

LGBT DISCRIMINATION



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LGBT Issues are an EEOC Priority

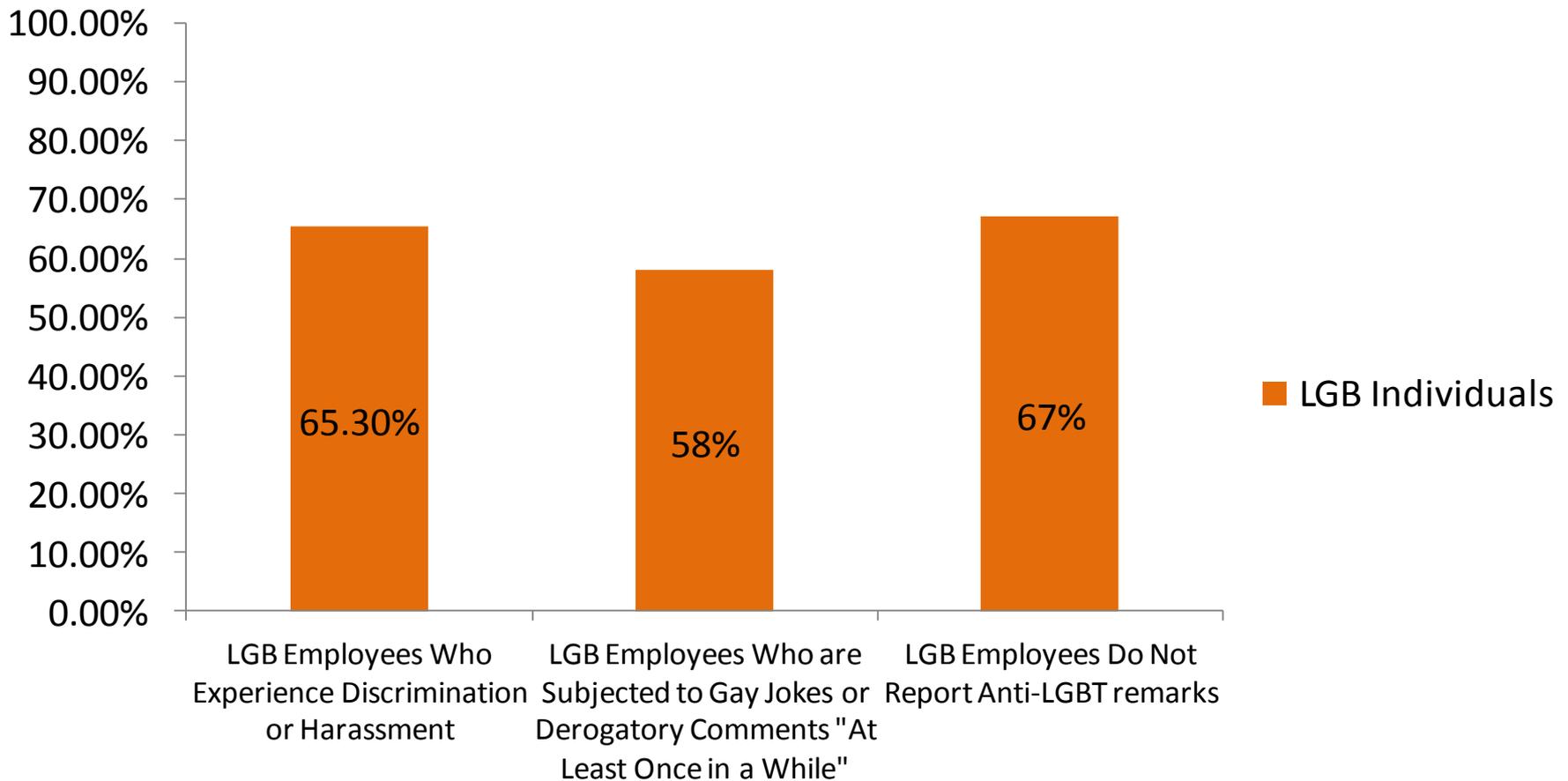
- EEOC's 2013-2016 Strategic Enforcement Plan calls for, amongst other things, addressing emerging and developing issues, including:
- Seeking protection for Lesbian, Gay, Bisexual and Transgendered individuals under Title VII.

Sexual Orientation

- ◎ Sexual orientation is a person's sexual identity in relation to the gender they are attracted to.
- Gay: a person who is attracted to a person of the same gender
- Lesbian: a woman who is attracted to another woman
- Bisexual: a person who is attracted to both genders
- Heterosexual or straight: a person who is attracted to people of the opposite gender

LGB employees report that they experience high percentages of discrimination and harassment in the workplace

LGB Individuals



Sexual Orientation: The Law

- Allegations of discrimination on the basis of sexual orientation will *always and necessarily* state a claim of discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.
- Baldwin v. Department of Transportation, EEOC Appeal No. 0120133080 (July 16, 2015)

Sexual Orientation: The Law

- ⦿ The question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination:
 - Whether the Agency has “relied on sex-based considerations” or “taken gender into account” when taking the challenged employment action
- ⦿ The Commission found that sexual orientation is “inherently a sex-based consideration”

Sexual Orientation: The Law

- ⦿ This does not **only** apply to individuals who identify as Lesbian, Gay, or Bisexual – it **also applies** to individuals who identify as heterosexual or straight and asexual

Sexual Orientation – Private Sector Cases

- ⦿ Jury found that anti gay epithets and other abuse motivated by sex stereotypes that the CP was insufficiently masculine
 - EEOC v. Boh Brothers Construction Co., 731 F.3d 444 (5th Cir. 2013)
- ⦿ Sex harassment where a gay male employee was called “she” and “her,” mocked him for carrying his tray “like a woman,” and called him a “faggot” and a “female whore.”
 - Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001)
- ⦿ “Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms..and proper role of men and women”
 - Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)

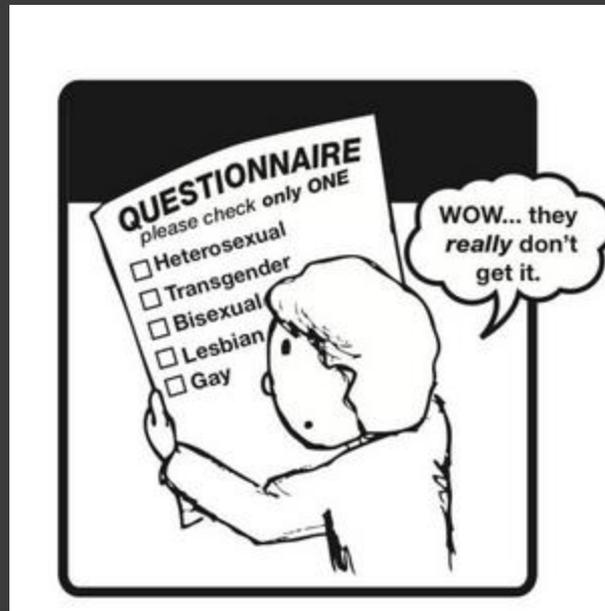
Sexual Orientation – Private Sector

- ⦿ A gay male stated a viable claim of sex discrimination where supervisor discriminated against him based on sex stereotype because he is married to a man and took husband's last name
 - Koren v. Ohio Bell Telephone Co., 2012 WL 3484825 (N.D. Ohio Aug. 14, 2012)
- ⦿ A gay man stated a viable claim of discrimination where his sexual orientation was not consistent with his supervisor's perception of acceptable gender roles
 - TerVeer v. Library of Congress, 2014 WL 1280301 (D.C. Dist. Ct, May 13, 2014, *denial of LOC's summary judgment*)
- ⦿ The denial of spousal health benefits, due to the sex of the spouse, states a claim of sex discrimination.
 - Hall v. BNSF Ry. Co., No. 13-2160 (W.D. Wash., September 22, 2014)

Question: What is the difference between sexual orientation and gender identity?

Answer: **Everything**

A person's gender identity has nothing to do with their sexual orientation



Transgender

Transgender is an umbrella term that can be used to describe people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on his or her birth certificate)

- The term **Transgender woman** typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female
- Likewise, the term **Transgender man** typically is used to refer to someone who was assigned the female sex at birth but who identifies as male
- **Gender non-binary** is a term for an individual who may not have the gender identity of either a male or female, or who may identify as both male and female. They may personally prefer the term genderqueer, gender neutral, agender, or non-binary

Transgender Employees Report An Extremely High Percentage of Discrimination in the Workplace

Series 1



Transgender Employment: The Law

- The Commission found that discrimination against someone because they are transgender is discrimination “based on sex” and is prohibited under Title VII
- Below is Mia Macy, the Complainant in Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821



Understanding the Transition Process

- ⦿ Some transgender individuals will find it necessary to transition from living and working as one gender to another
- ⦿ These individuals often seek some form of medical treatment, however some individuals, will not pursue some (or any) forms of medical treatment
- ⦿ The transition process is different for every individual
- ⦿ No medical treatment is required for an individual to be considered “transitioned” to the gender they identify with

Transgender Individuals & Restrooms

- Lusardi v. Dep't of Army, EEOC Appeal No. 0120133395 (April 1, 2015)
- This decision answers one of the most frequent questions that the Commission has heard since Macy was decided – the question of access to restrooms.
- This decision makes clear that when an individual has transitioned to the gender that reflects his or her gender identity, denial of equal access to the restroom that corresponds with the individual's gender identity is discrimination under Title VII.
- Once an individual has transitioned to being a woman, she *is* a woman, and Title VII therefore requires that she be provided equal access to the women's restroom. Similarly, once an individual has transitioned to being a man, he *is* a man, and Title VII therefore requires that he be provided equal access to the men's restroom.

Transgender Individuals & Restrooms

- This decision makes clear that transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure in order to have access to facilities designated for use by a particular gender
- Some individuals who transition from one gender to another may undergo genital surgery, but others do not. This decision makes clear that nothing in Title VII makes any particular medical procedure a prerequisite for equal opportunity.

Transgender Individuals & Restrooms

- ⦿ This decision makes clear that supervisory or co-worker confusion or anxiety may not justify discriminatory terms and conditions of employment, including denial of access to particular restrooms.
- ⦿ Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.

Transgender Individuals & Locker Rooms

- This decision also noted that if an employer provides locker rooms to its employees, Title VII requires that the employer afford a Transgender individual access to the locker room consistent with his or her gender identity

After the Transition

- ① **Confidentiality:** An employee's transition should be treated confidentially, and medical information received about an individual employee is protected under the Privacy Act and the Americans with Disabilities Act
- ② **Dress and Appearance:** To the extent that some Agencies have dress codes, dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender
- ③ **Records:** all employee records should be changed to reflect the new name and gender of the employee

Names and Pronouns

He

Ma'am

- Managers, supervisors, and coworkers should use the name and pronouns appropriate to the employee's new gender.

They

- Managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.

She

- Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992 (May 20, 2013); OPM's Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace

Her

Sir

His

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