

Employment Law for Business, 6th ed.
 Bennett-Alexander

Chapter 8

Affinity Orientation Discrimination

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Statutory Basis

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e-2(a).

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Out of the Closet

- Affinity orientation pushes a lot of buttons in society and the workplace
 - Discussed all across the country
 - Vast implications for people's everyday lives
- Affinity orientation is not covered under Title VII
- However, discrimination is prohibited under:
 - Local ordinances
 - State laws
 - Thousands of workplaces

Affinity orientation
 Whom one is attracted to for personal and intimate relationships.

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Out of the Closet

- Costly and avoidable matter in its proper **workplace** perspective
- It is the **employer's** workplace
 - Employees don't have the right to engage in activity that will cause unnecessary liability for the employer
 - You have no right to impose your personal beliefs on the workplace in a way that increases the employer's liability

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Impact of Recent Historical Issues

- AIDS in the workplace
- The military's "don't ask, don't tell" policy
- Bill Clinton's support for gays and the proposed ENDA
- Colorado's attempted constitutional ban on protection for gays and lesbians
- March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation

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Out of the Closet (continued)

- Employers must know their legal liability
- Company support of gay and lesbian events
 - Gay Pride
- Stonewall Inn
- National Coming Out Day
- Domestic partnership benefits

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Out of the Closet (continued)

- Base workplace decisions solely on an employee's ability to perform the job.
- If the employee's **conduct** interferes with the workplace, it may be the basis for a disciplinary action.

Gender/sexual reassignment surgery

The surgery required to change a person's gender.

Transsexual

Someone who undergoes a change from one gender to another.

Bi-gender affinity orientation

Someone attracted to both genders.

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Out of the Closet (continued)

- Amount of litigation
- Absence of federal legislation
- State and local legislation
 - All states now have *some* form of job antidiscrimination protection
- 1st, 5th, and 14th Amendments
- Tort actions
- Gender stereotyping

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Affinity Orientation as a Basis for Adverse Employment Decisions

- Employer concerns if the employee:
 - Is gay or lesbian
 - Has primary relationships with those of the same gender
 - Exhibits inappropriate workplace behavior
 - Wears clothing, jewelry, or make-up in violation of workplace grooming codes
 - Undergoes gender reassignment surgery
 - Is in the presurgery adjustment stages of GR surgery

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Affinity Orientation as a Basis for Adverse Employment Decisions (continued)

- Action vs. status
- Allegations of other recognized bases for discrimination under Title VII
- Allegations vs. actual proof
- Facts that will support categories the employee may allege as a basis for suit

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Same-Gender Sexual Harassment

- The Supreme Court has determined the important inquiry is whether “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”
- Every harassment between employees of the same gender is not based on same-gender affinity orientation.

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Transsexual Discrimination

- One of the fastest-growing issues related to affinity orientation.
- Courts have not upheld the argument that transsexuals should be afforded protection under Title VII because they have changed their gender status.
- Courts have ruled that gender dysphoria is not a “handicap.”

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Workplace Issues for Gays and Lesbians

- Nondiscrimination policies
- Bereavement leave for domestic partners
- Vacation leave transfer
- Benefits for domestic partners

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Employment Benefits

- Registration of unmarried couples as domestic partners
 - Living together for a specified length of time
 - Given mutual aid and support
- Nearly half of the Fortune 500 companies offer domestic partner benefits
- Single gender couples with children
- Urban institute research shows that Mississippi is the state where gay couples are most likely to raise children

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Domestic Partner Law Debate

- Domestic partner law protects personal wishes such as:
 - The right to have your partner visit if you're hospitalized
 - The right to have your partner act as guardian if you're incapacitated
 - The right to leave your money and property to who you wish in your will with no court battles from relatives
- Growth of benefits
- Opposing view

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Management Considerations

- Affinity orientation is not a protected category under Title VII
 - Employers have flexibility
- Actions of gays or lesbians should be dealt with as legitimate workplace issues
- Focus should be on conduct, not affinity orientation
- Gay and lesbian acceptance policies should come from the top

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Management Considerations (continued)

- Some employers may take an adverse workplace decision involving a gay or lesbian employee
 - This area is not heavily regulated
- Some employers take a middle-ground position
- Laws are changing every day
- Employers should consider other possible repercussions

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Summary

- Affinity orientation is **not** protected by Title VII.
- Washington, D.C., 15 states, and hundreds of municipalities have passed protective legislation. Constitutional protection may also apply to public employees.
- Employers in most jurisdictions have more leeway in this area to make employment decisions without regard to the same legal strictures applicable to other categories of employees included within Title VII.
- The safer approach is to base employment decisions on the person's **qualifications** and **fitness for the job**, rather than on questionably relevant characteristics about his or her personal life.

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