

# PRIDE YOURSELF AT WORK:

## LGBT+ Inclusivity in the Workplace

*With it being Pride Month, Lawyer Monthly decided to delve into the LGBT+ community's rights in the workplace, especially if they have been discriminated against based on their sexual orientation or gender identity.*

*Talking to the award-winning employment lawyers at Phillips & Associates, we learn what rights the LGBT+ community have and what laws protect them from harassment at work.*

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PHILLIPS & ASSOCIATES



Do members of the LGBT community have protections against discrimination in employment?

Employees who are part of the LGBT+ community are generally entitled to protection from harassment in the workplace, to some degree. The extent of these protections varies depending on the jurisdiction in which a person is employed. Fortunately, The City of New York has enacted some of the most protective legislation in the country for employees that are part of the LGBT+ community. Before discussing the varying degrees of protections, it's important to understand the meaning of the acronym LGBT+.

For purposes of legal protection in the workplace, the term LGBT+ refers broadly to an individual's sexual orientation and/or their gender identity. **More specifically, lesbian, gay, and bisexual people** are part of a protected class based on their sexual orientation. Transgender people are part of a separate protected class based on their gender identity. The '+' at the end of the acronym refers to a broader spectrum of sexuality and gender which may include queer, questioning, intersex, pansexual, and others. There is debate over how best to recognize these different categories without excluding any particular group. This article will discuss the interaction of various legal protections and members of the LGBT+ community.

What laws protect employees that suffer discrimination on the basis of their sexual orientation or gender identity?

Unfortunately, there is no federal law which explicitly recognizes a person's sexual orientation or their gender identity as a protected characteristic with regard to workplace harassment. However, LGBT+ litigants have successfully brought discrimination lawsuits against their private employers in federal court by making creative legal arguments that they suffered discrimination "on the basis of sex." In the 1989 case, *Price Waterhouse v. Hopkins*, the Supreme Court recognized a prohibition against discrimination stemming from "gender stereotyping" under Title VII of the Civil Rights Act of 1964, the federal anti-discrimination statute. While that case did not pertain to an LGBT+ litigant, members of the community have successfully claimed gender stereotyping as a legal theory for underlying sexual orientation or gender identity discrimination.

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the federal civil rights protections in the workplace, has also held that discrimination on the basis of gender identity is prohibited in employment (*Macy v. Dep't of Justice*, April 2012), and that discrimination on the basis of sexual orientation is prohibited in employment (*Baldwin v. Dep't of Transportation*, July 2015). In both cases the aggrieved employees only prevailed on a theory that they

## THE NEW YORK CITY HUMAN RIGHTS LAW ON THE OTHER HAND, EMPLOYS A FAR MORE EMPLOYEE-FRIENDLY STANDARD FOR CLAIMING A HOSTILE WORK ENVIRONMENT.

suffered discrimination "on the basis of sex". Claims of "sex discrimination" have long served as a backdoor for relief to LGBT+ people who would not otherwise have recourse in federal court. This is due to language used in Title VII which is antiquated and non-inclusive.

Fortunately, the New York City Human Rights Law provides much broader protections for all employees working in the **five boroughs, including an explicit recognition of sexual orientation and gender identity as protected categories.** For instance, a transgender litigant does not have to claim that they are being discriminated against "on the basis of sex" to bring an action in New York State Supreme Court. They may claim that the discrimination is on the basis of their **gender identity. Gender is defined very broadly by the New York**

City Commission on Human Rights to include "Actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to that person at birth."

What forms of discrimination and harassment against members of the LGBT+ community are actionable?

The standard for what rises to the level of actionable harassment differs between the federal level as compared to the municipal level. Unsurprisingly, the federal court's interpretation of Title VII imposes a high bar for claims of a hostile work environment by an employee that is suffering harassment in the workplace. A plaintiff must plead that

## AT PHILLIPS & ASSOCIATES, WE LEVEL THE PLAYING FIELD

Employees were, and for the most part still are, at a big disadvantage in the workplace. There is a dramatic power imbalance between employees and the companies for which they work. This power balance can intensify after experiencing sexual harassment or discrimination. **The company/employer often hires a large law firm to represent it, while the employee may have just lost their job, have very little money and no one to help them understand their rights. At Phillips & Associates, we have the experience, staffing, and financial backing to keep the playing field level. People need to take a close look at the lawyer or law firm they want to hire and determine if that lawyer or firm has the funds, experience and the resources to properly litigate their case.**

Phillips & Associates is one of the largest plaintiffs' only employment law firms in New York. The firm handles cases involving sexual harassment and discrimination in the workplace including pregnancy, race, disability, religion, gender, and sexual orientation and other protected traits. Phillips & Associates also handles other areas of harassment at work such as retaliation and wrongful termination. Most recently, the American Institute of Legal Counsel selected Phillips & Associates as one of the "10 Best Employment & Labor Law Firms in New York."

### ABOUT STEVEN FINGERHUT

Steven Fingerhut is an employment litigation associate at Phillips & Associates. He provides vigorous representation to individuals who have suffered from workplace discrimination and harassment in New York City and need an attorney to protect their rights. At trial, Steven Fingerhut, with co-counsel, obtained a judgment in the amount of \$77,054.64, including attorney fees and costs, for their client who was discriminated against by her supervisor and wrongfully terminated from her employment due to her pregnancy. (*Weng v. Fancy Lee Sushi Bar & Grill, Inc.*, 2017 U.S. Dist. LEXIS 183657 (E.D.N.Y., Nov. 18, 2017)).

Mr. Fingerhut is an active member of the National Employment Lawyers Association ("NELA") as well as the New York State Trial Lawyers Association ("NYSTLA"). He was selected as a "Rising Star" in New York by Super Lawyers and has also been recognized by various other legal organizations such as the American Institute of Legal Counsel, the Lead Counsel Review Board, and the Best Attorneys of America.

the harassment suffered is "sufficiently severe or pervasive to alter the conditions of the victim's employment." This can be a difficult standard to reach and many federal courts have ruled that even very nasty or aggressive harassing language does not subject an employer to judicial scrutiny. Federal judges may be particularly inclined to dismiss causes of action for a hostile work environment if they regard the harassing behavior as a "one-off incident."

The New York City Human Rights Law on the other hand, employs a far more employee-friendly standard for claiming a hostile work environment. Any harassment "above a petty slight or trivial inconvenience" may be actionable in the City of New York if it is suffered by an employee due to their membership in a protected class. Therefore, the LGBT+ community is protected in the workplace against lewd comments, offensive jokes, taunts, and the use of homophobic/transphobic slurs. Offensive jokes or comments about an employee's spouse, family, or community may also constitute a hostile work environment in the City of New York. LGBT+ employees should reach out for help if they believe they are being treated differently as a result of their protected category. For example, if a gay employee notices a pattern in which management repeatedly declines to promote any

qualified, gay employees, they may be suffering discrimination in the form of disparate treatment.

Are employees ever required to disclose their sexual orientation or information about their gender identity?

Employees absolutely do not have to disclose their sexual orientation in the workplace, nor can they be compelled to discuss their gender identity. An employee who receives repeated requests to confirm their sexual orientation or gender identity may be the victim of actionable workplace harassment. An employer cannot prod their employees for private, personal information that has no relevancy to whether she can perform her job duties. In the same vein, an employer should not ask their employees their age, religion, national origin, etc.

Transgender people may choose to disclose information about their gender identity to their employer, particularly if they are in the process of transitioning. This step is a transgender person's right and may be a vital step in their process of transition. An employer must make their employee comfortable in this regard, particularly since their employee's transition may prompt use of a different name, gender pronoun, and it may affect the employee's health benefits. Transgender people

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are entitled to be called by their preferred name, and referred to by their preferred pronoun. Importantly, employers cannot request any documents from their transgender employee to "prove" their name, sex, gender, etc. Requests for **name change certifications, birth certificates, or any medical records** are prohibited and may themselves constitute workplace harassment.

What measures can employers take to ensure they are as inclusive as possible?

Employers should make their

employees comfortable in the workplace by emphasizing the availability of support for any employees that need to discuss any personal/sensitive matters. This typically comes in the form of a human resources department. An employer should make an employee feel free to voice a complaint if they believe they are being harassed or discriminated against. An employee should be suspicious if they are discouraged from making a complaint or if they are discouraged from putting anything in writing about harassment. Situations such as these arise during the

unfortunate scenario in which a human resources department does not really function to help the employee, but rather is charged to minimize the employer's potential legal liability. An LGBT+ person being discouraged from making a harassment complaint should immediately reach out to an attorney to better understand their rights.

It may be particularly difficult to voice a complaint if management-level employees subject an employee to a hostile work environment, especially in a small company where there is no human resources department. Victims of harassment on the basis of their sexual orientation or gender identity should reach out to an attorney as soon as the harassment begins, and not wait until it escalates to such an extreme degree that the employee is terminated or feels forced to resign. An attorney can counsel an employee on how best to handle these **difficult workplace issues**.

What form of compensation can clients expect if they are harassed on the basis of their sexual orientation or gender identity?

Clients who have been harassed on the basis of their sexual orientation or gender identity may be entitled to **significant monetary damages** for the hostile work environment they've endured. In some circumstances, when discrimination causes a failure to hire, failure to promote, or an unlawful termination, an employee may also be entitled to monetary damages in the form of lost wages. Under the New York City Human Rights Law, employees who have suffered harassment due to their membership in a protected class can also claim punitive damages, which is an additional amount that a jury can award to punish the bad actor. Assessing available damages can be complex and anyone who believes they are the victim of unlawful workplace harassment should reach out to speak to a professional. LM

## DIVERSITY

## Just 22% of equity partners at law firms are women – compared to 61% of trainees

Just 22% of equity partners at law firms are women compared to 61% of trainee solicitors who are women, suggesting that law firms need to be doing far more to improve retention rates of female lawyers, says new research published today by Thomson Reuters and Acritas.

However, the research shows that law firms are making significant progress in addressing the disparity in the gender make-up at senior and junior levels by introducing a raft of successful initiatives. For example:

- 69% of law firms have a board level representative where a significant part of their role is focused on diversity
- 60% of law firms analyse their gender diversity at a practice-by-practice level
- 60% of law firms have voluntarily added partners into their gender pay gap reporting to improve transparency

The Transforming Women's Leadership in the Law research study, conducted in partnership with Acritas, is based on responses from 48 leading UK and European law firms. The study analyses levels of gender diversity across positions from Trainee to Executive Board and the steps law firms are taking to

improve retention of women into senior roles.

Lucinda Case, Lead, Legal Professionals, Europe, at Thomson Reuters says: "There are signs of cracks in the glass ceiling at UK law firms."

"There is still a long way to go, but law firms now are becoming increasingly engaged in fixing this problem."

"Many law firms have accepted that the significant imbalance at the top of their structures is not helping their business. They are responding to that by implementing changes to their strategies that should, given time, be a force for good."

The study also shows the following:

- 46% of law firms have initiatives for a representative gender balance in all pitches to potential clients
- 30% of law firms have initiatives that ensure a representative gender balance on all client teams
- 47% have initiatives to offer sponsorships to female candidates for Partnership
- 42% have processes in place to ensure that slates of candidates up for promotion are gender balanced

### What are the most successful steps law firms are taking to improve gender diversity?

There are three key themes that have emerged from the research that law firms see as vital to successfully delivering an improvement in gender balance at senior levels. These are:

#### Make gender diversity a strategic goal

Law firms can demonstrate a serious commitment to gender diversity progress by clearly naming gender diversity as a strategic goal. To achieve this, firms should treat achieving gender diversity the same way as any other strategic goal – by appointing a board representative, openly declaring targets and tracking progress on those targets.

#### Ensure female lawyers get sufficient client exposure and access to a wide range of work

The research shows that firms that actively try

to ensure that teams are balanced have the highest retention rate of women from junior associate to equity partners. Firms can achieve the balance by taking it upon themselves to ensure client teams are equally representative, and also by welcoming client demands for gender balance.

#### Reconsider 'women-only' initiatives and check that mentors are giving the right advice

Unfortunately, there are some well-intentioned initiatives that correlate with less success in improving gender balance at senior level. The research showed that 'Women only networks', for example, can be damaging for gender balance, but opening those networks up to include men can result in them having a positive effect. Mentoring programs also showed a negative correlation. Further qualitative exploration suggested that advice can sometimes put women off the part-

nership track rather than encourage them. The key to making these initiatives a success is collating feedback from staff.

Lisa Hart Shepherd, Acritas' CEO, commented "The research has delivered some surprising insights that are consistent with broader diversity research which suggests some diversity programs have a negative effect. It is important for firms to take a step back and review their portfolio of initiatives and check that they are working holistically to positive effect in their current form."

Lucinda Case adds: "We are delighted that it has resulted in numerous practical and implementable recommendations for law firms. We are excited about the new and innovative approaches that law firms are taking in driving such change. But there is a long way to go and it is important that gender diversity, like other forms of diversity, remains an absolute top priority for law firms."

