discrimination against transgender employees cuts to the core of what a ‘gender stereotype’ is.”¹⁴⁶ Discrimination against transgender individuals

is rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are “supposed” to behave and about how male and female bodies are “supposed” to appear. For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation and/or disability.¹⁴⁷

In other words, when an employer discriminates based on gender stereotypes, sex-based discrimination is implicated. Title VII’s prohibition against different treatment “because of sex” should not cease to apply because an individual is or may be lesbian, gay, bisexual, or transgender, even though stereotypes about whether a male is masculine enough or a female is feminine enough frequently have motivated exclusions of LGBT people from employment.

Since the Supreme Court’s decision in *Price Waterhouse*, many lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this sound principle now governs in at least five circuits.¹⁴⁸ In addition to recognition that Title VII’s

146. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562, 589 (2007). The U.S. District Court for the District of Columbia has accepted that view. See *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

147. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000).

148. *Glenn v. Brumby*, 663 F.3d 1312, 1316–20 (11th Cir. 2011) (deciding the case on equal protection grounds, but stating that Title VII’s sex-discrimination protections extend to transgender people under a sex-stereotyping theory); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–65 (3d Cir. 2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that a harasser was motivated by a belief that a victim did not conform to gender stereotypes, but finding that the plaintiff had been targeted based only on his sexual orientation); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (recognizing that a claim for sex discrimination could be grounded in comments that targeted a gay man for his “effeminate

prohibition against sex discrimination can cover adverse treatment based on sexual stereotypes and gender variance, and on a person's change of gender presentation or identification, courts also have come to recognize that Title VII's prohibition against sexual harassment includes same-sex sexual harassment¹⁴⁹ and that lesbian, gay, and bisexual employees do not lose their protection against sexual harassment as a function of their sexual orientation.¹⁵⁰ Despite this progress, however, courts have not uniformly adopted these understandings. The continuing resistance to them is sufficient to warrant more explicit federal protections.

1. Gender Identity Discrimination as a Form of Sexual Stereotyping

Among the first appellate decisions to extend *Price Waterhouse* to an adverse job action against a transgender plaintiff was *Smith v. City of Salem*,¹⁵¹ in which the Sixth Circuit found that a fire department employee was subjected to impermissible sex discrimination under Title VII when she was forced to resign because of nonconformity with gender stereotypes.¹⁵² The court held that "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."¹⁵³

A year later, the Sixth Circuit again recognized actionable sex-stereotype discrimination against a transgender public employee. In *Barnes v. City of Cincinnati*,¹⁵⁴ Barnes filed suit against the City of Cincinnati after he was demoted from his position as a police officer.¹⁵⁵ Barnes lived as a woman outside of work and sometimes

behavior," but declining to hear the plaintiff's case because the sex stereotyping theory had not been advanced in the district court). The Seventh Circuit also applied this principle in *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998). Because that decision was vacated on other grounds, the law of the circuit regarding gender stereotyping claims is unclear. As discussed in *Bibby*, district courts in the circuit have continued to follow *City of Belleville*'s analysis of such claims. *Bibby*, 260 F.3d at 263 n.5.

149. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

150. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Equal Emp't Opportunity Comm'n v. Dillard's, Inc.*, No. 6:07-cv-1496-Orl-19GJK, 2009 U.S. Dist. LEXIS 23605 (M.D. Fla. Mar. 23, 2009).

151. 378 F.3d 566 (6th Cir. 2004).

152. *Id.* at 575.

153. *Id.*

154. 401 F.3d 729 (6th Cir. 2005).

155. *Id.* at 735.

came to work with makeup, arched eyebrows, and a manicure.¹⁵⁶ At the precinct, one of Barnes's supervisors told him he was not sufficiently masculine, and another official informed Barnes that he "needed to stop wearing makeup and act more masculine."¹⁵⁷ After they placed him on probation, superiors told Barnes that he would fail probation for not acting masculine enough; in fact, Barnes became the only officer to fail probation over a three-year period.¹⁵⁸ Explaining that Title VII protects against discrimination based on gender stereotypes regardless of the transgender status of the employee, the court held that Barnes had produced sufficient evidence at trial to establish a Title VII sex stereotype claim.¹⁵⁹

The Eleventh Circuit also relied heavily on cases applying Title VII's protections from sex stereotyping to transgender people when it found that terminating a transgender state employee violated the Equal Protection Clause of the U.S. Constitution.¹⁶⁰ In *Glenn v. Brumby*,¹⁶¹ the court applied heightened scrutiny to the state's decision to fire the employee because, like Title VII, "the Equal Protection Clause does not tolerate gender stereotypes."¹⁶²

District courts outside these circuits also have applied Title VII to protect transgender employees. For example, in *Schroer v. Billington*,¹⁶³ the court ruled after trial that the Library of Congress was liable under Title VII for its discrimination against a transgender woman,¹⁶⁴ finding that the plaintiff prevailed on two legal theories: direct or disparate treatment sex discrimination and sex-stereotype discrimination.¹⁶⁵ Testimony at trial had established that the negative reaction to the plaintiff resulted from her not fitting gender stereotypes because she had transitioned.¹⁶⁶ The court also held that discrimination based on a gender transition is literally discrimination based on sex because gender identity is a component of sex, and therefore discrimination based on gender identity is sex

156. *Id.* at 734.

157. *Id.* at 735.

158. *Id.*

159. *Id.* at 738.

160. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

161. 663 F.3d 1312 (11th Cir. 2011).

162. *Id.* at 1316–20.

163. 577 F. Supp. 2d 293 (D.D.C. 2008).

164. *Id.* at 303–08.

165. *Id.* at 304–08.

166. *Id.*

discrimination.¹⁶⁷ The court reasoned that, just as discrimination against converts from one to faith to another is discrimination based on religion, so too is discrimination against a person who undergoes gender transition sex discrimination.¹⁶⁸ The U.S. Department of Justice defended the government in the district court but did not appeal the ruling.¹⁶⁹

Similarly, in *Kastl v. Maricopa County Community College District*,¹⁷⁰ Estrella Mountain Community College (EMCC) required the plaintiff, who had been diagnosed with gender identity disorder and was transitioning from male to female, to use the men's restroom until she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply.¹⁷¹ The court denied EMCC's motion to dismiss,¹⁷² reasoning that "[t]he presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification."¹⁷³

Some courts, however, have continued the pre-*Price Waterhouse* rule that denies protection based on stereotyping to transgender employees. For example, in *Etsitty v. Utah Transit Authority*,¹⁷⁴ a transgender employee of the Utah Transit Authority was fired after she began living openly as a woman as part of the sex reassignment process.¹⁷⁵ The Transit Authority claimed that the termination stemmed from concerns that other employees would complain about the plaintiff's restroom usage, despite the fact that no complaints had actually been made.¹⁷⁶ The Tenth Circuit refused to apply Title VII's prohibition on sex-stereotype discrimination to a

167. *Id.*

168. *Id.*

169. *See DOJ Will Not Appeal Veteran's Victory in Transgender Discrimination Case*, AM. CIVIL LIBERTIES UNION (July 1, 2009), <http://www.aclu.org/lgbt/transgender/40092prs20090701.html>.

170. No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004).

171. *Id.* at *1.

172. *Id.* at *9-10.

173. *Id.* at *2; *see also* *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 660-61 (S.D. Tex. 2008) ("Lopez has pled, and developed facts in support of, a claim that River Oaks discriminated against her, not because she is transgendered, but because she failed to comport with certain River Oaks employees' notions of how a male should look.").

174. 502 F.3d 1215 (10th Cir. 2007).

175. *Id.* at 1219.

176. *Id.* at 1224.

transsexual plaintiff, holding that any discriminatory treatment was due to the plaintiff's transsexual status rather than to gender stereotypes.¹⁷⁷ Similarly, in *Creed v. Family Express Corp.*,¹⁷⁸ the district court disregarded the transgender woman plaintiff's evidence that her supervisors had made comments like, would it "kill [her] to appear masculine for eight hours a day,"¹⁷⁹ and held that she had been fired for noncompliance with a valid gender-based appearance code.¹⁸⁰

2. Sexual Orientation Discrimination and Sex Stereotyping

For lesbian, gay, and bisexual workers, courts have begun to use a sex stereotyping principle in situations involving harassment, but even here, the results are not uniform. *Doe v. City of Belleville*¹⁸¹ illustrates the emerging approach. There, two brothers who worked in a city public maintenance crew were taunted for what coworkers apparently perceived as feminine characteristics, including wearing an earring.¹⁸² Subjected to "a relentless campaign of harassment by their male co-workers," they sued the city alleging intentional sex discrimination.¹⁸³ The plaintiffs alleged that their harassment included being called degrading names like "queer" and "fag," comments such as "[a]re you a boy or a girl?" and threats of "being taken 'out to the woods'" for sexual purposes.¹⁸⁴ The brother who wore the earring was subject to more ridicule and was once asked whether his brother had passed a case of poison ivy to him through intercourse.¹⁸⁵ The verbal taunting turned physical when a coworker grabbed one of the boys' genitals to determine if he was a girl or a boy.¹⁸⁶ As a result, the plaintiffs left two days after giving their two

177. *Id.*

178. No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009).

179. *Id.* at *9.

180. *See id.* at *10-11.

181. 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998) (remanding to the Seventh Circuit for further consideration of the sexual harassment claim in light of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which held that same-sex sexual harassment is actionable under Title VII, but not critiquing the circuit court's gender stereotyping analysis).

182. *Id.* at 566-67.

183. *Id.* at 566-68.

184. *Id.* at 566-67.

185. *Id.* at 567.

186. *Id.*

weeks' notice due to continuing harassment.¹⁸⁷ The Seventh Circuit noted that "a homophobic epithet like 'fag[]' . . . may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."¹⁸⁸ The court found that a "because of" nexus between the allegedly proscribed conduct and the victim's gender could be inferred "from the harassers' evident belief that in wearing an earring, [the brother] did not conform to male standards."¹⁸⁹

Trial-level courts similarly have agreed that sex stereotyping claims by gay plaintiffs can be cognizable. For example, in *Fischer v. City of Portland*,¹⁹⁰ the lesbian plaintiff was a city inspector who wore masculine attire.¹⁹¹ At work, she did not wear makeup, had short hair, and wore men's clothing. Her supervisor subjected her to harassing comments based on both gender stereotypes and sexual orientation, including remarking that her shirt looked "like something her father would wear" and saying "are you tired of people treating you like a bull dyke[?]"¹⁹² Her coworkers also made multiple harassing comments based on both gender stereotypes and sexual orientation, including calling her a "bitch," saying loudly that they were "surrounded by all these fags at work," and asking her "would a woman wear a man's shoes?"¹⁹³ In holding that the employee could proceed with her Title VII claim, the court determined that the sex stereotype claim was not precluded by the fact that the harassers might also have been motivated by sexual orientation bias.¹⁹⁴

187. *Id.*

188. *Id.* at 593 n.27.

189. *Id.* at 575. Other appellate courts have rendered comparable decisions. *E.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

190. No. CV 02-1728, 2004 WL 2203276 (D. Or. Sept. 27, 2004).

191. *Id.* at *7.

192. *Id.*

193. *See id.* at *8.

194. *See id.* at *11–12. *See also* *Ellsworth v. Pot Luck Enters., Inc.*, 624 F. Supp. 2d 868, 877 (M.D. Tenn. 2009) ("Although sexual orientation is not a basis for a Title VII claim, sexual orientation does not prevent a plaintiff from asserting an otherwise-valid sex discrimination claim when the harasser happens to be of the same sex."); *McMullen v. S. Cal. Edison*, No. EDCV 08-9570VAP (PJWx), 2008 U.S. Dist. LEXIS 95635, at *21 (C.D. Cal. Nov. 17, 2008) ("[E]ven though sexual orientation does not appear in Title VII . . . harassment based on being effeminate and not conforming to male stereotypes . . . [i]s sufficient to state a claim under Title VII.")

A number of other courts, however, have rejected stereotyping claims by LGB parties despite strong evidence. Several of these courts have dismissed Title VII claims after concluding that the actual motivation for the alleged discrimination or harassment was the plaintiff's sexual orientation, and the courts have stressed that gender-based comments must be assessed in context.¹⁹⁵ These courts often admonish against the improper "bootstrapping" of sexual orientation discrimination claims with sex discrimination claims, in effect finding that any workplace harassment based on sexual orientation precludes a claim based on sex, even if much of the harassment is in explicitly gendered terms or based on gender stereotypes.¹⁹⁶

For example, in *Anderson v. Napolitano*,¹⁹⁷ the court explained away the evidence of gender bias by characterizing it as evidence of sexual orientation bias.¹⁹⁸ Where the plaintiff asserted that his coworkers had mocked him in gendered terms by lisping, the court concluded any such conduct was not based on traits associated with the other sex.¹⁹⁹ Rather, the court said, "the logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp. Lisp is not a stereotype associated with women."²⁰⁰

Other decisions illustrating this misunderstanding of stereotyping include *Trigg v. New York City Transit Authority*,²⁰¹ in which a city employee was subjected to a number of comments by

195. See, e.g., *Williams v. Waffle House*, No. 10-357-M2, 2010 U.S. Dist. LEXIS 116762, at *3, *9 (M.D. La. Nov. 2, 2010) (dismissing a sex discrimination claim as a "poorly disguised claim of sexual orientation discrimination"); *Equal Emp't Opportunity Comm'n v. Family Dollar Stores of Ga., Inc.*, No. 1:06-CV-2569-TWT/AJB, 2008 U.S. Dist. LEXIS 109045, at *51-59 (N.D. Ga. July 30, 2008) (dismissing a claim despite a supervisor's alleged comments that the seventeen-year-old male plaintiff employee was "half-female" and question about why the employee would "walk like that"); *Byars v. Jamestown Teachers Ass'n*, 195 F. Supp. 2d 401, 417 (W.D.N.Y. 2002); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 735-37 (E.D. Pa. 2002).

196. *Kiley v. ASPCA*, 296 Fed. Appx. 107, 110 (2d Cir. 2008); *Garside v. Hillside Family of Agencies*, No. 09-CV-6181-CJS, 2011 U.S. Dist. LEXIS 828, at *27 (W.D.N.Y. Jan. 4, 2011); *Pagan v. Holder*, 741 F. Supp. 2d 687, 695 (D.N.J. 2010); *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 446-47 (N.D.N.Y. 2002) (rejecting a claim by a gay male employee of a state correctional facility who was subjected to coworkers' harassing sex- and sexual orientation-based comments).

197. No. 09-60744-CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010).

198. *Id.* at *6.

199. *Id.* at *17-18.

200. *Id.*

201. No. 99-CV-4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001).

his supervisor implicating both sexual orientation and sex stereotypes.²⁰² The supervisor used anti-gay slurs, but also told the employee to do tasks in a “more manly” way and “with more strength.”²⁰³ The court rejected the employee’s Title VII gender stereotyping claim because it found that sexual orientation, rather than sex stereotyping, was the *sine qua non* of the claim.²⁰⁴ The court thus allowed the sexual orientation discrimination to foreclose otherwise actionable sex stereotype discrimination.²⁰⁵ Similarly, in *Cash v. Illinois Division of Mental Health*,²⁰⁶ an employee of a state home for the developmentally disabled was subjected to hostile treatment based on both sex stereotypes and perceived sexual orientation.²⁰⁷ The employee was accused of being a closeted homosexual, was subjected to simulated sex acts, and was called a “he/she.”²⁰⁸ The federal district court rejected the employee’s Title VII claim, ignoring the gender-stereotyping dimensions of the treatment, and the Seventh Circuit affirmed.²⁰⁹

Other courts have noted the evidence of sex stereotyping, but have rejected the plaintiff’s claim after deeming the conduct insufficiently severe or pervasive to create a hostile environment cognizable under Title VII.²¹⁰ Likewise, in same-sex sexual harassment cases, the same question always exists of whether the court will deem the plaintiff’s allegations or evidence adequate to satisfy Title VII’s requirement that the adverse conduct must have been severe or pervasive.²¹¹

Courts also have rejected same-sex sexual harassment cases on the ground that the harasser did not sexually desire the plaintiff,

202. *Id.* at *2–4.

203. *Id.* at *3.

204. *Id.* at *6.

205. *See id.*

206. 209 F.3d 695 (7th Cir. 2000).

207. *Id.* at 696–97.

208. *Id.* at 697.

209. *See id.* at 697–98; *see also* Lugo v. Shinseki, No. 06 Civ. 13187 (LAK) (GWG), 2010 U.S. Dist. LEXIS 49732, at *4 (S.D.N.Y. May 21, 2010) (dismissing a claim despite the male plaintiff’s allegations that coworkers had harassed him with assertions that he had been wearing lipstick); Ford v. N.Y.C. Dep’t of Health & Mental Hygiene, 545 F. Supp. 2d 377, 389 (S.D.N.Y. 2008) (dismissing plaintiff’s claim despite her allegations that a coworker had said she “had a penis” and that other coworkers had “called her a man”).

210. *See, e.g.,* Morales v. ATP Health & Beauty Care, Inc., Civ. No. 3:06CV01430 (AWT), 2008 U.S. Dist. LEXIS 63540, at *17–30 (D. Conn. Aug. 18, 2008).

211. *See, e.g.,* Ogilvie v. N. Valley EMS, Inc., No. 07-485, 2008 U.S. Dist. LEXIS 87913, at *15–22 (E.D. Pa. Oct. 29, 2008).

although *Oncale* does not require proof of an accused harasser's sexual desire for the complaining plaintiff.²¹² Many of these cases are notable because they show rejection of sexual harassment claims despite evidence that the harassers had touched the plaintiffs in a sexual manner or had touched themselves in a sexual manner in the presence of the plaintiffs, and/or that the harassers' comments to the plaintiffs indicated that they actually had been motivated by sexual desire.²¹³

Lastly, courts dispense with Title VII claims if a plaintiff's pleadings or testimony indicate that he or she believed that the discrimination was based on his or her sexual orientation or transgender status, regardless of what else the evidence might support.²¹⁴ Thus, even as recognition has grown that LGBT employees should have the same right as heterosexual employees have to protection from sexual harassment and discrimination based on sexual stereotyping and others' hostility to their gender presentation, it appears that at least some judges remain hostile to applying Title VII in this manner. As a result, for LGBT workers facing sexual harassment or discrimination based on gender stereotypes, remedies under Title VII are uncertain at best. Passage of a federal law like ENDA would alleviate this problem by confirming that the range of sex- and gender-related adverse treatment is prohibited, whether the treatment is based on an individual's gender-related appearance or mannerisms or on the sex of one's partner.

212. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998) (explaining that a plaintiff can show improper sexual harassment in part with evidence that an alleged harasser's conduct was motivated by sexual interest in the plaintiff, but suggesting other ways cognizable harassment may be demonstrated without a showing of sexual interest).

213. *See, e.g.*, *Moore v. USG Corp.*, No. 2:10CV00066-NBB-SAA, 2011 U.S. Dist. LEXIS 106906, at *9–12, *16, *43 (N.D. Miss. Sept. 20, 2011); *Wheatfall v. Potter*, No. H-07-1937, 2010 U.S. Dist. LEXIS 72084, at *3, *13–14 (S.D. Tex. July 19, 2010); *Argeropoulos v. Exide Techs.*, No. 08-CV-3760 (JS), 2009 U.S. Dist. LEXIS 59009, at *3, *10 (E.D.N.Y. July 8, 2009); *Taylor v. H.B. Fuller Co.*, No. 06cv854, 2008 U.S. Dist. LEXIS 83420, at *2–3, *16–17 (S.D. Ohio Oct. 20, 2008); *Love v. Motiva Enters., LLC*, No. 07-5970, 2008 U.S. Dist. LEXIS 69978, at *3–5, *13–14 (E.D. La. Sept. 16, 2008).

214. *See, e.g.*, *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011); *Iniguez v. Boyd Corp.*, No. 1:08-CV-1758-AWI-DLB, 2009 U.S. Dist. LEXIS 59951, at *25–26 (E.D. Cal. July 13, 2009); *Parrella v. Lawrence & Mem'l Hosp.*, No. 3:08-CV-1445 (PCD), 2009 U.S. Dist. LEXIS 37892, at *2, *6–7 (D. Conn. May 5, 2009).

*B. At the State Level—
State Laws and Executive Orders*

1. State Laws

Currently, twenty-one states²¹⁵ and the District of Columbia²¹⁶ prohibit employment discrimination on the basis of sexual orientation and/or gender identity by statute.²¹⁷ Of these twenty-two jurisdictions that prohibit discrimination in employment on the basis of actual sexual orientation, three do not prohibit discrimination on the basis of *perceived* sexual orientation,²¹⁸ and five do not explicitly prohibit discrimination on the basis of gender identity by statute.²¹⁹

In other words, twenty-nine states do not have antidiscrimination statutes that prohibit sexual orientation discrimination, and thirty-four do not have statutes that explicitly

215. These states are: California (CAL. GOV'T CODE § 12900 (West 2003)); Colorado (COLO. REV. STAT. § 24-34-401 (2008)); Connecticut (CONN. GEN. STAT. § 46a-51 (2007)); Delaware (DEL. CODE ANN. tit. 19, § 710 (2009)); Hawaii (HAW. REV. STAT. § 378-1 (1991)); Illinois (775 ILL. COMP. STAT. ANN. 5/1-101 (2007)); Iowa (IOWA CODE § 216.1 (2008)); Maine (ME. REV. STAT. ANN. tit. 5, § 4551 (2007)); Maryland (MD. CODE ANN. art. 49B, § 15 (West 2008)); Massachusetts (MASS. GEN. LAWS ch. 151B, § 4 (2008)); Minnesota (MINN. STAT. § 363A.08 (2008)); Nevada (NEV. REV. STAT. § 613.310 (2008)); New Hampshire (N.H. REV. STAT. ANN. § 354-A:7 (2008)); New Jersey (N.J. STAT. ANN. § 10:5 (West 2008)); New Mexico (N.M. STAT. ANN. § 28-1-1 (2008)); New York (N.Y. EXEC. LAW § 292 (McKinney 2008)); Oregon (OR. REV. STAT. § 659A.030 (2005)); Rhode Island (R.I. GEN. LAWS § 28-5-1 (2008)); Vermont (VT. STAT. ANN. tit. 21, § 495 (2008)); Washington (WASH. REV. CODE § 49.60.030 (2008)); and Wisconsin (WIS. STAT. § 111.31 (2007)).

216. D.C. CODE § 2.1401 (2003).

217. *See infra* notes 219–20.

218. These are Delaware, Vermont, and Washington. DEL. CODE ANN. tit. 19, § 710 (2009); VT. STAT. ANN. tit. 21, § 495 (2008); WASH. REV. CODE § 49.60.030 (2008).

219. The following five states protect employees on the basis of sexual orientation but have no explicit statutory protections against gender identity discrimination: Delaware, Maryland, New Hampshire, New York, and Wisconsin. In several states including New York, however, lower courts or administrative agencies have ruled that individuals discriminated against on the basis of gender identity can bring a sex discrimination claim under the state antidiscrimination statute. *See, e.g.*, *Rentos v. OCE-Office Sys.*, 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060, at *26 (S.D.N.Y. Dec. 24, 1996) (holding that New York “outlaws discrimination against transsexuals as a form of unlawful ‘sex discrimination’”); *Lie v. Sky Publ'g Corp.*, 01-5117-J, 2002 Mass. Super. LEXIS 402, at *15 (Mass. Super. Ct. Oct. 7, 2002) (holding that a transgender plaintiff's claim against her employer was inherently based upon sex discrimination); *Jette v. Honey Farms Mini Mkt.*, 2001 Mass. Comm. Discrim. LEXIS 50, at *3 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (holding that under Massachusetts law, “discrimination against transsexuals because of their transsexuality is discrimination based on ‘sex.’”); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Comm'n on Human Rights & Opportunities June 7, 2006), available at <http://www.ct.gov/chro/cwp/view.asp?a=2526&Q=315942> (holding that the Connecticut statute prohibiting sex-based discrimination encompasses discrimination against transgender people).

prohibit gender identity discrimination.²²⁰ In terms of population, 56 percent of Americans live in states that do not offer protection from sexual-orientation discrimination in the workplace, and 77 percent live in states that do not explicitly prohibit employment discrimination based on gender identity.²²¹

2. Executive Orders

In eleven of the thirty-four states that do not offer statutory protection for sexual orientation and gender identity, gubernatorial executive orders prohibit discrimination on either or both bases against state employees.²²² However, these orders provide limited enforcement opportunities and lack permanency:

- None provides employees a private right of action,²²³
- Only seven confer any power to investigate complaints,²²⁴ and
- The executive orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have been issued and then rescinded by successive governors during the last fifteen years.²²⁵

220. Note that, as with Title VII, the sex discrimination prohibitions in every state's employment law may be interpreted by each state's courts as forbidding gender identity discrimination.

221. E-mail from Dr. Gary Gates, Williams Distinguished Scholar, to Jennifer C. Pizer, Legal Dir. & Arnold D. Kassoy Senior Scholar of Law, the Williams Inst., UCLA Sch. of Law (March 19, 2012) (on file with the Williams Institute).

222. Alaska (Alaska Admin. Order No. 195 (Mar. 5, 2002)); Arizona (Ariz. Exec. Order 2003-22 (June 21, 2003)); Indiana (Ind. State Gov't Emp't Policy Statement (Aug. 17, 2004)); Kansas (Kan. Exec. Order 07-24 (Aug. 31, 2007)); Kentucky (Ky. Exec. Order 2008-473 (June 2, 2008)); Michigan (Mich. Exec. Dir. No. 2007-24 (Nov. 21, 2007)); Missouri (Mo. Exec. Order 10-24 (July 9, 2010)); Montana (Mont. Exec. Order No. 41-2008 (Nov. 14, 2008)); New York (N.Y. Exec. Order 33 (Dec. 16, 2009)); Ohio (Ohio Exec. Order 2007-10S (May 17, 2007)); Pennsylvania (Exec. Order 2003-10 (July 28, 2003)); *see* DOCUMENTING DISCRIMINATION, *supra* note 1, at 15-89 n.414; *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 16.

223. DOCUMENTING DISCRIMINATION, *supra* note 1, at 15-3; *see* Mo. Exec. Order 10-24 (July 9, 2010); N.Y. Exec. Order 33 (Dec. 16, 2009). For example, the Virginia Supreme Court ruled in June 2009 that there was "no reversible error" in a lower court decision holding that an executive order prohibiting discrimination based on sexual orientation created no right for the aggrieved employee to file suit in court. Va. Dep't of Human Res. Mgmt., Office of Equal Emp't Servs., Private Letter Ruling 0107-038 (Jan. 7, 2009); Final Order, Moore v. Va. Museum of Natural History, No. 690CL09000035-00 (Va. Cir. June 15, 2009).

224. DOCUMENTING DISCRIMINATION, *supra* note 1, at 15-3; N.Y. Exec. Order 33 (Dec. 16, 2009).

225. DOCUMENTING DISCRIMINATION, *supra* note 1, at 15-3.

3. Local Laws

More than two hundred cities and counties have enacted local ordinances prohibiting employment discrimination on the basis of sexual orientation and/or gender identity. In 2008, the Williams Institute identified 203 such municipalities located in thirty-five states.²²⁶ There is no state statutory protection or any identified municipality that explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity in Alaska, Arkansas, Idaho, Mississippi, Montana, Nebraska, North Dakota, South Carolina, Tennessee, or Wyoming. Several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms, or willingness to accept and investigate sexual orientation and/or gender identity discrimination complaints.²²⁷

4. Limitations on Effectiveness of State and Local Laws

a. Resource and capacity impediments to agency enforcement

The Williams Institute's recent research concerning the enforcement efforts and experiences of state agencies yielded results consistent with earlier studies. A 2009 Williams Institute study asked 20 state and 203 local government enforcement agencies to provide data on sexual orientation and gender identity discrimination complaints filed by public sector workers.²²⁸ Of the 20 state enforcement agencies contacted, only 6 made redacted complaints available for review.²²⁹ Moreover, only 122 of the 203 local agencies responded and only 23 provided documentation of specific examples of discrimination against public sector employees.²³⁰

Of the agencies that responded:

- Two had incorrectly referred such complainants to the U.S. Equal Employment Opportunity Commission

226. *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 11–12.

227. *See, e.g.*, Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AM. REV. PUB. ADMIN. 175 (1996); William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001).

228. *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 11.

229. DOCUMENTING DISCRIMINATION, *supra* note 1, at 11-5.

230. *Id.* at 11-12, 11-16 tbl.12-H, 11-17 tbl.12-I.

(EEOC), despite the lack of federal policy authorizing the EEOC to receive and investigate complaints of sexual orientation discrimination;

- One inaccurately reported that the city in question did not prohibit such discrimination;
- One incorrectly reported there was no administrative enforcement mechanism for such complaints;
- Five said they did not have the resources to investigate such claims and that they referred callers to their state administrative agency; and
- Three said they lacked the resources to provide the requested data.²³¹

b. Threat of repeal

In addition to limitations in scope of coverage, enforcement mechanisms, remedies, and resources for implementation and enforcement, state and local laws prohibiting employment discrimination against LGBT people also have been vulnerable to repeal. From 1974 to 2009, over 120 ballot measures sought to repeal or prevent laws against sexual orientation or gender identity discrimination.²³² Half of these measures passed.²³³ Twenty-two of the 120 measures were brought between 2000 and 2009.²³⁴ Ballot initiatives aimed at preventing the LGBT population from gaining legal protection from workplace discrimination began as attempts to repeal specific legislation or executive orders. Over time, an increasing number of these campaigns have aimed to block future laws against discrimination. In 1996, the U.S. Supreme Court in *Romer v. Evans*²³⁵ declared unconstitutional Colorado's Amendment 2, which had conditioned passage of any such protections on amendment of the Colorado Constitution.²³⁶ Since the *Romer* decision, there have been nearly two dozen similar initiatives pressed across the country.²³⁷

231. *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 12; DOCUMENTING DISCRIMINATION, *supra* note 1, at 11-17 tbl.12-J.

232. DOCUMENTING DISCRIMINATION, *supra* note 1, at 13-1.

233. *Id.* at 13-2.

234. *Id.* at 13-25 to 13-26, 13-51 to 13-54.

235. 517 U.S. 620 (1996).

236. *Id.* at 632.

237. *Executive Summary*, in DOCUMENTING DISCRIMINATION, *supra* note 1, at 16.

Local ordinances also have been vulnerable to legislative repeal. In 2011, the Tennessee legislature passed a law prohibiting local governments from adopting broader antidiscrimination ordinances or policies than provided for by state law.²³⁸ Because Tennessee's statutes do not prohibit discrimination based on sexual orientation or gender identity, the new law prevents municipalities in the state from enforcing local ordinances prohibiting discrimination on these bases.²³⁹ The Tennessee law was passed to overturn a Nashville ordinance that required its city contractors to not discriminate against their employees based on sexual orientation or gender identity.²⁴⁰

5. Corporate Policies

Over the past decade, there has been a surge in the number of corporations adopting workplace policies prohibiting discrimination based on sexual orientation and/or gender identity. In 1999, 72 percent of Fortune 500 companies included sexual orientation in their nondiscrimination policies and only a handful included gender identity.²⁴¹ By 2009, 87 percent of such companies included sexual orientation and 41 percent included gender identity.²⁴² While this trend is encouraging, these corporate policies do not provide the protections of a state or federal law with an external enforcement agency, a private right of action to seek redress in court, or remedies. While such policies may provide the basis for a breach of contract claim, many employment policies are designed to ensure that making such a claim is difficult if not completely precluded.²⁴³

238. See *Bill Information for HB0600*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0600> (last visited Mar. 22, 2012).

239. See *id.*

240. *Resolution Opposing the Equal Access to Intrastate Commerce Act: Tennessee General Assembly HB 0600*, METRO HUMAN RELATIONS COMM'N (May 2, 2011), http://www.nashville.gov/humanrelations/docs/pressreleases/110502_MHRCResolutionOpposingHB0600.pdf

241. BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES 1 (2011) [hereinafter ECONOMIC MOTIVES], available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>.

242. *Id.*

243. See LAMBDA LEGAL, OUT AT WORK: A TOOL KIT FOR WORKPLACE EQUALITY 8 (2007), available at http://data.lambdalegal.org/publications/downloads/out-at-work_ch1.pdf ("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.").

This overview of federal, state, and local laws and corporate policies against discrimination shows that, while the protections against sexual orientation and gender identity discrimination are evolving, they are incomplete at the federal level, inconsistent and nonexistent at the state and local levels, and often unenforced or unenforceable when they exist at the local level or simply as a matter of corporate policy.

IV. ENDA AND THE DENIAL OF EQUAL ACCESS TO BENEFITS FOR EMPLOYEES WITH A SAME-SEX SPOUSE OR PARTNER

The insufficiency of current protections combined with the documentation of ongoing discrimination described above supports the continuing need for a federal law such as ENDA. However, ENDA in its current form does not go far enough because it would not require equal access to employee benefits. In this part, after examining the provisions in ENDA that limit its application to employee benefits, we present research documenting the inequality that LGBT employees face as a result of the denial of equal benefits to employees with a same-sex spouse or partner, and the harms stemming from this inequality. We then examine the growing legal support for the view that this inequality is an unlawful form of employment discrimination, and we consider the increasing practice of companies and state and local governments requiring equal benefits. This substantial body of experience with equal benefits policies for over two decades indicates that they result in minimal costs and have positive effects for employees, employers, and the economy.

A. ENDA and Its Exclusion of Equal Benefits for Same-Sex Spouses and Partners

As noted above, federal legislators have sought to enact explicit protections for lesbian and gay workers consistently since 1973, introducing bills in every Congress since 1994 but the

109th Congress.²⁴⁴ The 2011 version is pending currently in both the House of Representatives and the Senate.²⁴⁵

In its current form, ENDA would prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity.²⁴⁶ It would apply to private- and public-sector employers with fifteen or more employees but not to tax-exempt bona fide private-membership clubs²⁴⁷ or religious organizations.²⁴⁸ The remedies provided for generally track those available to an aggrieved employee who files a claim under Title VII.²⁴⁹ Public- and private-sector employees could recover economic damages.²⁵⁰ Non-equitable relief for all employees would be subject to graduated caps,²⁵¹ and employees of a state or the United States²⁵² would not be able to recover punitive damages.²⁵³ Equitable relief would be available to all public- and private-sector employees.²⁵⁴

The current version of ENDA has several exclusions that may deserve reconsideration in light of developments in law, evolution of business practices, and shifts in public opinion during the years that similar bills have been pending. This Article considers one of them:

244. *Timeline: The Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://sites.hrc.org/sites/passendanow/timeline.asp> (last visited Jan. 25, 2012).

245. Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011). The House Education and Labor Committee held a hearing on ENDA during the 111th Congress, in September 2009; the Senate Committee on Health, Education, Labor and Pensions also held a hearing during the 111th Congress, in November of 2009. Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 10(b) (2009). The next steps in the enactment process likely would have been a markup in either the Senate committee or the House committee, followed by a floor vote in that chamber. As of this writing, no hearings or other such actions have been scheduled in either chamber since ENDA's reintroduction into the 112th Congress.

246. H.R. 1397 § 4(a); S. 811 § 4(a).

247. H.R. 1397 §§ 3(a)(4), 11; S. 811 §§ 3(a)(4), 11.

248. H.R. 1397 § 6; S. 811 § 6.

249. H.R. 1397 § 10(b); *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1964), *amended by* Civil Rights Act of 1991, 42 U.S.C. § 1981a (1991).

250. Economic damages include back pay, interest on back pay, and front pay. Non-economic damages include punitive damages, future pecuniary losses, and non-pecuniary losses. 42 U.S.C. §§ 1981a, 2000e-5; H.R. 1397 § 10(b); S. 811 § 10(b); Equal Emp't Opportunity Comm'n Decision No. 915-002, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, 1992 WL 189088 (July 14, 1992).

251. 42 U.S.C. § 2000e-5; H.R. 1397, § 10(b) (2011); S. 811, 104th Cong., § 10(b) (2012).

252. When the United States is mentioned herein as an employer, it does not include the Armed Forces, to which the current version of ENDA does not apply. "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard. *See* H.R. 1397 § 7(a); S. 811 § 7(a).

253. *See* 42 U.S.C. § 1981(a); S. 811 § 11(d)(1).

254. Employment Non-Discrimination Act, H.R. 3017, 111th Cong., § 10(b) (2009).

the exclusion of employee benefits.²⁵⁵ Several provisions in ENDA limit its ability to address employment policies that do not provide the same benefits for employees' same-sex spouses and partners that are provided to employees' different-sex spouses.

First, ENDA explicitly provides that none of its protections are to be construed to require employers to treat unmarried couples the same as married couples for employee-benefits purposes.²⁵⁶ The bill then limits who may be recognized as married under the Act by referencing the federal DOMA, which restricts the terms "marriage" and "spouse" to different-sex partners for federal-law purposes.²⁵⁷

Second, the current version of ENDA explicitly precludes disparate impact claims.²⁵⁸ Under Title VII, such claims commonly are premised on a showing that a facially neutral employer policy or practice has resulted in a group of employees defined by a covered trait, usually race or sex, that is smaller than would seem warranted by the relative sizes of the groups in the general population.²⁵⁹ A plaintiff may attempt to show that the representation of her or his group is suspiciously small with comparative statistics, which may create an inference of discrimination that shifts the burden to the employer to show a nondiscriminatory reason for the alleged imbalance.²⁶⁰

255. ENDA also excludes disparate impact claims, the data collection processes contained in Title VII with respect to race and sex of employees, and claims asserted by members of the U.S. Armed Forces. There has not been nearly as much study and public discussion about these exclusions from ENDA as there has been about the relative benefits, costs, and equities of family benefits for same-sex partners. As the fields of law, policy, and research concerning LGBT people continue to expand, however, there doubtless will be more attention paid to whether and how more data should be collected about LGBT people, whether disparate impact claims based on sexual orientation and/or gender identity should be allowed under federal law, and whether members of the U.S. Armed Forces should have greater protection.

256. H.R. 1397, § 8(b).

257. 1 U.S.C. § 7 (2006). However, President Obama has directed that federal agencies provide many benefits for same-sex domestic partners of employees to the same extent they are available for spouses of employees. *See, e.g.*, Federal Long Term Care Insurance Program: Eligibility Changes, 75 Fed. Reg. 30267 (June 1, 2010) (to be codified at 5 C.F.R. pt. 875); Federal Travel Regulation (FTR), Terms and Definitions for "Dependent", "Domestic Partner", "Domestic Partnership" and "Immediate Family" Interim Rule, 75 Fed. Reg. 67629, 67631 (2010); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 3 FAM 1611 (2009).

258. H.R. 1397 § 4(g); S. 811 § 4(g).

259. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that an employer violated Title VII by requiring a diploma or passing an intelligence test as a condition of employment because there was no showing such that requirements were related to successful performance of jobs for which they were used, but requirements did disproportionately screen out applicants by race).

260. *Id.* at 432.

In addition to precluding disparate impact claims explicitly, the current version of ENDA also limits challenges to sexual orientation or gender identity discrimination based on population data. The bill excludes claims based on “the total number or percentage of persons” with a particular sexual orientation or gender identity in a given community,²⁶¹ and prohibits the collection of workforce data in the manner that Title VII requires with respect to race and sex.²⁶² Whether there are common employer practices that LGBT employees should be allowed to challenge using a disparate impact theory, and what methods may be developed for collecting data concerning employee sexual orientation and gender identity without intruding inappropriately into workers’ privacy, are questions for a future day. For now, we focus solely on the fact that ENDA’s current exclusion of disparate impact claims limits the bill’s ability to address unequal employee-benefit policies. This is because employment benefits for family members most commonly have been based on the ostensibly neutral criteria of a recognized marriage and legal ties between parents and children. Marital status was not selected historically as the qualifying criterion in order to categorically exclude LGB people from eligibility for family benefits, but the routine practice nonetheless has had that effect.²⁶³ Consequently, employees claiming that such policies discriminate against them have met with difficulty when courts have required them to show an anti-gay motive for, or an explicit anti-gay rule in, the benefit plan, rather than recognize that it is a form of anti-gay discrimination to require a heterosexual marriage as a condition of receiving family benefits.²⁶⁴ Although earlier court decisions saw such a marriage requirement as marital status discrimination with

261. H.R. 1397 § 4(f)(1); S. 811 § 4(f)(1).

262. H.R. 1397 § 9; S. 811 § 9.

263. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 112–13 (Minn. Ct. App. 1995); *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1997); *Phillips v. Wis. Pers. Comm’n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992).

264. See, e.g., *Hinman v. Dep’t of Pers. Admin.*, 213 Cal. Rptr. 410 (Ct. App. 1985). Moreover, challenges to such policies based on a state nondiscrimination statute have met with difficulty when the statutes themselves precluded claims against a *bona fide* insurance benefit plan not adopted as a *subterfuge* to evade the law’s nondiscrimination mandate. See, e.g., *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 444 (Or. Ct. App. 1998). At the same time, as with religion, permitting disparate impact claims based on sexual orientation or gender identity is unlikely to inspire any substantial amount of litigation. Without population-based data about LGBT workers in particular settings, court cases based on statistics—as have been pursued with respect to worker population disparities based on race and sex—seem improbable.

only disparate impacts on lesbian and gay employees, more recent decisions recognize that these exclusions can be direct, intentional, categorical, and actionable.²⁶⁵

The exclusion of an equal-benefits requirement from a bill designed to ensure equal treatment, including equal terms and conditions of employment, may be recognized as a political compromise that was driven years ago by the concerns of some about the costs of domestic partner benefits. However, as discussed below, unequal benefits result in LGBT people having less access to health insurance and other benefits, imposing real harms; courts have increasingly held that such policies are unlawful discrimination;²⁶⁶ and the rapid growth in corporate and governmental equal benefits policies has shown that the costs of these policies are minimal and they have positive effects for employees, employers, and economies.

*B. Denial of Equal Access to Employer-Provided
Family Benefits Has Harmful Consequences for LGBT People*

LGBT people, and members of same-sex couples in particular, disproportionately lack access to health insurance and other employer-provided benefits.²⁶⁷ This causes a range of significant harms. Some consequences of discrimination with respect to two high-value benefits—health insurance and retirement benefits—are considered briefly here.

265. *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2001), *aff'g* *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 795 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Tanner*, 971 P.2d at 446–48.

266. *Diaz*, 656 F.3d at 1008; *Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10-00257 JSW, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. Feb. 22, 2012); *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1192 (N.D. Cal. 2011); *Alaska Civil Liberties Union*, 122 P.3d at 795; *Snetsinger*, 104 P.3d at 445; *Tanner*, 971 P.2d at 446–48.

267. WILLIAM D. MOSHER ET AL., *CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002* at 16 (2005), available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf> (“While 19 percent of heterosexual men had no health insurance coverage, 27 percent of homosexual men and 35 percent of those who reported their sexual orientation as something else had no coverage.”).

1. Health Insurance

a. LGBT people and their families are less likely to have access to health insurance

LGBT people are uninsured at higher rates than heterosexual people are.²⁶⁸ The 2002 National Survey of Family Growth, a nationwide probability sample of men and women between the ages of fifteen and forty-four, found that 27.2 percent of gay men and 15.2 percent of lesbians were not insured, compared to 18.9 percent of heterosexual men and 14.8 percent of heterosexual women.²⁶⁹ Gay men and bisexual women were 60 percent more likely to report no current health insurance coverage than their heterosexual counterparts were.²⁷⁰ Transgender people are even less likely to have health insurance through an employer than LGB people are.²⁷¹ A 2009 survey of 6,450 transgender people from every state in the United States found that only 40 percent received employer-based health insurance coverage, compared to 62 percent of the population at large.²⁷²

Multiple studies have attributed at least partial responsibility for the disparity in health insurance coverage to the lack of employer-based coverage to same-sex partners of employees.²⁷³ Roughly 80 percent of non-elderly people in the United States are insured through their jobs or through a family member's job—typically a

268. *Id.*

269. *Id.* at 40 tbl.22; see Michael A. Ash & M.V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y 582 (2006) ("Because 80 percent of nonelderly insured people in the United States receive coverage through their own employment or through the employment-based health insurance of a family member, the exclusion of domestic partners makes unmarried couples and their children likely to lack insurance at a rate higher than the 14 percent U.S. average for the nonelderly." (citations omitted)).

270. Mosher et al., *supra* note 267, at 40 tbl.22. See generally JEFF KREHELY, CTR. FOR AM. PROGRESS, HOW TO CLOSE THE LGBT HEALTH DISPARITIES GAP: DISPARITIES BY RACE AND ETHNICITY (2009) (providing a discussion of disparities in health insurance coverage for LGB people by race and ethnicity).

271. NAT'L CTR. FOR TRANSGENDER EQUAL. & THE NAT'L GAY & LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY: PRELIMINARY FINDINGS 3 (2009), available at http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf.

272. *Id.*

273. See, e.g., KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2009 ANNUAL SURVEY 37 (2009), available at <http://ehbs.kff.org/pdf/2009/7936.pdf>; Ash & Badgett, *supra* note 269.

spouse's job.²⁷⁴ However, it is still only a minority of employers that offer benefits to same-sex and/or different-sex unmarried partners.²⁷⁵ A 2009 Kaiser Family Foundation survey of a random sample of employers found that only 21 percent of firms that offered health benefits to cover employees' spouses reported also covering same-sex domestic partners of employees, while 31 percent offered these benefits to different-sex unmarried partners.²⁷⁶

Because a large majority of same-sex couples in the United States are unable to access workplace benefits available only to "spouses," people in same-sex relationships and in different-sex unmarried relationships are less likely to be insured than those in a different-sex marriage are.²⁷⁷ In fact, the 2009 Kaiser study, analyzing data from the Current Population Survey (a large, nationally representative sample of households in the United States), found that people with a same-sex or different-sex unmarried partner are two-to-three times more likely to be uninsured than heterosexually married people are, even after controlling for factors influencing coverage.²⁷⁸ The Kaiser study estimated that provision of employment-related health insurance in a comprehensive manner to domestic partners would cut the number of uninsured people in unmarried couples by 30 percent to 43 percent.²⁷⁹

A study analyzing data from the National Health Interview Survey similarly found that women in same-sex couples were less likely to have health insurance than women in different-sex relationships.²⁸⁰ In contrast, while men in same-sex relationships were less likely to have health insurance than men in different-sex relationships, the difference was not statistically significant.²⁸¹

274. Ash & Badgett, *supra* note 269, at 582.

275. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, *supra* note 273, at 37.

276. *Id.*; see N. Ponce et al., *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, 29 HEALTH AFF. 1539, 1541 (2010) (noting that while there is some data to suggest that more California firms are offering coverage to same-sex and different-sex domestic partners, there is still a disparity between the financial value of the coverage benefits given to domestic partners and those given to spouses).

277. See KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, *supra* note 273, at 37.

278. *Id.*

279. *Id.*

280. Julia E. Heck et al., *Health Care Access Among Individuals Involved in Same-Sex Relationships*, 96 AM. J. PUB. HEALTH 1111, 1111 (2006).

281. *Id.*

These figures can be expected to change if the health insurance exchanges provided for in the Patient Protection and Affordable Care Act (PPACA)²⁸² begin operation in 2014.²⁸³ However, serious problems may remain. For example, the PPACA does not address the unavailability to unmarried couples of coverage through an employed partner's workplace plan.²⁸⁴ One can see the inequity if one assumes that a Partner A receives health insurance through employment and a Partner B does not. If Partner B is guaranteed access to a policy through an exchange, such coverage may cost more or cover less than the benefits offered to eligible spouses through Partner A's employer-provided plan.

b. Health effects of unequal access to health insurance for LGBT people

Many research studies have documented health disparities for LGBT people.²⁸⁵ For example, studies find that heterosexual adults are more likely than LGB adults are to report that they are in excellent or good overall health.²⁸⁶ LGB adults report higher rates of cancer than do heterosexual adults.²⁸⁷ Reasons for these health disparities are complicated, but lower rates of health insurance, as well as discrimination and minority stress, and lack of culturally competent medical care, likely combine to produce worse health outcomes for LGBT people.²⁸⁸ As a general matter, public health

282. Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

283. *Affordable Insurance Exchanges*, HEALTHCARE.GOV (July 11, 2011), <http://www.healthcare.gov/law/features/choices/exchanges/index.html>.

284. *See* 124 Stat. 119.

285. INST. OF MED., *supra* note 97.

286. K.J. CONRON ET AL., MASS. DEP'T OF PUB. HEALTH, A HEALTH PROFILE OF MASSACHUSETTS ADULTS BY SEXUAL ORIENTATION IDENTITY: RESULTS FROM THE 2001–2006 BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM SURVEYS 20 tbl.2 (2008), available at <http://www.mass.gov/eohhs/docs/dph/health-equity/sexual-orientation-disparities-report.pdf>.

287. Analysis by Gary J. Gates using the California Health Interview Survey (2007) (on file with the Williams Institute); *see* Christopher Carpenter, *Sexual Orientation and Body Weight: Evidence from Multiple Surveys*, 21 GENDER ISSUES 60 (2003) (reporting that lesbian and bisexual women are less likely to receive mammograms, and that lesbians, on average, have higher body mass index ratings, which are associated with obesity and other health problems). *See generally* Resources, NATIONAL COAL. FOR LGBT HEALTH, <http://lgbthealth.webo.luthianary.com/content/resources> (last visited Feb. 18, 2012) (providing a list of resources with additional information on LGBT health).

288. INST. OF MED., *supra* note 97.

research has confirmed repeatedly that persons without health insurance have poorer health.²⁸⁹

2. Retirement and Pension Plans

a. Unequal access to retirement and pension plans

The percentage of the U.S. workforce eligible for a defined benefit pension upon retirement has diminished, as more employers have moved to tax-exempt employee savings plans instead. Under the Pension Protection Act of 2006 (PPA),²⁹⁰ same-sex partners can inherit a retiree's tax-exempt retirement account with fewer adverse tax consequences, though the tax treatment for a same-sex partner is still not as preferred as the treatment of a federally recognized spouse.²⁹¹ But some retirement plans still offer a defined-benefit pension for a surviving spouse, and comparable inclusion of unmarried partners can be an important element of compensation. Lack of recognition for same-sex partners of employees results in unequal treatment in employers' retirement plans because many same-sex partners are not eligible for joint-and-survivor annuities or for beneficiary status within employer-provided plans. Women in same-sex couples are particularly disadvantaged in access to employer-sponsored pension plans, and this difference is exacerbated by differential access to survivor annuities for members of same-sex couples.²⁹²

b. Harmful consequences of unequal access to retirement income

The lack of a national rule requiring equality in employer-sponsored retirement plans may be a cause of the recent finding that members of same-sex couples have less income from retirement

289. Jack Hadley, *Sicker and Poorer—The Consequences of Being Uninsured: A Review of the Research on the Relationship Between Health Insurance, Medical Care Use, Health, Work, and Income*, 60 MED. CARE RES. & REV. 3S, 3S (2003).

290. Pub. L. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26, 29 U.S.C.).

291. The Worker, Retiree and Employer Recovery Act of 2008 (WRERA), Pub. L. 110-458, 122 Stat. 5092 (codified as amended in scattered sections of 26, 29 U.S.C.). WRERA contained technical corrections to the PPA that took effect in 2010. *Id.*

292. NAOMI G. GOLDBERG, THE WILLIAMS INST., THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS 3-4 (2009) [hereinafter THE IMPACT OF INEQUALITY], available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

plans when they are elderly. Female same-sex couples were found to have almost 20 percent (\$12,000) less income in retirement than married different-sex couples have.²⁹³ This differential results because female same-sex couples receive less income from all three of the primary sources of retirement income for most Americans: Social Security payments, retirement plan income, and income from interest, rentals, and dividends.²⁹⁴ Female same-sex couples rely most heavily on Social Security income as a percent of their overall income.²⁹⁵ For female couples in which both members are age sixty-five and older, Social Security income comprises 36 percent of their income as compared to 33 percent of married different-sex couples' income, and 31 percent of male same-sex couples' income.²⁹⁶ On average, female same-sex couples over sixty-five receive 15 percent less (\$2,800) in Social Security benefits than do married different-sex couples.²⁹⁷

Female couples also are 10 percent less likely than married different-sex couples over sixty-five to have income from retirement plans or accounts.²⁹⁸ On average, their income from these sources is almost 27 percent less (\$3,575) than that for married different-sex couples over sixty-five.²⁹⁹ Further, they are 21 percent less likely than married different-sex couples over sixty-five to have income from interest, rentals, and dividends.³⁰⁰ As a result, elderly female same-sex couples rely more on public benefit programs and continue to work to maintain their household incomes.³⁰¹ Lesbians who are sixty-five and over have a poverty rate twice as high as the poverty rate for married different-sex couples sixty-five and over.³⁰² In contrast, as compared to married different-sex couples, male same-sex couples with at least one member age sixty-five or older have higher income during retirement. But they are 21 percent less likely to have income from retirement plans. Instead, they are likely to have

293. *Id.* at 6.

294. *Id.* at 6–7.

295. *Executive Summary*, in *THE IMPACT OF INEQUALITY*, *supra* note 292.

296. *THE IMPACT OF INEQUALITY*, *supra* note 292, at 8.

297. *Executive Summary*, in *THE IMPACT OF INEQUALITY*, *supra* note 292.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. RANDY ALBELDA ET AL., CAL. CTR. FOR POPULATION RESEARCH, *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 11 (2009).

more wage income and interest income. In fact, they are 60 percent more likely to have wage income than married different-sex couples are.³⁰³

*C. Court Rulings Confirm That Denial
of Equal Benefits Is Discrimination*

A growing number of state and federal courts have concluded that policies excluding employees' same-sex spouses and partners from coverage equivalent to the coverage offered for different-sex spouses are unlawful forms of employment discrimination. Specifically, these courts have held that public employers offering benefits according to criteria that categorically exclude same-sex partners are acting in violation of constitutional guarantees of equal protection.

1. State Court Rulings

Starting more than a decade ago, state courts began to be receptive to claims that a denial of equal benefits denies equal compensation as guaranteed by state equal protection provisions. In 1998, the Oregon Court of Appeals was the first to hold that a state employer's decision to use marriage as the sole way employees could qualify an adult partner for benefits—at a time when same-sex couples as a class were barred from that status—violated the Oregon Constitution's equal privileges and immunities clause.³⁰⁴ The Montana Supreme Court then considered a state-employee benefit plan that offered coverage for unmarried different-sex partners of employees but not for unmarried same-sex partners.³⁰⁵ That court held in 2004 that this denial of benefits for same-sex partners, who were similarly situated to their unmarried coworkers in different-sex relationships, was an unjustifiable sexual orientation classification.³⁰⁶ The following year, the Alaska Supreme Court echoed the Oregon court and held that a categorical denial of benefits to all employees with a same-sex partner violated the state constitution's equal protection clause.³⁰⁷ As a result, the Oregon, Montana, and Alaska

303. *Executive Summary*, in THE IMPACT OF INEQUALITY, *supra* note 292.

304. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 523–25 (Or. Ct. App. 1998).

305. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004).

306. *Id.* at 450–51.

307. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 795 (Alaska 2005).

state governments, as employers, must provide equal benefits, and those courts have charted a path for same-sex-partner recognition as a constitutional matter in contexts where a state's marriage restriction is not being challenged but its employee-compensation policies are avoidably unequal.³⁰⁸

2. Federal Court Rulings

The Ninth Circuit considered this same issue in *Diaz v. Brewer*³⁰⁹ and upheld an injunction requiring the State of Arizona to offer domestic partner health insurance coverage for those of its employees with a same-sex life partner.³¹⁰ The Ninth Circuit explained:

[B]arring the state of Arizona from discriminating against same-sex couples in its distribution of employee health benefits does not constitute the recognition of a new constitutional right to such benefits. Rather, it is consistent with long standing equal protection jurisprudence holding that “some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.”³¹¹

Other pending cases consider similar equal benefits questions in the broader context of a challenge to DOMA.³¹² For example, in *Golinski v. U.S. Office of Personnel Management*,³¹³ an employee of the Ninth Circuit sought equal access to health insurance for her same-sex spouse.³¹⁴ The U.S. District Court for the Northern District of California assessed the reasons advanced in defense of the law distinguishing between same-sex spouses and different-sex spouses for federal benefits purposes and concluded “that DOMA, as applied to Ms. Golinski, violates her right to equal protection of the law . . . by, without substantial justification or rational basis, refusing to

308. The Oregon state government also has been required to provide equal benefits by statute since the state's domestic partnership law went into effect in 2005. OR. REV. STAT. §§ 106.300–.340 (2009).

309. 656 F.3d 1008 (9th Cir. 2001), *aff'g* Collins v. Brewer, 727 F. Supp. 2d 797 (D. Ariz. 2010).

310. *Id.* at 1014–15.

311. *Id.* (alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (quoting U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

312. 1 U.S.C. § 7 (2006).

313. No. C 10-00257 JSW, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. Feb. 22, 2012).

314. *Id.* at *3–10.

recognize her lawful marriage to prevent provision of health insurance coverage to her spouse.”³¹⁵

Dragovich v. U.S. Department of Treasury,³¹⁶ pending in the U.S. District Court for the Northern District of California, considers the federal constitutional claim advanced by state employees of an equal right to enroll a same-sex spouse or domestic partner in the long-term-care insurance plan offered to state employees.³¹⁷ At issue is California’s refusal to allow state workers with a life partner other than a different-sex spouse to enroll in the tax-qualified insurance plan offered by California according to federal tax rules and DOMA.³¹⁸ The district court has held preliminarily that DOMA appears to be unconstitutional in this context and thus cannot require the discriminatory exclusion of those otherwise eligible to enroll.³¹⁹

D. Providing Equal Benefits Has Minimal Costs and Positive Benefits for Employees, Employers, and Economies

While the exclusion of benefits from ENDA might originally have been part of a political compromise, the growing practice of private companies and state and local governments in offering these benefits has shown that the politics around this issue have changed. Many private employers voluntarily offer equal benefits, recognizing such benefits as part of employee compensation and seeking to gain from the appeal of such benefits in their competition for skilled workers. Indeed, partner benefits have become the norm in many sectors of the economy. As a result, studies increasingly have shown that employers do not find equal family benefits to be burdensome but, instead, believe them to have positive business effects. For the same reasons, many state and local governments voluntarily provide equal benefits. Moreover, when state and local governments have required that their contractors offer partner benefits, these policies have greatly increased the number of employers that do so and have

315. *Id.* at *49, *64, *85 (holding that heightened scrutiny applies to the anti-gay classification drawn by DOMA, and that the statute fails both heightened scrutiny and on rational basis review).

316. 764 F. Supp. 2d 1178 (N.D. Cal. 2011).

317. *Id.* at 1186.

318. 1 U.S.C. § 7 (2006); *Dragovich*, 764 F. Supp. 2d at 1179–80.

319. *Dragovich*, 764 F. Supp. 2d at 1192. See *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (holding DOMA unconstitutional as applied in the contexts presented in the case), which currently is pending on appeal before the First Circuit, and *Pedersen v. Office of Personnel Management*, No. 3:10 CV 1750 (VLB) (D. Conn.).

met with little to no resistance. This growing body of experience suggests that inclusion of equal benefits within ENDA would be beneficial not only for employees but for employers as well.

1. Corporate Equal Benefits Policies

The Human Rights Campaign (HRC) has been surveying large corporations for a decade, tracking which ones offer domestic-partner benefits along with other measures of LGBT-friendly policies. HRC's reports show steady increases. As of 2008, 39 percent of the Fortune 1000, 57 percent of the Fortune 500, and 83 percent of the Fortune 100 companies offered benefits to cover their employees' same-sex partners.³²⁰ As of early 2012, 60 percent of the Fortune 500 companies were offering such benefits.³²¹ The figures for the decade during which HRC conducted its Corporate Equality Index surveys make clear that equal benefits now are a business norm; the rates at which responding companies have been offering benefits to cover their employees' same-sex partners has risen from 69 percent in 2002 to 89 percent in 2012.³²²

It has become widely recognized that providing equal family benefits is not burdensome for businesses and, in fact, usually has positive effects for a company's bottom line.³²³ Studies consistently suggest a 0.3 percent to 1 percent increase in enrollment when employers offer same-sex domestic partner benefits and a similar increase in costs,³²⁴ far less than may be assumed.

Providing benefits to cover same-sex partners does entail a small burden for employers because the benefits are taxed as imputed income to employees for federal tax purposes. Employers thus also must pay taxes on this additional income provided to their

320. HUMAN RIGHTS CAMPAIGN, *THE STATE OF THE WORKPLACE 2007–2008*, at 9 (2009), available at http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.

321. HUMAN RIGHTS CAMPAIGN FOUND., *CORPORATE EQUALITY INDEX 2012: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 8* (2012), available at http://sites.hrc.org/documents/CorporateEqualityIndex_2012.pdf.

322. *Id.* at 25; see N. Ponce et al., *supra* note 276, at 1541 (“The percentage of firms . . . offering . . . coverage to same-sex domestic partners grew from 34.4 percent in 2004 to 64 percent in 2006.”).

323. M.V. LEE BADGETT & GARY J. GATES, *THE EFFECT OF MARRIAGE EQUALITY AND DOMESTIC PARTNERSHIP ON BUSINESS AND THE ECONOMY 1, 5–6* (2006), available at <http://www.law.ucla.edu/williamsinstitute/publications/MarriageEqualityontheEconomy.pdf>.

324. Ash & Badgett, *supra* note 269.

employees.³²⁵ In 2007, the Williams Institute estimated that the average amount of payroll tax paid by the employer per employee receiving partner benefits was \$248.³²⁶ This taxation of domestic partnership benefits as imputed income requires companies to create a new administrative procedure to calculate the imputed income and corresponding taxes, resulting in an additional minimal burden upon them.

Offsetting these small additional burdens are positive effects for both employees and employers, such as increased employee productivity and improved employee recruitment and retention. Employer statements and research studies indicate that offering equal benefits helps employers attract, recruit, and retain employees.³²⁷ For example, in one public opinion survey, almost half of LGB employees indicated that partner benefits would be their most important consideration if offered another job.³²⁸ Such benefits tend to reduce gay, lesbian, and bisexual employee turnover and to increase their commitment to employers.³²⁹ By reducing turnover, partner benefits correspondingly reduce recruitment and training costs, which can be expensive.³³⁰ These effects have come to be well recognized, including by courts in cases considering whether public employers have business reasons for adopting domestic partner benefit plans for their employees.³³¹

325. M.V. LEE BADGETT, UNEQUAL TAXES ON EQUAL BENEFITS: THE TAXATION OF DOMESTIC PARTNER BENEFITS 4–5 (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf>. Employers do not have to pay this additional tax for benefits provided to different-sex spouses because these benefits are not considered taxable income. *Id.*

326. *Id.* at 6.

327. ECONOMIC MOTIVES, *supra* note 241.

328. HARRIS INTERACTIVE/WITECK-COMBS, MARCH 2003 POLL (2003).

329. B.R. Ragins & J.M. Cornwell, *We Are Family: The Influence of Gay Family-Friendly Policies on Gay, Lesbian and Bisexual Employees*, in SEXUAL ORIENTATION DISCRIMINATION: AN INTERNATIONAL PERSPECTIVE 105, 113 (M.V. Lee Badgett & Jefferson Frank eds., 2007).

330. Aharon Tziner & Assa Birati, *Assessing Employee Turnover Costs: A Revised Approach*, 6 HUMAN RES. MGMT. REV. 113, 119 (1996).

331. *See, e.g.,* Schaefer v. City & Cnty. of Denver, 973 P.2d 717, 719 (Colo. App. 1998) (“[E]mployee compensation, including benefits, is of particular importance to a local government because of its impact on a city’s ability ‘to both hire and retain qualified individuals.’” (quoting Colo. Springs Fire Fighters Ass’n v. Colo. Springs, 784 P.2d 766, 773 (Colo. 1989))); Crawford v. City of Chicago, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999) (noting that cities must be able to offer good employment benefits in order to be able to hire and retain qualified individuals); Tyma v. Montgomery Cnty., 801 A.2d 148, 156 (Md. 2002) (upholding a county partner-benefits plan in part because “many private and public employers provide or plan to provide benefits for the domestic partners of their employees” and “providing domestic partner benefits [would]

Substantial confirming data has been compiled by the City and County of San Francisco, which has taken systematic steps to evaluate the effectiveness and impact of its Equal Benefits Ordinance (EBO) governing public contracts, publishing six reports between 1999 and 2004.³³² The 2004 report showed that nearly all of the city's contractors (94.6 percent) were complying with the EBO.³³³ The city estimated that approximately 66,492 people employed by a contractor had received family benefits by that time because of the EBO.³³⁴

An external evaluation of the EBO conducted in 2003 inquired into the costs to jurisdictions and contractors of the policy, as well as its potential benefits.³³⁵ Concerning the cost to contractors of complying, the report found that, in general, the increases were small—between 0.02 percent and 0.12 percent.³³⁶ The report also noted that the number of applications for contracts had fallen slightly in the first year but recovered in the subsequent years. And while contractors did see small increases, the city's costs did not increase to any measurable extent.³³⁷

The report also determined that the city may have reduced public health spending because more residents had secured health insurance through an employer. The report reasoned that, if the estimated 26,000 city residents indeed were insured due to the EBO in the first five years after implementation, some of them probably had been uninsured previously.³³⁸ As a result, the city's health system likely would have absorbed the cost of some of their

significantly enhance the County's ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity."); *Heinsma v. Vancouver*, 29 P.3d 709, 712 (Wash. 2001) (upholding city's authority to offer partner benefits in service of its "strong interest in retaining qualified employees").

332. CITY AND CNTY. OF S.F. HUMAN RIGHTS COMM'N, SEVEN YEAR UPDATE ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2004), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=140>.

333. *Id.* Rates of compliance increased from 91 percent six months after the implementation of the EBO to 94.6 percent after seven years. *Id.* In addition, the majority of contractors with more than one employee (62 percent) had complied with the EBO by providing equal benefits, as opposed to not providing benefits at all. *Id.*

334. *Id.*

335. MARC A. ROGERS & DALEY DUNHAM, INST. OF GAY & LESBIAN STRATEGIC STUDIES, CONTRACTS WITH EQUALITY: AN EVALUATION OF THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2003).

336. *Id.* at 2.

337. *Id.*

338. *Id.* at 29.

uninsured health care. The 2003 report calculated that the city probably saved a minimum of approximately \$10 million because of the increase in insured residents.³³⁹

Other health policy studies similarly have shown that, in addition to the benefits for families of access to quality health care through private insurance, there are positive effects for the public fisc and public health programs. These positive effects include public cost savings and reduced demand on public health systems because more people are insured, receive wellness care, and do not need to rely on public systems as a last resort after health problems have become severe.³⁴⁰

Respected scholar Richard Florida studies another potential positive effect businesses and others may experience after adopting a nondiscriminatory benefits plan. Florida notes that this issue arises during a time when businesspeople, policymakers, and scholars have been focusing intensely on the business value of diversity in the United States.³⁴¹ He suggests that LGBT-friendly policies—like employment nondiscrimination, domestic partner benefits, and marriage equality—signal a welcoming and diversity-friendly climate that fosters entrepreneurship and innovation and attracts the creative class and the companies that employ them.³⁴² Florida describes the creative class as an eclectic mix of individuals in occupations—including artists, teachers, financiers, software engineers, and scientists—who constitute a relatively young, highly educated, and mobile workforce that values innovation and diversity as essential elements for creating stimulating work environments.³⁴³ He argues that the creative class represents a key to regional economic development in today's post-industrial and global economy.³⁴⁴

Although many large national companies offer equal benefits, and those practices influence public views about what is appropriate

339. *Id.*

340. E. RICHARD BROWN ET AL., UCLA CTR. FOR HEALTH POLICY RESEARCH, THE STATE OF HEALTH INSURANCE IN CALIFORNIA: FINDINGS FROM THE 2001 CALIFORNIA HEALTH INTERVIEW SURVEY 1, 53–54, 66 (2002), available at <http://www.healthpolicy.ucla.edu/pubs/files/shic062002.pdf>.

341. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS (Basic Books 2002).

342. *Id.*

343. *Id.*

344. *Id.*

and fair, there is a need for an equal benefits requirement in ENDA because approximately 70 percent to 80 percent of private employers do not offer domestic-partner benefits.³⁴⁵ In a 2009 survey of a random sample of employers, only 21 percent of firms that offered health benefits to employees also reported covering same-sex partners of employees.³⁴⁶ By comparison, 35 percent of firms surveyed said they did not offer such benefits to same-sex partners, and 44 percent reported that such benefits were “not applicable/not encountered,” a response that the authors interpreted as indicating the absence of a policy on partner benefits per se.³⁴⁷ The latter response was much more common for small employers (46 percent) than it was for large employers (6 percent).³⁴⁸

2. Equal Benefits Policies of State and Local Governments

Many state and local governments now provide equal benefits to their own employees for the same reasons that private businesses do.³⁴⁹ As of 2009, twenty states and the District of Columbia offered benefits to cover the domestic partners of their employees.³⁵⁰ More than 250 cities, counties, and other local government entities did so as well.³⁵¹ At least sixteen municipalities (and the State of California) have followed San Francisco’s lead and have passed an equal benefits law requiring businesses that wish to contract with the government to offer equal family benefits for the domestic partners of employees if they offer such benefits for employees’ different-sex

345. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, *supra* note 273.

346. *Id.*

347. *Id.* at 37, 43.

348. *Id.* at 43.

349. Courts have recognized municipal governments’ authority and business need to offer domestic partner benefits to their own employees in order to recruit and retain high quality employees. *Crawford v. City of Chi.*, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999); *Tyma v. Montgomery Cnty.*, 801 A.2d 148, 157 (Md. 2002); *Heinsma v. City of Vancouver*, 29 P.3d 709, 712–13 (Wash. 2001) (en banc); *Schaefer v. City & Cnty. of Denver*, 973 P.2d 717, 719 (Colo. App. 1998).

350. These states are Alaska, Arizona, California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. *Domestic Partnership Benefits and Obligations Act of 2009: Hearing on H.R. 2517 Before the Subcomm. on Fed. Workforce, Postal Serv. & the D.C. of the Comm. on Oversight & Gov’t Reform*, 111th Cong. 76 (2009), available at <https://house.resource.org/111/gov.house.ogr.fw.20090708.1.pdf> (statement of M.V. Lee Badgett, Research Director, Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law).

351. *Id.*

spouses,³⁵² as an additional component of the contractors' agreement not to discriminate in other ways. Despite this trend, a federal statutory requirement to end this form of employment discrimination would have substantial effect because thirty states and most localities do not yet have these requirements.

V. CONCLUSION

Is a federal law prohibiting employment discrimination on the basis of sexual orientation and gender identity still needed? Based on the current research and existing laws, the answer is clearly yes. A developing body of social science research confirms that discrimination is persistent, widespread, and harmful.

Current federal, state, and local laws, and voluntary corporate policies, are insufficient to address this pervasive discrimination. Since 1964, Title VII has offered American workers both a firm endorsement of the principle of equal employment opportunity based on race, sex, national origin, and religion, and an effective tool with which to pursue it. The prohibition against sex discrimination has come to be understood as forbidding a broader range of conduct, including types of sexualized and gender-based conduct that often feature prominently in the discrimination complaints of lesbian, gay, bisexual, and transgender workers. State and local laws provide important coverage as well, where they exist and include meaningful remedies.

But, despite some expansion of coverage under Title VII, LGBT workers on the whole are not protected effectively by the existing federal statute and by piecemeal state and local protections.

352. See Berkeley, Cal. (BERKELEY, CAL., CODE § 13.29.010–.100 (2009)); Dane County, Wis. (DANE CNTY., WIS., CODE § 25.016 (2010)); King County, Wash. (KING CNTY., WASH., CODE § 12.19.002–.100 (2009)); Long Beach, Cal. (LONG BEACH, CAL., CODE § 2.73.010–.090 (2009)); L.A., Cal. (L.A., CAL., ADMIN. CODE § 10.8.2.1 (2009)); Miami Beach, Fla. (MIAMI BEACH, FLA., CODE § 2-373 (2009)); Minneapolis, Minn. (MINNEAPOLIS, MINN., CODE § 18.200 (2009)); Oakland, Cal. (OAKLAND, CAL., CODE § 2.32.010–.110 (2010)); Olympia, Wash. (OLYMPIA, WASH., CODE § 3.18.020 (2009)); Portland, Or. (PORTLAND, OR., CHARTER § 3.100.053–.056 (2009)); Sacramento, Cal. (SACRAMENTO, CAL., CODE § 3.54.010–.120 (2009)); San Diego, Cal. (SAN DIEGO, CAL., CODE § 22.4301–.4308 (2011)); S.F., Cal. (S.F., CAL., ADMIN. CODE § 12B.1(b) (2009)); Santa Monica, Cal. (SANTA MONICA, CAL., CODE § 4.65.025 (2011)); San Mateo County, Cal. (SAN MATEO CNTY, CAL., CODE § 2.84.010–.050 (2009)); Seattle, Wash. (SEATTLE, WASH., CODE § 20.45.010–.050 (2009)); and Tumwater, Wash. (TUMWATER, WASH., CODE § 3.46.010–.060 (2009)).

While the research will continue, and more detailed legal and policy recommendations will emerge in time, the findings surveyed here should eliminate any doubt about the need for explicit federal statutory protections. ENDA offers those protections and has been ripe for passage for many years. During this period, courts, states, and the private sector have concluded ever more emphatically that ending unequal treatment based on sexual orientation or gender identity—with respect to terms, conditions, *and* benefits of employment—is warranted, feasible, and beneficial.

