



Chapter 3: Constitutional Rights Violated by Employment Discrimination Based on Sexual Orientation or Gender Identity

As described more fully in Chapter 1, *supra*, one of the criteria stated by the Supreme Court for determining whether Congressional abrogation of State sovereign immunity is valid is the scope of the constitutional rights at issue.

Discrimination in public sector employment based on sexual orientation or gender identity implicates three separate and independent constitutional provisions:

- the Equal Protection Clause of the Fourteenth Amendment,
- the Due Process Clause of the Fourteenth Amendment, including both its liberty and procedural dimensions,
- and the First Amendment.

Implicit in the question of whether actions by state governments have been unconstitutional is the question of which standard should be used to evaluate such actions.¹ In its analysis under the Equal Protection Clause, the Supreme Court has clearly set the standard for some characteristics either at heightened scrutiny (race and sex, for example) or at rational basis review (age and disability, for example).² For sexual orientation and gender identity, the Court has not definitively identified which Equal Protection standard of review should be utilized. Under even the lowest standard,

¹ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001).

² ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 671, 782 (2006).

however, *employment* discrimination on those grounds has repeatedly been found to be unconstitutional under the Equal Protection Clause.³

The standard of review question is easier for those constitutional rights implicated in ENDA that arise under the Due Process Clause or the First Amendment. Parallel to the equal protection case law involving heightened scrutiny, the enforcement of “basic rights” under these two Constitutional provisions leads to searching judicial scrutiny, at least as stringent as that accorded to sex-based classifications.⁴ As a result, what is effectively heightened scrutiny, whether explicit or not, applies to all the instances of discrimination that would fall within ENDA’s purview, which grants greater leeway to Congress in its assessment of the pattern of unconstitutional discrimination by state employers.⁵

³ See *infra* note 23.

⁴ *Tennessee v. Lane*, 541 U.S. 509, 529 (2004).

⁵ *Hibbs*, 538 U.S. at 736.

I. Equal Protection

(A) Discrimination based on sexual orientation

The bedrock principle of Equal Protection doctrine is that “all persons similarly situated should be treated alike.”⁶ The leading case in which the Supreme Court has applied that command to discrimination against gay people is *Romer v. Evans*.⁷ In *Romer*, the Supreme Court invalidated an amendment to the Colorado constitution that both rescinded all civil rights coverage for gay Coloradans and also created a special rule that in order to enact new anti-discrimination protection covering sexual orientation in the future, proponents would have to persuade voters to adopt another amendment to the state constitution, rather than rely on the normal process for enacting a state statute. The Court found that the sweep of the amendment across many facets of daily life – including employment - “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁸

In its penultimate paragraph, the Court unequivocally states that discrimination based on sexual orientation, divorced from any legitimate purpose, violates the Constitution:

⁶ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

⁷ 517 U.S. 620 (1996).

⁸ *Id.* at 634.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, [and also] its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.⁹

Courts and scholars have debated whether this language signals the adoption of heightened scrutiny.¹⁰ Regardless of whether it does, its teaching for the evaluation of instances of employment discrimination is clear. In order for adverse employment actions by state actors based on sexual orientation to be valid, they must, at a minimum, be “directed to [an] identifiable legitimate purpose or discrete objective.”

Justice O'Connor elaborated on the meaning of the Court's opinion in *Romer* in her concurring opinion in *Lawrence v. Texas*.¹¹ In *Lawrence*, she diverged from her colleagues on the Court in concluding that the Texas sodomy law was unconstitutional

⁹ *Id.* at 635.

¹⁰ See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Svcs*, 358 F.3d 804, 815-817 (2004); *Lofton v. Sec'y of the Dep't of Children & Family Svcs*, 377 F.3d 1275, 1285-1296 (denial of a rehearing en banc) (Barkett, J., dissenting)(Anderson J., dissenting); Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L. J. 885, 885-86 (2000-2001).

¹¹ 539 U.S. 558 (2003).

because it violated the Equal Protection Clause, rather than because it infringed the liberty interests protected by the Due Process Clause, as five Justices held in the Opinion of the Court.¹² Justice O'Connor's opinion explained why her Equal Protection Clause analysis did not apply the traditional and highly deferential form of rational basis review:

We have consistently held ... that some objectives, such as "a bare ... desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.¹³

Justice O'Connor concluded that the statute at issue in *Lawrence* had precisely that effect:

Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else...¹⁴

Justice O'Connor then went on to explicate why the justification asserted by Texas – enforcement of its preferred belief regarding morality – was invalid as a matter of law when applied to discrimination against a group of persons:

¹² Although the opinion of the Court is based on the Due Process Clause, the language of the decision emphasizes themes of equality as well, because the statute being struck down criminalized the same conduct for same-sex partners that was lawful for different-sex partners. Thus the Court was presented with state action that *selectively* infringed liberty. *Lawrence v. Texas*, 539 U.S. 558, 562-63, 572-74 (2003).

¹³ *Lawrence*, 539 U.S. at 580 (internal citations omitted).

¹⁴ *Id.* at 581.

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.... A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.¹⁵

Thus, unlike discrimination based on age, which the Supreme Court has several times upheld using a traditional rational basis standard of review,¹⁶ the Court has *struck down* the use of sexual orientation as a legitimate basis for classification, using language that is, at the least, an unusually powerful form of rational basis review.¹⁷ The doctrinal status of sexual orientation today is reminiscent of how the Court initially approached sex discrimination in the 1970's¹⁸: first by striking down a state statute while using the language of rationality review to achieve an outcome normally requiring much stricter

¹⁵ *Id.* at 582, 585.

¹⁶ *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

¹⁷ Under traditional rational basis review, a classification is upheld if the Court can, retrospectively, imagine any situation in which the law's application could be legitimate. *Heller v. Doe*, 509 U.S. 312, 323-326 (1993). Whatever is going on in the sexual orientation cases, it is clearly not the utilization of this highly deferential form of rational basis review.

¹⁸ This trajectory is documented in the papers of the Justices. Nan D. Hunter, *Twenty-First Century Equal Protection: Making Law in an Interregnum*, 7 GEO. J. GENDER & L. 141, 153-56 (2006).

scrutiny.¹⁹ Later, the effort to muster a majority to treat sex as a suspect classification fell short;²⁰ and the Court ultimately settled on an intermediate standard.²¹ Given the state of the current case law, Congress should reject the dichotomous all-or-nothing approach of having to choose between traditional rational basis analysis and suspect class analysis, and instead utilize either the heightened scrutiny standard applied to sex discrimination or the heightened rational basis standard proposed by Justice O'Connor in *Lawrence*.²²

The Equal Protection case law applicable to employment demonstrates two fundamental points: first, that, even today, discrimination against LGBT state and local government employees continues; and second, that even utilizing a rational basis test, such discrimination is unconstitutional. As documented throughout the pages of this report, from the “lavender scare” purges to the present, the instances of anti-gay state government job discrimination (and the very similar examples in the context of local government) have lacked an “identifiable legitimate purpose or discrete objective.”²³ The facts of some examples are inflected with a degree of animus that crosses the line into violence.²⁴

¹⁹ *Reed v. Reed*, 404 U.S. 71 (1971).

²⁰ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

²¹ *Craig v. Boren*, 429 U.S. 190 (1976).

²² The Connecticut Supreme Court adopted the sex discrimination level of scrutiny as the correct measure of sexual orientation classifications under that state’s constitution. *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135 (2008).

²³ *Miguel v Guess*, 51 P.3d 89 (Wn. Ct. App. 2002); *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (E.D.N.Y. 2006); *Sorrenti v. City of New York*, 851 N.Y.S.2d 61 (N.Y. Sup. Ct. 2007); *Lovell v. Comsewogue Sch. Dist.*, 2005 WL 1398102 (E.D.N.Y. 2005); *Emblen v. Port Authority of New York/New Jersey*, 2002 WL 498634 (S.D.N.Y. 2002); *Glover v. Williamsburgh Local School Dist. Bd. Of Educ.*, 20 F.Supp.2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F.Supp.2d 1279 (D. Utah 1998).

²⁴ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf> (California Highway Patrol officer Thomas Figenshu was subjected to extreme harassment based on his sexual orientation which included a co-worker urinating in his locker); Lambda Legal, All Cases: *Grobeson*

For example:

- A railroad ticket agent sued the Long Island Railroad, a state employer, for failing to address sexual orientation harassment in the workplace. In 2006, a U.S. District Court, relying on the U.S. Supreme Court's 1996 decision, *Romer v. Evans*,²⁵ denied the Railroad's summary judgment motion and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause.²⁶ The ticket agent alleged that he was referred to by several people in the office as a "f***** faggot" and "a queer."
- In 2001, a lesbian brought an action against her former employer, a hospital district, for wrongful termination based on sexual orientation alleging state and federal equal protection clause violations. She and her immediate supervisor were both terminated for opposing the hospital's discriminatory treatment of her. The director of the hospital's radiology department made several derogatory comments, including calling her a "f***** faggot" a "f***** dyke" and a "queer." The Washington Court of Appeals held that she had raised material

v. *City of Los Angeles*, <http://www.lambdalegal.org/in-court/cases/grobesson-v-city-of-los-angeles.html> (last visited Sept. 5, 2009) (police officer's co-workers refused to back him up in life-threatening situations); Negotiated Settlement and General Release, *Colle v. City of Millville*, D. Conn., Civil Action No. 07-5834 (police officer refused back up because of his sexual orientation when a woman he was apprehending bit his finger to the bone); GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Nov. 26, 2007) (on file with GLAD) (transgender correctional officer was slammed into a concrete wall by a co-worker because of her gender identity).

²⁵ 517 U.S. 620 (1996).

²⁶ *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (2006 E.D.N.Y.).

issues of fact with respect to whether the hospital and the doctor were “state actors” for her federal claims and remanded the case for trial.²⁷ The hospital eventually settled with her for \$75,000.²⁸

- In *Jantz v. Muci*, a federal district court found that a Kansas school teacher had an equal protection claim actionable under 42 U.S.C. § 1983 because he had been denied a teaching position because of a principal’s perception that he had “homosexual tendencies.” The court noted that “homosexual orientation alone does not impair job performance, including the job of teaching in public schools” and concluded that the decision was “arbitrary and capricious in nature”-- failing even under rational basis review.²⁹
- In 1995, Justice Sotomayor, then a judge for the Southern District of New York, denied a motion to dismiss a case where the plaintiff had been fired from his job as a prison kitchen worker because he was gay. Criticizing the defendants’ argument that removing the plaintiff was rationally related to preserving mess hall security, Sotomayor stated that a "person's sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security." She also rejected the defendants’ qualified immunity defense, stating that the "The

²⁷ *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002).

²⁸ ACLU, *Following ACLU Lawsuit, Lesbian Illegally Fired from Washington Hospital Received Generous Settlement* (Oct. 8, 2003), <http://www.aclu.org/lgbt/discrim/12359prs20031008.html>.

²⁹ *Jantz v. Muci*, 759 F. Supp. 1543, 1543 (D. Kan. 1991). The court further held that the principal was not entitled to a qualified immunity defense and denied his motion for summary judgment. The Tenth Circuit reversed, finding that the principal was entitled to qualified immunity. *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992).

constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law."³⁰

Whether the courts' reasoning on the question of the applicable standard is motivated by the knowledge that much discrimination against LGBT people is impermissibly motivated by animus and hostility toward a group, or whether multiple courts have concluded that anti-gay discrimination in the ordinary exchanges of daily life is presumptively irrational is, in the end, irrelevant. Under *any* interpretation of these cases and under *either* standard of review, workplace discrimination against LGBT Americans must be found unconstitutional.

(B) Discrimination based on gender stereotyping and on sex

In addition to and overlapping with sexual orientation discrimination, LGBT people have suffered job discrimination based on gender stereotyping and on sex. As noted above, sex-related discrimination is subject to heightened review. In *United States v. Virginia*, the Court held that the Virginia Military Institute's denial of admission to women violated the federal constitutional prohibition of sex-based discrimination.³¹ The Court explained that to defend "gender-based government action," the state "must demonstrate an 'exceedingly persuasive justification' for that action."³² Significantly, the Court held that the justification must not rely on sex stereotypes, or "overbroad generalizations about the different talents, capacities, or preferences of males and

³⁰ *Holmes v. Artuz*, 1995 WL 634995 (S.D.N.Y. 1995).

³¹ 518 U.S. 515, 519 (1996).

³² *Id.* at 531.

females.”³³ The Court has also made clear that individuals have a right under the Equal Protection Clause to be free of sex-based discrimination in public employment.³⁴

Because of the existence of Title VII, only a small number of employment discrimination claims involving sex bias are brought as constitutional claims. However, courts routinely treat the substantive criteria of factually similar Title VII and constitutional claims interchangeably.³⁵ Since the Supreme Court decided *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), Title VII law has recognized that an employee who suffers job discrimination because of a failure to conform to gender stereotypes can assert a viable claim under Title VII. Discrimination based on gender stereotypes also violates the Constitution’s guarantee of equal protection.³⁶

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 traditional sex roles.”³⁷ Koppelman reviewed a substantial amount of 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

³³ *Id.* at 533.

³⁴ *Davis v. Passman*, 442 U.S. 228, 234-35 (1979).

³⁵ *See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986).

³⁶ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-26 (1982)

³⁷ Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994).

esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.”³⁸

In a book-length article that appeared in the *California Law Review*, Professor Francisco Valdes also analyzed the conflation of gender and sexual orientation.³⁹ 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).”⁴⁰ Numerous other scholars have pointed to the same phenomenon.⁴¹ As Professor Valdes wrote, “discrimination putatively based on sexual orientation is in concept and practice tightly intertwined with gender discrimination.”⁴²

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 profound than for lesbian, gay and bisexual persons. As one author has noted, “discrimination against transgender...employees is per se a form of sex-stereotyping

³⁸ *Id.* at 235.

³⁹ See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 87-90 (1995).

⁴⁰ *Id.* at 135.

⁴¹ In addition to Koppelman and Valdes, see, e.g., 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 N.W. 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 and 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).

⁴² *Id.* at 335.

discrimination...The issue of discrimination against transgender employees cuts to the core of what a ‘gender stereotype’ is.”⁴³ 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.⁴⁴

When government employers discriminate based on gender stereotypes, regardless of the employee’s LGBT status, sex-based discrimination is implicated. This occurs often in the workplace. Stereotypes about whether a male is masculine enough or a female is feminine enough have been widely used as the basis for excluding LGBT people from employment.

However, instead of recognizing this overlap, many courts have instead tried to parse out whether discriminatory comments are referencing an employee’s sexual orientation or gender identity, and therefore are not actionable, or whether the comments

⁴³ Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007).

⁴⁴ 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).

reflect sex stereotyping, and therefore are actionable. Courts have noted that because of the very high degree of inter-relationship between the two this not an easy task.⁴⁵

Currently the case law is divided on whether courts will recognize that gay or transgender individuals can even state a claim for Title VII sex stereotype discrimination, or whether the judges will reject Title VII sex stereotype claims based on a litigant's sexual orientation or gender identity status. The early case law uniformly denied relief to gay and transgender plaintiffs.⁴⁶

Since the Supreme Court's decision in *Price Waterhouse*, some lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this better reasoned understanding now governs in many circuits and district courts.⁴⁷ For example, the Sixth Circuit Court of Appeals found in *Smith v. City of Salem* that a transgender fire department employee was subjected to impermissible sex discrimination under Title VII based on nonconformity with gender stereotypes.⁴⁸ The court held that "discrimination against a plaintiff who is transsexual – and therefore fails to act and/or identify with his

⁴⁵ See, e.g., *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1065 n. 5 (7th Cir. 2003) ("We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes."). See, also, *Prowel v. Wise Business Forms, Inc.*, --- F.3d ---, 2009 WL 2634646, at *2 (3d Cir. Aug. 28, 2009)

⁴⁶ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979); and *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

⁴⁷ In addition to the Sixth and Seventh Circuit cases discussed in the text, comparable decisions by appellate courts involving private sector employers or non-employment contexts include *Prowel*, 2009 WL 2634646; *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).

⁴⁸ 378 F.3d 566, 575 (6th Cir. 2004).

or her gender – is no different from Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”⁴⁹

A year later, the Sixth Circuit again recognized actionable sex stereotype discrimination against a transgender public employee. In *Barnes v. City of Cincinnati*, Barnes filed suit against the City of Cincinnati after he was demoted from his position as a police officer.⁵⁰ Barnes was living as a woman outside of work and sometimes came to work with make-up, arched eyebrows, and a manicure.⁵¹ 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.”⁵² After being placed 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.⁵³ 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.

In *Doe v. City of Belleville*, two brothers who worked in a city public maintenance crew were taunted for what co-workers apparently perceived as feminine characteristics, including wearing an earring. Subjected to “a relentless campaign of harassment by their

⁴⁹ *Id.*

⁵⁰ 401 F. 3d 729 (6th Cir. 2005).

⁵¹ *See id.* at 734.

⁵² *Id.* at 735.

⁵³ *See id.*

male co-workers,” they sued the city alleging intentional sex discrimination.⁵⁴ The plaintiffs alleged that their harassment included being called “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.⁵⁵ 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.⁵⁶ The verbal taunting turned physical when a co-worker grabbed one of the boy’s genitals to determine “if he was a girl or a boy.”⁵⁷ When the plaintiffs failed to return to work, supervisors terminated their employment.⁵⁸ 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.”⁵⁹ 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.”⁶⁰

Federal district courts have reached similar decisions as to the cognizability of a sex stereotyping claim by gay or transgender plaintiffs. For example:

⁵⁴ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). The U.S. Supreme Court vacated and remanded to the Seventh Circuit for further consideration in light of *Oncale v. Sundowner Offshore Services*. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

⁵⁵ *Id.* at 566-567.

⁵⁶ *Id.* at 567.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 593 n.27.

⁶⁰ *Id.* at 576.

- In *Fischer v. City of Portland*, the plaintiff was a lesbian city inspector who wore masculine attire.⁶¹ 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 that her shirt looked “like something her father would wear” and saying “are you tired of people treating you like a bull dyke[?]”.⁶² Her co-workers 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?”⁶³ 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.⁶⁴
- In *Schroer v. Billington*,⁶⁵ the court not only denied a motion to dismiss, but also ruled after trial that the Library of Congress was liable under Title VII for its discrimination against a transgender woman. The court found that the plaintiff prevailed on two legal theories: direct or disparate treatment sex discrimination and sex stereotype discrimination. Testimony at trial established that the negative reaction to the plaintiff resulted from her not

⁶¹ 2004 WL 2203276, at *7 (D. Or. 2004).

⁶² *See id.*

⁶³ *See id.* at *8.

⁶⁴ *See id.* at *11.

⁶⁵ 577 F. Supp.2d 293 (D.D.C. 2008). In July 2009, the Department of Justice announced that it would not appeal the ruling. See ACLU press release available at <http://www.aclu.org/lgbt/transgender/40092prs20090701.html>.

fitting gender stereotypes because she transitioned, and thus the court found that there was "compelling evidence that the Library's hiring decision was infected by sex stereotypes."⁶⁶ Secondly, the court held that discrimination based on 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 discrimination. The *Schroer* court reasoned that just as discrimination against converts from one to faith to another is discrimination based on religion, so too discrimination against transgender persons is sex discrimination.⁶⁷

- In *Glenn v. Brumby*, a legislative editor for the Georgia General Assembly's Office of Legislative Counsel was fired after she was diagnosed with gender identity disorder and began appearing at work as a woman (pursuant to a doctor's orders) prior to undergoing gender reassignment surgery.⁶⁸ Since 2005, she had been responsible for editing proposed legislation and resolutions for the Georgia Assembly. A federal district court summarized the grounds for termination as, "in the view of Glenn's employers, gender transition surgery and presentation as a woman in the workplace would be seen as immoral... and would make other employees uncomfortable."⁶⁹ In rejecting the state's motion to dismiss, the court ruled that the editor's complaint "clearly states a claim for denial of equal protection" under the

⁶⁶ *Id.* at 305.

⁶⁷ *Id.* at 306-07.

⁶⁸ *Id.*

⁶⁹ *Id.*

Fourteenth Amendment on alternative theories of discrimination on the basis of sex and a medical condition.⁷⁰ The court noted that “it is now well-established in federal law that discrimination based on the failure of an individual to conform to sexual stereotypes is a form of sex discrimination.”⁷¹ The court then held that the plaintiff had met the burden of showing that she was treated differently based on her gender identity disorder and her failure to conform to sex stereotypes.⁷²

- In *Kastl v. Maricopa County Community College District*⁷³, Estrella Mountain Community College (EMCC) required plaintiff, who was diagnosed with gender identity disorder and was transitioning from male to female, to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated her upon her refusal to comply with this directive. The court denied EMCC's motion to dismiss, 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.”⁷⁴

Despite this emerging trend in the case law toward allowing Title VII claims by gay and transgender plaintiffs to go forward, there continue to be numerous and recent examples

⁷⁰ *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009).

⁷¹ *See id.* at *6.

⁷² *See id.* at *7.

⁷³ Case No. 02-1531, 2004 WL 2008954 (D. Ariz. June 3, 2004).

⁷⁴ 2004 WL 2008954 at *2.

of courts refusing to recognize a sex discrimination claim if the plaintiff is gay or transgender. For example: in *Etsitty v. Utah Transit Authority*, a transgender state employee of the Utah Transit Authority was fired after she began living openly as a woman as part of the sex reassignment process.⁷⁵ 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. The Tenth Circuit refused to apply Title VII's prohibition on sex stereotype discrimination to a transsexual plaintiff, holding that any discriminatory treatment stemmed from the plaintiff's transsexual status rather than from gender stereotypes.⁷⁶ Three similar results in district courts involve state or local government employees.⁷⁷

- In *Trigg v. New York City Transit Authority*, a city employee was subjected to a number of comments by his supervisor implicating both sexual orientation and sex stereotypes.⁷⁸ The supervisor used anti-gay slurs, but also told the employee to do tasks in a “more manly” way and “with more strength.”⁷⁹ 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.⁸⁰ The court, therefore, allowed the sexual

⁷⁵ 502 F.3d 1215 (10th Cir. 2007).

⁷⁶ *See, id.*, at 1224.

⁷⁷ Other examples of courts that have found a loophole to prevent gay or transgender public employees from bringing a sex stereotyping claim include *Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.1996), *Byars v. Jamestown Teachers Assoc.*, 195 F. Supp. 2d 401 (W.D.N.Y. 2002), *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002), *Haladay v. Thurston County Fire Dist. No. 1*, 2005 WL 3320861 (W.D.Wash. Dec 7, 2005), and *Brockman v. Wyoming*, No. 00-cv-0087-B, slip. op. (D. Wyo. May 9, 2001).

⁷⁸ Case No. 99-CV-4730, 2001 WL 868336 (E.D.N.Y. July 26, 2001).

⁷⁹ *Id.* at *3.

⁸⁰ *See id.* at *6.

orientation discrimination against the employee to foreclose otherwise actionable sex stereotype discrimination.

- In *Cash v. Illinois Division of Mental Health*, an employee of a state home for the developmentally disabled was subjected to hostile treatment based on both sex stereotypes and perceived sexual orientation.⁸¹ The employee was accused of being a closeted homosexual, was subjected to simulated sex acts, and was called a “he/she.”⁸² The federal district court rejected the employee’s Title VII claim because it failed to see the gender stereotyping dimensions of the treatment, and the Seventh Circuit Court of Appeals affirmed.⁸³
- In *Martin v. New York State Department of Correctional Services*, a gay male employee at a state correctional facility was subjected to co-workers’ harassing sexual and sexual orientation-based comments.⁸⁴ After supervisors failed to take action, the employee brought suit. Rejecting the Title VII sex stereotyping claim, the court expressed the need to avoid “bootstrapping” sexual orientation discrimination claims of discrimination under Title VII and concluded that the plaintiff had not shown discriminatory treatment based on his actual or perceived masculinity.⁸⁵

⁸¹ 209 F.3d 695 (7th Cir. 2000).

⁸² *See id.* at 697.

⁸³ *See id.* at 697-98.

⁸⁴ 224 F. Supp. 2d 434, 441 (N.D.N.Y. 2002).

⁸⁵ *See id.* at 446-47.

These decisions and others like them leave lesbians and gay men facing discrimination based on sex stereotypes with no remedy under Title VII. The passage of ENDA is necessary to ensure that lesbians and gay men subjected to sex stereotype discrimination in employment are able to seek redress.

In sum, as to Equal Protection analysis, given the open nature of U.S. Supreme Court jurisprudence on the question of which constitutional standard is correct for sexual orientation classifications, Congress may properly conclude that heightened scrutiny is the most appropriate metric for assessing the validity of employment actions that discriminate against LGBT persons. Alternatively, Congress may choose to apply rational basis review under the Fourteenth Amendment's Equal Protection Clause as the better path. Under *either* approach, workplace discrimination based on sexual orientation or gender identity is unconstitutional. Moreover, a significant portion of the instances of sexual orientation and gender identity discrimination documented in this report are, under law, also forms of sex discrimination, and *require* application of heightened scrutiny.

II. Due Process

Adverse employment actions against LGBT public employees can violate the rights protected by the Due Process Clause of the Fourteenth Amendment in several ways. First, employee's liberty and privacy interests are violated when they are discriminated against in public employment for engaging in same-sex relationships

outside of the workplace that are protected by the Due Process Clause. Second, LGBT public employees have been subjected to invasive and harassing questions in the workplace about their sexuality that violate their privacy rights protected by the Due Process Clause. Finally, animosity towards LGBT people has led state employers to terminate LGBT employees without providing them with adequate notice and a meaningful opportunity to respond as required by the procedural requirements of the Due Process Clause.

A. Liberty and Privacy

Public employers that terminate employment based on an individual's "immoral conduct" alone or exercise of his or her right to form an intimate relationship violate an employee's liberty and privacy interests protected by the Due Process Clause. Most public employees have a constitutional property interest in not losing their jobs for arbitrary reasons.⁸⁶ As early as 1969 federal employees won an important legal victory when the D. C. Circuit ruled on Due Process grounds that they could not be fired based on "immoral conduct" unless the conduct affected the individual's job performance.⁸⁷ As the court explained,

[T]he Commission[']s discretion in determining what reasons may justify removal of a federal employee ... is not unlimited. The Government's

⁸⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.9 (1970), dictum followed in *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972); *Slochower v. Board of Higher Education, City of New York*, 350 U.S. 551, 555-56 (1956).

⁸⁷ *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious. These constitutional limits may be greater where, as here, the dismissal imposes a ‘badge of infamy,’ disqualifying the victim from any further Federal employment, damaging his prospects for private employ, and fixing upon him the stigma of an official defamation of character. The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections. Whatever their precise scope, these due process limitations apply even to those whose employment status is unprotected by statute.⁸⁸

Despite the decision in *Norton*, many State employers continued to consider “immoral conduct” – often defined in practice as homosexuality or transgender status – as a ground for firing or not hiring an individual. For example:

- In *Holt v. Rapides Parish School Board*, a tenured teacher and coach for women's sports teams at a public high school in Louisiana was fired on suspicion of being a lesbian. The teacher was suspected of having an inappropriate relationship with a student, who was actually the daughter of her cousin, with whom she had a close

⁸⁸ *Id.* at 1163-64 (internal citations omitted). Congress codified the nexus requirement established by *Norton* in 5 U.S.C. § 2302(b)(10), which provides that federal managers may not “discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.”

familial relationship. After being discharged on a 5-4 vote, the teacher filed suit and the trial judge found in her favor. The appeals court affirmed the trial court's decision, finding that the charges against her "are replete with insinuations and innuendos" and "the Board's case is seriously lacking in evidence, much less the 'substantial evidence' required to support the Board's actions." The court concluded that the School Board's decision "was arbitrary and an abuse of discretion," and assessed the School Board the full costs of the appeal.⁸⁹

- In *Dawson v. State Law Enforcement Division*, an employee of the South Carolina State Law Enforcement Division ("SLED") alleged that he was constructively discharged because of his perceived sexual orientation – after allegations that he had slept with a co-worker's husband and was then harassing the co-worker at work.⁹⁰ The employee denied the allegations, but the court found that the truth or falsity of the basis upon which the employee was discharged "neither enhances nor diminishes" his claim, because the fact that the employee was gay alone was sufficient to justify his termination.⁹¹ The Court stated that it was not willing to extend the right of privacy to include homosexual conduct because such "activity clearly bears no relationship to marriage, procreation, or family life"⁹² and held that homosexual conduct is not protected under the due process clause of the Fourteenth Amendment.⁹³ The Court also stated that "the constitutional right of

⁸⁹ *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720 (La. Ct. App. Dec. 11, 1996).

⁹⁰ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2 (D.S.C. April 6, 1992).

⁹¹ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5.

⁹² *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *6.

⁹³ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *1-2.

privacy and free association do not preclude a law enforcement agency from inquiring into an officer's off-duty same-sex relationships."⁹⁴

- In 1993, a public high school in Byron Center, Michigan hired a teacher to revive its music program.⁹⁵ The teacher was a tenured music teacher described by many as one of the best teachers on staff.⁹⁶ Two years later in 1995, after the teacher successfully revitalized the Center's music program, he and his partner planned a commitment ceremony.⁹⁷ Before the event took place, someone at the high school learned of the commitment ceremony and spread word to staff, parents and students. At a school board meeting, a few parents demanded that the music teacher be fired. The school board did not take immediate action, but issued a statement that, "The board firmly believes that homosexuality violates the dominant moral standard of the district's community. Individuals who espouse homosexuality do not constitute proper role models as teachers for students in this district" and warned the teacher that they would "investigate and monitor" the situation.⁹⁸ In the months that followed the board meeting, many parents removed their children from the teacher's class and he became the center of media attention. While the teacher struggled to maintain his classroom for the remainder of the school year, he ultimately relented at the end of the school year and entered into a settlement agreement with the school district: he agreed not to sue or seek

⁹⁴ *Dawson v. State Law Enforcement Div.*, 1992 WL 208967, at *5, citing *Walls v. Petersburg*, 895 F.2d 188 (4th Cir.1990).

⁹⁵ Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers*, 24 HUM. RTS. 3 (ABA 1997), available at <http://www.abnet.org/irr/hr/yared.html>.

⁹⁶ *Id.*

⁹⁷ Jill Smolowe, et al., *The Unmarrying Kind*, TIME, Apr. 29, 1996, available at <http://www.time.com/time/printout/0,8816,984469.00.html>; Yared, *supra* note 93.

⁹⁸ Yared, *supra* note 93.

employment in the district in exchange for one-year's salary, health benefits and a letter of reference.⁹⁹ Five months later, he collapsed, went into a coma and died days later at the age of thirty-two. A forensic pathologist concluded that his died from a congenital malfunctioning heart valve, adding that this condition was typically not fatal, but the stress from his public struggle may have contributed to his death.¹⁰⁰

- In *Woodard v. Gallagher*, a deputy sheriff brought suit in 1992 after he was constructively terminated because of his sexual orientation and a jury found in his favor. The court then, in analyzing the sheriff's right to privacy claim, noted that "none of his actions could be construed so as to bring disrepute or dishonor to the Sheriff's office...[the "homosexual conduct"] occurred away from and unrelated to his job and was within his personal private life. There was no evidence that his job or public life was affected in any respect by such conduct." The court concluded that the use of facts known to the office by way of accidental discovery and sheriff's self-revelation in response to confidential questions "as a basis to discharge him" violated his right to privacy.¹⁰¹

In 2003, in striking down the Texas sodomy statute, the Supreme Court further clarified that LGBT public employees could not be fired because employers viewed their private relationships as immoral. In *Lawrence v. Texas*, the Supreme Court quoted and adopted as "correct" a passage from Justice Stevens' dissent in *Bowers v. Hardwick*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶ 41, 652, 1992 WL 252279 (Fla. Cir. Ct. 1992).

which stated in part that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁰² By invalidating sodomy laws, the Court’s holding eliminated the basis in law for much of the “immorality” cited by public employers as justification for firing or not hiring LGBT workers. More directly, the opinion in *Lawrence* accords constitutional protection to the individual’s liberty interest in forming an intimate relationship with a same-sex partner. Governmental actions that terminate employment based on the individual’s exercise of her right to form such a relationship are properly subject to heightened scrutiny.¹⁰³

Since *Lawrence* also held that *Bowers v. Hardwick*,¹⁰⁴ the decision it reversed, was incorrect when it was decided in 1986,¹⁰⁵ it in effect held that adverse employment decisions based on state sodomy laws dating back to at least 1986 had violated the liberty interests of LGBT employees.¹⁰⁶ Until 2003, sodomy laws served as a central reason for LGBT people staying in the closet and artificially crippling their potential in the workplace.¹⁰⁷ The nature of the link between sodomy laws and employment discrimination was succinctly stated by Professor Patricia Cain, who wrote that “[s]o long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers

¹⁰² *Lawrence*, 539 U.S. at 577-578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

¹⁰³ *Witt v. Dep’t of Air Force*, 527 F.3d 806 (9th Cir. 2008).

¹⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰⁵ *Lawrence v. Texas*, 539 US. 558, 578 (2003).

¹⁰⁶ This is not to say that states would be liable for such for such decisions, since they could argue that properly relied on the *Bowers* decision, but the state’s immunity based on *Bowers* does not mean that LGBT employees constitutional rights were not, in fact, violated.

¹⁰⁷ WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 (2008).

could argue that they should not be forced to hire criminals.”¹⁰⁸ State governments used this argument to deny employment and licensing with particular frequency in the fields of education and law enforcement.

The link between sodomy laws and job discrimination was so widespread and pervasive that it was relied on by the Supreme Court in *Lawrence* and by numerous state courts in overturning sodomy laws. Chapter 3 provides an in-depth look at the relationship between sodomy laws and discrimination against LGBT employees in public employment. Here are a few examples of such discrimination presented to the Supreme Court in *Lawrence*:

- In the 1990s, the Dallas Police Department had a policy of denying jobs to LGB applicants who had engaged in violations of the state’s sodomy law, without regard to whether they had ever been charged with, or convicted of, any crime. By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.¹⁰⁹

¹⁰⁸ Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1588 (1993).

¹⁰⁹ Amicus Brief of Constitutional Law Professors at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993)).

- Also in the 1990s, the state attorney general of Georgia was able to rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman.¹¹⁰
- In 2002, the Texas Homosexual Conduct Law was used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate's own party argued, "whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law ... is wrong."¹¹¹
- In the pre-*Lawrence* landscape, "individuals *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d)."¹¹²

¹¹⁰ *Id.* at 16, citing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (finding rescission of job offer justified because of the mere *existence* of a sodomy law, when she could be *presumed* to be violating the state law against homosexual sodomy).

¹¹¹ Amicus Brief of the American Bar Association at 13, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, HOUSTON VOICE, Nov. 8, 2002, at 1).

¹¹² Amicus Brief of Constitutional Law Professors at 16-17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

- In January 2003, just as briefs were being filed in the *Lawrence* case, a Virginia legislator suggested that a gay person’s violations of a sodomy law could disqualify her from being a state judge.¹¹³

Based on this and other evidence of the impact of sodomy laws on public and private employment, in *Lawrence*, both the majority opinion and Justice O’Connor’s concurring opinion relied on the impact of sodomy statutes on employment as one reason that *Bowers* should be overturned:

- The majority noted that if an adult is convicted in Texas for private, consensual homosexual conduct, “the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.”¹¹⁴
- Justice O’Connor’s concurrence also noted the impact on employment, with the restrictions that would keep a homosexual from joining a variety of professions.¹¹⁵
- O’Connor also noted that “the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”¹¹⁶

¹¹³ Amicus Brief of LGBT Associations at 13, n.35, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing Scanlon & Halladay, *Sex Life May Be Used Against Judges*, DAILY PRESS, Jan. 15, 2003).

¹¹⁴ *Lawrence*, 539 U.S. at 576.

¹¹⁵ *Id.* at 581 (O’Connor, J., concurring) (“It appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1) (athletic trainer); § 1053.252(2) (interior designer).”)

¹¹⁶ *Id.* at 582 (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

As further detailed in Chapter 3, even though *Lawrence* overturned the remaining sodomy laws in the United States, their impact on employment continues today. Thirteen states still had sodomy laws on their books in 2003 when the Supreme Court declared them unconstitutional. Of those thirteen states, only the legislature of one state, Missouri, has since repealed its sodomy law statute. Efforts to repeal sodomy laws in the other states, both before and after *Lawrence*, have failed. None of the thirteen states that had sodomy laws when *Lawrence* was decided had anti-discrimination statutes prohibiting discrimination in employment on the basis of sexual orientation or gender identity. In fact, state sodomy laws have been used as a basis to argue against passing such protections.¹¹⁷

B. Workplace Inquiries that Invade LGBT Employee's Privacy

Courts have also held that LGBT employees have had their constitutional right to privacy violated by workplace inquiries about their sexuality and their relationships. A number of cases have held that public employees have a constitutional right not to be asked about their off-duty romantic relationships, sexual activities, abortions, or miscarriages absent a showing that those relationships have an impact on job performance.¹¹⁸ Similarly, LGBT public employees have a right to not be asked about their sexual orientation or sexual practices. For example:

¹¹⁷ See Chapter 3, *infra*.

¹¹⁸ *Shuman v. City of Philadelphia*, 470 F.Supp. 449, 459-459 (E.D.Pa. 1979) (“[T]here are ... matters which fall within a protected zone of privacy simply because they are private; “that is, that [they do] not adversely affect persons beyond the actor, and hence [are] none of their business.” *Ravin v. State*, 537 P.2d

- In *Eglise v. Culpin*, an applicant for police department job filed a right to privacy claim because during the application process she was asked "What exactly are your sexual practices and preferences?" The District Court held that such inquiries had violated her right to privacy, but that the police official was entitled to qualified immunity. On appeal, the Second Circuit reasoned that since the conduct had occurred in 1995, a reasonable official would not have known the conduct was constitutionally proscribed.¹¹⁹
- In *Walls v. City of Petersburg*, an administrator of the City of Petersburg's Community Diversion Incentive Program was fired in 1986 for refusing to answer questions about her sexual orientation as part of a city background check. She had already been in her position for three years when asked to complete the questionnaire. When she refused, she was suspended but then reinstated because the City Manager determined that her position did not require a background check. However, at the same time he changed city policy to require her to have one. When she again refused, she was terminated. In 1990, the Fourth Circuit relied upon *Bowers v. Hardwick* in holding that she had no right to privacy with respect to this information although it did note that the relevance of this

494 (Alaska 1976 [1975]).... These private matters do not necessarily relate to the exercise of substantive rights, but may simply constitute areas of one's life where the government simply has no legitimate interest.”). See also *Thorne v. City of El Segundo*, 726 F.2d 459, 469-470 (9th Cir. 1983), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1983) (even the government's heightened interest in the context of police officers did not justify questions concerning an applicant's off-duty sexual relations and history of abortion and/or miscarriage);

¹¹⁹ *Eglise v. Culpin*, 2000 WL 232798, at *1 (2d Cir. Feb. 28, 2000).

information was "uncertain[.]"¹²⁰ In 2003, the United States Supreme Court held that *Bowers v. Hardwick* was wrong when it was decided in 1986.¹²¹

- In 1994, three female state police trooper candidates were not hired as state troopers because of alleged inconsistencies in their polygraph examination questions concerning sexual orientation. Previously, two of them had been discriminated against at the Maryland State Police Academy. They claimed their treatment at the Academy violated the Maryland Declaration of Rights, the Equal Protection Clause, the Due Process Clause, and a Governor's Executive Order banning sexual orientation discrimination by the state government. The state settled with the two women, agreeing to the injunctive relief requested and offering the positions sought. They then successfully completed their training at the Academy, but were thereafter denied positions as state troopers, along with a third lesbian candidate.¹²²

Complaints filed by LGBT public employees with legal organizations during the past several years indicate that such invasive questions continue today.¹²³

¹²⁰ *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

¹²¹ *Lawrence v. Texas*, 539 US. 558, 578 (2003).

¹²² GAY & LESBIAN L. NOTES, (Dec. 1995), available at <http://www.qrd.org/qrd/usa/legal/lgl/1995/12.95>.

¹²³ E-mail from Jon Davidson, Legal Director, Lambda Legal, to Nan D. Hunter, Legal Scholarship Director, the Williams Institute (Feb. 11, 2009, 12:18:00 EST) (on file with the Williams Institute) (applicant for position in South Carolina police department was not hired after she disclosed that she was a lesbian in response to a polygraph question); GLAD Hotline Intake Form, Gay & Lesbian Advocates & Defenders, Report of Employment Discrimination (Oct. 15, 2002) (on file with GLAD) (a New Hampshire corrections department applicant was not hired after revealing she was a lesbian in response to a polygraph question); HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>. (police department applicant was refused a position after answering that he was gay in response to a polygraph examination question. After he was terminated, he requested a copy of the polygraph report—the first statement read, “he’s gay.”).

C. Procedural Due Process

The procedural feature of the Due Process Clause requires that when the state deprives people of their property interest in their state jobs, it give them notice of the termination, reasons for the termination, and a fair opportunity to respond before a neutral decisionmaker.¹²⁴ As straightforward as this principle is, the degree of animus and fear directed toward gay and transgender employees can derail what ought to be a standardized process. For example,

- In *Bianchi v. City of Philadelphia*, a male firefighter had been subjected to a pattern of abusive harassment (including having used condoms put in his desk, urine and feces put in his firefighting gear, and receiving threatening letters) because he was perceived to be gay. After going on medical leave as a result of the harassment, he did not receive notice or a pre-termination hearing before the city blocked his return from leave and accused him of abandoning his position. While the court recognized that the actions taken against him constituted harassment, it held the harassment was not actionable under Title VII because it was based on his perceived sexual orientation and therefore was not sex discrimination. However, it also held that his procedural due process and First

¹²⁴ See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.9 (1970); *Cleveland Bd. of Edu. v. Loudermill*, 470 U.S. 532 (1985) (Due Process Clause requires that a government employee be afforded notice and a hearing before termination coupled with the availability of appropriate post-termination procedures); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991) (where a government employee did not have access to an impartial decision-maker at the pre-termination stage, he must be afforded impartial review at his post-termination hearing) (citing *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), cert. denied, 489 U.S. 1081 (1989); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987)).

Amendment claims survived summary judgment and furnished the basis for an award of more than \$1 million in damages, which was subsequently upheld by the U.S. Court of Appeals for the Third Circuit.¹²⁵

- In *McDaniels v. Delaware County Community College*, a state employee of a community college in Delaware was fired on the basis of a same-sex sexual harassment claim. He filed suit alleging he was denied a proper pre-termination hearing on the charges. A jury ordered that he be reinstated to his teaching position and awarded \$134,081 in back pay.¹²⁶
- In *Martinez v. Personnel Board*, a municipal worker had been harassed based on other employees' perception of him that he was gay and was discharged in connection with allegations that he had inappropriately sexually harassed volunteers in the department. He contested the allegations and the court determined that the city had violated his due process rights because he was not provided with the materials on which his supervisor based his decision to fire him.¹²⁷
- In *Langsbeth v. County of Elbert*, a female nurse in Colorado alleged that she was terminated in part because of her sexual orientation and was awarded \$26,950

¹²⁵ See *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726 (2002) and *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (3d Cir., Nov. 4, 2003).

¹²⁶ *McDaniels v. Delaware County Cmty. Coll.*, 1994 WL 675292 (E.D. Pa. Nov. 21, 1994).

¹²⁷ *Martinez v. Personnel Bd. of the City of Loma Linda*, 2003 WL 429505 (Cal. App. 2003)

because she was not given notice and a pre-termination opportunity to be heard in violation of her due process rights. Her award was affirmed on appeal.¹²⁸

- And in *Ashlie v. Chester-Upland School District*, a transgender art teacher’s due process rights were violated when she was fired for “immorality” immediately after her transition without being afforded a pre-termination hearing.¹²⁹

III. First Amendment

The rights of expression and association guaranteed by the First Amendment are central to the ability of LGBT Americans to lead healthy, productive and honest lives, because sexual orientation and gender identity are often not visible traits. Yet the patterns of discrimination engaged in by state and local governments against LGBT workers have repeatedly violated First Amendment rights entitled to the highest level of scrutiny. State and local employees have had their First Amendment rights to free expression violated through adverse employment actions resulting from

- coming out at work,¹³⁰ even in response to direct questions;¹³¹

¹²⁸ *Langsbeth v. Cnty. of Elbert*, 916 P.2d 655 (Colo. App. 1996)

¹²⁹ *Ashlie v. Chester-Upland Sch. Dist.*, 1979 U.S. Dist. LEXIS 12516 (E.D. Pa. 1979)

¹³⁰ Discrimination against a gay person for coming out of the closet is unconstitutional because it burdens each person’s freedom of expression, a fundamental right grounded in the First Amendment. See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (dictum) (LGBT people’s expression of pride in their sexual orientation is expression protected against state action by the First Amendment). The state cannot condition continued employment on employees’ willingness to forego protected expression, including identity speech. *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979) (“coming out” speech by gay people is protected “political” expression); cf. *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state cannot condition employment on a loyalty oath that imposes conformity of belief on employees).

- discussing or writing about major news stories dealing with LGBT rights at work such as the Supreme Court’s decision in *Lawrence v. Texas*¹³² and Colorado’s Amendment 2,¹³³
- participating in protests and marches dealing with LGBT issues,¹³⁴
- advocating for gender equity in the funding of women’s sports,¹³⁵
- wearing or displaying rainbow flags¹³⁶ or red AIDS ribbons in the workplace,¹³⁷ even when no rules prohibit such displays, and

¹³¹ See, e.g., *Curcio v. Collingswood Bd. of Educ.*, 2006 WL 1806455 (D.N.J. 2006) (gay high school teacher was issued a formal reprimand and threatened with additional disciplinary action because he truthfully responded to a student who asked him if he was gay during class); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Miller v. Weaver*, 66 P.3d 592 (Apr. 4, 2003) (tenured public school teacher and volleyball coach was removed from her coaching position by the school after admitting to a player that she was gay in response to a direct and unsolicited question).

¹³² Press Release, ACLU, *Kansas Public Library Concedes That it Can’t Censor Employee for Discussing Historic Sodomy Ruling* (Aug. 5, 2003), available at <http://bit.ly/Kt0QP> (The Topeka and Shawnee public library ordered an employee to stop speaking about the *Lawrence v. Texas* Supreme Court decision at work. In response to a letter from the ACLU, the library admitted that it could not forbid its employees from speaking about Supreme Court decisions.).

¹³³ LESBIAN & GAY L. NOTES (July/August 1994), available at <http://www.qrd.org/qrd/usa/legal/lgn/1994/07> (A University of Colorado Law School librarian was forced out of her job after publishing an article about Amendment 2 in the newsletter of the American Association of Law Libraries. The school settled the case for \$25,000.).

¹³⁴ See e.g., email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute) (In 2005, a Florida public school teacher was reprimanded by his school district after he was quoted in the local paper for disagreeing with the premature dismantling of a Gay Pride book display at the local library.).

¹³⁵ LESBIAN & GAY L. NOTES (Summer 2007) (A Fresno State University volleyball coach was awarded \$5.85 million in damages after the university failed to renew her contract because she advocated for gender equity in University sports funding.).

¹³⁶ “EMcG,” *Tell Your Story*, TOWARD EQUALITY, <http://bit.ly/zqBIU> (In 2001, a Delaware public high school teacher alleged that the school principal forced her to remove a “Safe Space” rainbow triangle sticker from her classroom door. Although the school permitted the display of stickers of other clubs and organizations, the school district did not want to appear as an advocate of “Safe Space” associated with gay people.).

¹³⁷ PEOPLE FOR THE AMERICAN WAY FOUNDATION, *HOSTILE CLIMATE: REPORT ON ANTI-GAY ACTIVITY 198-99* (2002 ed.) (In 2002, an openly-gay highway employee was suspended from work for three and a half days for wearing a baseball hat embroidered with a symbol of a half-red, half-rainbow-colored ribbon symbolizing the fight against AIDS. The suspension was rescinded and the employee was reimbursed for lost wages as well as attorneys fees after the employee’s union argued that town rules make no mention of hats whatsoever.).

- speaking out about the harassment they have suffered in the workplace based on sexual orientation.¹³⁸

LGBT as well as heterosexual public employees have also had their rights to free association violated. For example,

- Until 2001, a police department in San Juan, Puerto Rico had a regulation that its offices could not associated with homosexuals. In striking down the policy as violating the First Amendment, the First Circuit noted in its decision that the policy had a chilling effect on First Amendment rights even if, as the Commonwealth claimed, it was an unenforced policy.¹³⁹
- A superintendent of a school district in Tennessee was not selected to continue in his position after he was invited to speak at a convention hosted by a church with predominantly gay and lesbian members. At the time, he was unaware that the church had a predominately gay and lesbian congregation. Although he was ultimately unable to accept the invitation, a newspaper published an article announcing that he would be a speaker at the convention. In response, he provided written statements explaining the inaccuracies of the article and noting that he did not endorse homosexuality, but he would not refuse to associate with LGBT people. When he was then not selected by the school

¹³⁸ *Bianchi v. City of Philadelphia*, 183 F. Supp 2d 726, 745-47 (E.D. Pa. 2002) (finding that a firefighter's complaints concerning the workplace harassment he endured were entitled to First Amendment protection because the mistreatment was a matter of public concern and the value of the complaints was not outweighed by the Department's interest in effective functioning).

¹³⁹ *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288 (1st Cir. 2001).

board to continue as superintendent he sued and won a judgment from the U.S. Court of Appeals for the Sixth Circuit.¹⁴⁰

LGBT employees have also had their free association rights violated for adverse employment action resulting from forming or participating in LGBT organizations,¹⁴¹ for dancing with friends of the same sex outside of work,¹⁴² for going to gay bars,¹⁴³ and participating in commitment ceremonies with their same-sex partners.¹⁴⁴

IV. Conclusion

Discrimination in public sector employment based on sexual orientation or gender identity implicates LGBT employee's constitutional rights protected by the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the

¹⁴⁰ *Scarborough v. Morgan County Bd of Educ.*, 470 F.3d 250 (6th Cir. 2007).

¹⁴¹ *Debro v. San Leandro Unif. Sch. Dist.*, 2001 U.S. Dist. LEXIS 17388 (N.D. Cal. Oct. 11, 2001) (California public high school teacher was issued a letter of censure and the school adopted a policy requiring pre-approval of discussion of "controversial issues" in the classroom after the teacher helped establish a Gay-Straight Alliance to provide support for students and to prevent harassment and thereafter mentioned the GSA to his class); MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (A gay youth counselor for the State of Alaska was told he could not take the youth he counseled out on "pass" to go out to movies or to shop, in order to reward them for their good behavior. The counselor learned that he was considered a risk because had been the leader of a "militant homosexual group," referring to his facilitation of a support group for young gay men and lesbians.).

¹⁴² MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (A lesbian employee of the Alaska Marine Highway was terminated after a co-worker saw her dancing with friends of the same sex at a bar she attended off work hours to celebrate a softball team victory.).

¹⁴³ MELISSA S. GREEN & JAY K. BRAUSE, *IDENTITY REPORT: SEXUAL ORIENTATION BIAS IN ALASKA* 53 (Identity Inc., 1989) (An applicant for a clerk-typist position with the Alaska State Troopers was asked in her interview if she was a lesbian. When she said yes, the interviewer told her that though she was well-qualified, she would only be considered if she agreed to stop going to any of the gay bars in town. Because she did not agree to the condition, she was told she would no longer be considered for the position.).

¹⁴⁴ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (attorney's employment offer rescinded by Georgia Attorney General's Office after she made comments in front of co-workers concerning her upcoming commitment ceremony to her same-sex partner); *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987) (a road patrol deputy for the Saline County Sheriff's Department was fired after rumors circulated that she was a lesbian and involved in a relationship with another employee).¹⁴⁴

Fourteenth Amendment, including both its liberty and procedural dimensions, and the First Amendment. As a result, what is effectively heightened scrutiny, whether explicit or not, applies to all the instances of discrimination that would fall within ENDA's purview, which grants greater leeway to Congress in its assessment of the pattern of unconstitutional discrimination by state employers.¹⁴⁵

¹⁴⁵ *Hibbs*, 538 U.S. at 736.