

# Employment Discrimination Against Bisexuals: An Empirical Study

Ann E. Tweedy

Karen Yescavage

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# EMPLOYMENT DISCRIMINATION AGAINST BISEXUALS: AN EMPIRICAL STUDY

ANN E. TWEEDY, J.D.\* & KAREN YESCAVAGE, PH.D.\*\*

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## INTRODUCTION

By most counts, bisexuals make up the largest sexual minority group in the United States, and they have been litigating and advocating for their right to be free of discrimination since the early days of the gay rights movement.<sup>1</sup> Yet they remain largely invisible in the

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\* Tribal Attorney, Muckleshoot Indian Tribe, Associate Professor, Hamline University School of Law. The authors would like to thank Naomi Mezey, Mary Anne Case, June Carbone, Monica Eppinger, Nancy Marcus, and Steve Macias for reviewing and commenting on drafts of this Article and Ann McGinley, Holning Lau, Heidi Bruins Green, Niko Antalffy, The Williams Institute, and Sharon Preves for assistance during the early stages of this project. Additionally, we would like to thank St. Louis University School of Law for including this project in its Spring 2014 Faculty Colloquium, as well as the organizers of, and the participants at, the many conferences where we presented this material. Finally, we are grateful for the excellent research assistance of Courtney Pedersen, Brice Zabel, Benjamin Ranallo, Laura Brooks, and Leslie Saporito.

\*\* Associate Professor of Psychology, Colorado State University–Pueblo.

1. For information on the number of bisexuals in the population compared to lesbians and gays in the population, see S.F. HUMAN RIGHTS COMM'N LGBT ADVISORY COMM., BISEXUAL INVISIBILITY: IMPACTS AND RECOMMENDATIONS 1–3 (2011) (describing bisexuals as the largest sexual minority group in the United States based on data from several studies); GARY J. GATES, WILLIAMS INST. HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL,

case law and in the popular understanding of discrimination.<sup>2</sup> Why is this? While more than one academic in the field suggested—in informal discussion about this project—that lack of discrimination was the reason for bisexuals’ invisibility in the case law, this supposition is inconsistent with the emerging social science data on the experiences of bisexuals.<sup>3</sup> It also conflicts with the results of our study, which is the first published quantitative study to focus comprehensively on bisexuals’ experiences with employment discrimination. Our study demonstrates that bisexuals face considerable discrimination in the workplace.

### A. *Bisexual Invisibility Generally*

Fifteen years ago, building on the work of other legal scholars such as Naomi Mezey,<sup>4</sup> Kenji Yoshino documented bisexual invisibility and theorized that it was due to what he termed “an epistemic contract of bisexual erasure.”<sup>5</sup> In other words, social norms that unconsciously developed from heterosexuals’ and homosexuals’ shared interest in eliding bisexuality.<sup>6</sup> He posited that this erasure developed

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AND TRANSGENDER? 1 (Apr. 2011) (describing bisexuals as comprising a slight majority compared to those who identify as lesbian or gay); *see also* LISA M. DIAMOND, *SEXUAL FLUIDITY: UNDERSTANDING WOMEN’S LOVE AND DESIRE* 27 (2008) (stating that “individuals with bisexual attractions . . . [are now known to] outnumber individuals with exclusive same-sex attractions . . .”); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353, 380 (2000) (reporting that the studies examined reveal that “the incidence of bisexuality [among each study’s respondents] was greater than or comparable to the incidence of homosexuality”). For information demonstrating bisexuals’ involvement in the early days of the gay rights movement, *see* Brett Beemyn, *Bisexuality, Bisexuals, and Bisexual Movements*, in 1 *ENCYCLOPEDIA OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED HISTORY IN AMERICA* 141, 141–42 (Marc Stein ed., 2004). For a relatively early example of a bisexual plaintiff litigating a discrimination claim, *see* *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984); *see also* *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 133 (1967) (Douglas, J., dissenting) (quoting the psychiatry report in a case appealing exclusion of an alien for homosexuality, which stated that “[h]is sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility”).

2. JENNIFER BAUMGARDNER, *LOOK BOTH WAYS: BISEXUAL POLITICS* 192 (2007) (discussing the lack of case law and organizing around bisexual rights); MEG BARKER ET AL., *THE BISEXUALITY REPORT: BISEXUAL INCLUSION IN LGBT EQUALITY AND DIVERSITY* 4 (2012) (discussing the invisibility of bisexuality); Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 *OHIO ST. L.J.* 1, 30 (1995) (“The term ‘bisexual’ is rarely recognized by courts and legislatures.”); Yoshino, *supra* note 1, at 434–35 (stating that “bisexuals are for the most part . . . invisible in the law . . .”).

3. *See, e.g.*, S.F. HUMAN RIGHTS COMM’N LGBT ADVISORY COMM., *supra* note 1, at 12–13, 27.

4. Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 *BERKELEY WOMEN’S L.J.* 98 (1995). Ruth Colker is another legal scholar who wrote pioneering work on bisexuality in the years before Yoshino. Colker, *supra* note 2, at 30–41.

5. Yoshino, *supra* note 1, at 391–92.

6. *Id.* at 391–92.

because of both groups' shared interest in (1) "the stability of sexual orientation categories"; (2) maintenance of "the primacy of sex as a diacritical characteristic"; and (3) "the preservation of monogamy," all of which are threatened by bisexuality.<sup>7</sup> Yoshino described several different methods of bisexual erasure and noted that the erasure was reflected in both social science literature and in the law.<sup>8</sup>

Since Yoshino's article was published in 2000, bisexual visibility has increased to some degree, but bisexual invisibility remains a formidable problem.<sup>9</sup> Some concrete indications that bisexual visibility is increasing have occurred in the past couple of years. For instance, for the first time ever, an openly bisexual Member of the House of Representatives was elected in November 2012.<sup>10</sup> House member Kyrsten Sinema beat her Tea Party opponent by 10,000 votes in a nail-biting race that was not called until several days after the election.<sup>11</sup> She is one of only a small handful of out bisexual elected officials in the nation.<sup>12</sup> As this Article was going to press, Kate Brown became the nation's first openly bisexual governor, taking office in Oregon after John Kitzhaber resigned.<sup>13</sup> Actresses and entertainers are also increasingly coming out as bisexual, sometimes proudly, as in the case of

7. *Id.* at 399; see also Mezey, *supra* note 4, at 99, 103, 114–15 (describing homosexuals' and heterosexuals' shared interest in eliding bisexuality); accord Gretchen Adel Myers, Note, *Allowing for Cultural Discussion of Queerness and Pansexuality: Sex/Gender/Sexual Belief Systems, the Religion Clauses, and the Ideal of Pluralism*, 38 STETSON L. REV. 409, 421–22 (2009).

8. Yoshino, *supra* note 1, at 367–68, 395.

9. See, e.g., DIAMOND, *supra* note 1, at 27, 95 (documenting the comparatively low percentage of scholarly literature on same-sex sexuality that mentions bisexuality in the title, abstract, or subject headings); BARKER ET AL., *supra* note 2, at 4 (discussing bisexual invisibility); Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 453–57 (2012) (discussing bisexual erasure and invisibility); Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. OF GENDER & L. (forthcoming in 2015) (discussing continuing problems of bisexual erasure in LGBT rights litigation and discourse) (unpublished manuscript on file with author); Eliel Cruz, *The Year in Bisexual Invisibility: It's been a year of some awful bisexual erasure*, ADVOCATE.COM (Dec. 30, 2014), <http://www.advocate.com/year-review/2014/12/30/year-bisexual-invisibility?page=full>, archived at <http://perma.cc/XZ5R-8NPW>. At the same time, the very fact that issues confronting bisexuals are getting increased attention, including the issue of bisexual invisibility, shows that bisexuals are gradually becoming more visible.

10. Peter O'Dowd, *Sinema, First Openly Bisexual Member Of Congress, Represents 'Changing Arizona'*, NPR BLOG, IT'S ALL POLITICS (Jan. 1, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/01/08/168362011/sinema-first-openly-bisexual-member-of-congress-represents-changing-arizona>, archived at <http://perma.cc/JQ5Q-GFC4>.

11. *Id.*

12. See, e.g., Nazly Siadate, *America's 6 Out Bisexual Elected State Officials*, ADVOCATE.COM (Aug. 23, 2012), <http://www.advocate.com/politics/politicians/2012/08/23/americas-six-out-bisexual-elected-state-officials>, archived at <http://perma.cc/FE5Q-FRNE>.

13. See, e.g., Samantha Allen, *Bisexuality's Watershed Political Moment*, THE DAILY BEAST (Feb. 14, 2015), <http://www.thedailybeast.com/articles/2015/02/14/bisexuality-s-watershed-political-moment.html>, archived at <http://perma.cc/X3V6-9J6A>.

comedian Margaret Cho,<sup>14</sup> and sometimes reluctantly and even somewhat clumsily, as in the case of Sex and the City actress Cynthia Nixon.<sup>15</sup> Additionally, bisexual characters are slowly becoming more prevalent on television, and the authenticity of their portrayals of bisexuality is, in some cases, improving.<sup>16</sup> Even hate crimes against bisexuals are beginning to gain attention,<sup>17</sup> as is the plight of bisexual asylum seekers.<sup>18</sup> Although, just a few years ago, a popular bisexual writer complained that LGBT rights organizations had not taken on a single case on behalf of a bisexual plaintiff, the National Center for Lesbian Rights changed that in 2010 when it undertook representation of Stephen Apilado, LaRon Charles, and John Russ in their suit against the North American Gay Amateur Athletic Alliance (NAGAAA) for public accommodations discrimination based on the players' bisexuality.<sup>19</sup>

On the other hand, as Cynthia Nixon explained, bisexuals who are visible—or who become so—continue to face a great deal of often blatant prejudice: “I don’t pull out the ‘bisexual’ word because nobody likes the bisexuals. Everybody likes to dump on the bisexuals.”<sup>20</sup>

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14. *Margaret Cho Opens Up About Her Open Marriage, Outing John Travolta*, HUFFINGTON POST GAY VOICES (Aug. 8, 2013), [http://www.huffingtonpost.com/2013/08/08/margaret-cho-open-marriage\\_n\\_3727268.html](http://www.huffingtonpost.com/2013/08/08/margaret-cho-open-marriage_n_3727268.html), archived at <http://perma.cc/AYG9-E48K>; see also Steven Petrow, *Is Anna Paquin's Bisexuality 'Past Tense' Now That She's Married to Stephen Moyer?*, WASH. POST (Aug. 18, 2014), [http://www.washingtonpost.com/lifestyle/style/is-anna-paquins-bisexuality-past-tense-now-that-shes-married-to-stephen-moyer/2014/08/18/2c508a58-23d8-11e4-86ca-6f03cbd15c1a\\_story.html](http://www.washingtonpost.com/lifestyle/style/is-anna-paquins-bisexuality-past-tense-now-that-shes-married-to-stephen-moyer/2014/08/18/2c508a58-23d8-11e4-86ca-6f03cbd15c1a_story.html), archived at <http://perma.cc/5Y86-VT5T>.

15. Kevin Sessums, *Cynthia Nixon on Bisexuality & Her New Role in 'Wit'*, THE DAILY BEAST (Jan. 24, 2012), <http://www.thedailybeast.com/articles/2012/01/24/cynthia-nixon-discusses-her-role-in-wit-her-cancer-bisexuality-and-her-kids.html>, archived at <http://perma.cc/RPX2-8VPL>.

16. Casey Quinlan, *Bisexuality on TV: It's Getting Better*, THE ATLANTIC (Oct. 25, 2013), <http://www.theatlantic.com/entertainment/archive/2013/10/bisexuality-on-tv-its-getting-better/280850/>, archived at <http://perma.cc/4TUG-LL9W>.

17. See, e.g., Joshua Melvin, *San Mateo Beating of Bisexual Man Charged as Hate Crime*, SAN JOSE MERCURY NEWS (Aug. 9, 2013), [http://www.mercurynews.com/san-mateo-county-news/ci\\_23824292/hate-crimes-charged-san-mateo-beating-bisexual-man](http://www.mercurynews.com/san-mateo-county-news/ci_23824292/hate-crimes-charged-san-mateo-beating-bisexual-man), archived at <http://perma.cc/BQ2T-3ZJQ>; Eliel Cruz, *Bisexual College Student Shot Dead in Front of His Home*, ADVOCATE.COM (Aug. 5, 2014), <http://www.advocate.com/bisexuality/2014/08/05/bisexual-college-student-shot-dead-front-his-home>, archived at <http://perma.cc/M8WU-T535>.

18. See, e.g., Eliel Cruz, *Bisexual Jamaican in U.K. Released From Detention After 6 Weeks*, ADVOCATE.COM (Sept. 9, 2014), <http://www.advocate.com/bisexuality/2014/09/09/bisexual-jamaican-uk-released-detention-after-6-weeks>, archived at <http://perma.cc/H4Y-EDVM>.

19. BAUMGARDNER, *supra* note 2, at 192; Press Release, Nat'l Ctr. for Lesbian Rights, NCLR Files Suit Challenging Discriminatory Athletic Policy: Athletes, Coach Humiliated at Public Interrogation about Sexual Orientation (Apr. 20, 2010), available at <http://www.nclrights.org/press-room/press-release/nclr-files-suit-challenging-discriminatory-athletic-policy>, archived at <http://perma.cc/GEH6-XW27>.

20. Sessums, *supra* note 15.

Actress Evan Rachel Wood experienced a similar reaction upon coming out as bisexual, and she explains her current public affirmance of her bisexual identity as a response to having “felt shamed from both sides.”<sup>21</sup> What Nixon and Wood are describing is the phenomenon of double discrimination: in other words, “the fact that bisexual people can be discriminated against both by heterosexuals and by lesbian and gay people.”<sup>22</sup> In addition to this mutual ostracization, bisexuals must deal with the fact that their sexual identity is often not perceived to be legitimate—either by those heterosexuals who are generally accepting of homosexuality or by gay and lesbian persons themselves.<sup>23</sup>

Turning to the academic realm, there are indications of increasing visibility in that sphere as well. Although historically, if gathered at all, data regarding bisexuals were usually conflated with data about gays and lesbians,<sup>24</sup> in the past few years, social scientists and others have begun to gather data specifically about bisexuals.<sup>25</sup> The results that are beginning to emerge are alarming. Recent health and economic data demonstrate that bisexual men and women have much

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21. Greg Hernandez, *Evan Rachel Wood Tells Gay Star News She Wants to Help End Stigma About Bisexuality*, GAYSTARNEWS (May 27, 2014), <http://www.gaystarnews.com/article/evan-rachel-wood-tells-gay-star-news-she-wants-help-end-stigma-about-bisexuality270514>, archived at <http://perma.cc/P9WW-DJ4L>.

22. BARKER ET AL., *supra* note 2, at 21. The discrimination that bisexuals face from other LGBT persons, particularly lesbians and gays, is an example of intragroup discrimination. Bisexuals are not unique in being the victims of intragroup discrimination, but the extent to which it is still seen as societally acceptable to overtly discriminate against bisexuals within both the LGBT and straight communities makes the situation of bisexuals at least very unusual, if not unique. For general information on intragroup discrimination in the context of race and sex, see, e.g., Enrique Schaefer, *Intragroup Discrimination in the Workplace: The Case for “Race Plus,”* 45 HARV. C.R.-C.L. L. REV. 57, 58–60 (2010).

Additionally, the fact that bisexuals face overt, culturally sanctioned discrimination from both the LGBT and straight communities appears to make it more difficult for them to access the support needed to cope with discrimination. See, e.g., S.F. HUMAN RIGHTS COMM’N LGBT ADVISORY COMM., *supra* note 1, at 12.

23. Brent Chamberlain, *Stonewall Workplace Guides: Bisexual People in the Workplace: Practical Advice for Employers*, STONEWALL, 2–3 (2012), [http://www.stonewall.org.uk/documents/bisexual\\_people.pdf](http://www.stonewall.org.uk/documents/bisexual_people.pdf), archived at <http://perma.cc/E3KA-ZUTP>; see also BARKER ET AL., *supra* note 2, at 21; Mezey, *supra* note 4, at 116–18. For an example of an assertion of the illegitimacy of bisexuality by a lesbian, see Julie Bindel, *Where’s the Politics in Sex?*, HUFFINGTON POST GAY VOICES (June 12, 2012), [http://www.huffingtonpost.com/julie-bindel/where-is-the-politics-in-b\\_1589435.html](http://www.huffingtonpost.com/julie-bindel/where-is-the-politics-in-b_1589435.html), archived at <http://perma.cc/CL42-B2QC>. It is noteworthy to see such blatant prejudice against bisexual women in a left-wing publication like the *Huffington Post*. Bindel clearly subscribes to the stereotypes of bisexuals as greedy and selfish, as well as hypersexual, which are discussed elsewhere in this Article. Anyone who needs an antidote to the intolerance in the Bindel piece may want to look at Cindy Rizzo, *When You Use Your Identity As A Hammer, Everything Looks Like A Nail*, DO I LOOK LIKE A WRITER IN THIS? ON WRITING, IDEAS, LESFIC, LGBT ISSUES, AND OTHER LATE MIDLIFE THOUGHTS (Sept. 12, 2014), <https://cindyrisso.wordpress.com/2014/09/12/when-you-use-your-identity-as-a-hammer-everything-looks-like-a-nail>, archived at <http://perma.cc/5C2V-GDUL>.

24. S.F. HUMAN RIGHTS COMM’N LGBT ADVISORY COMM., *supra* note 1, at 3.

25. See *id.* at 3, 11–12; Chamberlain, *supra* note 23.



higher rates of suicide ideation than gay men and lesbians respectively, that bisexual women are more likely to experience frequent mental distress than lesbians and that they have poorer general health than lesbians, and that bisexual men and women are more likely to live in poverty than gay men and lesbians respectively.<sup>26</sup> Moreover, bisexual women also appear to be at greater risk of intimate partner violence than gay men, lesbians, or heterosexual men or women.<sup>27</sup>

However, services to bisexuals to address these problems and research on their experiences and challenges are undoubtedly hampered by the fact that bisexual-focused programs and organizations receive only a minute portion of the grants that are awarded to benefit the various segments of the LGBT population.<sup>28</sup> Indeed, bisexual-focused organizations and programs received less than 0.3% of the funding that was awarded to either lesbian-focused or gay male-focused organizations and programs over a forty-year period (\$84,356 awarded to bisexual organizations and programs compared to \$34,173,243 awarded to gay male-focused organizations and programs and \$30,470,934 awarded to lesbian-focused organizations and programs).<sup>29</sup>

Another problem is that bisexuals themselves appear to be contributing to their invisibility, partly out of fear of discrimination and, in some cases, out of ambivalence about the bisexual label itself, which, in some instances, could be characterized as internalized biphobia.<sup>30</sup> For instance, a recent study by Pew Research Center found that bisexuals were less than half as likely as gays and lesbians to have told most or all of the important people in their lives about their sexual orientations, and a 2013 survey of employees in Britain revealed that bisexuals are only roughly one third as likely as gays and lesbians to feel comfortable being out in the workplace.<sup>31</sup> And, in the workplace,

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26. S.F. HUMAN RIGHTS COMM'N LGBT ADVISORY COMM., *supra* note 1, at 12–13, 27.

27. See Naomi G. Goldberg & Ilan H. Meyer, Brief Note, *Sexual Orientation Disparities in History of Intimate Partner Violence: Results From the California Health Interview Survey*, 28 J. INTERPERSONAL VIOLENCE 1109, 1109 (2013); accord BARKER ET AL., *supra* note 2, at 22 (comparing risks faced by bisexual people to those faced by lesbian and gay people).

28. Anthony Bowen, *Forty Years of LGBTQ Philanthropy: 1970–2010*, LGBT FUNDERS, 33 (2012), [http://www.lgbtfunders.org/files/40years\\_lgbtqphilanthropy.pdf](http://www.lgbtfunders.org/files/40years_lgbtqphilanthropy.pdf), archived at <http://perma.cc/M7S6-EJ2R>.

29. *Id.*

30. Helena See & Ruth Hunt, *Bisexuality and Identity: The Double-Edged Sword: Stonewall Research into Bisexual Experience*, 11 J. BISEXUALITY 290, 292–94 (2011); see also BARKER ET AL., *supra* note 2, at 4 (defining biphobia); accord Petrow, *supra* note 14 (describing a bisexual friend's experiences of discussing her bisexuality and quoting her statement that bisexuality is "exhausting trying to explain . . ."). Besides biphobia, other possible reasons to reject or feel ambivalent about the bisexual label include the fact that the word itself semantically incorporates a notion of the gender binary, personal dislike of labels, and reluctance to espouse any identity.

31. A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES, PEW RESEARCH CENTER 44–45 (June 13, 2013), [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf), archived at <http://perma.cc/2SLP>

this reluctance to come out contributes to feelings of dissatisfaction at work.<sup>32</sup>

However, in evaluating bisexuals' lower rates of outness at work and in other contexts, it is important to keep in mind that the process of revealing one's bisexuality often differs in important ways from the arguably more straightforward process of coming out as lesbian or gay. For example, coming out as bisexual often requires educating others about what bisexuality is, and the person coming out may find herself "constantly . . . questioned and asked to justify" her sexual orientation.<sup>33</sup> Relatedly, because bisexuality may not be seen as a legitimate orientation by those to whom a bisexual person comes out, profession of the identity may be viewed as an indication that the bisexual person is obstinately refusing to choose between heterosexuality and homosexuality.<sup>34</sup> Additionally, the fact that bisexuals tend to be imputed a heterosexual or homosexual sexual orientation based on their being partnered with an opposite-sex or same-sex person may make coming out and staying out as bisexual more labor-intensive than coming out as lesbian or gay,<sup>35</sup> and those in opposite-sex relationships who come out as bisexual may be accused of unfairly taking advantage of heterosexual privilege.<sup>36</sup> In other words, the status of being out as bisexual to most or all of the important people in one's life may be viewed with more suspicion than a lesbian or gay identity and may be harder to maintain. Finally, some bisexuals have reported that they do not identify with the concept of coming out.<sup>37</sup>

As a result of these unique challenges and circumstances, it is important not to assume that bisexuals' lower likelihood of being out and visible is a reflection of a personal failure or weakness. On the other hand, it should be recognized that concealing one's identity causes harm to those who do so,<sup>38</sup> and thus efforts should be made to make the coming out experiences of those bisexuals who identify with that process easier. As with other invisible minorities, the invisibility of bisexuality presents a double bind. If bisexuals come out at work

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-8ZK4; Ruth Hunt & Vignesh Ashok, *Workplace Equality Index: Five Year Review*, STONEWALL, 50 (2013), [http://www.stonewall.org.uk/documents/workplace\\_equality\\_index\\_five\\_year\\_review.pdf](http://www.stonewall.org.uk/documents/workplace_equality_index_five_year_review.pdf), archived at <http://perma.cc/B7DZ-D2MW>.

32. See & Hunt, *supra* note 30, at 293.

33. See, e.g., Human Rights Campaign, Issue: Coming Out: Bisexual (2014) (on file with author); Chamberlain, *supra* note 23, at 3–5 (quoting interview respondent Niamh, as well as the experiences of other respondents).

34. See Chamberlain, *supra* note 23, at 5.

35. See, e.g., BARKER ET AL., *supra* note 2, at 4 (describing the practice of "assuming people's sexuality on the basis of their current partner" as a form of biphobia).

36. Accord Rizzo, *supra* note 23.

37. See, e.g., BAUMGARDNER, *supra* note 2, at 118–19, 209–10.

38. See, e.g., Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 527–28 (1998).



they will likely be happier but also will likely face more discrimination, particularly since evidence suggests that visible bisexuals face more stigma from heterosexuals than do gays and lesbians.<sup>39</sup>

### B. Our Survey

In order to gain an empirical understanding of the reasons for bisexuals' invisibility in the legal realm, and in employment discrimination case law specifically, we decided to ask bisexuals themselves and others with fluid identities (such as those who identify as pansexual or omnisexual<sup>40</sup>) whether they had experienced employment discrimination and whether they had sought relief of any kind.

We explored these questions via an online survey that was approved by Hamline University's Institutional Review Board. In designing the survey, we elected to define bisexuality in terms of sexual identity rather than solely based on either our respondents' reports of sexual behavior or even their reports of attraction to both sexes if coupled with a homosexual or heterosexual identity. We took this approach for several reasons. One is that we wanted to include those who have attractions to both sexes rather than focusing solely on those who have engaged in sexual behavior or have had relationships with both sexes because, in accord with the prevailing scientific view, we see attraction as more indicative of sexual orientation than sexual behavior.<sup>41</sup> Additionally, we view identity as generally more culturally salient than the more objective concept of sexual orientation<sup>42</sup> (and

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39. See Gregory M. Herek, *Heterosexuals' Attitudes Toward Bisexual Men and Women in the United States*, 39 THE J. OF SEX RESEARCH 264, 271 (2002) [hereinafter Herek, *Heterosexuals*]; see also BARKER ET AL., *supra* note 2, at 24 (discussing workplace discrimination against bisexuals); Heidi Bruins Green et al., *Working Bi: Preliminary Findings from a Survey on Workplace Experiences of Bisexual People*, 11 J. OF BISEXUALITY 300, 313 (2011) (reporting a relationship between outness and workplace satisfaction among bisexuals).

40. "Omnisexual" and "pansexual" generally refer to "people who recognize the existence of more than two sexes and/or more than two genders and can be attracted to many characteristics of a person independent of or beyond the classifications of male and/or female or man and/or woman." Matt Kailey, *Transgender Issues 101: Pansexual, Omnisexual, and Queer*, EXAMINER.COM (Aug. 21, 2009), <http://www.examiner.com/article/transgender-issues-101-pansexual-omnisexual-and-queer>, archived at <http://perma.cc/LG4Q-SS4X>. Notably, we are using "fluid" differently than Professor Diamond uses it in *SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE & DESIRE*. See DIAMOND, *supra* note 1. Our use of "fluid" refers to identities that themselves incorporate a notion of fluidity or potential for attraction to both or multiple sexes, whereas Professor Diamond is using fluidity to refer to changes in sexual attraction over time. *Id.* at 3–4. For instance, a person who identified as lesbian in her twenties and then as heterosexual in her thirties would fit Professor Diamond's definition of fluidity but not ours.

41. DIAMOND, *supra* note 1, at 12.

42. "[S]exual orientation" and "sexual identity" are closely related but distinct terms. As Professor Lisa Diamond explains:

"[S]exual orientation" . . . mean[s] a consistent, enduring pattern of sexual desire for individuals of the same sex, the other sex, or both sexes, regardless of whether this pattern of desire is manifested in sexual behavior. . . . "Sexual

thus as a more likely basis of discrimination). For example, a person who harbors same-sex attraction but never outwardly acknowledges it is unlikely to face discrimination based on it.<sup>43</sup> Identity, however, implies an acknowledgment and avowal of one's attractions and, therefore, if known by others, may well trigger discrimination. Finally, we wanted to recognize, as much as possible in the course of collecting quantitative data, each individual's right of self-naming and self-determination relating to his or her sexuality.<sup>44</sup>

Our respondents reported significant levels of employment discrimination and yet very few of them had sought any kind of relief. None had sought relief in the court system. Given the aforementioned health and mental health statistics and the effects that discrimination can have on health and mental health,<sup>45</sup> the high level of discrimination revealed in our survey results is not surprising.

This Article presents the results of the survey. It then examines the likely reasons for bisexual invisibility in the case law and bisexuals' apparent reluctance to sue for discrimination in the workplace, and it recommends steps that judges, lawyers, and employers can take to improve bisexuals' prospects for remedying discrimination and accessing justice. It concludes with suggestions for further research.

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identity" refers to a culturally organized conception of the self, usually "lesbian/gay," "bisexual," or "heterosexual." . . . [W]e cannot presume that these identities correspond to particular patterns of behavior.

*Id.* Thus, "sexual orientation" is an objective term based on the content of a person's desires, whereas "sexual identity" can be thought of as the sexual orientation label that a person recognizes as her own, sometimes only privately but often both privately and publicly. Because we focused on respondents' self-identification in our survey, our survey results provide information about bisexual- and fluid-identified respondents, rather than those who may technically have a bisexual orientation but who do not identify that way.

43. [I]t would appear to be the person who either self-identified with a societally disfavored sexual preference or who was involuntarily identified by others as exhibiting such a preference who would most need the protections of an anti-discrimination law. By engaging in the political act of expressing her identity, such a person makes herself uniquely vulnerable to discrimination (or is made so in the case of involuntary identification).

Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1477–78 (2011) (footnotes and citations omitted).

44. See, e.g., Nathan Patrick Rambukkana, *Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory*, 4 J. BISEXUALITY 141, 152 (2004).

45. Mark L. Hatzenbuehler et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOC. SCI. & MEDICINE 33, 33 (2014) (reporting that the life expectancy of sexual minorities living in communities with high levels of anti-gay prejudice is twelve years shorter than for those living in low-prejudice communities); Lori E. Ross et al., *Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination*, 100 AM. J. PUB. HEALTH 496, 497 (2010) (detailing bisexual participants' perception that biphobia and monosexism played critical roles in their mental health experiences); Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. OF PUB. HEALTH 452 (2010) (reporting increased rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder, among LGB respondents living in states that passed anti-marriage equality constitutional amendments).

Part I of this Article describes the existing case law pertaining to discrimination against bisexuals and then explains the ways in which courts and lawyers have obfuscated bisexuality and denied its legitimacy. Part II begins with a literature review of social science research on bisexuals and lesbian, gay, bisexual, and transgender (LGBT) peoples' experiences with employment discrimination. It then presents the results of our survey and explores the qualitative evidence available on bisexuals' experiences with workplace discrimination. Part III examines the limited case law available and the social science research pertaining to bisexuals to shed light on the ways in which lawyers, courts, and employers may be failing bisexuals who have experienced employment discrimination. It also suggests ways to improve bisexuals' experiences in the workplace and with the justice system. The last Part concludes with suggestions for further research.

#### I. BI INVISIBILITY IN THE COURTROOM AND THE CASE REPORTER

Currently, twenty-one states and the District of Columbia have laws in place that bar sexual orientation discrimination against public and private employees.<sup>46</sup> Although there is currently no broad-based federal law protecting workers from such discrimination, public lesbian, gay and bisexual (LGB) employees have had mixed success relying on the equal protection clause and the First Amendment, and, additionally, an Executive Order was recently adopted that bans sexual orientation and gender identity discrimination by federal contractors.<sup>47</sup> Additionally, nine states have sexual orientation discrimination laws that protect only public employees, and many localities have protections of varying scope in place as well.<sup>48</sup> Finally, employers' non-discrimination policies may serve as a source of protection in some instances. Notably, statutory and administrative definitions of sexual

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46. See *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (Jan. 16, 2015), available at [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps), archived at <http://perma.cc/9ZM9-LS56>.

47. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449–50 (bisexual guidance counselor held to have neither equal protection nor First Amendment protection for sexual orientation disclosure); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1285 (D. Utah 1998) (lesbian teacher held to have First Amendment protection for disclosure of sexual orientation); *Ambris v. City of Cleveland*, 2012 WL 5874367, 116 Fair Empl. Prac. Cas. (BNA) 949, 96 Empl. Prac. Dec. P 44,701 (N.D. Ohio 2012) (granting City's motion to dismiss equal protection claim); *Gill v. Devlin*, 867 F. Supp. 2d 849, 859 (N.D. Tex. 2012) (denying motion for judgment on the pleadings in equal protection case); Exec Order No. 1,367,279, 79 Fed. Reg. 42971 (July 21, 2014). We use 'LGB' rather than 'LGBT,' the latter of which includes transgender persons, simply to separate out sexual orientation from gender identity. We firmly support antidiscrimination protections for transgender persons.

48. See HUMAN RIGHTS CAMPAIGN, *supra* note 46; Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & SEXUALITY 61, 64 (2011).

orientation in discrimination laws do tend to explicitly include bisexuality.<sup>49</sup> Thus, although existing statutory protections for LGB people are far from ideal, bisexual employees have state law protections against employment discrimination in twenty-one states and the District of Columbia, and some bisexual workers outside of those states have protection because they are public workers or employed by federal contractors or because of a local ordinance or an individual employer's policy.

Nonetheless, although bisexuals are the largest sexual minority group in the United States,<sup>50</sup> electronically available court decisions involving bisexual plaintiffs' claims of employment discrimination are rare compared to those involving gay, lesbian, and heterosexual plaintiffs,<sup>51</sup> and it seems to be virtually unheard of for a bisexual plaintiff

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49. See Tweedy, *supra* note 43, at 1463; Robin Cheryl Miller, *Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination*, 82 A.L.R.5th 1, § 2[a] (2000).

50. S.F. HUMAN RIGHTS COMMON LGBT ADVISORY COMM., *supra* note 1, at 1.

51. We found a total of eleven employment discrimination cases brought by bisexual plaintiffs in the ALLCASES database on Westlaw, and only four (or possibly five) of those were based on state laws that prohibited sexual orientation discrimination: *Flood v. Bank of America*, No. 14-0168 (1st Cir. Feb. 27, 2015) (reinstating two of plaintiff's sexual orientation discrimination claims under Maine law); *Rowland*, 730 F.2d at 446 (First Amendment and equal protection claim brought by public employee); *Davis v. Signius Investment Corp./Answernet*, 2013 WL 1339758, at \*7 (N.D. Ga. Feb. 26, 2013) (bisexual female plaintiff's Title VII claim dismissed because sexual orientation is not a protected class); *Dawkins v. Richmond Cnty. Schs.*, 2012 WL 1580455, at \*6 (M.D.N.C. May 4, 2012) (granting motion of gay/bisexual male plaintiff to proceed in forma pauperis and allowing his equal protection claim based on sexual orientation to go forward against one defendant, while dismissing his Title VII claim and disallowing him from proceeding on equal protection grounds against another defendant); *Blaylock v. Transp. Sec. Admin.*, 2009 WL 2606245, at \*24 (D.N.J. 2009) (Title VII claim premised on sexual orientation discrimination dismissed because of insufficient evidence); *Parrella v. Lawrence & Mem'l Hosp.*, 2009 WL 1279290, at \*3 (D. Conn. 2009) (Title VII claim based on sexual orientation discrimination dismissed because sexual orientation is not a statutorily protected class); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1119–28 (9th Cir. 2008) (bisexual plaintiff's state-law employment discrimination claim was barred by statute of limitations); *Cullen v. Southington Oral & Maxillofacial Surgeons P.C.*, Docket No. HHDCV603 7579S, 2014 WL 5571580, at \*6, \*8 (Super. Ct. Conn. Sept. 30, 2014) (granting summary judgment with respect to a bisexual plaintiff's sexual orientation discrimination claim under state law while allowing her other claims to go forward); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 352 (Minn. Ct. App. 2004) (holding bisexual church music director's employment discrimination claim not actionable because of religious exemption in state discrimination law); *Janssen v. Inc. Vil. of Rockville Ctr.*, 59 A.D.3d 15, 16–17, (N.Y. App. Div. 2008) (Title VII claim based on sexual orientation discrimination dismissed because sexual orientation is not a protected class but plaintiff granted leave to amend complaint to properly allege the elements of state law harassment claim); *Zalewski v. M.A.R.S. Enter., Ltd.*, 561 F. Supp. 601, 602 (D. Del. 1982) (summary judgment granted on bisexual male plaintiff's quid pro sexual harassment claim under Title VII because of failure to comply with procedural requirements).

Thus, of the cases brought by bisexual plaintiffs cited above, only *Flood*, *Johnson*, *Cullen*, and *Egan* appeared to include sexual orientation-based employment discrimination claims rooted in state law. It is unclear whether the state law claim in *Janssen* was based

to succeed in such a claim on the merits.<sup>52</sup>

Ironically, the most prominent appearance of bisexuals in employment discrimination case law is in the role of the so-called bisexual harasser, a largely hypothetical character who perpetrates discrimination with impunity because her treatment of both sexes is equally bad and therefore not actionable under Title VII.<sup>53</sup> The confinement of bisexuals to this negative and largely hypothetical role in the case law may well be rooted in the popular stereotype that bisexuals are greedily attempting to have their cake and eat it too.<sup>54</sup> Rather than bisexuals' being subordinated in the workplace due to heteronormativity, occasional homonormativity, and outright prejudice, judges and

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on sex or sexual orientation. A later order describes the claim as one of sexual harassment, suggesting that it was a gender-based claim, *Janssen*, 94 A.D.3d at 949, although the evidence described in the 2008 order appeared to relate to sexual orientation discrimination.

To get a sense of the greater abundance of state law, sexual orientation-based employment discrimination claims brought by lesbian, gay, and even heterosexual plaintiffs, see Miller, *supra* note 49, at §§ 7–10. While the sexual orientation of the plaintiffs was not clear in all of Miller's case summaries, most of the summaries identified the plaintiff's orientation as being lesbian, gay, or heterosexual. In those summaries in which the orientation was unclear, in all cases except one, examination of the opinion or order itself either revealed that the plaintiff was lesbian, gay, or heterosexual (rather than bisexual) or did not reveal the orientation at all. *Compare* Walker v. City of Holyoke, 523 F. Supp. 2d 86 (D. Mass. 2007) (lesbian plaintiff); Howard Univ. v. Green, 652 A.2d 41, 49 n.11 (D.C. 1994) (heterosexual plaintiff); Young v. Ill. Human Rights Comm'n, 74 N.E.2d 385, 388 (Ill. App. 2012) (homosexual plaintiff); Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005) (lesbian plaintiff), with Thomas v. Coleman Enters., 2000 WL 385479, at \*1 (Minn. Ct. App. 1999) (sexual orientation of plaintiff unclear but complaint involved anti-lesbian remark); Taylor v. New York Univ. Med. Ctr., 871 N.Y.S.2d 568, 571–72 (App. 2008) (sexual orientation of plaintiff unclear but allegations included anti-gay conduct and comments and expressions of distaste for homosexuals); Jones v. Lodge at Torrey Pines P'ship, 54 Cal. Rptr. 3d 379, 385 (4th Dist. 2007) (sexual orientation of plaintiff unclear but allegations involved gay-bashing comments), *as mod.* 42 Cal.4th 1158 (Cal. 2008); Cnty. of Onondaga v. Mayock, 910 N.Y.S.2d 628 (App. Div. 2010) (sexual orientation discrimination alleged without further specification). Of all the cases Miller discusses in the cited sections, only one, *Egan*, clearly involved a bisexual plaintiff.

52. To date, the only case we found in which a bisexual employee ultimately succeeded on the merits in a sexual orientation discrimination case was a harassment case from the United Kingdom. See *Harassment of Bisexual Employee*, 212 EQUAL OPPORTUNITIES REV. 29 (May 2011) (summarizing Rosik v. Wood and others, case no.2704114/09 (Dec. 13, 2010)). However, in a somewhat well-known American case, plaintiff Majorie Rowland had succeeded at the trial level on her constitutionally based employment discrimination claims against a school district, but the Sixth Circuit reversed. *Rowland*, 730 F.2d at 446. Additionally, in *Flood*, No. 14-1068, the First Circuit reversed the district court's dismissal on summary judgment of two of a bisexual plaintiff's sexual orientation claims under Maine law. Whether *Flood* will ultimately prevail remains to be seen.

Although we learned of the *Rosik* case in the U.K. by researching periodicals, our caselaw search was generally limited to United States state and federal cases available on Westlaw.

53. See, e.g., Yoshino, *supra* note 1, at 440–42; *HR Agenda*, HR BRIEFING 8 (Nov. 15, 2000).

54. See BARKER ET AL., *supra* note 2, at 20 (describing the stereotype that bisexuals are greedy and want to have their cake and eat it too).



litigants imagine that bisexuals are getting away with something, just as they are thought to do in their personal lives. In actuality, however, an equal opportunity harasser could be any sexual orientation: harassment need not be motivated by sexual attraction.<sup>55</sup>

In addition to the lack of employment discrimination cases brought by bisexual plaintiffs, lawyers, judges, and justices have also used tactics that elide the existence of bisexuals.<sup>56</sup> One of the most blatant examples of this was Justice Kennedy's opinion for the Majority in *Romer v. Evans*.<sup>57</sup> Although the Colorado law that the Court struck down explicitly listed bisexuals, along with gays and lesbians, as intended objects of its discriminatory bar, the Court elected to refer to the affected class as homosexual persons or gays and lesbians.<sup>58</sup> While this framing seems innocuous in itself, it has the effect of making bisexuality invisible to those reading the opinion and of implicitly denying the injustice that bisexuals experienced at the hands of the Colorado voters who passed the law.

Another important example of a judge's elision of bisexuality occurred in a recent federal district court case, *Apilado v. North American Gay Amateur Athletic Alliance*, which was brought by bisexual and apparently somewhat closeted softball players alleging that the NAGAAA discriminated against them based on their sexual orientation in violation of Washington's public accommodations law.<sup>59</sup> The NAGAAA had a rule that each team could have no more than two heterosexuals, and, during the NAGAAA's 2008 world series, another team challenged the plaintiffs' team, D2, on the basis that it included more than two heterosexual players.<sup>60</sup> Five of D2's players, including the three plaintiffs, were summoned to a hearing where, in the presence of more than twenty-five people, they were forced to answer intrusive questions about their sexual

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55. See, e.g., John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997–1998 Term*, 71 TEMP. L. REV. 773, 774 (1998) (“[S]exual harassment flows from a disparity of power.”).

56. Elizabeth Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1033–35 (2012) (describing Ted Olson's questioning of his client, Sandy Stier, in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)); Yoshino, *supra* note 1, at 367 (discussing the Majority's framing of the issue in *Romer v. Evans*, 517 U.S. 620 (1996)).

57. 517 U.S. 620 (1996). A much more inclusive approach was proffered by Judge Norris in a 1998 Ninth Circuit opinion that was later withdrawn. See Mezey, *supra* note 4, at 125 (quoting *Watkins v. United States Army*, 837 F.2d 1428, 1429 n.1 (9th Cir. 1988), amended, 847 F.2d 1329 (9th Cir. 1988), withdrawn, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990)). Similarly, Judge Berzon uses inclusive language in her concurrence in *Latta v. Otter*. 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J., concurring).

58. *Romer*, 517 U.S. at 624; Yoshino, *supra* note 1, at 367.

59. 792 F. Supp. 2d 1151, 1155–56 (W.D. Wash. 2011); see also *Apilado v. North Am. Gay Amateur Athletic Alliance*, 2011 WL 5563206, at \*1–2 (W.D. Wash. Nov. 10, 2011).

60. *Apilado*, 792 F. Supp. 2d at 1155.



attractions and practices.<sup>61</sup> In response to one plaintiff's statement that he was attracted to both men and women, an NAGAAA member stated "this is not a bisexual world series—this is a gay world series."<sup>62</sup> Ultimately, the NAGAAA's protest committee voted the three plaintiffs to be heterosexual and their team was forced to forfeit its second-place finish.<sup>63</sup> The NAGAAA's treatment of plaintiffs is particularly disturbing given that its mission explicitly included promotion of the participation of bisexuals.<sup>64</sup> Yet, rather than allowing plaintiffs to claim or prove bisexuality, the organization utilized and enforced rules that drew a dichotomy between gay and heterosexual, leaving no room for the existence of bisexuals.<sup>65</sup> Thus, in a move to enforce homonormativity that is similar to the discriminatory actions that some of our bisexual respondents reported having experienced from other LGBT non-profits, the NAGAAA appears to have given lip-service to bisexuality without meaningfully allowing bisexual people to participate as such.<sup>66</sup>

The district court, after acknowledging the plaintiffs' framing of the case as being about bisexuality in an early order,<sup>67</sup> apparently failed to grasp that rules drawing a sharp dichotomy between gay and straight with no space for a middle ground exclude bisexuals.<sup>68</sup> Thus, although plaintiffs raised the NAGAAA's discrimination against bisexuals in their brief and alerted the court to the NAGAAA's acknowledgment that its constituency included bisexuals,<sup>69</sup> the court upheld the NAGAAA's First Amendment right to draw the dichotomy in order to limit the participation of heterosexuals without recognizing the rules' harmful effects on bisexuals.<sup>70</sup> Instead of addressing

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61. Press Release, National Center for Lesbian Rights, Parties Settle Case Challenging Disqualification of Bisexual Players' Team at 2008 Gay Softball World Series (Nov. 28, 2011), <http://www.nclrights.org/press-room/press-release/parties-settle-case-challenging-disqualification-of-bisexual-players-team-at-2008-gay-softball-world-series>, archived at <http://perma.cc/KZD4-9RAZ>.

62. *Id.*

63. *Id.*; Glazer, *supra* note 56, at 1027–28.

64. *Apilado*, 792 F. Supp. 2d at 1159.

65. *Id.* at 1155. This sort of dichotomous thinking is condemned by Naomi Mezey. Mezey, *supra* note 4, at 121.

66. Sadly, many LGBT organizations similarly appear to only nominally include bisexuals as constituents. See, e.g., S.F. HUMAN RIGHTS COMM'N LGBT ADVISORY COMM., *supra* note 1, at 31.

67. *Apilado*, 792 F. Supp. 2d at 1156.

68. *Apilado v. North Am. Gay Amateur Athletic Alliance*, 2011 WL 5563206, at \*1–3 (W.D. Wash. Nov. 10, 2011).

69. Plaintiffs' Response in Opposition to Granting Partial Summary Judgment to NAGAAA on its First Amendment Defense to Plaintiffs' Claim of Sexual Orientation Discrimination under RCW 49.60 and Request for Judgment in Plaintiffs' Favor, at 5, *North Am. Gay Amateur Athletic Alliance*, No. C10-00682 JCC, 2011 WL 5563206 (W.D. Wash. Nov. 10, 2011).

70. *Apilado*, 2011 WL 5563206, at \*1–3.

the rule's effects on the bisexual plaintiffs as bisexuals, it somewhat myopically framed the issue alternately as whether the NAGAAA had a right to exclude "straight or closeted players" or "people who chose not to identify as predominantly interested in the same sex."<sup>71</sup> Given that discrimination based on bisexuality was a central issue in the case, this framing indicates a significant blind spot.

The district court's grant of partial summary judgment appears to have been based on a combination of an unduly broad, although unelaborated, reading of *Boy Scouts of America v. Dale*<sup>72</sup> and a lack of understanding of what constitutes discrimination against bisexuals. Although the court's reading of *Dale* appears to have been erroneous,<sup>73</sup> if interpreting *Dale* to grant the NAGAAA the First Amendment right to discriminate against bisexuals despite purporting to support bisexual players in its mission, it would have been preferable for the court to at least acknowledge the harmful effects of the NAGAAA's rules on bisexuals. This approach would have avoided making bisexuals (and the discrimination against them) invisible in their own case.

Nonetheless, as with Justice Kennedy's majority opinion in *Romer*, it is far from clear that the court in *Apilado* bore any ill will towards bisexuals. It may be that the court simply failed to comprehend plaintiffs' legal argument because it did not understand bisexuality itself and that the court therefore avoided explicitly addressing

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71. *Id.* at \*2–3.

72. 530 U.S. 640, 640–41 (2000).

73. Although *Dale* was worded very broadly, the court's decision is in tension with, and even inconsistent with, *Dale*, given that the Boy Scouts of America did provide some pre-litigation evidence of the organization's disapproval of homosexuality, whereas, in *Apilado*, the NAGAAA's mission specifically listed bisexuals as being *part of its constituency*. *Dale*, 530 U.S. at 651–53; *Apilado v. North Am. Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151, 1159 (W.D. Wash. 2011); *see also* Andrew Koppelman, *Should Non-commercial Associations Have an Absolute Right to Discriminate?*, 67 L. & CONTEMP. PROBS. 27, 30–31 (2011) (describing the broadness of *Dale*). Additionally, the Court in *Dale* could colorably read the Boy Scouts' mission as being inconsistent with homosexuality, although it was necessary to assume a homophobic point of view to do so. 530 U.S. at 650. However, given the NAGAAA's professed support of bisexuals, there was no way to read its mission as expressing an intention to limit their participation. Perhaps most importantly, the Court in *Dale* specifically stated that it was not saying that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. *Id.* at 653.

It is possible that, if the *Apilado* Court had understood how the NAGAAA's rules and actions discriminated against the bisexual plaintiffs in direct contravention of its own mission, it would not have held the NAGAAA to be shielded by the First Amendment under *Dale*. *Accord* *Stevens v. Optimum Health Inst. San Diego*, 810 F. Supp. 2d 1074, 1094 (S.D. Cal. 2011) (applying *Dale* and holding that forced admittance of the plaintiff, a disabled person, would not infringe on the defendant religious organization's right of expressive association). Indeed, granting an organization the First Amendment right to discriminate in direct contravention of its own mission would stretch *Dale* beyond all reasonable limits.

the argument in its second partial summary judgment order. Regardless, however, the decision was harmful to the plaintiffs and other bisexuals in not acknowledging a principal basis of the NAGAAA's discrimination and in not acknowledging even the possibility of bisexuality as a legitimate orientation. Fortunately, after the decision, the case settled, and NAGAAA agreed as part of the settlement to clarify in its Instruments of Governance that bisexual individuals shall not be subject to Roster limitations, to amend its rules to be more inclusive, and to take other proactive measures.<sup>74</sup>

In addition to judicial obfuscations of bisexuality, lawyers sometimes strategically engage in similar practices, usually on behalf of gay and lesbian clients, in order to simplify their clients' claims or to make their clients appear similar to heterosexuals.<sup>75</sup> For example, Roberta Kaplan, the attorney representing Edith Windsor in *United States v. Windsor*, used the terms "gay marriage," "straight marriage," "marriages of gay couples," and "marriages of straight people" in her brief and oral argument on behalf of Ms. Windsor, reportedly because she believes that those are the terms used by people who are comfortable with gays and lesbians.<sup>76</sup> However, in contrast to the terms "same-sex marriage" and "different-sex marriage," this terminology erases bisexuals by suggesting that the only two relevant groups are gays and lesbians on the one hand and straight people on the other. Bisexuals are nowhere acknowledged.

Unfortunately, similar terminology, specifically use of the terms 'lesbians and gays' and 'gay people,' is used in the plaintiffs' merits brief before the Supreme Court in *Obergefell v. Hodges*, a case which is pending before the Court as this Article goes to press.<sup>77</sup> Thus, the trend of advocates for lesbian and gay plaintiffs erasing bisexuals continues.

Additionally, Ms. Kaplan's merits brief in *Windsor* argues against the concept of sexual fluidity and specifically avers that Ms. Windsor

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74. Settlement Agreement between Steven Apilado, LaRon Charles and John Ross and the North American Gay Amateur Athletic Alliance (Nov. 23, 2011), *available at* [http://web.archive.org/web/20120121210405/http://www.ncrights.org/site/DocServer/Fully\\_Executed\\_Settlement\\_Agreement\\_-\\_No\\_Schedule\\_A.pdf?docID=9081](http://web.archive.org/web/20120121210405/http://www.ncrights.org/site/DocServer/Fully_Executed_Settlement_Agreement_-_No_Schedule_A.pdf?docID=9081), *archived at* <http://perma.cc/2PCY-9MWX>.

75. See, e.g., Janet E. Halley, "Like Race" Arguments, in *WHAT'S LEFT OF THEORY: NEW WORK ON THE POLITICS OF LITERARY THEORY* 52–53 (Judith Butler et al. eds., 2000).

76. *United States v. Windsor*, 133 S. Ct. 2675 (2013); Pamela S. Karlan et al., Brief on the Merits for Respondent Edith Schlain Windsor, *United States v. Windsor*, No. 12-307, 2013 WL 701228, at \*56 (Feb. 26, 2013); see Oral Argument Tr., *United States v. Windsor*, No. 12-307, 2013 WL 1232726, at \*102 (March 27, 2013); Audio recording: Roberta A. Kaplan, Keynote Speaker, AALS Section on Sexual Orientation and Gender Identity Issues Luncheon, The Ass'n of American Law Schools Annual Meeting (Jan. 5, 2014).

77. Susan L. Sommer et al., Brief for Petitioners, *Obergefell v. Hodges*, No. 14-556 (February 27, 2015), *available at* [http://www.lambdalegal.org/sites/default/files/henry\\_oh\\_20150227\\_petitioners-brief.pdf](http://www.lambdalegal.org/sites/default/files/henry_oh_20150227_petitioners-brief.pdf), *archived at* <http://perma.cc/HMK2-DG7E>.

is a lesbian despite her brief marriage to a man.<sup>78</sup> While there is no reason to question the truth of Ms. Kaplan's averment regarding her client's sexual identity, it is interesting and troubling that attorneys feel compelled to prove their clients in same-sex marriage cases to be lesbian or gay as distinguished from bisexual, although there is no legal reason that bisexuals should have fewer rights.<sup>79</sup>

A similar example occurred in Ted Olson's questioning of his client Sandy Stier in the trial on California's Proposition 8.<sup>80</sup> Ms. Stier had previously been married to a man, and her attorney asked her to confirm that she really was gay, apparently on the assumption that she needed to be gay (rather than bisexual) to claim a right to marriage (or possibly on the assumption that she would have a stronger claim to the right as a lesbian than she would as a bisexual): "How convinced are you that you are gay? You've lived with a husband. You said you loved him. Some people might say, 'Well, it's this and then it's that and it could be this again.' Answer that."<sup>81</sup> Stier confirmed that she was gay, and we can only assume that she in fact identifies that way.<sup>82</sup> Again, what is interesting about the exchange is that Olson apparently felt that it was important to rule out bisexuality in order to win the case,<sup>83</sup> an intuition that was arguably supported by one of the questions Judge Walker posed to the parties prior to closing arguments.<sup>84</sup>

Drawing parallels to interracial marriage, it would be surprising to find evidence of an attorney's having questioned Mr. Loving, the white male plaintiff in *Loving v. Virginia*,<sup>85</sup> about whether he were sure that he could only be attracted to black women. Most people in

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78. Karlan et al., *supra* note 76, at \*26–27.

79. One reason that attorneys may be making this argument, which is related to the concerns about demonstrating immutability that are discussed below, is that "the ability of a given class of plaintiffs to succeed in bringing anti-discrimination claims [has tended to] derive[] largely from the group's ability to successfully analogize their situation to that of an oppressed racial group . . . ." Tweedy, *supra* note 43, at 1469. Thus, the idea that sexual orientation is consistent over time, if proven, could conceivably aid in making a plaintiff's case more convincing because it would allow the case to closely align with the racial paradigm. However, the harms that this strategy inflicts on bisexuals clearly warrant reconsideration of this approach. Additionally, it is arguably a somewhat hollow victory if LGBT rights are premised on an incorrect understanding of sexual orientation.

80. Glazer, *supra* note 56, at 1033.

81. *Id.*

82. *Id.*

83. *Id.* at 1033–34.

84. Specifically, Judge Walker asked the parties to address: "What are the constitutional consequences if the evidence shows that sexual orientation is immutable for men but not for women? Must gay men and lesbians be treated identically under the Equal Protection Clause?" Questions for Closing Arguments, Docket No. C 09-2292 VRW, Document 677, at 10 (June 8, 2010). This question also ignores the existence of bisexuality, but this is arguably understandable given the lack of bisexual plaintiffs in the case.

85. 388 U.S. 1 (1967).

the United States now make their own choices about who they will marry, and, for them, marriage tends to be about individual bonds rather than categories of people.<sup>86</sup> Thus, if a man asked his white, brown-haired girlfriend to marry him and she refused, it is not as though a concerned friend would just suggest another brown-haired white woman as a potential stand-in and then expect the second woman's consent to solve the problem. Individuals are not fungible. Yet, it seems quite ordinary to require lesbian and gay plaintiffs to prove the consistency and exclusivity of their attractions over time, rather than just having to prove their bonds with particular persons.

The temptation to require such proof may arise from the Supreme Court's largely historical focus on immutability and the misperception of bisexuality as mutable.<sup>87</sup> However, while courts were previously often reluctant to accept the argument that homosexuality (much less bisexuality) was immutable,<sup>88</sup> the immutability requirement has been both declining in importance over time and gradually changing in substance—in many cases where it continues to be applied—to more clearly encompass sexual orientation and identity.<sup>89</sup> Under this new approach, immutability has been expanded to include “traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless

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86. See, e.g., Pamela C. Regan et al., *Relationship Outcomes in Indian-American Love-Based & Arranged Marriages*, 110 PSYCHOL. REPORTS 915, 915–16 (2012) (describing marriage by choice as being the “norm” in, and “typical[]” of, Western countries like the United States and noting that persons who enter such marriages emphasize “feelings of mutual compatibility and attraction between the partners”). The idea that marriage focuses on individual bonds between the parties rather than categories of people is also illustrated by Mr. Loving's statement, through his attorney, to the Supreme Court justices during oral argument: “[t]ell the Court I love my wife, and it is just unfair that I can't live with her in Virginia.” Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of Loving v. Virginia*, in FAMILY LAW STORIES 18–19 (2008).

87. See, e.g., Boucai, *supra* note 9, at 468–72.

88. See Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1512 (2009). The question of whether sexual orientation is immutable as that term was traditionally understood is closely tied to the question of whether it is genetically determined or whether it develops as a result of life experience. See, e.g., Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 63 (1996). Some social scientists are now coming to understand sexual orientation and identity as resulting from a combination of the two. DIAMOND, *supra* note 1, at 22.

89. Boucai, *supra* note 9, at 471–72; Nancy Levit, *Theorizing & Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 58–61 (2010); M.K.B. Darmer & Tiffany Chang, *Moving Beyond the “Immutability Debate” in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 27–33 (2009); Schmeiser, *supra* note 88, at 1512–19. Requiring immutability as traditionally understood is also problematic from a policy standpoint. In addition to excluding groups that warrant protections, Janet Halley has pointed out that the immutability requirement “is springloaded to harm racial minorities,” even though race is considered the paradigmatic immutable trait, because of “its hidden assumption that racial discrimination would be morally acceptable if blacks could change the color of their skin . . . .” Halley, *supra* note 75, at 66.



of how easy that change might be physically.”<sup>90</sup>

Additionally, while it may be confusing to some people to think of attraction to both different-sex and same-sex partners as immutable, in fact bisexual orientation is immutable in that it is no more subject to individual control than is any other orientation.<sup>91</sup> Bisexuals are not superheroes who can control their attractions to others at will while everyone else is left at the mercy of the twists and turns of their hearts. Thus, it would make no more sense to deny a bisexual woman’s claimed right to marry her same-sex partner because it is technically possible that she might, at some point in her life, fall in love with a man than it would have made to deny Mr. Loving’s claimed right to marry Miss Jeter because it was conceivable that he might have someday fallen in love with a white woman.

Finally, it must be remembered that to impose a requirement on LGBT rights plaintiffs that they show consistent, exclusive attraction to their own sex over time in order to recover undermines the legitimacy of bisexuality and logically implies that bisexuals should be entitled to fewer rights than lesbians and gays (who, the subtext goes, are entitled to the same rights as heterosexuals because of their similarity to them).

As described above, then, the electronically available employment discrimination case law in the United States reflects a dearth of cases brought by bisexual plaintiffs.<sup>92</sup> Similarly troubling is the fact that, so far, bisexuals have ultimately won *none* of those cases on the merits, although we came across a British case in which a bisexual plaintiff had won a workplace harassment case and the First Circuit recently reinstated a bisexual plaintiff’s state law employment discrimination claim.<sup>93</sup> This evidence suggests that bisexuals may

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90. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (1989) (Norris, J., concurring in the judgment); Boucai, *supra* note 9, at 471–72 (describing other courts’ adoption of this approach).

91. See Boucai, *supra* note 9, at 472; cf. *DIAMOND*, *supra* note 1, at 11 (noting with respect to the related but distinct issue of fluidity of sexual identity among many women over time that, “[e]ven when women undergo significant shifts in their patterns of erotic response [over time], they typically report that such changes are unexpected and beyond their control. . . . This finding is consistent with the extensive evidence . . . showing that efforts to change sexual orientation through ‘reparative therapy’ simply do not work.”).

92. It is conceivable that more bisexual plaintiffs are involved in the cases than appears because some plaintiffs may have sued as gays or lesbians for strategic reasons or because some of the small handful of plaintiffs whose sexual orientation was not apparent in the order or opinion may in fact be bisexual. However, if the former possibility is true, it suggests that bisexuals cannot come out in their own cases alleging discrimination based on bisexuality. This would be a very troubling instance of bisexual erasure. Another possibility is that plaintiffs were assumed to be gay or lesbian based on current relationship status. Given the requirement of showing suspect class membership to prove discrimination, however, it seems unlikely that a plaintiff would fail to state her actual orientation in a pleading unless there was some strategic reason for reframing it.

93. *Harassment of Bisexual Employee*, *supra* note 52; *Flood v. Bank of America*, No. 14-0168 (1st Cir. Feb. 27, 2015).



have difficulty accessing justice and may be unable, in many circumstances, to obtain quality representation (*Rowland* and *Apilado* being among the notable exceptions).

Relatedly, the larger context of cases addressing LGBT rights demonstrates that judges obfuscate bisexuality even in cases like *Romer* in which the laws at issue explicitly discriminate against bisexuals. And in cases such as *Apilado* where bisexual plaintiffs sue on the basis of sexual orientation discrimination, judges may not fully understand what bisexuality is and how discrimination against bisexuals occurs. Finally, the strategies highly skilled attorneys use in the course of advocating for lesbian and gay clients also may diminish the legitimacy of bisexuality. We see this in Roberta Kaplan's references to gay and straight marriages and in her arguments about lack of sexual fluidity in *Windsor*, as well as in Ted Olson's examination of his client, Sandy Stier, in *Perry*.

All of this information provides evidence of discrimination against bisexuals, but, with the exception of the facts in *Apilado* and *Flood* (the First Circuit case), the information does not tell us about the actual experiences of bisexuals. Instead, through courtroom tactics, judicial voice, and perhaps the decisions of individual lawyers to refuse representation, the lives of bisexuals are erased from, not only the legal record, but also the jurisprudential imagination.

We set out to answer the question of what discrimination bisexuals experience through our survey, particularly in the employment discrimination context, and found that a surprising number of respondents (slightly over 50 percent) reported having experienced employment discrimination, broadly defined, at some point in their lives.

## II. WHAT DISCRIMINATION DO BISEXUALS FACE IN THE WORKPLACE?

### A. Literature Review

Based on a review of existing literature on employment discrimination against LGBT people, our study appears to be the first descriptive, quantitative study designed to specifically measure the subjective experiences of bisexuals with employment discrimination, broadly defined.<sup>94</sup> Most other available studies of employment discrimination against LGBT people take one of three approaches: (1) not including bisexuals; (2) combining data for bisexual women with data

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94. Heidi Bruins Green et al. asked additional employment discrimination questions of their bisexual respondents, which are not included in their *Journal of Bisexuality* piece but which may be addressed in a later piece. See Bruins Green et al., *supra* note 39; E-mail from Heidi Bruins Green to author (Oct. 11, 2011 at 6:05 P.M.) (including attachment of survey questions) (on file with author).

for lesbians or combining data for bisexual men with data for gay men or; (3) combining all data regarding LGBT people together.<sup>95</sup> We found two other studies that separately measure employment discrimination against bisexuals, both of which also address discrimination against gays and lesbians: Gregory M. Herek's 2008 article *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates From a National Probability Sample* and Pew Research Center's *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*.<sup>96</sup> However, both defined employment discrimination in a significantly more narrow way than we did. For instance, Herek limited the question to instances where a person was fired, denied a job, or denied a promotion, whereas, as further explained below, we defined discrimination broadly to include harassment, unequal benefits, and other types of unequal treatment.<sup>97</sup> While Pew Research Center's single question on subjective experiences with employment discrimination was somewhat broader than Herek's, Pew Research Center similarly focused on limited types of employment discrimination. Pew's Survey asked, "For each of the following, please indicate whether or not it has happened to you because you are, or were perceived to be [gay, lesbian, or bisexual]. . . . Been treated unfairly by an employer in hiring, pay, or promotion."<sup>98</sup> Again, our definitions were substantially broader, as our entire study was focused on workplace discrimination and we wanted to find out as much as possible about bisexuals' experiences in the workplace, given the little that is known.

Both Herek's and Pew Research Center's findings indicate that bisexuals are less likely to experience employment discrimination than gays and lesbians. Herek found that roughly 16% of gay men and lesbians reported having experienced such discrimination compared to 3.7% of bisexual men and 6.8 % of bisexual women.<sup>99</sup> Herek, however, did not attribute the lower rates of employment discrimination reported by bisexuals to lower rates of societal stigma against them. Rather, having previously found that heterosexuals express higher

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95. S.F. HUMAN RIGHTS COMM'N LGBT ADVISORY COMM., *supra* note 1, at 3; *see also* James M. Croteau, *Research on the Work Experiences of Lesbian, Gay, and Bisexual People: An Integrative Review of Methodology and Findings*, 48 J. OF VOCATIONAL BEHAVIOR 195, 196–98 (1996); Michele J. Eliason et al., *Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Nurses' Experiences in the Workplace*, 27 J. OF PROF'L NURSING 237, 239 (2011).

96. Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates From a National Probability Sample*, 24 J. OF INTERPERSONAL VIOLENCE 54 (Jan. 2008) [hereinafter Herek, *Hate Crimes*]; PEW RESEARCH CENTER, *supra* note 31.

97. Herek, *Hate Crimes*, *supra* note 96, at 59.

98. PEW RESEARCH CENTER, *supra* note 31, at 148–49.

99. Herek, *Hate Crimes*, *supra* note 96, at 61.

rates of stigma towards bisexuals than towards lesbians and gays, Herek attributed bisexuals' lower rates of employment discrimination to their comparative lack of visibility in the workplace.<sup>100</sup>

Pew Research Center's very recent report, also based on a nationally representative probability sample, similarly indicated that bisexuals reported lower rates of employment discrimination than did gay men and lesbians.<sup>101</sup> However, Pew Research Center's study indicated higher rates of such discrimination for all LGB groups and further showed a higher proportion of bisexuals reporting discrimination *vis a vis* lesbian and gay respondents: 15% of bisexuals compared to 23% of lesbians and 26% of gay men.<sup>102</sup>

The relative lowness of rates of employment discrimination against LGB people reported in both the Herek and Pew Research Center studies may be due to the somewhat narrow phrasing of the single question each asked on the subject. The rates of discrimination against LGB people in both studies appear to fall on the low side when compared to other studies. For instance, in a review of existing studies, James M. Croteau reported that LGB workers experience pervasive workplace discrimination, with reported rates from different studies ranging from 25% to 66%,<sup>103</sup> although more recent studies tend to report somewhat lower rates.<sup>104</sup>

Another important recent study, which specifically focused on bisexuals in the employment context, was conducted by Heidi Bruins Green, Nicholas R. Payne, and Jamison Green.<sup>105</sup> Bruins Green and her colleagues sought to measure bisexuals' satisfaction with their workplace environments, as well as other factors, such as their levels of outness at work, their perceptions of co-workers' attitudes towards bisexuals, and the prevalence, effect, and content of employment non-discrimination policies at bisexuals' places of employment.<sup>106</sup>

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100. *Id.* at 69. In fact, Herek found in the earlier study that heterosexuals rated bisexual men and women lower than any of the other fourteen named political, racial, ethnic, and religious groups—except for injecting drug users. Herek, *Heterosexuals*, *supra* note 39, at 268. Pew Research Center's study corroborates bisexuals' lack of visibility in the workplace. PEW RESEARCH CENTER, *supra* note 31, at 44.

101. PEW RESEARCH CENTER, *supra* note 31, at 42, 113.

102. *Id.* at 42.

103. Croteau, *supra* note 95, at 198. A similarly high level of discrimination (60%) was reported by college and university student affairs professionals in a more recent study by Croteau. James M. Croteau & Julianne S. Lark, *On Being Lesbian, Gay, or Bisexual in Student Affairs: A National Survey of Experiences on the Job*, 46 NASPA J. 382, 390 (2009).

104. M.V. LEE BADGETT ET AL., THE WILLIAMS INST., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 3 (June 2007) (stating that fifteen recent studies report employment discrimination rates against LGB people ranging from 15% to 43%). *But see* Croteau & Lark, *supra* note 103, at 390.

105. Bruins Green et al., *supra* note 39.

106. *Id.*

The authors did not report data on bisexuals' experiences with employment discrimination, however.

The studies described above were the most relevant to our project. Other studies examine discrimination against LGBT workers in specific industries<sup>107</sup> or focus on specific types of discrimination against LGBT workers.<sup>108</sup> A small number of studies examine the specific experiences of bisexual workers, but in a somewhat narrower context than our study,<sup>109</sup> and one British publication provides practical advice for employers on supporting bisexual workers based on interviews and focus groups.<sup>110</sup>

## *B. Methodology and Results of the Current Survey*

### *1. Methodology*

We reviewed other employment discrimination surveys and adapted our questions from those surveys. We also followed the Williams Institute's Best Practices for Asking About Sexual Orientation on Surveys with minor modifications.<sup>111</sup> Most of our questions regarding the types of employment discrimination experienced were adapted to the context of sexual orientation discrimination from Richard Roessler et al.'s *The Employment Discrimination Experiences of Adults with Multiple Sclerosis*, which contained the most comprehensive

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107. See, e.g., Eliason et al., *supra* note 95 (LGBT and Queer/questioning nurses); Croteau & Lark, *supra* note 103 (college and university student affairs professionals who identify as LGB); Jeff Frank, *Gay Glass Ceilings*, 73 *ECONOMICA* 485, 485 (2006) (analyzing salaries and ranks of LGB non-academic and academic university staff in the United Kingdom).

108. See, e.g., John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 *INDUS. & LAB. RELATIONS REV.* 622, 622 (2003) (analyzing effects of sexual orientation and gender on earnings); M.V. Lee Badgett, *The Wage Effects of Sexual Orientation*, 48 *INDUS. & LAB. RELATIONS REV.* 726, 726 (1995) (same).

109. See, e.g., Thomas Köllen, *Bisexuality and Diversity Management—Addressing the B in LGBT as a Relevant 'Sexual Orientation' in the Workplace*, 13 *J. OF BISEXUALITY* 122, 131 (2013) (assessing the effectiveness of diversity management techniques in German companies in improving the workplace climate for bisexuals); TUC, *FOCUSING ON BISEXUAL TRADE UNIONISTS: THE RESULTS OF A TUC SURVEY AND RECOMMENDATIONS FOR CHANGE* 6 (2010), <http://union.org.nz/sites/union/files/2010%20TUC%20Survey%20of%20Bisexual%20Unionists.pdf>, archived at <http://perma.cc/5NBA-RY9C> (presenting results of a survey of bisexual members of trade unions and describing the invisibility experienced by some respondents and the continued existence of inaccurate stereotypes of bisexuality).

110. Chamberlain, *supra* note 23 (providing advice for employers on providing support for bisexual workers based on interviews and focus groups).

111. WILLIAMS INST., *SEXUAL MINORITY ASSESSMENT RESEARCH TEAM, BEST PRACTICES FOR ASKING ABOUT SEXUAL ORIENTATION ON SURVEYS* (2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf>, archived at <http://perma.cc/73KY-GKR9>.

set of questions examining employment discrimination that we could find.<sup>112</sup> We asked about diverse types of employment discrimination and also utilized a frequency scale for each answer ranging from “Never” to “Regularly.” Using a range of questions about employment discrimination, rather than a single-term measure, is recommended by other researchers such as Croteau.<sup>113</sup> We validated the survey by distributing it to colleagues in the social sciences for review, and we modified some questions in response to their recommendations.

After Hamline University’s Institutional Review Board approved the project in June 2012 and after we had conducted our validation, we distributed the online survey beginning in late July 2012 by contacting LGBT and bisexual organizations and listservs nationwide via e-mail and asking the organizations and listserv owners to distribute the survey. We also posted the survey ourselves on listservs to which we belonged and made some use of Facebook to distribute the survey. Although we did not attempt to track rates of responses from each group we contacted, several staff members and listserv owners responded and either expressed willingness to distribute the survey or described the efforts they had undertaken to do so. We also contacted friends and colleagues in our disciplines and asked them to consider taking the survey and to distribute it to others who may be interested (snowball distribution). Listserv participants and colleagues in other countries also offered to help distribute the survey internationally, and we made a few attempts ourselves to reach out to LGBT groups in other English-speaking countries such as Canada and Ireland.

After it became clear that our initial respondents were predominantly white, with only small percentages of African-American and Native American respondents and a very small percentage of Latino/a respondents, we identified additional LGBT groups of color to reach out to and also contacted professional organizations such as the Association of American Law Schools Section on Minority Groups. However, although these efforts had some positive impact, they ultimately did not make a substantial difference.

In response to comments received by survey respondents during the course of the survey, we made changes to two questions regarding respondents’ current employment to allow respondents to specify that they either were not currently employed or that the question did not apply to them. These changes did not affect the core of our results,

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112. Richard Roessler et al., *The Employment Discrimination Experiences of Adults with Multiple Sclerosis*, 77 J. OF REHABILITATION 20, 23 (Table 1) (2011).

113. Croteau, *supra* note 95, at 204.



which address prior experiences with employment discrimination, rather than current workplace dynamics.

## 2. Results

### a. General Respondent Demographics

A total of 190 respondents completed the survey or some portion of it. One hundred and seventeen of them currently identified as bisexual, including those who chose “Other” and wrote in an answer that included “bisexual” such as “Queer/bisexual” or “bisexual/pansexual.” Also included in that 117 is a respondent who wrote in “bi-leaning, married monogamously to a cisgendered member of the opposite gender” because we were focused on bisexual self-identification rather than strictly on bisexual behavior. Broadening the sexual identity category to include both bisexuals and others with fluid identities, such as those who wrote in “pansexual” or similar terms in the “Other” category, increased the number of relevant respondents to 125.<sup>114</sup> Only 10.1% of the respondents identified as gay or lesbian and 3.0% identified as straight or heterosexual.<sup>115</sup>

Of the total respondents, 64.5% were female, 28.4% were male, and 7.4% identified themselves as “Other.”<sup>116</sup> We also asked if respondents identified as transgender, and 6.5% of the total respondents indicated that they did. In terms of race, we allowed respondents to check multiple boxes. Of the total respondents, 91% identified as White, 3.6% as Black or African American, 1.2% as Asian or Asian-American, 0.6% as Native Hawaiian or Pacific Islander, 3.6% as American Indian or Alaska Native, and 6.6% as Other. Some of those who marked “Other” for race wrote in answers such as “Black British,” “mixed” or “South Asian.” Additionally, 1.8% of respondents reported that they were Hispanic or Latino/a. Seventy-eight percent of the total respondents were from the United States, 10% were from the United Kingdom, and 5.8% were from Australia. Other countries represented included Germany, the Netherlands, and Canada. Four people did not complete the survey.<sup>117</sup>

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114. We did not include those who wrote in “Queer” by itself in the “Other” category as fluid-identified because queer can mean so many different things. *See, e.g., A Definition of “Queer,”* PFLAG, <http://community.pflag.org/page.aspx?pid=952> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/A5W7-AEGZ>.

115. These percentages include only those who checked “gay or lesbian” or “straight or heterosexual.” No respondents who checked “Other” are included in these percentages.

116. The most common answer specified in this category was “intersex.”

117. Only a few of our questions, such as the initial long question on how frequently if ever a respondent experienced any of the numerous types of discrimination listed, were required to be answered. Thus, the four people who did not complete the survey did not address all of the required questions.



Notably, the percentages of discrimination faced by international respondents of all orientations were generally similar to the overall percentage of discrimination experienced by U.S. respondents of all orientations, with the exception of Germany, where our one respondent did not report discrimination. The percentages of international respondents facing discrimination ranged from 47% in the United Kingdom to 64% in Australia. The overall percentage of United States respondents who reported discrimination was 59%.

The most commonly represented U.S. states were California (20 respondents), Washington (19 respondents), Minnesota (16 respondents), New York (15 respondents), and Massachusetts (8 respondents). As appears to be typical of respondents to surveys on sexual orientation discrimination,<sup>118</sup> our respondents were highly educated, with all of them having completed at least some college and 39.3% having completed graduate or professional school. In terms of age, 75.3% of respondents were 45 or under, with the largest percentage, 16.6%, being in the 31–35 category.

Of the bisexual respondents specifically, 90.4% identified as White, 4.3% as American Indian or Alaska Native, 3.5% as Black or African American, and 7.0% as Other, with four people in the Other category specifying designations that indicated that they were persons of color, such as “mixed,” “mulatto/a,” “Black British,” or “South Asian.” One person, or 0.9%, identified as Native Hawaiian or other Pacific Islander and two people (1.7%) identified as Asian or Asian-American. Additionally, one person (0.9%) reported identifying as Hispanic or Latino/a. In all, we had 16 bisexual-identified respondents who were persons of color.<sup>119</sup> In terms of sex of the bisexual respondents, 64.1% of them described themselves as female, 33.3% as male, and 2.6% as Other. Additionally, 3.4% identified themselves as transgender. The age and education breakdowns were similar for bisexuals as for respondents as a whole.

#### *b. Discrimination-Related Demographics and Timing*

Slightly over half of bisexual-identified respondents (51.7%) reported having experienced employment discrimination at some point in their lives. Examining the responses of all those with fluid identities resulted in a slightly higher level of discrimination (53.2%). Bisexual-identified respondents of color reported a significantly higher rate of discrimination based on sexual orientation—68.8% or 11 out of

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118. Croteau, *supra* note 95, at 201.

119. This number includes the Hispanic/Latino/a respondent. Moreover, all of the respondents of color who reported having experienced discrimination stated that it had occurred in the United States or in the United Kingdom.

16. The initial question inquired about the frequency of respondents' experiences, if any, with nearly forty types of employment discrimination (see Table 1). After this initial, broad-based question, many of the remaining questions were directed at respondents' most recent experience of discrimination.

It is important to note that, because our list of types of discrimination was very broad, not all of the respondents' negative employment experiences that were based on their sexual orientations, if proven, would be actionable in and of themselves. Taking harassment as an example, state law, like federal law, tends to require that harassment based on membership in a protected class be severe or pervasive to be actionable (unless the harassment has resulted in a tangible employment action).<sup>120</sup> Thus, a person who had experienced only one homophobic slur at work would not likely be able to sue for sexual orientation discrimination under state law. However, respondents could not reasonably be expected to be able to accurately estimate whether any harassment they faced would be considered severe or pervasive as a legal matter or to generally evaluate the viability of their potential legal cases, so we decided to err on the side of collecting information about experiences that were probative of discrimination even if each experience on its own would not necessarily qualify as actionable discrimination.<sup>121</sup>

Notably, limiting the focus to more traditional types of discriminatory actions such as firing and failure to hire also reveals that a significant—although much smaller—portion of our respondents believed they had been subject to those types of discrimination. For example, 12.8% (n=15) of bisexual-identified respondents believed that they had not been hired due to their sexual orientation, and 7.7% (n=9) of them reported that they had been fired or terminated based on sexual orientation.

In terms of when the most recent experience occurred, the most common answer was between one and five years ago (37.1% of bisexual identified respondents and 35.3% of all fluid-identified respondents). Alarming, 21.0% of bisexuals and 25.0% of all those with fluid identities had experienced an instance of employment discrimination within

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120. See, e.g., *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) (discussing the severe or pervasive requirement under Title VII); BARBARA T. LINDERMAN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1304 (4th ed. 2007) (same); Carol Schultz Vento, *When is Work Environment Intimidating, Hostile or Offensive, so as to Constitute Sexual Harassment Under State Law*, 93 A.L.R.5th 47, §§ 5, 13 (2001) (summarizing cases that apply the severe or pervasive requirement under state law in the context of sexual harassment).

121. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (acknowledging in a case about a company's failure to promote an employee based on her sex that "stereotyped remarks" do not "inevitably prove" discrimination but stating that such remarks can be evidence of discrimination).

the last six months. However, a composite of roughly 35% reported that the most recent incident was either five to ten years ago or more than ten years ago (35.5% of bisexuals and 33.8% of all those with fluid identities).

We asked what relationships respondents were in at the time of the most recent experience of employment discrimination as well as how they identified at work at that time. Slightly more bisexual-identified respondents were in a different-sex monogamous relationship (19.4%) than in a same-sex monogamous relationship (14.5%). Roughly a third of the bisexual respondents were in a polyamorous or non-monogamous relationship (33.9%) and roughly a third (32.3%) were not in a relationship at the time. The percentage breakdown for relationships was very similar for the group of all respondents with fluid identities. For the respondents in polyamorous or non-monogamous relationships at the time of the most recent incident, most reported that their partners were some combination of persons of the same sex, those of a different sex, and/or transgender or intersex persons (71.4% of bisexual respondents and 73.9% of all fluid respondents). The remainder of respondents in polyamorous or non-monogamous relationships were partnered with persons of a different sex.<sup>122</sup>

We asked about how respondents self-identified at work at the time of the most recent incident both because some respondents may have been closeted and because people's identities may change over time, a phenomenon that is quite common for women especially.<sup>123</sup> The

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122. Because relationships with different-sex or same-sex persons often serve as a proxy for others in assessing a person's sexual orientation, thus increasing the invisibility of bisexuals and other fluid-identified persons, *see, e.g.*, Chamberlain, *supra* note 23, at 12; TUC, *supra* note 109, at 3, it was somewhat surprising to see that a substantial percentage of bisexual and other fluid respondents reported experiencing discrimination while solely in different-sex relationships. We assume that respondents' self-identification as bisexual or fluid, in some cases, and the knowledge or perception that they were other than heterosexual, in others, was more salient to those engaging in the discrimination than the make-up of their relationships at the time. This was certainly the case with the respondent who volunteered to be interviewed. She disclosed her bisexuality and polyamorous identity to her employer and then was fired, despite being in an different-sex marriage at the time and not being involved in any polyamorous activity. *See infra* note 128 and associated text.

The fact that about a third of our respondents were in nonmonogamous or polyamorous relationships at the time of the most recent incident of discrimination accords with research suggesting that bisexuals as a whole may be more open to nonmonogamy than straight or gay people. *See, e.g.*, Zhana Vrangalova Ph.D, *Are Bisexuals Really Less Monogamous Than Everyone Else? When it comes to commitment, does sexual orientation make a difference?*, PSYCHOL. TODAY (Sept. 27, 2014), <https://www.psychologytoday.com/blog/strictly-casual/201409/are-bisexuals-really-less-monogamous-everyone-else>, archived at <https://perma.cc/84RG-ZRFL>; Tweedy, *supra* note 43, at 1480 n.77 (citing Geri Weitzman, *Therapy with Clients Who Are Bisexual and Polyamorous*, in *AFFIRMATIVE PSYCHOTHERAPY WITH BISEXUAL WOMEN AND BISEXUAL MEN* 137, 141 (Ronald C. Fox ed., 2006)).

123. *See* Tweedy, *supra* note 43, at 1471 n.34 (citing DIAMOND, *supra* note 1, at 82–85, 87).

majority of both bisexual-identified respondents and all those with fluid identities self-identified as bisexual at that time (61.3% of bisexuals and 55.9% of all fluid-identified respondents). Slightly over a fifth (22.6% of bisexuals and 20.6% of fluid-identified respondents) reported that they did not self-identify and were presumed heterosexual. Several respondents (12.9% of bisexuals and 20.6% of fluid-identified respondents) picked Other. Among bisexual-identified respondents who chose “Other,” several explained that, although they did not self-identify at work, they were known not to be straight by at least some people at their workplaces. Additional responses from the group of all fluid respondents included “Genderqueer pansexual,” “panoramic asexual,” and “Queer/fluid/lesbian.”

In the majority of cases, the most recent incident of employment discrimination experienced by bisexual-identified respondents and all fluid respondents occurred in an urban setting (59.7% for bisexual identified respondents and 58.8% of all fluid respondents). Similarly, most of these respondents reported that the most recent incident occurred in the private sector (58.1% of bisexual-identified respondents and 58.8% of all fluid respondents) with a roughly equal split in the remainder between public sector and non-profits. For a majority of respondents who had experienced workplace discrimination, the most recent instance had occurred in a workplace with over one hundred employees (60.7% of bisexuals and 58.2% of all fluid-identified respondents). The largest portion of these respondents (32.8% of bisexuals and 29.9% of all fluid-identified respondents) had experienced the most recent incident while working for an employer with over one thousand workers.

### *c. Types of Discrimination Experienced*

We asked respondents “how frequently, if ever,” they believed they had experienced “any of the following forms of discrimination due to [their] (perceived/presumed) sexual orientation in any work environment.” By far the most common type of discrimination experienced by bisexuals and all those with fluid identities was “inappropriate jokes or insults in work or break settings,” with 58.1% of bisexual-identified respondents and 59.2% of all fluid respondents reporting having experienced this type of discrimination at least once and almost 10% of each group reporting that it happens regularly (9.4% of bisexuals and 9.6% of all fluid respondents).<sup>124</sup> Other quite common types of sexual

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124. This percentage was higher than the total who noted, in response to the next question, that they had experienced some type of employment discrimination. A possible explanation for this is that some respondents did not believe experiencing jokes or insults rises to the level of discrimination.

orientation discrimination included verbal sexual harassment (30.8% of bisexuals and 31.2% of all fluid-identified respondents reported having experienced this at least once); unfair access to fringe benefits (27.4% of bisexuals and 29% of fluid-identified respondents had experienced this);<sup>125</sup> verbal harassment based on gender expression (25.6% of bisexuals and the same proportion of all fluid-identified respondents); verbal harassment based on sexual identity (24.8% of bisexuals and 25.6% of fluid-identified respondents); and threats or verbal abuse in work or break settings (20.5% of bisexual respondents and 19.2% of fluid-identified respondents). Additionally, over 15% of bisexual and fluid respondents reported having experienced the following four types of discrimination at least once: receiving excessive supervision or oversight on the job (18.8% of bisexuals and 20.0% of fluid-identified); different or harsher standards of performance (19.8% of bisexuals and 22.6% of fluid-identified); discriminatory questions or comments during the job interview (21.4% of bisexuals and 21.6% of fluid-identified); and inappropriate questions or statements on the job application (15.5% of bisexuals and 20.2% of fluid identified). Having received excessive or inappropriate discipline was somewhat more common for fluid-identified respondents as a whole (17.6%) than for bisexuals (14.5%). A chart showing the main question on discrimination and the answers of bisexual respondents only is provided in Table 1.<sup>126</sup>

TABLE 1. TYPES OF DISCRIMINATION EXPERIENCED BY  
BISEXUAL RESPONDENTS

Indicate by marking the bubbles in the corresponding column how frequently, if ever, you believe you have experienced any of the following forms of discrimination due to your (perceived/presumed) sexual orientation in any work environment:						
Answer Options	Never	Once	Rarely	Occasion-ally	Regu-larly	Response Count
Discriminatory questions or comments during the job interview (e.g., questions explicitly or implicitly asking about sexual orientation)	92	13	6	4	2	117

125. The example listed in the survey for this question was a lack of domestic partnership benefits.

126. In the actual survey, many of the types of discrimination listed had examples next to them, but those examples are not shown in Table 1.

Answer Options	Never	Once	Rarely	Occasion-ally	Regu-larly	Response Count
Inappropriate questions or statements on the job application	98	4	8	4	2	116
Unfair use of written or oral tests for employment screening purposes	106	4	5	2	0	117
Failure or refusal to hire due to sexual orientation	102	6	2	6	1	117
Employer purportedly sought sexual minority applicants as part of a diversity initiative but nonetheless discriminated against them	104	5	1	6	0	116
Restricted access to advertised employment opportunities	107	3	2	3	0	115
Restriction to a certain type of job	106	3	3	2	1	115
Assignment to inappropriate job tasks or duties	106	4	2	2	1	115
Different or harsher standards of performance	93	6	8	5	4	116
Excessive or inappropriate discipline	100	6	1	7	3	117
Unfair compensation or wages	102	6	4	4	0	116
Unfair access to fringe benefits	85	9	7	9	7	117
Unfair access to maternity leave or other unfair treatment in the context of pregnancy or parenthood as a result of sexual orientation	106	4	1	2	3	116
Denial of seniority rights and privileges	104	5	2	4	1	116
Denial of pension or other retirement benefits	112	2	1	0	1	116
Lack of support from a labor organization	108	4	0	3	1	116
Limited access to job-related training or continuing education	108	4	1	0	2	115



Answer Options	Never	Once	Rarely	Occasion-ally	Regu-larly	Response Count
Restricted access to general use areas, restrooms, and/or recreational areas	113	0	1	2	0	116
Unfair rules related to working conditions, job environment, or employment privileges	106	6	4	0	1	117
Receiving excessive supervision or oversight on the job	95	7	7	6	2	117
Inappropriate jokes or insults in work or break settings	49	11	28	18	11	117
Threats or verbal abuse in work or break settings	93	12	8	4	0	117
Physical intimidation or abuse in work or break settings	106	3	4	3	1	117
Physical sexual harassment	101	6	3	7	0	117
Verbal sexual harassment	81	10	11	12	3	117
Physical harassment based on gender expression	112	2	0	3	0	117
Verbal harassment based on gender expression	87	7	9	13	1	117
Physical harassment based on sexual identity	106	6	2	3	0	117
Verbal harassment based on sexual identity	88	7	11	10	1	117
Denial or delay of promotion	102	4	4	6	1	117
Unfair demotion	107	5	1	4	0	117
Unfair suspension	113	4	0	0	0	117
Forced retirement	116	1	0	0	0	117
Unfair layoff practices	107	5	1	0	2	115
Firing or termination related to sexual orientation	107	7	1	0	1	116
Failure of employer to reinstate employment	111	5	1	0	0	117
Denial of severance pay	113	3	0	1	0	117

Answer Options	Never	Once	Rarely	Occasion- ally	Regu- larly	Response Count
Negative job references provided by employer or former employer	105	7	3	0	2	117
<i>answered question</i>						117
<i>skipped question</i>						0

We also asked respondents two related open-ended questions: first, to describe the most recent incident of discrimination and then to describe their most detrimental experience with workplace discrimination. Some themes emerged in the responses to these questions. Several respondents recounted having been fired or forced to leave their workplaces due to their bisexuality. One person reported having to move to find work and alluded to health problems that had developed as a result of the discrimination.

Another important theme was hypersexualization. Two female respondents reported that co-workers or supervisors viewed them as sexually available after learning of their bisexuality and then proceeded to make verbal or physical advances. A third female respondent, who identified herself as being Native American as well as White, was asked by a co-worker in a law firm about her interest in threesomes and public sex after he learned about her bisexuality from the Internet. The co-worker then proceeded to extort help with his work from her based on threats that he would tell their supervisors of her sexual orientation. A fourth female respondent recounted being told frequent jokes about threesomes based on her bisexuality in her job in student affairs at a university. One male respondent of Native American heritage also reported hypersexualization, explaining that his manager laughed when a co-worker made jokes about the supposed looseness of his anus.

A third theme was discrimination by gays and lesbians in the workplace, usually in the form of biphobia.<sup>127</sup> For example, two respondents reported being told directly by gay or lesbian supervisors that the supervisors disapproved of their bisexuality. One of these two respondents also reported, in response to the question about her most detrimental experience of discrimination, that an LGBT youth organization had rejected her application for her “dream job” because she “was not gay enough.” She further explained: “I ended up internalizing feelings of not being a ‘real queer’ or ‘queer enough’ person and struggled with feeling alienated from the queer community in my city for a long time. It’s taken me 10 years to get back involved.”

127. See, e.g., BARKER ET AL., *supra* note 2, at 4 (defining biphobia).

Similarly, a bisexual transgender man reported that, during an interview for a position addressing HIV prevention for bi and gay men, he was told that he “would not be perceived as ‘gay’ enough, or as a ‘real man’” and that the other interviewers failed to speak up or intervene. This respondent perceived the remark to be both about his sexuality and his gender fluidity. Two other respondents reported having hurtful jokes about bisexuality directed at them by gay and lesbian co-workers.

Another theme that emerged was discrimination by religious individuals or religiously affiliated organizations. Only three people reported such discrimination, but, in at least two of the cases, it had devastating effects on the respondents’ lives. In one case, a female respondent contacted us after we distributed the survey and offered to be interviewed.<sup>128</sup> During the interview, she described an incident that occurred shortly after she had moved across the country with her husband and young child. She obtained a job working in the social services division of a religiously affiliated non-profit. Not long after starting the job, she began to have concerns about some of the organization’s policies, and she decided to come out as bisexual and polyamorous via a letter to her two immediate supervisors. They were then forced to fire her by those higher up in the organization. She filed a complaint with a state agency and engaged in some activism to bring attention to the organization’s discriminatory actions against her. Apparently as a result, she had not been able to find work when we talked to her, several months after the incident. She also had experienced stomach problems as a result of the experience and reported being under extreme financial stress due to the difficulty of providing for her child. Her husband, who had a history of mental health problems, experienced worsening mental health after the incident and had to leave his part-time job. The couple almost divorced in response to the stress caused by the firing and its aftermath.

In the second case, a woman who had been employed as a musician by a religiously affiliated band reported constant pressure to alter her appearance to be more feminine as well as repeated questioning about whether she was a lesbian. She eventually was fired and thereafter emigrated to Austria and then Germany in reaction to the incident. She now works for herself in order to avoid any possibility of discrimination.

Finally, although not overtly similar to incidents reported by other respondents, four additional responses are of interest. One female academic of Native American, White, and Jewish heritage reported being denied tenure in part as a result of being outed by her own

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128. This interview was separately approved by the Chair of Hamline’s Institutional Review Board.

sexuality-related research, and a male respondent noted that he would lose his professional license (of unspecified type) in South Carolina if his and his partner's bisexuality were discovered because his orientation would be considered evidence of "moral ineptitude." Next, a male respondent reported experiencing physical violence at his workplace based on his sexual orientation—a supervisor would throw things at him and call him a "faggot." Lastly, one respondent who stated that she had not been discriminated against commented specifically on the invisibility of bisexuality.

*d. Remedies Sought*

In hopes of finding out why so few bisexual employees appear to pursue litigation in response to discrimination, we asked respondents a series of questions relating to relief sought and barriers to relief, if any, that respondents had encountered. As a preliminary note, it is not possible to definitively determine whether any laws or rules were in place that prohibited the sexual orientation discrimination that our respondents reported. This is because we lack information on the precise date of the discrimination in each case, and because, at least in the United States, a confusing array of state, local, and, in some cases, tribal laws govern (or fail to govern) this type of discrimination. Furthermore, employer policies may prohibit the discrimination even in the absence of a relevant law. Additionally, as noted earlier, it is impossible to tell from the information we have whether a given incident would be actionable under applicable law. Nonetheless, we did ask three questions that provide some information on this question. First, we asked respondents what country the most recent incident of discrimination occurred in, and we then asked United States respondents to identify the city and state. Of the bisexual-identified respondents who answered this question and who experienced the most recent incident in the United States, 71.7% of them experienced the incident in a jurisdiction that *currently* has a statewide law in place prohibiting discrimination based on sexual orientation.<sup>129</sup>

We also asked whether there was an employer policy prohibiting sexual orientation discrimination at the workplace where the most recent incident occurred and whether there were laws in place "at any level" at the time that protected against such discrimination. As to employer policies, 50% of bisexual identified respondents reported that a policy prohibiting sexual orientation discrimination was in place,

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129. See HUMAN RIGHTS CAMPAIGN, *supra* note 46 (listing state laws). We omitted from this count one respondent that listed the most recent incident as having occurred in three states, two of which had protections in place.

approximately 16% said that no such policy was in place, and about 34% said that they did not know. The breakdown for all fluid respondents on employment policies was 48.5% had such policies, about 16% did not, and just over 35% of respondents did not know.<sup>130</sup> As to whether any laws were in place at the relevant time that protected against sexual orientation discrimination, 56.5% of bisexual respondents said yes, 17.7% of such respondents said no, and 25.8% of bisexual respondents did not know. For all fluid-identified respondents, the breakdown was 57.4% yes, 16.2% no, and 26.5% did not know. Thus, it does appear that, in a majority of cases, there were laws or policies in place prohibiting sexual orientation discrimination, although precise percentages are impossible to estimate.

Only a handful of respondents (six) reported having filed some kind of complaint in response to the discrimination (9.7% of bisexual-identified respondents and 8.8% of all fluid-identified respondents).<sup>131</sup> Five of the six stated that the complaint was filed internally in the company, and two of those five also filed a complaint in a state, local, or tribal agency. The sixth respondent noted that a complaint was filed in the "Department office," which appears to mean that the complaint was filed internally. Of the two people who filed complaints in agencies, one case was still pending and the other had been resolved unfavorably to the respondent. Three of the respondents had their internal complaints resolved in a way that was favorable to them.

We asked the six respondents who had sought relief how frequently they had faced barriers or obstacles. Reassuringly, three people, or half, reported that they had never faced barriers or obstacles. These three respondents had all filed internal complaints through which the issue had been resolved favorably to them. The three other respondents, two of whom had filed complaints in agencies, reported that they faced barriers or obstacles "somewhat often." Two of these respondents had cases that were still pending, and the third had his complaint filed in an agency resolved unfavorably to him. The respondents who had faced barriers or obstacles described the barriers as disbelief and downplaying of the situation, uncertainty about the legality of the conduct that resulted in foot dragging, and denial of charges by the employer followed by a provision of references that were devoid of information.

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130. It is possible that persons who identify as pansexual or omnisexual or who use other terms for their sexual identities that are less widely recognized could have trouble accessing protections under policies and laws that define sexual orientation using more standardized terms.

131. A seventh person reported having filed a complaint but specified Facebook as the place where it was filed. We omitted this response because the question was directed at legal and administrative complaints.



*e. Decisions Not to Pursue Relief*

In addition, we asked those who had experienced discrimination but had not filed a complaint why they had not done so and provided several reasons to choose among, as well as an open-ended “Other” category. The most common response (except for “Other”) was “Did not think I would get the assistance I needed” (45.5% of self-identified bisexuals and 42.6% of all fluid-identified respondents). In the open-ended responses, several respondents noted a fear of “rock[ing] the boat” or creating drama for others in the workplace. Additionally, a female respondent noted a fear of retaliation and an intersex person noted an inability to afford gaining a reputation as a freelancer who was difficult to work with. One respondent noted that the incident had occurred in front of her boss, so she did not think she should have to file a complaint. Several people reported that they did not file a complaint because they viewed the incident as minor or because they had dealt with the situation themselves.

*3. Discussion*

Our study revealed levels of subjective experiences with discrimination (51.7% of bisexuals or 53.2% of all fluid respondents) that are similar to some other studies addressing the experiences of LGBT respondents in general,<sup>132</sup> but which are significantly higher than rates reported for bisexuals in both Herek’s 2008 study and the Pew Research Center’s 2013 report. There are likely several reasons for this. As mentioned previously, our definitions of employment discrimination were much broader than those reflected in the single questions posed by Herek and Pew Research Center. Additionally, our approach of contacting listservs and LGBT and bisexual organizations probably resulted in our attracting respondents who were much more likely to be out about their sexuality than bisexuals in general, which in turn would make our respondents more likely to be targets of discrimination. However, due to the difficulty of finding bisexual respondents, this appears to be a common method of survey distribution when attempting to study bisexuals.<sup>133</sup>

The study confirmed that bisexuals and others with fluid identities believe they experience a wide range of types of discrimination based on sexual orientation, including many types of harassment as

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132. See, e.g., Croteau, *supra* note 95, at 198; Croteau & Lark, *supra* note 103, at 390.

133. Ross et al., *supra* note 45, at 497, 501; Wendy Bostwick, *Assessing Bisexual Stigma & Mental Health Status: A Brief Report*, 12 J. OF BISEXUALITY 214, 216 (2012); Herek, *Hate Crimes*, *supra* note 96, at 70.

well as the more traditional types of discrimination—firing and failure to hire due to sexual orientation. These results corroborate existing research demonstrating that bisexuals are subject to both homophobia, largely from the mainstream culture, and biphobia, or oppression specifically linked to fear of bisexuals, which is perpetrated both by heterosexuals and lesbian and gay persons.<sup>134</sup> For example, homophobia was evident in the experiences of the respondent whose supervisor threw things at him and called him “faggot,” while biphobia was demonstrated in the experiences of respondents who were told they were “not gay enough” to work for LGBT organizations. Because our study was primarily quantitative, it is difficult to assess to what extent respondents experienced homophobia versus biphobia, although our open-ended questions provide some snapshots of the discrimination that respondents experienced.

Some of the answers we received to open-ended questions about discrimination are consistent with Stonewall U.K.’s qualitative research indicating that bisexuals are subject to specific stereotypes, such as the perception that they are untrustworthy or indecisive.<sup>135</sup> For example, when one male respondent attended an LGBT conference, a co-worker told him “bisexuals can’t decide between choices.”

Several respondents to the survey also described being treated as hypersexual by co-workers and supervisors. While this stereotype was historically applied to gays and lesbians as well, and continues to be so applied to some extent,<sup>136</sup> it appears that it is particularly prevalent with respect to bisexuality.<sup>137</sup>

The fact that such a high proportion of respondents had experienced inappropriate jokes or insults based on their sexual orientations may be evidence that bisexuality is not seen as a serious identity that

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134. See Ross et al., *supra* note 45, at 501.

135. Chamberlain, *supra* note 23, at 6.

136. See, e.g., Gena Castro Rodriguez, *LGBTQ Girls in the Juvenile Justice System—Discrimination, Alienation and Marginalization*, 15 U.C. DAVIS J. JUV. L. & POL’Y 401, 436 (2011) (describing the hypersexualization of lesbian and bisexual girls by staff in the juvenile justice system); Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military’s Anti-Gay Policy*, 80 IOWA L. REV. 979, 1008–09 (1995) (describing the historical and then-current hypersexualization of lesbians, gays, and bisexuals in American society).

137. See, e.g., MAJORIE GARBER, *BISEXUALITY & THE EROTICISM OF EVERYDAY LIFE* 54–55 (2000) (describing a former bisexual magazine’s appropriation of the stereotype that bisexuals will have sex with “anything that moves”); Anna Pulley, *9 Stupid Myths About Bisexuals that Will Make You Laugh*, ALTERNET, [http://www.alternet.org/print/story/149710/9\\_stupid\\_myths\\_about\\_bisexuals\\_that\\_will\\_make\\_you\\_laugh](http://www.alternet.org/print/story/149710/9_stupid_myths_about_bisexuals_that_will_make_you_laugh) (last visited Feb. 28, 2015), archived at <http://perma.cc/HG22-ASDT> (describing popular myths about bisexuals, two out of nine of which relate to hypersexualization: namely that bisexuals are sluts and that they love threesomes); Claire, *QA Topic: Bisexual Stereotypes*, QUEERATTITUDE.COM (on file with author) (describing several stereotypes of bisexuals involving hypersexualization); accord Yoshino, *supra* note 1, at 420.

is deserving of protection, a complaint that participants in Stonewall's study voiced.<sup>138</sup> Invisibility and discrimination by religious adherents are also reflected in both Stonewall's research and, to some degree, in our study.<sup>139</sup>

One of the most troubling results of our study was the infrequency with which our respondents appear to have sought relief from discriminatory action. It is difficult to find data regarding the frequency with which other populations file complaints when subjected to discrimination. Comparing our results on this issue (9.7% of the 62 bisexual respondents who had experienced discrimination and who answered this question had filed an internal complaint, 3.2% had filed a complaint in an agency, and *no* respondents had filed a lawsuit) with responses to similar questions asked in the Roessler et al. study mentioned earlier, *The Employment Discrimination Experiences of Adults with Multiple Sclerosis*, provides one useful point of comparison.<sup>140</sup> In the Roessler study, 7% of the fifty-nine respondents filed a lawsuit and 21% filed an internal written complaint.<sup>141</sup> Although there are undoubtedly important distinctions between disabled and sexual minority respondents, this contrast in the frequency of seeking relief among the respondents with multiple sclerosis and our bisexual respondents is nonetheless striking.<sup>142</sup>

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138. Chamberlain, *supra* note 23, at 3; *see also* BARKER ET AL., *supra* note 2, at 20.

139. Chamberlain, *supra* note 23, at 7–8; *see also* BARKER ET AL., *supra* note 2, at 4 (discussing invisibility); Eliason et al., *supra* note 95, at 241–42 (recounting the discrimination faced by a bisexual nurse at a Catholic organization).

140. Roessler et al., *supra* note 112, at 24, Table 2. The only other possible source of comparative information we found was a law review article by William Rubenstein. *See* William B. Rubenstein, *Do Gay Rights Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001). However, this Article compares the ratios of LGB people in the population to the percent of those filing agency complaints in certain states and concludes that those ratios are similar to the rates at which complaints based on gender and race discrimination are filed. *Id.* at 67–68. In this study, self-identified bisexuals with same-gender partners were included in the definition of “gays.” *Id.* at 85. This fact alone precludes a meaningful comparison between our study results and those of Professor Rubenstein. Other problems with such a comparison exist as well, such as the fact that we did not derive our data from a general population sample. Additionally, Professor Rubenstein only looked at jurisdictions where discrimination based on sexual orientation was prohibited, whereas our respondents included persons who worked or had worked in jurisdictions where no such laws were in place. Finally, Rubenstein's results, unlike ours, are not limited to persons who report having experienced discrimination.

141. Roessler et al., *supra* note 112, at 24, Table 2.

142. One important difference between disability and sexual minority status is that, under the federal Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213 (2014), discrimination against those with disabilities is prohibited in all fifty states, whereas the framework of protections for sexual minorities is spotty, within only twenty-one states providing comprehensive protections. *See supra* notes 46–48 and associated text. However, it does appear that most of our respondents were protected from discrimination based on sexual orientation by state or local law or by their employer's non-discrimination policy. *See supra* notes 129 and 130 and associated text. Additionally, the

The high degree of discrimination experienced by bisexuals and others with fluid identities combined with the low rates at which such respondents sought relief is cause for concern, particularly given that one of the primary reasons for not seeking relief, believing that one would not get the help that he or she needed, may well be reflective of felt stigma.

### III. SOLUTIONS AND NEXT STEPS

One important and obvious step that would help LGBT workers generally is the passage of a federal law barring employment discrimination based on sexual orientation. While the repeatedly proposed Employment Non-Discrimination Act (ENDA)<sup>143</sup> has been legitimately criticized for its shortcomings in comparison to Title VII, and particularly for its failure to allow for disparate impact claims and its allowance of broad religious exemptions,<sup>144</sup> passage of ENDA would be a step in the right direction for all LGBT workers (although amendment of Title VII to include sexual orientation and gender identity would provide stronger and more equitable protections). If either step is taken, however, discrimination against bisexuals (and, ideally, other fluid-identified persons) should be addressed specifically in the legislative history and findings,<sup>145</sup> preferably with some discussion of the fact that bisexuals face both homophobia and biphobia (and are commonly discriminated against by both heterosexuals and gay and lesbian persons). This would help make bisexuality more visible and would give bisexual plaintiffs some explicit evidence of the new law's intent to protect them, beyond the mere inclusion of bisexuality in a

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majority of our respondents' most recent incident of discrimination occurred at a large or mid-size employer, and such employers are probably more likely to include protections for sexual orientation discrimination in their policies. *See supra* Part II.B.2.b.

143. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

144. *Id.* at § 4(g); *see, e.g.*, Joel Rudin, *Half-Way Out: Why America's Sexual Minorities Deserve Better Than the Employment Non-Discrimination Act*, 16 J. WORKPLACE RIGHTS 337, 338, 340 (2012) (addressing an earlier version of ENDA); *see also* Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 314 (2014) (discussing the shortfalls of the current bill and arguing that evolving judicial interpretations of Title VII will ultimately better serve LGBT persons).

145. An example of such legislative findings can be found in the Equal Opportunities in Employment policy adopted by the City Council of Manchester:

The Council recognises that bisexual people may be the target of specific discrimination and that their experiences often differ from those of lesbians and gay men. The Council recognises that fear of discrimination is the major factor which forces bisexual people to conceal their sexuality . . . .

We aim to . . . creat[e] an atmosphere and environment where it is safe for them to do so and . . . [to] not assum[e] that employees or users of our services are heterosexual, lesbian or gay.

U.K. Manchester, U.K. City Council, Equal Opportunities in Employment Policy Statement, § 3.7.3 (Jan. 19, 2011); *see also* Chamberlain, *supra* note 23, at 11 (quoting policy).

definition section. Such a discussion in the legislative history and congressional findings appears to be necessary given the *Apilado* Court's apparent misunderstanding of bisexuality, despite bisexuality's explicit inclusion in Washington's public accommodations law,<sup>146</sup> and the judicial obfuscation of bisexuality in cases like *Romer*.

Beyond that, it is useful to think of solutions for the different institutions that play a role in bisexuals' discrimination-related experiences. At the highest level of the process of seeking a remedy, courts are integrally involved. Although our respondents did not describe any experiences with the court system related to their claims of discrimination, it is evident from the analysis in Part II that some work needs to be done in the court system to facilitate a better understanding of the claims of bisexuals. At a minimum, judges writing decisions and orders pertaining to LGBT rights should not use shorthand as in Justice Kennedy's majority decision in *Romer* to elide the existence of bisexuals when their rights are at issue in a case.<sup>147</sup> Such a practice increases the invisibility and marginalization of bisexuals and the related perception that bisexuals are not affected by discrimination.

Additionally, based on the order in *Apilado* and the opinion in *Romer*, it appears that judges need to be educated about bisexuality and fluid identities generally. Lawyers representing bisexual plaintiffs should begin to provide this education via expert witnesses. While the plaintiffs' attorneys in *Apilado* introduced expert testimony, it did not address core issues relating to explanations of bisexuality itself and the ways in which discrimination against bisexuals manifests.<sup>148</sup> However, given the widespread invisibility of bisexuals and the lack of understanding within both the gay and lesbian and heterosexual communities, it is imperative that lawyers start providing this basic education about bisexuality via expert witnesses.

Turning to the actions of lawyers more explicitly, and learning from the attorneys' strategic choices in *Perry* and *Windsor*, lawyers

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146. WASH. REV. CODE § 49.60.040(26) (defining "sexual orientation"); § 49.60.215 (prohibiting discrimination in public accommodations).

147. *Accord* Chamberlain, *supra* note 23, at 10.

148. Declaration of Russell Robinson in Support of Plaintiffs' Response in Opposition to Granting Partial Summary Judgment to NAGAAA on its First Amendment Defense to Plaintiffs' Claim of Sexual Orientation Discrimination under RCW 49.60, No. CIO-00682 JCC, Doc. 86 (Aug. 8, 2011) (expert testimony on the disproportionate effect that NAGAAA's discrimination against bisexuals and its limit of two heterosexual players per team would have on people of color); Declaration of Beth Dana Kivel in Support of Plaintiffs' Response in Opposition to Granting Partial Summary Judgment to NAGAAA on its First Amendment Defense to Plaintiffs' Claim of Sexual Orientation Discrimination under RCW 49.60, No. CIO-00682 JCC, Doc. 97 (Aug. 8, 2011) (expert testimony on the lack of necessity of rules limiting participation of heterosexuals in LGBT sports organizations).



representing lesbian and gay clients should become more cognizant of how their trial and briefing strategies can negatively affect bisexuals. Additionally, employment and civil rights lawyers should have the courage to represent bisexuals. A large proportion of the existing case law involving bisexual plaintiffs is comprised of pro se cases,<sup>149</sup> suggesting that bisexuals may not be getting the legal help that they need, a conclusion that is consistent with many respondents' views that they would not get the help they needed if they sought a remedy to the discrimination they had experienced. The conclusion that bisexuals need better legal representation (or to start with, legal representation period) is also supported by the fact that the bisexual plaintiffs in several of the electronically available discrimination cases attempted to sue under Title VII, which has repeatedly been held not to cover sexual orientation.<sup>150</sup>

In terms of employers and attorneys representing them on employment matters, it is important to explicitly include bisexuality in diversity initiatives related to sexual orientation. The usefulness of this is demonstrated by Köllen's research showing that explicit inclusion of bisexuality in such measures significantly improves bisexuals' perceptions of the working climate,<sup>151</sup> which is likely to have the added benefit for employers of making bisexual workers more productive.<sup>152</sup> More specifically, bullying and harassment policies should provide "examples of what antibisexual comments and behavior look like."<sup>153</sup> Additionally and relatedly, educating all staff about discrimination against bisexuals can help reduce the widespread discrimination evident in the responses to this survey.<sup>154</sup> Finally, the research of Heidi Bruins Green and her colleagues suggests that employers seeking to create a positive atmosphere for bisexuals should include gender identity in their anti-discrimination policies, as well as sexual orientation.<sup>155</sup>

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149. See, e.g., *Davis v. Signius Inv. Corp./Answernet*, 2013 WL 1339758 (N.D. Ga. Feb. 26, 2013); *Dawkins v. Richmond Cnty. Sch.*, 2012 WL 1580455 (M.D.N.C. May 4, 2012); *Blaylock v. Transp. Sec. Admin.*, 2009 WL 2606245 at \*1 (D.N.J. 2009); *Parrella v. Lawrence & Mem'l Hosp.*, 2009 WL 1279290 (D. Conn. 2009).

150. See, e.g., *Davis*, 2013 WL 1339758; *Dawkins*, 2012 WL 1580455; *Blaylock*, 2009 WL 2606245; *Parrella*, 2009 WL 1279290; see also LINDERMAN & GROSSMAN, *supra* note 120, at 551–52; Todd Brower, *Social Cognition 'At Work': Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 16–18 (2009).

151. Köllen, *supra* note 109, at 131; see also Chamberlain, *supra* note 23, at 15.

152. See & Hunt, *supra* note 30, at 293.

153. *Id.* at 297.

154. Chamberlain, *supra* note 23, at 15.

155. Bruins Green et al., *supra* note 39, at 311. Bisexuals' greater confidence in anti-discrimination policies that include gender identity may be the result of bisexuals' feeling solidarity with transgender people. Such solidarity seems likely given that the bisexuals and other fluid-identified respondents in Bruins Green's study identified transgender

## CONCLUSION

Our survey demonstrates that widespread discrimination exists against bisexuals and other fluid-identified persons, and the case law relating to the rights of bisexuals shows that there are deficiencies in our court system that need to be remedied. Problems at bisexuals' places of employment that are described in the social science literature have been corroborated by our survey. Much more research needs to be done on all aspects of bisexuals' experiences with employment discrimination. One very fruitful area of future research would be interviewing bisexuals who have taken at least initial steps to pursue legal claims of employment discrimination as to their experiences and the barriers they faced. Another would be examination of state administrative complaints alleging discrimination against LGBT persons filed in a specific jurisdiction to determine the proportion of bisexuals who file such complaints compared to the proportion of lesbian and gay persons who do so, as well as to analyze the content of complaints by bisexuals.

Given the harmful effects of discrimination on the health of bisexuals and other sexual minorities,<sup>156</sup> our study should serve as a call to action for the justice system and employers to move beyond bierasure and to affirmatively recognize the right of bisexuals to fair and equal treatment.

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persons as the most welcoming group. *Id.* at 310. Additionally, it may also be because, based on the merely nominal protection of bisexuals under many such policies, bisexuals and other fluid-identified persons see inclusion of gender identity as an indication that a given policy is robust and expansive.

156. See *supra* note 45 and sources cited therein.

