

CAN LGBT PEOPLE BE LEGALLY FIRED?

U.S. Supreme Court Considers Three Cases That Could Take America Backward

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INTRODUCTION

In October 2019, the U.S. Supreme Court will hear oral arguments in three cases that could determine whether lesbian, gay, bisexual, and transgender (LGBT) people will continue to have protections under federal nondiscrimination law, or whether it would be legal under federal law for employers to fire LGBT people just for who they are or whom they love.

While marriage equality was covered heavily in the news, many people today have no idea that the Supreme Court could soon say that companies are free under federal law to fire LGBT people. If the Court rules that LGBT people are not protected by existing federal workplace protections, anti-LGBT opponents will rapidly use the same legal reasoning to work to attempt to overturn critical federal protections in housing, healthcare, credit, education and more. In short, LGBT people could soon find themselves living in a nation where federal law says it is legal for them to be denied a job, fired, discriminated against at school, denied a loan, rejected by a doctor, and evicted from an apartment, simply because they are LGBT.

On their face, these cases are about whether LGBT people are excluded from federal workplace protections and companies can legally fire someone for being LGBT. And that is shocking enough. But on a deeper level, the cases are about whether LGBT people are worthy of equal opportunity or whether they may be treated as inferior citizens throughout all aspects of daily life.

If the Supreme Court finds that employment discrimination against LGBT people is legal under federal law, LGBT people will then only be protected under state and local nondiscrimination laws (and less than half of states have explicit nondiscrimination protections for LGBT people). It would then be up to Congress to pass, and the president to sign, federal legislation like the Equality Act to provide comprehensive federal nondiscrimination protections. While the Equality Act passed the House this May, it has been blocked from even coming to a vote in the Senate. Furthermore, the federal government, which initially

filed suit on behalf of the transgender worker in one of the cases, is now arguing that businesses should be able to fire someone simply for being LGBT.

BACKGROUND ON TITLE VII & LGBT PEOPLE

Legally, the three cases before the Court ask the question of whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against LGBT people. Title VII prohibits discrimination based on sex, as well as other characteristics like race, color, national origin, and religion. This law provides the backbone for equal employment opportunity in the U.S.

Title VII does not explicitly enumerate “sexual orientation” or “gender identity” as separate protected categories. However, it does not need to. Why? Because Title VII prohibits discrimination “because of” sex. And when a person is fired or discriminated against for being LGBT, this invariably involves discrimination “because of” sex. For example, if a lesbian is fired after her employer finds out that she is in a relationship with or married to another woman, this is discrimination based on her sex: that is, her employer does not fire workers who are in a romantic relationship or who are married, and he does not fire men who are in a romantic relationship with or married to a woman. Rather, he fires her because she’s a woman who is in a relationship with or married to a woman. Were she a man, she wouldn’t have been fired. This is sex discrimination.

Similarly, there are decades of case law establishing that discrimination based on stereotypes about what it means to be (and act and dress like) a woman or a man is illegal under Title VII. In fact, in 1989, the U.S. Supreme Court ruled in *Price Waterhouse v. Hopkins* that such discrimination violated federal law.¹ In this case, the court found that employers could not require that women only dress and appear in traditionally feminine attire. Using the same logic then, if an employer fires a gay man for not acting masculine enough or a lesbian for not being feminine enough, this is illegal sex discrimination. Or if an employer fires a transgender worker because the employee doesn’t wear clothing or act in a way typically associated with the sex on their original birth certificate, that is also sex discrimination.

Title VII is enforced through the courts, the federal Equal Employment Opportunity Commission (EEOC), and related federal and state agencies—many of which have already recognized that Title VII’s protections against sex discrimination also protect against anti-LGBT discrimination. Since *Price Waterhouse*, multiple federal courts² and several states³ have ruled that when a person is discriminated against because of their sexual orientation or gender identity, such discrimination is based on stereotypes about what it means to be a “woman” or a “man,” and therefore is also prohibited sex discrimination under Title VII. The Supreme Court must now decide whether to uphold these rulings, or whether to reverse them and strip away employment protections for millions of LGBT people across the nation.

CASES BEFORE THE U.S. SUPREME COURT

The Supreme Court is considering three cases centered on employment discrimination against LGBT workers:

- ***R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission (discrimination based on gender identity and expression)***. Aimee Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes in Michigan. When she was hired, she was living as a man. When she informed her employer that she is a transgender woman and planned to start living openly as a woman, the owner fired her, saying that it would be “unacceptable.” The Sixth Circuit Court of Appeals ruled in March 2018 that firing Stephens was discrimination based on her sex in violation of Title VII.
- ***Bostock v. Clayton County (discrimination based on sexual orientation)***. Gerald Lynn Bostock worked as a county child welfare services coordinator in Georgia. He was fired in 2013 when his employer learned he was gay. His case was first dismissed by a district court, and later rejected by the Eleventh Circuit Court of Appeals. Both decisions relied on a much earlier decision, which ruled in 1979 that Title VII’s protections against sex discrimination did not protect gay, lesbian or bisexual people from discrimination.
- ***Altitude Express Inc. v. Zarda (discrimination based on sexual orientation)***. Donald Zarda was fired from his job as a skydiver at Altitude Express in New York because of his sexual orientation. A district court rejected his discrimination claim, saying that Title VII did not protect him from the workplace bias he endured as 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 in Zarda’s favor, finding that discrimination based on sexual orientation is discrimination based on sex, and is therefore prohibited under Title VII.

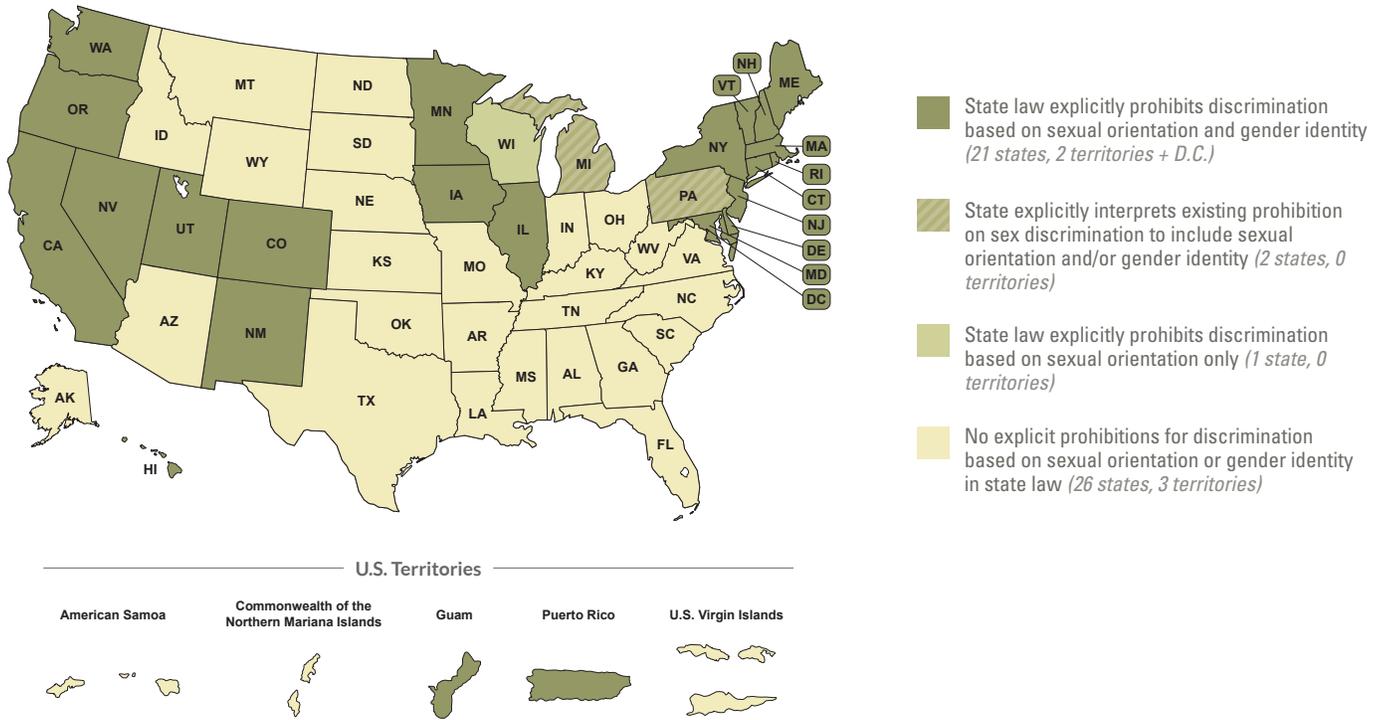
IMPLICATIONS OF THE COURT’S RULINGS

Regardless of how the Court rules in these cases, the impact of the Court’s rulings will have ramifications for LGBT people across the country. For example:

- **If the Supreme Court rules that Title VII protects LGBT people from discrimination**, it would have ramifications for LGBT people across the country. **Such a ruling would make it clear that workplace discrimination based on the sexual orientation or gender identity is prohibited under federal law, and it would protect LGBT workers throughout the nation.** A Supreme Court ruling that Title VII protects LGBT people would create definitive and unassailable protections. Those protections could not be taken away when new EEOC commissioners are appointed by future presidents. This is particularly important given that a number of newly appointed EEOC commissioners have expressed a desire to overturn the past commission rulings that protect LGBT workers. Additionally, it would provide clear unassailable protection in the majority of states that don’t explicitly protect LGBT people under state law. At present, only 21 states, Puerto Rico, Guam, and the District of Columbia have explicit state-level protections against such workplace discrimination, leaving more than half of the country’s LGBT population without explicit state-level protections, as shown in *Figure 1* on the next page.⁴
- **If the Court rules that Title VII does not protect LGBT workers from discrimination based on sexual orientation or gender identity (or both)**, this would strip away existing federal protections and mean that **employers in over half of states could now legally fire someone just for being LGBT**. That would send a deeply disturbing message that LGBT people are legally inferior workers in America. And when LGBT workers face workplace discrimination, they would no longer have legal recourse. The number of LGBT people who seek recourse through the EEOC demonstrates that nondiscrimination protections are vital and necessary: an examination of complaints (called “charges”) filed with the EEOC between 2012 and 2016 shows that almost half of the 9,121 charges were filed in states that lack explicit workplace protections for both sexual orientation and gender identity, as shown in *Figure 2* on the next page.⁵ These are the workers who would have nowhere to turn if the U.S. Supreme Court rules that sexual orientation and gender identity discrimination are not prohibited under existing federal law.

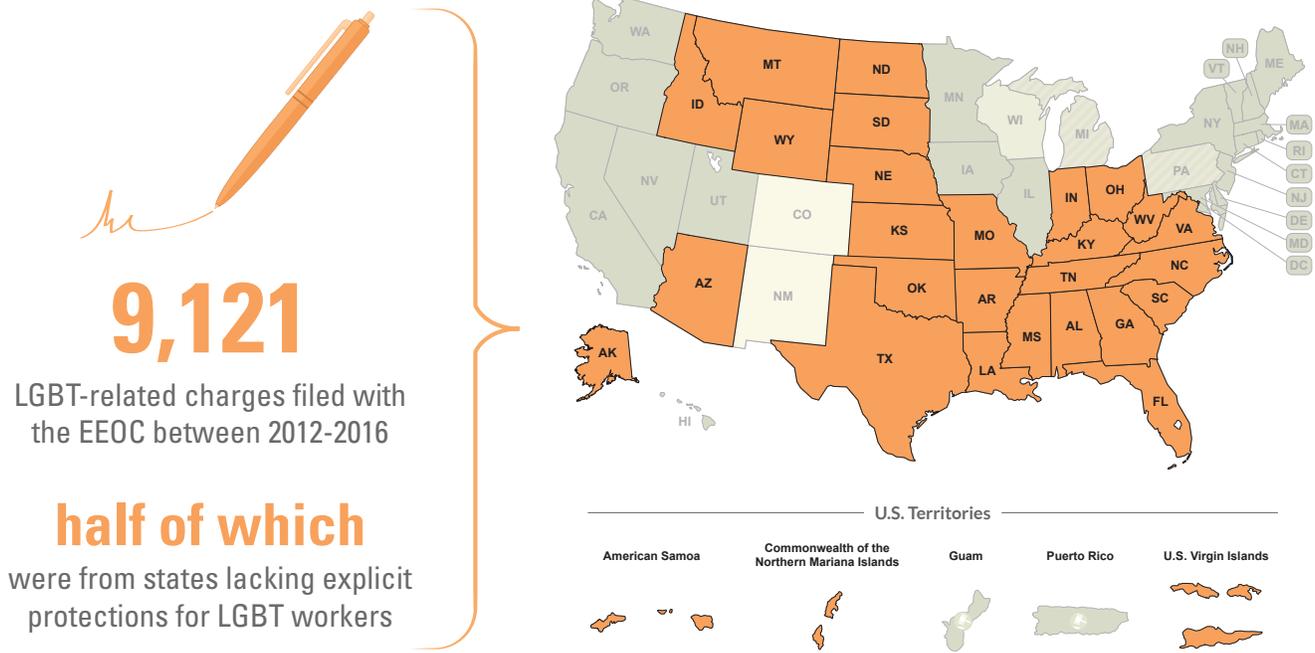
It is important to note, however, that this potential outcome **would not** take away the existing state-level employment nondiscrimination protections for the 48%

Figure 1: Patchwork of State-Level Employment Nondiscrimination Laws



Source: Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."

Figure 2: Federal Employment Law Provides Vital Protections for LGBT Workers



Source: M.V. Lee Badgett, Amanda Baumle, and Steven Boutcher. "Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination." July 2018. Center for Employment Equity, University of Massachusetts Amherst.

of LGBT people who live in the 21 states, two territories, and the District of Columbia that have explicitly enumerated sexual orientation and gender identity as protected classes, as shown in Figure 1 on the previous page.⁶ Nor would it invalidate the more than 280 city and county ordinances that prohibit discrimination in employment based on sexual orientation and gender identity.⁷ Neither would the Court's decision change state court interpretations of state sex discrimination laws to prohibit discrimination against LGBT people. Rather such a ruling would leave us with a state-by-state patchwork and would leave the remaining 52% of LGBT people in the United States who live in states without explicit protections without any state or federal protections when they experience discrimination on the job.

This would make the need for explicit federal protections based on both sexual orientation and gender identity even more urgent and necessary. Fortunately, there is broad public support, with majorities in every state, for federal laws prohibiting discrimination in employment, housing, and public accommodations.⁸ It will take action by Congress, backed by the voices of their constituents, to ensure that all people in the United States have the ability to work hard, take care of their families and live free from discrimination not just in employment, but in housing, education, public accommodations, healthcare, credit, and beyond.

Other Federal Protections Could Be at Risk if the Supreme Court Rules Against Title VII Protections for LGBT People

Title VII is just one of several federal laws that prohibit discrimination based on sex, and these other laws have also been understood by numerous courts and government agencies to protect LGBT people. As a result, the way the U.S. Supreme Court rules about the legal understanding of sex discrimination and its applicability to LGBT people may impact other areas of federal law that prohibit discrimination based on sex, including in health care, education, housing, and credit.

It is important to note that under the current administration, many of the agency interpretations protecting LGBT people from discrimination in health care, housing, and education are currently in the process of being rescinded or have already been rolled back. However, the Court's ruling in the employment context could impact these various protections, whether by strengthening them from a question of interpretation into clearly settled law or emboldening the administration to roll them and others back.



HEALTHCARE. The Affordable Care Act, passed in 2010, prohibits discrimination based on sex in health care, including federally funded programs like Medicaid, insurance, healthcare facilities that receive federal funding, and more. In 2016, the U.S. Department of Health and Human Services issued final regulations stating that "sex" in the Affordable Care Act included "gender identity" and that discrimination based on gender identity was prohibited.⁹ However, a rule proposed by the same department in May 2019, now under the Trump Administration, would remove the language prohibiting discrimination based on gender identity, suggesting the administration's view that it should be lawful to discriminate against people because they are transgender.¹⁰



EDUCATION. Title IX is the federal law that ensures equal access to education. It currently prohibits discrimination based on sex. In 2016, the U.S. Departments of Justice and Education released guidance stating that schools must treat a student's gender identity as the student's sex for the purposes of Title IX, including for school facilities and activities that are sex-segregated.¹¹ However, that guidance was rescinded by the Trump administration in 2017.¹² That said, multiple courts have held that Title IX's prohibition on discrimination based on sex does protect transgender students from discrimination, including discrimination by being forced to use sex-segregated facilities based on their sex assigned at birth rather than their gender identity.



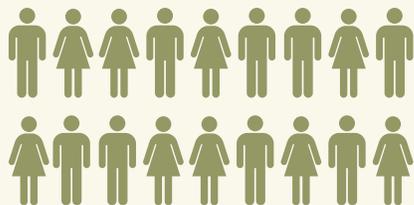
HOUSING. While many LGBT protections in federal housing programs came through a rule interpreting "family status" to include sexual orientation and gender identity, the Department of Housing and Urban Development (HUD) has relied on other agency interpretations of "sex" to articulate the ways in which transgender people should be treated in sex-segregated spaces like shelters. Similar to previous guidance from the Departments of Justice and Education in the education context, HUD clarified that an individual's gender identity should be used to determine placement in sex-segregated spaces, though the Trump Administration has recently called for changes to this clarification.¹³

THE DOMINO EFFECT: WHAT IF SCOTUS RULES LGBT PEOPLE AREN'T PROTECTED BY FEDERAL LAW?

an infographic presented by

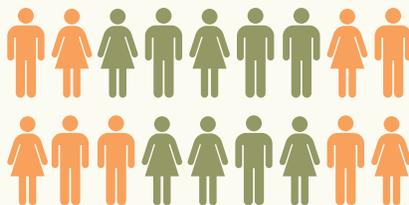


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TODAY: LGBT WORKERS HAVE NATIONWIDE PROTECTIONS

All 8.1 million LGBT workers are protected from discrimination on the job by federal law.¹



JUNE 2020: HALF OF LGBT PEOPLE CAN BE LEGALLY FIRED

All federal workplace protections for LGBT workers could be taken away if SCOTUS rules that Title VII doesn't protect LGBT workers. This would mean LGBT workers would only have a patchwork of state or local protections to rely on. As a result, **half of LGBT workers could be legally fired.**²



FUTURE: LGBT PEOPLE BECOME LEGALLY INFERIOR CITIZENS

The Court's decision could be used to unravel legal protections across **all areas of life for LGBT people**, rendering LGBT people legally inferior.

Learn more about the employment protections currently available to LGBT people, the cases before the U.S. Supreme Court in 2019, and what's at stake: <http://www.lgbtmap.org/lgbt-workers>

¹ The Williams Institute. "LGBT People in the United States Not Protected by State Nondiscrimination Statutes." April 2019.

² Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."

THE NEED FOR FEDERAL LEGISLATION & EXPRESS PROTECTIONS

Regardless of how the Supreme Court rules in 2020 on these cases, federal legislation is still needed that will explicitly provide protections for LGBT people.

If the Court affirms LGBT people are protected by Title VII. The cases under consideration by the Court directly address only employment. There are several other areas of life in which LGBT people both experience discrimination and federal sex discrimination protections like those currently in place through Title VII exist, including housing, education, credit, and healthcare. However, federal law does not currently prohibit discrimination based on sex in several places, including public accommodations or government-funded services, so it is critical that express protections for sex, sexual orientation, and gender identity are passed legislatively to ensure that LGBT people are able to live their lives freely as full participants in public life. Additionally, having federal statutes that expressly mention sexual orientation and gender is meaningful for the lives of LGBT people. For example, both employers and employees look to the statutes as to what their responsibilities and protections are, so having explicit, clear statutes indicating that discrimination based on sexual orientation and gender identity are prohibited removes ambiguity and creates clarity that will have a tangible impact on the lived experiences of LGBT people.

If the Court takes away existing employment protections for LGBT workers under federal law, the need for legislative action is clear. Nothing short of explicit protections for LGBT people in Title VII and beyond will allow LGBT people to fully participate in life and provide for themselves and their families.

CONCLUSION

The three cases the U.S. Supreme Court will consider this fall will have profound implications for LGBT people in the United States. The Court has the potential to strip away vital protections that LGBT workers have relied on through the EEOC and the courts to affirm that discrimination against LGBT people at work is illegal under federal law. To date more than 9,000 workers have filed complaints of discrimination because they are LGBT with the EEOC and had those complaints investigated and seek recourse through the courts. And many courts across the country have already recognized that LGBT people are protected under federal law. At stake in these cases is not only the ability of LGBT workers to see recourse through the EEOC and the courts but the ability of millions of LGBT workers to be treated fairly on the job.

And the cases have the potential to impact LGBT people far beyond the workplace. If the Court strips these protections from LGBT people in the workplace, it sends a message that discrimination against LGBT people is acceptable—and legal—throughout all areas of daily life. And given the rescinding of protections for LGBT people under federal law by the current administration, such a ruling would further embolden such actions.

These cases are profoundly important for our country, particularly at this moment in time. A majority of Americans support nondiscrimination laws that protect LGBT people. The Court's rulings could solidify existing protections or roll back the vital protections that LGBT people across the country have come to rely upon. Regardless of how the Court rules, it is critical that the path forward for securing legal equality for LGBT people include explicit protections through legislation.

ENDNOTES

¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

² Movement Advancement Project. "Equality Maps: Federal Court Decisions."

³ Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."

⁴ Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."

⁵ M.V. Lee Badgett, Amanda Baumle, and Steven Boutcher. "Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination." July 2018. Center for Employment Equity, University of Massachusetts Amherst.

⁶ Movement Advancement Project. "Equality Maps: State Non-Discrimination Laws."

⁷ Movement Advancement Project. "Equality Maps: Local Non-Discrimination Ordinances."

⁸ Daniel Greenberg, Emma Beyer, Maxine Najle, Oyindamola Bola, and Robert P. Jones. "Americans Show Broad Support for Nondiscrimination Protections." March 2019. PRRI.

⁹ U.S. Department of Health and Human Services. "Section 1557: Frequently Asked Questions."

¹⁰ U.S. Department of Health and Human Services. "Nondiscrimination in Health and Health Education Programs or Activities."

¹¹ U.S. Department of Justice and U.S. Department of Education. "Dear Colleague Letter on Transgender Students." May 13, 2016.

¹² U.S. Department of Justice and U.S. Department of Education. "Dear Colleague Letter." February 22, 2017.

¹³ U.S. Department of Housing and Urban Development and Office of Management and Budget. "Revised Requirements Under Community Planning and Development Housing Programs." Spring 2019.

