

EQUAL PROTECTION OF THE LAW FOR SEXUAL MINORITIES

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The right to have a sexual orientation that differs from what is professed and presumably practiced by the people who make up the mainstream culture has been expressed in the writings and works of America's founding fathers', most notably James Madison, whose contribution to the Bill of Rights included the Ninth Amendment.

The Ninth Amendment is widely interpreted to support the proposition that people have certain natural rights, such as the right to travel and the right to marital privacy, that are not specifically mentioned in the Bill of Rights.

Although gay, lesbian, and bisexual people certainly did not enjoy legal protections in the days of the founding fathers, the revolutionaries and statesmen who brought us the Constitution gave us a document that has survived, and the principles behind it are today widely interpreted to let individuals decide for themselves how they wish to live the sexual part of their lives.

In 2003, the United States Supreme Court struck down a law in Texas that outlawed sodomy, i.e. "unnatural" sexual acts, between consenting adults.¹

Justice Sandra day O'Connor expressed the opinion that the law was unconstitutional because the gay community was its apparent target, and that violated the principle of equal protection of the law.

Other justices believed that the law violated the right to personal liberty guaranteed by the Due Process clause², though a minority of three justices (Rehnquist, Scalia and Thomas) dissented.

That it took the legal system over two hundred years to reach the understanding that people with different sexual orientations deserve to be free from such laws is disturbing. Although the law has evolved slowly, our society has reached the point where sexual minorities can seek redress for discriminatory behavior in the workplace and other abuses, such as hate crimes, and now have the right to marry in some states.

Massachusetts has several laws and regulations in place to protect gay, lesbian, bisexual and transgendered persons from discrimination in the workplace.

Chapter 151B of the Massachusetts General Laws is the anti-discrimination statute for the Commonwealth of Massachusetts. The statute provides protection against discrimination on the basis of race, color, religious creed, national origin, ancestry, sex or sexual orientation. This protection prohibits an employer from treating a person differently based upon that person's actual or perceived sexual orientation. Massachusetts defines sexual orientation as

¹ Lawrence v. Texas 539 U.S. 558

² The concept of "substantive due process" is held to guarantee individuals such rights as personal liberty and freedom from abusive treatment by government.

“heterosexuality, homosexuality, or bisexuality.” Other sexual orientations are not specifically included, and may or may not receive protection under this law.

The protection offered by Chapter 151B has some general limitations. Small businesses with five or less employees and non-profit social organizations are exempt from these rules. Religious organizations, including any charities or educational organizations run by religious organizations, are also exempted from Chapter 151B restrictions to avoid government interference with their religious practices. Finally, Chapter 151B’s protection is limited to discriminatory actions in the workplace. An employer may take other actions that have disproportionate effects on LGBT individuals, including the provision of employee benefits. The most common application of this is an employer’s decision to provide health insurance for spouses in heterosexual but not homosexual relationships. While clearly discriminatory against LGBT individuals, such business decisions are explicitly exempt from Chapter 151B protection.

Massachusetts Law on Gender Identity and Expression

Massachusetts does not provide protection for gender identity and expression at this time. Legislation seeking to protect an employee from employment discrimination or retaliation based upon their gender identity and expression has been brought before the Massachusetts legislature, but has yet to receive sufficient support. States that have passed legislation protecting gender identity and expression as of June 2009 include California, Colorado, Iowa, Illinois, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia has passed similar legislation.

While there are currently no laws protecting all Massachusetts citizens from employment discrimination on the basis of their gender identity or expression, some legal protection is available. The Massachusetts Commission Against Discrimination, the Commonwealth’s human rights commission, and some Massachusetts courts have allowed employees to bring gender identity discrimination claims against employers as claims for discrimination on the basis of sex or disability.¹

In addition to Massachusetts law, local ordinances protect employees in certain parts of the Commonwealth from discrimination based on sexual orientation and gender identity and expression. The municipalities of Amherst, Boston, Cambridge, and Northampton have non-discrimination ordinances in place

Other Massachusetts Regulations

Massachusetts has several general regulations to protect Massachusetts citizens from employment discrimination. Executive Order No. 340 allows Commonwealth employees to register their domestic partners for certain employment benefits. A more recent order, Executive Order No. 478, requires all programs, activities, and services provided by the Commonwealth to be conducted without unlawful discrimination, and makes the Office of Diversity and Equal Opportunity responsible for overseeing compliance.

Federal Law

Currently, there are no federal laws specifically protecting United States citizens from employment discrimination based upon sexual orientation or gender identity and expression.² Even so, employment discrimination claims based upon sexual orientation or gender identity and expression can and have been made using existing laws. The most prominent anti-employment discrimination law is Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination on the basis of race, color, religion, sex (including pregnancy), or national origin. Subsequent laws have also added protection against discrimination on the basis of age, disability, or genetic information. Laws specifically protecting employees from discrimination on the basis of sexual orientation, gender identity and expression remain under consideration by Congress. The federal government created the U.S. Equal Employment Opportunity Commission (“EEOC”) to interpret and enforce these laws.

Federal employees receive some protection from employment discrimination or retaliation based upon their sexual orientation. In 1998, President Bill Clinton signed an executive order prohibiting discrimination based on sexual orientation in the federal civilian workforce. Other government employees may claim protection from discriminatory practices by the federal and state government under the due process clause of the United States Constitution. The U.S. Constitution limits the power of federal and state governments to deprive people of “life, liberty, or property” without due process of the law”, and requires that each person be treated equally by state and federal governments. When applied to employment, this prevents the federal or state governments from discriminating in their employment practices against former, current, or potential employees based upon their perceived or actual membership in a protected group, as discussed above. It is important to note that the United States Constitution only applies to federal and state employees, and does not directly apply to employees in the private sector.

While federal laws do not provide specific protection against private sector employment discrimination based upon sexual orientation or gender identity and expression, victims of LGBT-related employment discrimination have successfully used federal laws to oppose discriminatory practices. Specifically, LGBT individuals have successfully used Title VII of the Civil Rights Act of 1964 to sue employers for sexual orientation and gender identity and expression discrimination by using claims of sexual harassment and creation of a hostile work environment.

The Law offices of David Grossack offer professional and confidential assistance to people concerned about employment discrimination or relation in their workplaces based on sexual orientation or other circumstances

Attorney Grossack is an outspoken supporter of LGBT rights in Massachusetts and has been a strong supporter of marriage equality..

List of Resources and Other References

More about the Federal and State laws and organizations influencing employment discrimination and retaliation may be found through the sources below:

General Laws of Massachusetts, Chapter 151B: Unlawful discrimination because of race, color, religious creed, national origin, ancestry or sex.
<http://www.mass.gov/legis/laws/mgl/gl-151b-toc.htm>

Massachusetts Commission Against Discrimination (MCAD): <http://www.mass.gov/mcad/>

U.S. Equal Employment Opportunity Commission: <http://www.eeoc.gov>
