

ARE LGBT WORKERS PROTECTED FROM DISCRIMINATION?

Unravelling the Patchwork of Federal, State, and Local Employment Protections

October 2018



INTRODUCTION

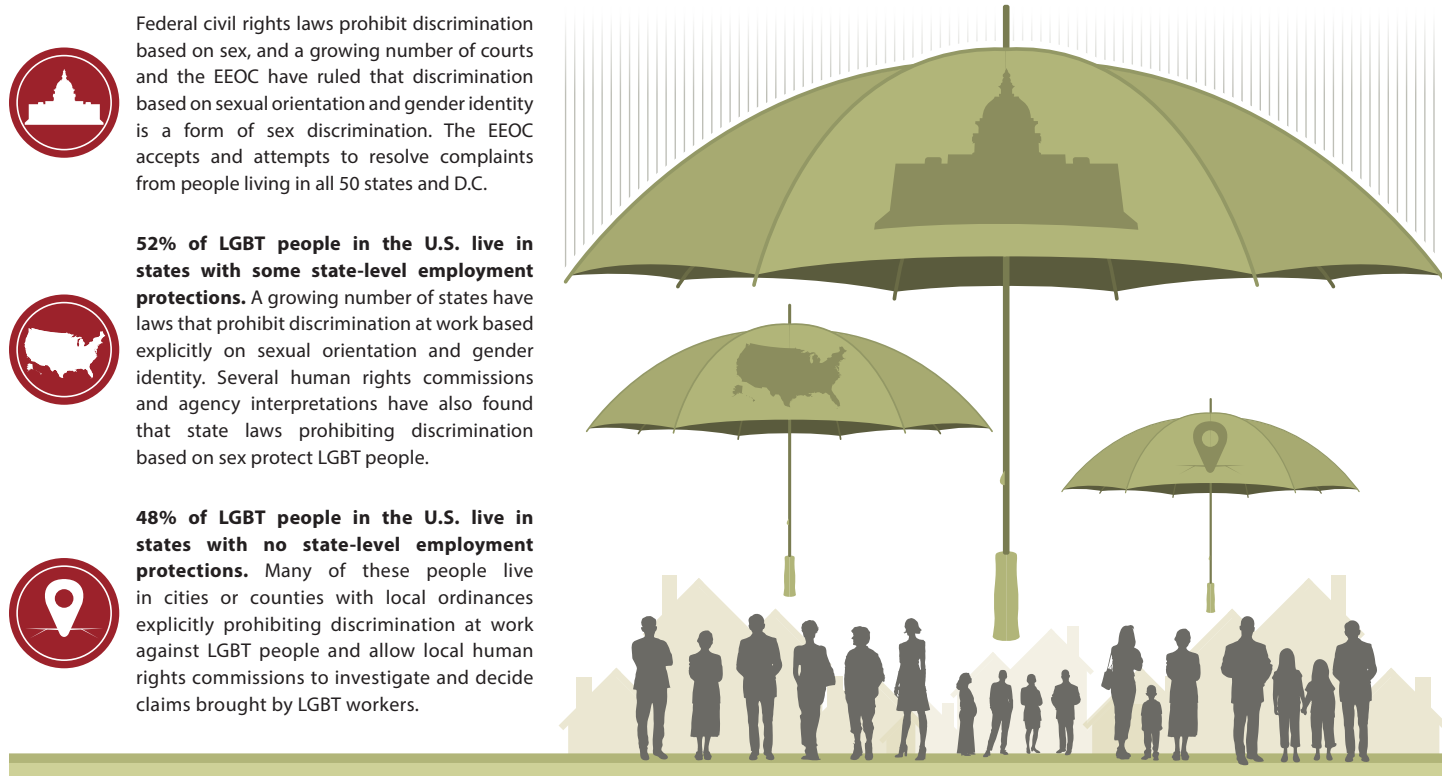
It is surprising for many people to learn that nearly half (48%) of lesbian, gay, bisexual, and transgender (LGBT) adults live in states lacking laws explicitly prohibiting discrimination at work based on sexual orientation and/or gender identity. While most people believe that federal law already protects against anti-LGBT discrimination in the workplace, the law does not explicitly refer to “sexual orientation” or “gender identity,” and the existing protections are under direct attack by the Trump Administration. The 2015 marriage ruling by the U.S. Supreme Court ruling provided a moment of stark contrast, where same-sex couples could finally marry throughout the country, but the act of marrying could potentially lead to discrimination at work, in housing, and in public spaces, threatening many LGBT people’s ability to earn a living and provide for themselves and

their families.

LGBT people across the country face a patchwork of federal protections and state and local nondiscrimination laws and ordinances. This patchwork of laws and legal interpretations—where protections for LGBT people are established in some states but not others—is bad for the economy, bad for businesses, and bad for workers and their families. Simultaneously, a shifting federal legal landscape has created new opportunities for LGBT workers to seek redress for discrimination. Later this fall, the U.S. Supreme Court may take up one or more cases that could definitively establish the extent to which LGBT workers are protected under existing federal civil rights laws.

This report provides an overview of the current state of employment nondiscrimination protections for LGBT people with an emphasis on Title VII of the federal Civil

Figure 1: Where Do Protections for LGBT Workers Come From?



Source: Analysis of percent of LGBT people living in states and localities with protections by the Movement Advancement Project.

Figure 2: What Protections Currently Exist for LGBT Workers?

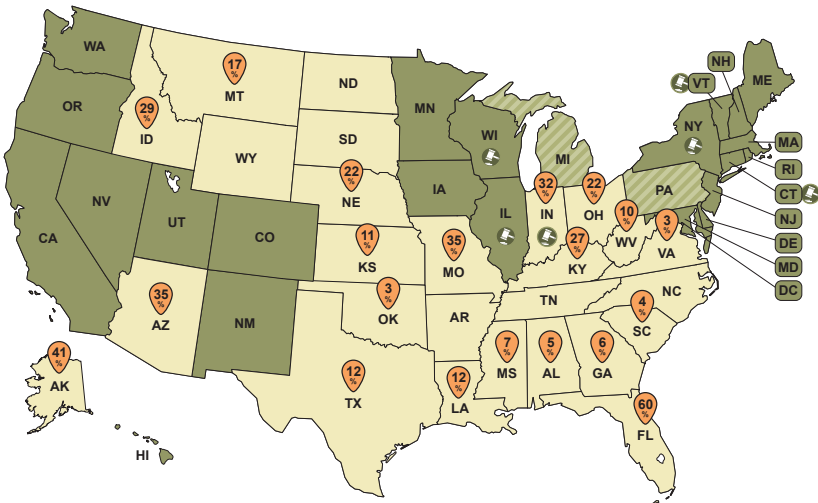


Figure 2a: Sexual Orientation Protections Through Federal Circuit Court Rulings, State Laws, and Local Nondiscrimination Ordinances

- State law explicitly prohibits discrimination based on sexual orientation (22 states and D.C.)
- State interprets existing prohibition on sex discrimination to include sexual orientation (2 states)
- No *explicit* state protections for discrimination based on sexual orientation (26 states)
- ⚡ State is in a federal circuit with a ruling that explicitly interprets federal prohibition on sex discrimination to include discrimination based on sexual orientation (6 states)
- 📍 Percent of the state population protected from discrimination based on sexual orientation through local ordinances

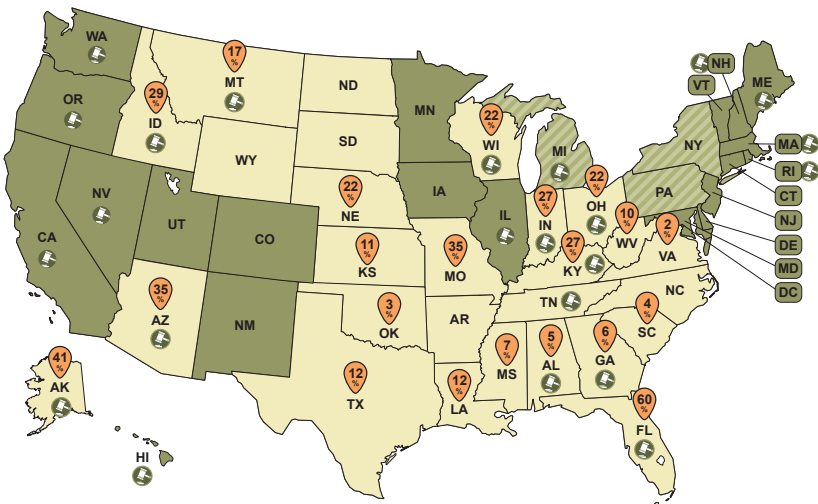


Figure 2b: Gender Identity Protections Through Federal Circuit Court Rulings, State Laws, and Local Nondiscrimination Ordinances

- State law explicitly prohibits discrimination based on gender identity (20 states and D.C.)
- State interprets existing prohibition on sex discrimination to include gender identity (3 states)
- No *explicit* state protections for discrimination based on gender identity (27 states)
- ⚡ State is in a federal circuit with a ruling that explicitly interprets federal prohibition on sex discrimination to include discrimination based on gender identity (23 states)
- 📍 Percent of the state population protected from discrimination based on sexual orientation through local ordinances

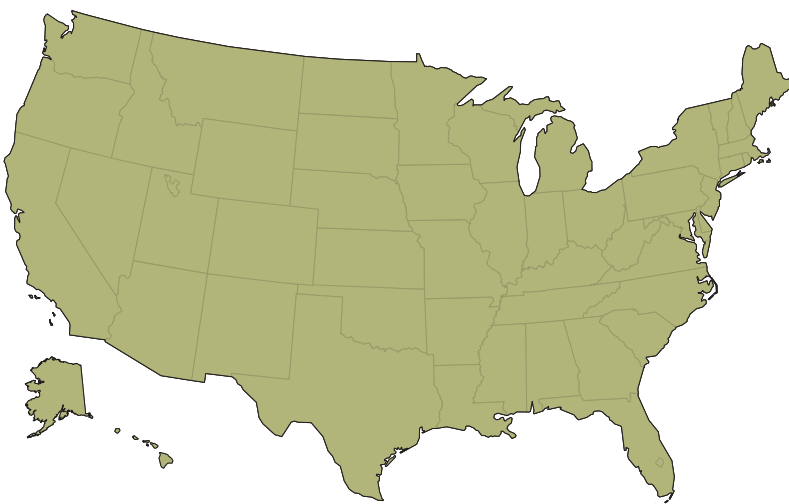


Figure 2c: Employees Across the Country Can File A Complaint with the EEOC, Have That Complaint Investigated, and Potentially Receive Redress

Note: Clear federal protections are needed because if a resolution is not found through the EEOC, an employee may seek recourse through the courts, and there is currently a lack of consistency across federal courts.

Rights Act of 1964, state nondiscrimination laws, and local nondiscrimination ordinances. This overview reveals that progress is being made in updating state laws and local ordinances to reflect what the American public, as well as businesses large and small, already know: no one should have to live in fear of being fired from their job because of their sexual orientation or gender identity.



Federal Law: Title VII Prohibits Discrimination Based on Sex

Title VII of the federal Civil Rights Act of 1964 prohibits discrimination based on sex, race, color, national origin, and religion. This law provides the backbone for equal employment opportunity in the United States. Title VII is enforced both through the courts and through the federal Equal Employment Opportunity Commission (EEOC) and related federal and state agencies.

A growing number of courts and the EEOC have concluded that when a person is discriminated against because of their sexual orientation or gender identity, such discrimination is inherently differential treatment based on the individual's sex. Take the case of a lesbian who is fired after her employer finds out that she is married to another woman. Were it not for the fact she's a woman—that is, if

she were a man married to a woman—she would not have been fired. Hence this discrimination is based on her sex.

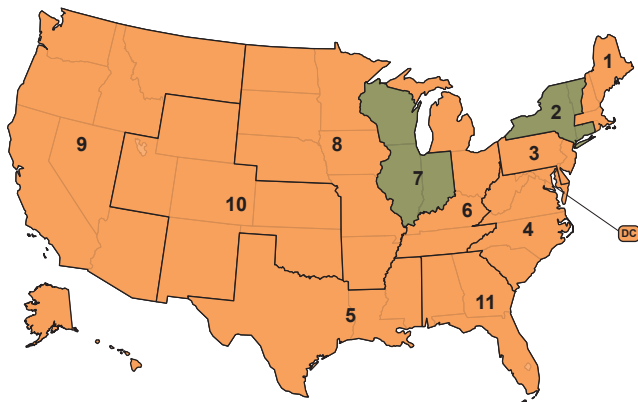
In 1989, the U.S. Supreme Court ruled in *Price Waterhouse v. Hopkins* that discrimination based on stereotypes about what it means to be a “woman” or a “man” constitutes discrimination prohibited under Title VII’s ban on sex discrimination. Under this same rationale, there is a growing understanding that discrimination based on gender identity or sexual orientation is based on stereotypes about what it means to be a “woman” or a “man,” and, therefore, prohibited sex discrimination.

More recently, a number of employment cases in which transgender employees—as well as lesbian, gay, and bisexual employees—have been unfairly fired, harassed, discriminated against, or denied employment have been filed in federal courts. To date, five federal circuits covering 23 states have ruled that discrimination based on gender identity constitutes illegal sex discrimination under federal law, and two circuits covering six states have ruled similarly on cases involving sexual orientation discrimination.¹ There are many lower court decisions that have also concluded this. As a result, **in circuits with appellate court rulings,**

¹ Cases coded by circuit available at: http://www.lgbtmap.org/equality-maps/federal_court_decisions

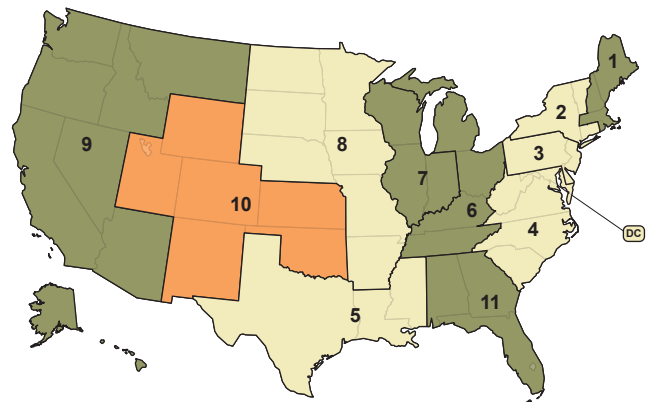
Figure 3: Federal Appeals Courts Rulings Provide Protections to LGB or Transgender Workers in Most States

Figure 3a: Currently, the Second and Seventh Circuits hold that discrimination based on sex includes discrimination based on sexual orientation



- Circuit court decision holding that sex discrimination under federal law includes discrimination based on sexual orientation (6 states)
- Circuit court decision holding that sex discrimination under federal law DOES NOT include discrimination based on sexual orientation (44 states and D.C.)
- State has no relevant case law (0 states)

Figure 3b: Five circuit courts, covering 23 states, hold that discrimination based on sex includes discrimination based on gender identity



- Circuit court decision holding that sex discrimination under federal law includes discrimination based on gender identity (23 states)
- Circuit court decision holding that sex discrimination under federal law DOES NOT include discrimination based on gender identity (6 states)
- State has no relevant case law (21 states and D.C.)

Source: Movement Advancement Project, LGBT Equality Maps, as of September 2018.

LGBT workers can bring cases of discrimination under Title VII, as shown in *Figure 3*.

The U.S. Supreme Court could consider one or more of these cases in the near future and could definitively rule whether Title VII's sex protections prohibit discrimination based on sexual orientation and/or gender identity.

Equal Employment Opportunity Commission (EEOC)

In 2012, the EEOC ruled in *Macy v. Holder* that discrimination against a transgender person because they are transgender is, by definition, discrimination based on sex.² Just three years later in *Baldwin v. Foxx*, the EEOC ruled that discrimination based on sexual orientation similarly constitutes unlawful sex discrimination under Title VII.³ As a result of these rulings, the EEOC **accepts, investigates, and attempts to resolve claims filed by LGBT employees across the country** alleging discrimination based on their sexual orientation and/or gender identity under Title VII.

In 2018, researchers conducted an analysis of more than 9,000 charges (complaints) filed with the EEOC or state and local agencies in collaboration with the EEOC by workers alleging discrimination based on sexual orientation and/or gender identity under Title VII.⁴ The analysis shows that almost half of those charges were filed by workers in states without state-level protections. A separate analysis of sexual orientation and gender identity charges filed in 2017 with the EEOC found that 84% of charges were related to sexual orientation and 13% were related to transgender status, while 3% were related to both.⁵

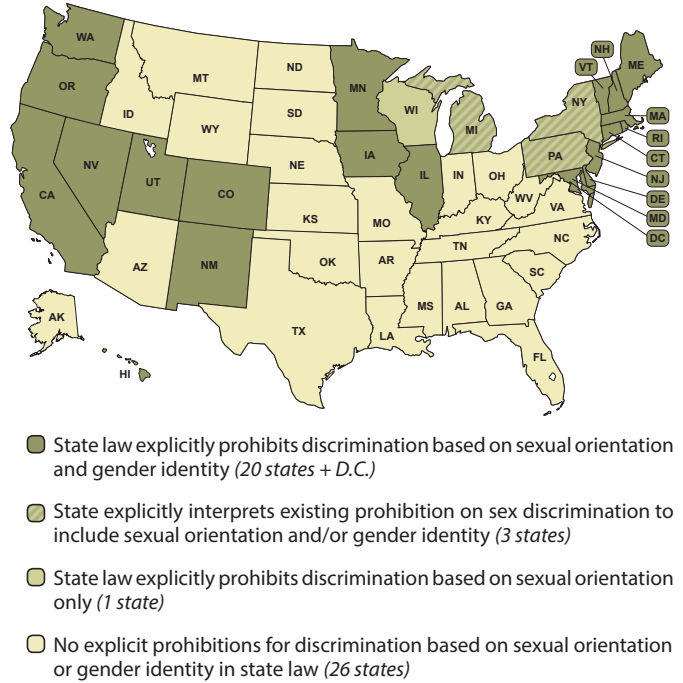


State Laws: A Patchwork of Protections

Almost all states across the country have laws prohibiting discrimination in the workplace based on certain characteristics, including race, sex, and national origin. However, only 20 states and the District of Columbia have state statutes that explicitly prohibit discrimination in employment based on sexual orientation and gender identity, while two states have statutes that explicitly prohibit discrimination based on sexual orientation but not gender identity, as shown in *Figure 4*.

Just as the EEOC and federal courts have come to understand the ways in which discrimination against LGBT people is, in fact, sex discrimination, several states have similarly advanced protections against discrimination based on gender identity (New York, Michigan, and Pennsylvania) and sexual orientation (Michigan and

Figure 4: Many States Have Protections Against Employment Discrimination Based on Sexual Orientation and Gender Identity



Source: Movement Advancement Project, LGBT Equality Maps, as of September 2018.

Broad Public Support for Fair Treatment at Work for LGBT People

Strong majorities of Americans agree: in 2018, 71% of Americans said they support laws that protect lesbian, gay, bisexual, and transgender (LGBT) people from discrimination, including majority support in every state across the country.⁶ Despite this support, however, federal laws, many state laws, and the majority of local ordinances do not *explicitly* prohibit discrimination against LGBT people.

Pennsylvania). In New York, gender identity protections came through executive agency interpretation; in Michigan and Pennsylvania, protections for sexual orientation and gender identity have been implemented through each state's human rights commissions, which have ruled that the existing prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity. In all three instances,

² *Macy v. Holder*, EEOC ruling, April 2012.

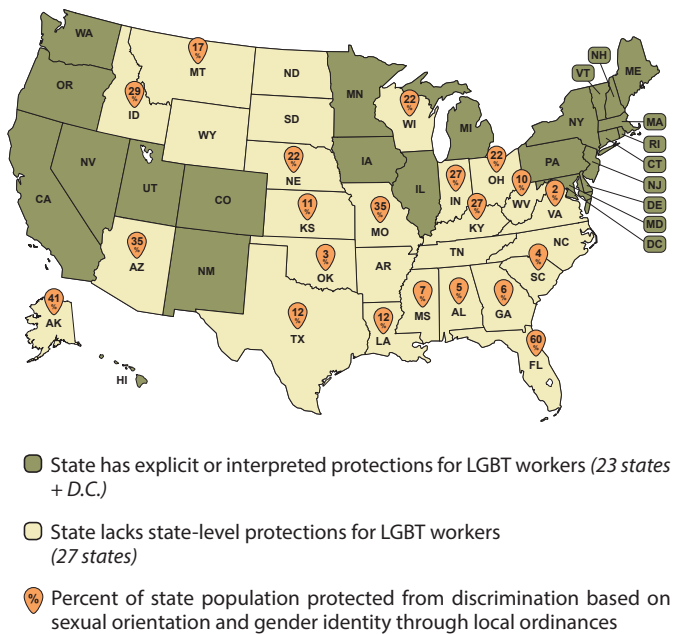
³ *Baldwin v. Dep't of Transportation*, EEOC ruling, July 2015.

⁴ M.V. Lee Badgett, Amanda Baumle, and Steven Boucher, "Evidence from the Frontlines of Sexual Orientation and Gender Identity Discrimination," Center for Employment Equity, July 2018.

⁵ "LGBT Discrimination in the Workplace," Insurance Quotes, June 22, 2018.

Figure 5: Local Nondiscrimination Ordinances Provide LGBT Protections When States Don't

Cities and States with LGBT Nondiscrimination Protections



Source: Movement Advancement Project, LGBT Equality Maps, as of September 2018.

explicit state laws would improve public understanding and education efforts to ensure that LGBT people don't experience discrimination at work.

Local Ordinances: Cities and Counties Leading the Way

The first local employment nondiscrimination ordinance protecting people from discrimination based on sexual orientation was passed in 1974 in Minneapolis, MN. One year later, the ordinance was amended to include gender identity, making it the first inclusive ordinance. Since then, hundreds of city and county councils throughout the country have passed local nondiscrimination ordinances to extend employment protections to LGBT workers living in those jurisdictions. Local NDOs currently provide important job safeguards for thousands of LGBT individuals living in states lacking explicit state-level protections. For example, approximately 60% of people living in Florida, a state

⁶ Alex Vandermaas-Peeler, Daniel Cox, Maxine Najle, and Molly Fisch-Friedman, "Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America," PRRI, 2018.

Cases the U.S. Supreme Court Could Take



Aimee Stephens (right) and her wife Donna. Photo credit: ACLU

The U.S. Supreme Court is considering whether to take up three cases focused on Title VII and its protections against sex discrimination. Given that various federal courts of appeals have ruled differently, there is the potential that the Court would take one more or of these cases.

ZARDA V. ALTITUDE EXPRESS (SEXUAL ORIENTATION)

Donald Zarda, a skydiver, was fired from his job because of his sexual orientation. A district court rejected his discrimination claim, saying that the Civil Rights Act does not protect him for bias he endured for being a gay man. Tragically, in October 2014, Zarda died unexpectedly, but the case continues on behalf of his estate. In February 2018, the full Second Circuit Court of Appeals ruled that discrimination based on sexual orientation constitutes discrimination based on sex as prohibited under Title VII.

EEOC V. R.G. & G.R. HARRIS FUNERAL HOMES (GENDER IDENTITY AND EXPRESSION)

Aimee Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes when she informed the funeral home's owner that she is a transgender woman and planned to start dressing in appropriate business attire for a woman. The owner fired her two weeks later, explaining that it would be "unacceptable" for her to present and dress as a woman. The Sixth Circuit Court of Appeals ruled in March 2018 that she was discriminated against in violation of Title VII.

BOSTOCK V. CLAYTON COUNTY (SEXUAL ORIENTATION)

In May 2018, the full Eleventh Circuit Court of Appeals refused to reconsider a 1979 decision wrongly excluding sexual orientation discrimination from sex discrimination and denied the appeal of Gerald Lynn Bostock, a Georgia man who was fired from his job as a county child welfare services coordinator when his employer learned he is gay.

lacking explicit nondiscrimination protections for sexual orientation and gender identity, live in cities or counties with local employment protections, as shown in *Figure 5*.

CONCLUSION

While progress is being made in the courts to interpret existing laws to protect LGBT employees, these cases operate on an uncertain timetable, and this effort could take many years. That's why updating our nondiscrimination laws—at the federal, state, and local level—is crucial. Everyone needs to be able to earn a living, including people who are LGBT. Employees should be judged on their qualifications, experience, and the job they do—nothing more, and nothing less. The current patchwork of protections has many gaps and is difficult to understand, which creates confusion for employers and legal uncertainty for individual workers who face discrimination. Importantly, it also contributes to the public's lack of understanding of the need for explicit protections and the extent to which LGBT people experience high rates of discrimination at work.