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# Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008

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BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE  
OF SEXUAL ORIENTATION AND GENDER IDENTITY  
DISCRIMINATION 1998–2008

M.V. LEE BADGETT, BRAD SEARS, HOLNING LAU, AND DEBORAH HO\*

EXECUTIVE SUMMARY

This article summarizes social science data published during the past decade documenting discrimination against lesbian, gay, bisexual, and transgender (LGBT) people in employment. Over the last ten years, many researchers have conducted studies to find out whether LGBT people face sexual orientation discrimination in the workplace. These studies include surveys of LGBT individuals' workplace experiences, wage comparisons between lesbian, gay, and bisexual (LGB) and heterosexual persons, analyses of discrimination complaints filed with administrative agencies, and testing studies and controlled experiments.

Studies conducted from the mid-1980s to mid-1990s revealed that 16% to 68% of LGB respondents reported experiencing employment discrimination at some point in their lives. Since the mid-1990s, an additional fifteen studies found that 15% to 43% of LGB respondents experienced discrimination in the workplace.

When asked more specific questions about the type of discrimination experienced, LGB respondents reported the following experiences that were related to their sexual orientation: 8% to 17% were fired or denied employment, 10% to 28% were denied a promotion or given negative performance evaluations, 7% to 41% were verbally/physically abused or had

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their workplace vandalized, and 10% to 19% reported receiving unequal pay or benefits.

Although data on the transgender population are scarce, several studies have brought to light the presence of discrimination against this community. When transgender individuals were surveyed separately, they reported similar or higher levels of employment discrimination. In six studies conducted between 1996 and 2006, 20% to 57% of transgender respondents reported having experienced employment discrimination at some point in their life. More specifically, 13% to 56% were fired, 13% to 47% were denied employment, 22% to 31% were harassed, and 19% were denied a promotion based on their gender identity.

Beyond survey responses, collection and analysis of state-level discrimination complaint data allow another lens through which to measure sexual orientation discrimination. Individual complaints of discrimination filed with government agencies provide another measure of perceived discrimination. In 1997 the General Accounting Office (or GAO, now known as the Government Accountability Office) collected the number of complaints filed in states that outlaw sexual orientation discrimination and found that 1% of all discrimination complaints related to sexual orientation. However, comparisons of data from sixteen states and the District of Columbia show that the rate of sexual orientation discrimination complaints per LGB person is 5 per 10,000, which is roughly equivalent to gender-based discrimination complaints.

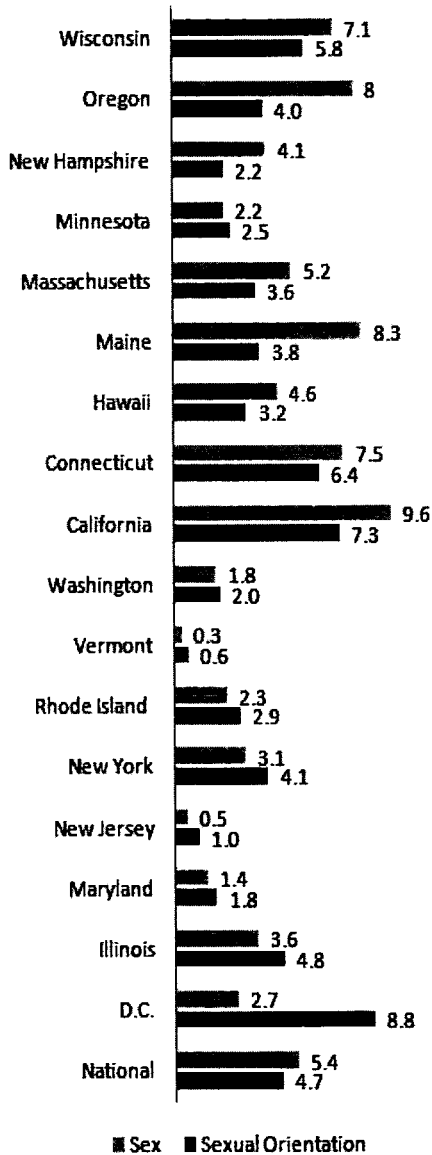
A wage or income gap between LGB people and heterosexual people with the same job and personal characteristics provides another indicator of sexual orientation discrimination. A growing number of studies using data from the National Health and Social Life Survey (NHSLs), the General Social Survey (GSS), the United States Census, and the National Health and Nutrition Examination Survey (NHANES III) show that gay men earn 10% to 32% less than otherwise similar heterosexual men. The findings for lesbians, however, are less clear. In some studies they earn more than heterosexual women but less than heterosexual or gay men.

Controlled experiments reveal sexual orientation discrimination in workplace settings. In controlled experiments, researchers manufacture scenarios that allow comparisons of the treatment of LGB people with treatment of heterosexuals. Seven out of eight studies using controlled experiments related to employment and public accommodation find evidence of sexual orientation discrimination.

Despite the variations in methodology, context, and time period in the studies reviewed in this report, our review of the evidence demonstrates

one disturbing and consistent pattern: sexual orientation-based and gender identity discrimination is a common occurrence in many workplaces across the country.

**Population-Adjusted Complaint Rates  
(Per 10,000)**



SOURCE: U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-98-7R, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES' EXPERIENCE WITH STATUTORY PROHIBITIONS 10-14 (1997), available at [http:// archive.gao.gov/f0502/575711.pdf](http://archive.gao.gov/f0502/575711.pdf).

## INTRODUCTION

Over the last ten years, academic researchers in economics, sociology, psychology, and other social sciences have conducted research to find out whether lesbian, gay, bisexual, and transgender people face employment discrimination. Government and community organizations have also conducted such research. With increasing frequency, policymakers at the federal, state, and local level are considering the rates of employment discrimination as they consider laws that would ban employment discrimination based on sexual orientation and gender identity. In this report we summarize the findings of research about employment discrimination against LGBT people from four different kinds of studies.

- *Surveys of LGBT people's experiences with workplace discrimination*

These studies routinely show that considerable numbers of LGBT people believe they have been discriminated against in the workplace. These studies also show that heterosexuals perceive discrimination against their LGB peers. Because these studies tend to focus on particular occupations, population groups, or geographic areas, the rates of perceived discrimination vary considerably across their findings.

- *Analyses of employment discrimination complaints filed with government agencies*

Thus far, there has been one published study on the number of sexual orientation discrimination complaints filed with government agencies. Although the raw number of complaints is small, the rate of complaints per 10,000 LGB people is comparable to the rate of sex discrimination complaints per 10,000 women.

- *Analyses of wage differentials between LGBT and heterosexual persons*

Employment discrimination often translates into lower earnings. Wage analyses consistently show that gay men earn 10% to 32% less than heterosexual men. The findings on lesbians' earnings are less consistent. While less data is available about the incomes of transgender people in comparison with non-transgender people, a number of surveys have found high unemployment rates and low income levels for transgender people.

- *Controlled experiments*

A new and expanding line of research involves experiments that control conditions to test whether LGB people experience differences in treatment when compared with identical heterosexual people. These studies find

that LGB and heterosexual persons are subject to disparate treatment.

The remainder of this report describes the studies' methods and findings. The methodologies used and contexts studied vary considerably and limit our ability to generalize findings to all locations, occupations, or economic contexts. Also, the limitations of the methods mean that we cannot say how likely a LGBT person would be to experience employment discrimination. Despite these caveats, the review does demonstrate a consistent pattern: there is ample evidence that sexual orientation and gender identity discrimination against LGBT people occurs in many workplaces across the country.

## I. SELF-REPORTED EXPERIENCES OF SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT DISCRIMINATION

### *A. Surveys Measuring Sexual Orientation Discrimination*

One way that researchers have assessed discrimination is by asking LGB people directly whether they believe they have experienced discrimination. These studies routinely show that many LGB individuals believe that they have experienced employment discrimination. Tables 1<sup>1</sup> and 2<sup>2</sup>

1. Table 1: M.V. LEE BADGETT ET AL., NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., PERVERSIVE PATTERNS OF DISCRIMINATION AGAINST LESBIANS AND GAY MEN: EVIDENCE FROM SURVEYS ACROSS THE UNITED STATES (1992); M.V. Lee Badgett, *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, 2 ANGLES: THE POL'Y J. INST. FOR GAY AND LESBIAN STRATEGIC STUD. 1, 2 (1997); James M. Croteau, *Research on the Work Experiences of Lesbian, Gay, and Bisexual People: An Integrative Review of Methodology and Findings*, 48 J. VOC. BEHAV. 195, 195-98 (1996); Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343, 343-78 (1998); Sarah D. Fox, *Gender Expression as a Basis for Employment Discrimination in Gay, Lesbian and Bisexual Populations*, (August 7, 1999) (unpublished preprint, on file with the International Journal of Transgenderism), available at <http://web.archive.org/web/20000817134208/www.ntac.org/ge01.html>.

2. Table 2: RODDRICK COLVIN, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., THE EXTENT OF SEXUAL ORIENTATION DISCRIMINATION IN TOPEKA, KS 3 (2004); EMPIRE STATE PRIDE AGENDA, ANTI-GAY/LESBIAN DISCRIMINATION IN NEW YORK STATE 1 (2001); LARRY GROSS ET AL., THE PHILADELPHIA LESBIAN AND GAY TASK FORCE, THE 1999-2000 STUDY OF DISCRIMINATION AND VIOLENCE AGAINST LESBIAN WOMEN AND GAY MEN IN PHILADELPHIA AND THE COMMONWEALTH OF PENNSYLVANIA 14 (2000); HENRY J. KAISER FAMILY FOUNDATION, INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 2-3 (2001); JUDICIAL COUNCIL OF THE STATE OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE (2001); BOB KARP, HUMAN RIGHTS COUNCIL OF NORTH CENTRAL FLORIDA, GAINESVILLE/ALACHUA COUNTY GAY AND LESBIAN COMMUNITY SURVEY (1997); LAMBDA LEGAL AND DELOITTE FIN. ADVISORY SERV. LLP, 2005 WORKPLACE FAIRNESS SURVEY (2006), <http://data.lambdalegal.org/pdf/641.pdf>; Rafael M. Diaz et al., *The Impact of Homophobia, Poverty, and Racism on the Mental Health of Gay and Bisexual Latino Men: Findings From 3 US Cities*, 91 AM. J. PUB. HEALTH 927, 930 (2001); 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. INTERPERSONAL VIOLENCE 54, 64 (2008); David M. Huebner, Gregory M. Rebhock &

present details of the studies.

### B. Literature Reviews

Five academic reviews of such studies that were published between 1992 and 1999 found substantial evidence of discrimination. These reviews, examining over thirty-five studies, found that 16% to 68% of LGB respondents reported experiencing discrimination in the workplace (see Table 1). Since these literature reviews were published, an additional fifteen surveys have been conducted that report similar findings.

**Table 1: Literature Reviews Examining Studies Published Between 1992 and 1999**

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
<b>Badgett <i>et al.</i> (1992)</b>	1992	Review of 1 national survey and 20 city and state surveys of LGB people (n of 21 surveys = 11,984 )	Literature Review	<b>16-44%</b>	8-19% fired  5-24% denied employment  5-33% denied a promotion  3-14% bad job rating or evaluation
<b>Badgett (1997)</b>	1997	Review of 3 city surveys and 6 surveys of various professional groups of LGB people (n of 9 surveys = 8,221)	Literature Review	<b>27-68%</b>	

Susan M. Kegeles, *Experiences of Harassment, Discrimination, and Violence among Young Gay and Bisexual Men*, 94 AM. J. PUBLIC HEALTH 1200 (2004); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 91 1869-76 (2001); NEW JERSEY SUPREME COURT. TASK FORCE ON SEXUAL ORIENTATION ISSUES: FINAL REPORT (2001).

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
Croteau (1996)	1996	Review of 9 published studies on work experiences of LGB people, with 3 studies reporting experiences of discrimination (n of 3 surveys = 626)	Literature Review	25-66%	
Durkin (1998)	1998	Review of 11 studies of sexual orientation bias in the legal profession, 2 reporting experiences of discrimination (n of 2 surveys = 293)	Literature Review	23-40%	
Fox, Sarah D. (1999)	1999	Review of 2 studies on sexual orientation employment discrimination (n of 2 surveys = 378)	Literature Review	41-58%	

### C. National Random Samples

Three recent surveys are based on national probability samples (or “random” samples) of lesbian, gay, and bisexual people.

***Fifteen recent studies found that 15% to 43% of LGB respondents experienced workplace discrimination.***

- In 2000, the Henry J. Kaiser Family Foundation surveyed a random sample of 405 LGB people in fifteen large metropolitan areas and found that 18% of the respondents reported experiencing discrimination when applying for a job or keeping a job.<sup>3</sup>
- Another study analyzed data from the 1995 National Survey of Midlife Development, a

3. HENRY J. KAISER FAMILY FOUNDATION, INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 2-3 (2001).



nationally representative sample of adults aged twenty-five to seventy four years old, and revealed that LGB respondents reported the following types of “discrimination”: 8% reported being fired, 13% being denied employment, and 11% being denied a promotion.<sup>4</sup> While the survey did not ask LGB respondents whether each type of employment discrimination was related to their sexual orientation, 43% of LGB respondents said that some discrimination they experienced was due to their sexual orientation.<sup>5</sup>

- Another recent survey of a random sample found that 10% of LGB people (16% of lesbians and gay men) reported being fired or denied a job or promotion because of their sexual orientation.<sup>6</sup>

#### *D. Other National Samples*

Two other national studies of non-random samples also found that self-reported experiences of discrimination were common and that respondents reported facing a variety of discrimination in the employment context.

- The most recent survey, conducted in 2006, found that 7% of the 662 LGB respondents had reported experiencing job discrimination at some point in their lives.
- A survey conducted at the end of 2005 found that 39% of the 1,205 LGBT respondents have experienced some level of harassment or discrimination in their workplace over the past five years.<sup>7</sup>
- Similar rates of discrimination were documented in a survey by Out & Equal in 2002, which found that 41% of participants had experienced discrimination in the workplace.<sup>8</sup>

#### *E. Recent Surveys of Specific Areas*

Eight other studies of sexual orientation discrimination surveyed narrower subgroups of the LGB population focusing on people in a particular geographic area. These studies recruit “convenience” samples, or samples

4. Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 91 1869–76 (2001).

5. *Id.*

6. 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. INTERPERSONAL VIOLENCE 54, 64 (2008).

7. LAMBDA LEGAL AND DELOITTE FIN. ADVISORY SERV. LLP, 2005 WORKPLACE FAIRNESS SURVEY (2006), <http://data.lambdalegal.org/pdf/641.pdf>.

8. OUT & EQUAL WORKPLACE ADVOC., WITECK-COMBS COMM’N & HARRIS INTERACTIVE, GAYS AND LESBIANS FACE PERSISTENT WORKPLACE DISCRIMINATION AND HOSTILITY DESPITE IMPROVED POLICIES AND ATTITUDES IN CORPORATE AMERICA (2003).

of LGB people who are easy to locate and willing to return a survey. These survey respondents may not be representative of the larger population of LGB people. These studies also show experiences of perceived employment discrimination on the basis of sexual orientation are common.<sup>9</sup>

- 30% of LGBT people in Pennsylvania reported discrimination.<sup>10</sup>
- 36% of New Yorkers reported employment discrimination during the five years prior to the 2001 survey.<sup>11</sup>
- 11.2% of gay and bisexual men in three southwestern cities reported experiencing employment, housing or insurance discrimination in the six months prior to the survey.<sup>12</sup>
- 15% of gay and bisexual Latino men in Los Angeles, New York City, and Miami reported experiencing employment discrimination.<sup>13</sup>
- In a survey of LGB residents of Topeka, Kansas, 15% to 41% reported employment discrimination and on-the-job harassment.<sup>14</sup>
- 27% of the 195 northern Floridians surveyed reported experiencing employment discrimination.<sup>15</sup>

9. Two other surveys also indicate high levels of discrimination against LGBT people of color, although neither survey defined discrimination to be limited to, or even include, employment discrimination. In 2005 and 2007, the National Gay and Lesbian Task Force's Policy Institute released two reports on Asian Pacific American and Islander LGBT individuals showing that 75%–82% of the respondents from the two surveys reported experience with sexual orientation discrimination or prejudice of some kind. ALAIN DANG & CABRINI VIANNEY, NAT'L GAY & LESBIAN TASK FORCE POLICY INST., *LIVING IN THE MARGINS: A NATIONAL SURVEY OF LESBIAN, GAY, BISSEXUAL AND TRANSGENDER ASIAN AND PACIFIC ISLANDER AMERICANS*, 4–5 (2007); ALAIN DANG & MANDY HU, NAT'L GAY & LESBIAN TASK FORCE POLICY INST., *ASIAN PACIFIC AMERICAN LESBIAN, GAY, BISSEXUAL, AND TRANSGENDER PEOPLE: A COMMUNITY PORTRAIT 6* (2005). Another survey of participants from nine Black Pride events in 2000 by the Policy Institute found that 42% of black LGBT respondents reported having experienced discrimination or prejudice of some kind. JUAN BATTLE ET AL., NAT'L GAY & LESBIAN TASK FORCE POLICY INST., *SAY IT LOUD I'M BLACK AND I'M PROUD: BLACK PRIDE SURVEY 2000* (2002), available at <http://thetaskforce.org/downloads/reports/SayItLoud-BlackAndProud.pdf>.

10. LARRY GROSS ET AL., *THE PHILADELPHIA LESBIAN AND GAY TASK FORCE, THE 1999–2000 STUDY OF DISCRIMINATION AND VIOLENCE AGAINST LESBIAN WOMEN AND GAY MEN IN PHILADELPHIA AND THE COMMONWEALTH OF PENNSYLVANIA* 14 (2000).

11. *EMPIRE STATE PRIDE AGENDA, ANTI-GAY/LESBIAN DISCRIMINATION IN NEW YORK STATE* 1 (2001).

12. David M. Huebner, Gregory M. Rebchook & Susan M. Kegeles, *Experiences of Harassment, Discrimination, and Violence among Young Gay and Bisexual Men*, 94 AM. J. PUBLIC HEALTH 1200 (2004).

13. Rafael M. Diaz et al., *The Impact of Homophobia, Poverty, and Racism on the Mental Health of Gay and Bisexual Latino Men: Findings From 3 US Cities*, 91 AM. J. PUB. HEALTH 927, 930 (2001).

14. RODDRICK COLVIN, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., *THE EXTENT OF SEXUAL ORIENTATION DISCRIMINATION IN TOPEKA, KS* 3 (2004).

15. BOB KARP, HUMAN RIGHTS COUNCIL OF NORTH CENTRAL FLORIDA. GAINESVILLE/ALACHUA

- 30% of LGB people from fourteen of the sixteen counties across Maine reported experiencing discrimination in employment.<sup>16</sup>
- 43% of Washington State Pride event attendees reported experiencing employment discrimination.<sup>17</sup>
- 21% of the LGB attorneys in Minnesota law firms reported being denied employment, equal pay, equal benefits, a promotion, or another employment opportunity.<sup>18</sup>
- LGBT members of the California State Bar reported that 26% had been denied a promotion, 15% received unequal pay, and 19% received poor work assignments.<sup>19</sup>
- Lesbian and gay employees of the New Jersey Supreme Court reported that 17% were denied employment, 29% were teased or harassed, and 21% were given poor work assignments.<sup>20</sup>
- LGB employees of the California Court system reported experiences of discrimination based on sexual orientation: 13% have been called a derogatory name, 16% experienced a negative action based on sexual orientation, and 16% have heard sexual orientation used as the subject of a joke or ridicule.<sup>21</sup>

#### *F. Surveys of Heterosexual Co-Workers*

A small number of researchers have asked heterosexuals whether they have witnessed discrimination against their LGB peers. These studies have been limited to particular occupations, mainly the legal profession.

- In a survey of heterosexual attorneys in Minnesota law firms, 23% believe that LGBT attorneys were treated differently,

COUNTY GAY AND LESBIAN COMMUNITY SURVEY (1997).

16. STEPHEN WESSLER, CTR. FOR THE PREVENTION OF HATE VIOLENCE, DISCRIMINATION AGAINST GAY, LESBIAN, BISEXUAL AND TRANSGENDER INDIVIDUALS IN MAINE 12, 14 (2005).

17. SEATTLE OFFICE FOR CIVIL RIGHTS, OPINION SURVEY OF A SMALL SAMPLE OF PARTICIPANTS AT PRIDE 2006 (2006), [http://www.seattle.gov/scsm/documents/Pride06SexualOrient\\_Opinion\\_Survey\\_Final.doc](http://www.seattle.gov/scsm/documents/Pride06SexualOrient_Opinion_Survey_Final.doc).

18. TASK FORCE ON DIVERSITY IN THE PROFESSION OF THE MINN. STATE BAR ASS'N, 2005 SELF-AUDIT FOR GENDER AND MINORITY EQUITY: A RESEARCH STUDY OF MINN. LAW FIRMS, NON-FIRM EMPLOYERS & INDIVIDUAL LAWYERS 30, 35 (2006), <http://www2.mnbar.org/committees/Diversity-TaskForce/Diversity%20Report%20Final.pdf>.

19. STATE BAR OF CAL., CHALLENGES TO EMPLOYMENT & THE PRACTICE OF LAW FACING ATTORNEYS FROM DIVERSE BACKGROUNDS 17 (2006).

20. NEW JERSEY SUPREME COURT, TASK FORCE ON SEXUAL ORIENTATION ISSUES: FINAL REPORT (2001).

21. JUDICIAL COUNCIL OF THE STATE OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE (2001).

- with an additional 32% stating that they were not certain.<sup>22</sup>
- New Jersey Court system employees reported seeing sexual orientation discrimination: 7% reporting witnessing discrimination in hiring, 10% witnessed verbal abuse or harassment of LGBT coworkers, and 6% reported witnessing discrimination in the distribution of work assignments.<sup>23</sup>
  - 30% of the judges and attorneys surveyed in Arizona believe that lesbians and gays were discriminated against in the legal profession.<sup>24</sup>
  - 12% to 14% of heterosexual political scientists reported witnessing antigay discrimination in academic employment decisions, such as hiring and tenure decisions.
  - In Los Angeles, 24% of female heterosexual lawyers and 17% of male heterosexual lawyers reported either having experienced or witnessed anti-gay discrimination.<sup>25</sup>

### *G. Methods and Limitations of Surveys*

Although these studies provide a useful snapshot of LGB individuals' perceptions, they have certain limitations. As already noted, the samples used for most studies were not representative of the larger LGB population. Many of these studies only surveyed individuals in a particular geographic region, occupation, or population group. Almost all were convenience samples, as opposed to random or probability samples. Individuals who have been subject to sexual orientation discrimination may have been more likely to participate in such surveys, skewing the rate of discrimination reported. Therefore, we cannot necessarily apply these findings to all LGB people.

Two other limitations related to these studies' reliance on perceptions of discrimination are worth noting. First, people's perceptions may not be accurate measures of actual discrimination. For example, individuals may misperceive employers' motivations behind hiring and promotion decisions, ascribing discriminatory motives to employers when none existed. Alternatively, employers may conceal their discriminatory motives so well that LGB people perceive less discrimination than actually exists.

22. TASK FORCE ON DIVERSITY IN THE PROFESSION OF THE MINN. STATE BAR ASS'N, *supra* note 18, at 28.

23. NEW JERSEY SUPREME COURT, *supra* note 20.

24. GAY AND LESBIAN TASK FORCE, STATE BAR OF ARIZ., REPORT TO THE BOARD OF GOVERNORS 2 (1999).

25. STATE BAR OF CAL., *supra* note 19, at 17.

Second, many of these studies had vague definitions of “discrimination” and some did not define the term at all. In addition, the questions asking about employment discrimination were worded differently in each of the surveys. “Discrimination” included everything from denials of promotions to being subjected to “hard stares” because of one’s sexual orientation.<sup>26</sup> The variations in definitions and the wording of questions may also explain why the studies found varying levels of perceived discrimination.

**Table 2: Results of Surveys Measuring Employment Discrimination Against LGB People on the Basis of Sexual Orientation Since 1999**

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
Colvin R. (2004)	2003-2004	LGB people in Topeka, Kansas (n = 121)	Convenience Sample	NA	<p>15% fired</p> <p>16% denied employment</p> <p>11% denied a promotion</p> <p>18% overlooked for additional responsibilities</p> <p>24% teased or harassed</p> <p>35% received harassing e-mails, letters, or faxes</p> <p>41% verbal or physical abuse</p> <p>16% vandalized workplace</p>
Diaz <i>et al.</i> (2001)	1998-1999	GB Latino Men in New York, Miami, and Los Angeles (n = 912)	Convenience Sample	15%	

26. Levine, Martin P. & Robin Leonard, *Discrimination against Lesbians in the Work Force*, 9 SIGNS 700 (1984); James M. Croteau & Julianne S. Lark, *On Being Lesbian, Gay, or Bisexual in Student Affairs: A National Survey of Experiences on the Job*, 32 NASPA J. 189, 193-95 (1995).

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
<b>Empire State Pride Survey (2001)</b>	2001	LGB people in New York State (n = 1,891)	Convenience Sample	36% experienced discrimination in the past 5 years	8% fired 12% denied promotion 10% negative performance evaluation 27% verbally harassed 7% physically harassed
<b>Gross <i>et al.</i> (2000)</b>	1999-2000	LG people in Pennsylvania (n = 3,014)	Convenience Sample	30%	
<b>Henry J. Kaiser (2001)</b>	2000	LGB people in 15 metro areas in U.S. (n = 405)	Random Sample	18% applying for and/or keeping a job	
<b>Herek (2007)</b>	2006	LGB people in U.S. (n = 662)	Random Sample	10% experienced job discrimination once in their life	
<b>Huebner <i>et al.</i> (2004)</b>	1996-1997	GB Men aged 18 to 27 in Phoenix, AZ, Albuquerque, NM and Austin, TX (n = 1,248 )	Convenience Sample	11.2% experienced employment, housing, or insurance discrimination in a 6 month period	
<b>Judicial Council of the State of California (2001)</b>	1998-1999	California Court employees (n=1,525)	Random Sample (not completely clear in report)	20% experienced discrimination based on sexual orientation (only LG employees)	20% Heard negative comment 13% Verbally abused 16% Experienced negative action
<b>Karp, B. and Human Rights Council of North Central Florida (1997)</b>	1997	LGB people in Gainesville/ Alachua County Florida (n = 195)	Convenience Sample	27%	9% fired 15% denied employment 20% denied a promotion 16% bad job rating or evaluation

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
Lambda Legal & Deloitte (2006)	2005	LGBT people nationally (n = 1,205)	Convenience Sample	39% experienced discrimination/harassment in the past five years	19% denied a promotion
Mays <i>et al.</i> (2001)	1995	LGB people nationally (n = 73)	Random Sample	43%	8% fired 13% denied employment 11% denied a promotion
New Jersey Supreme Court (2001)	2000	LG New Jersey Court employees (n = 42)	Convenience Sample	NA	17% denied employment 28% denied a promotion 21% negative performance evaluation 21% not given good work assignments 29% teased or harassed 10% received unequal pay
Out & Equal Advocates. Harris Interactive & Witeck Combs (2002)	2002	LGBT people nationally (n = 110)	Convenience Sample	41%	9% fired 8% pressured to quit 12% denied a promotion 23% teased or harassed 22% experienced other forms of discrimination
Seattle Office of Civil Rights (2006)	2006	LGBT people in Washington (n = 54)	Convenience Sample	43%	
State Bar of California (2006)	2005	LGBT California State Bar members (n = 155)	Convenience Sample	NA	26% denied a promotion 19% not given good work assignments 15% received unequal pay 19% received unequal benefits

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)	Specific Types of Discrimination Experienced
<b>Task Force on Diversity in the Profession of the Minnesota State Bar Association (2006)</b>	2005-2006	LGB attorneys in Minnesota (n = 51)	Convenience Sample	22%	
<b>Wessler (2005)</b>	2005	LGBT people in Maine (n = 90)	Convenience Sample	30%	

### *H. Surveys Measuring Discrimination on the Basis of Gender Identity or Transgender Status*

Since 1996, a number of studies have found that large percentages of transgender persons report experiencing employment discrimination on the basis of their gender identity or transgender status. Details of these studies are presented in Table 3.<sup>27</sup>

#### 1. Convenience Samples

All of the surveys measuring employment discrimination against transgender people relied upon convenience samples. Only one was national in scope. The other studies focused on a particular geographic area or population group. Most were based on the transgender population in San

27. Table 3: SHANNON MINTER & CHRISTOPHER DALEY. SAN FRANCISCO: NAT'L CTR FOR LESBIAN RIGHTS AND TRANSGENDER LAW CTR. *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* (2003); BETH PLOTNER, MIRANDA STEVENS-MILLER, & TINA WOOD-SIEVERS, CHICAGO: *IT'S TIME, ILLINOIS, 6TH REPORT ON DISCRIMINATION AND HATE CRIMES AGAINST GENDER VARIANT PEOPLE* (2002); SAN FRANCISCO BAY GUARDIAN & TRANSGENDER LAW CTR., *GOOD JOBS NOW!: A SNAPSHOT OF THE ECONOMIC HEALTH OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* (2006); JESSICA M. XAVIER, ET AL., VA. DEP'T OF HEALTH, *THE HEALTH, HEALTH-RELATED NEEDS & LIFECOURSE EXPERIENCES OF TRANSGENDER VIRGINIANS* (2007), <http://www.vdh.virginia.gov/epidemiology/DiseasePrevention/documents/pdf/THISFINALREPORTVol1.pdf>; JESSICA M. XAVIER ET AL., *A Needs Assessment of Transgender People of Color Living in Washington, DC*, 8 INT'L J. TRANSGENDERISM 31 (2005); JESSICA M. XAVIER, ADMIN. FOR HIV/AIDS OF THE DIST. OF COLUMBIA GOV'T, *THE WASHINGTON, DC TRANSGENDER NEEDS ASSESSMENT SURVEY: FINAL REPORT FOR PHASE TWO* 15 (2000), <http://www.gender.org/resources/dge/gea01011.pdf>; Eiko Sugano, Tooru Nemoto & Don Operario, *The Impact of Exposure to Transphobia on HIV Risk Behavior in a Sample of Transgender Women of Color in San Francisco*, 10 AIDS & BEHAVIOR 217 (2006).



Francisco. Despite these limitations, the studies consistently found that between 15% and 57% of transgender people report experiencing employment discrimination on the basis of transgender status or gender identity.

- Nationally, 37% reported experiencing employment discrimination.
- 25% of transsexuals from Northern California had difficulties getting a job.
- A study of 244 transsexuals in Los Angeles County found that 28% reported being fired based on their gender identity and 47% reported difficulty in finding a job.
- In a study of 248 transgender people of color in Washington, D.C., 15% reported losing a job because of their transgender status.
- 37% to 42% of gender variant persons in Illinois reported experiencing some type of employment discrimination.<sup>28</sup>
- A study of male-to-female (MTF) transgender people of color in San Francisco found that 39% reported losing a job or a career opportunity because of their gender identity.<sup>29</sup>
- 20% of transgender persons in Virginia reported employment discrimination, with 13% fired, 20% denied employment and 31% harassed at work.<sup>30</sup>

The most recent survey of transgender individuals was conducted in 2006 by the San Francisco Bay Guardian and the Transgender Law Center.<sup>31</sup> The survey was specifically focused on employment issues, using a very broad definition of being transgender, and sought to recruit a broad cross-section of San Francisco's transgender population. The study found that 57% of the transgender respondents surveyed had experienced employment discrimination on the basis of their transgender status or gender identity.<sup>32</sup> More specifically, of those surveyed, 18% reported being fired, 40% being denied employment, 19% being denied a promotion, and 22% being verbally harassed.<sup>33</sup> In addition, 24% reported being sexually harassed, 14% lacked access to appropriate restrooms, 23% reported persistent use of their old name and/or pronoun, and 12% faced persistent questions

28. XAVIER ET AL., *supra* note 27.

29. SUGANO ET AL., *supra* note 27, at 220.

30. XAVIER ET AL., *supra* note 27.

31. SAN FRANCISCO BAY GUARDIAN & TRANSGENDER LAW CTR., *supra* note 27, at 45.

32. *Id.*

33. *Id.*

about surgery.<sup>34</sup> In other words, this survey found ample evidence of many forms of discrimination in what should be one of the most tolerant cities for transgender people in the United States.

**Table 3: Results of Surveys Measuring Employment Discrimination Against Transgender People on the Basis of Transgender Status or Gender Identity**

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless otherwise noted)
<b>Clements K., <i>et al.</i> (1999)</b>	1997	MTFs in San Francisco (n = 392)	46% report losing a job or difficulty in getting a job	
<b>Clements K., <i>et al.</i> (1999)</b>	1997	FTMs in San Francisco (n = 123)	57% report losing a job, difficulty getting a job or job discrimination	
<b>Lombardi <i>et al.</i> (2001)</b>	1996- 1997	Transgender people in the U.S. (n = 402)	37%	
<b>Reback <i>et al.</i> (2001)</b>	1998- 1999	MTF Transsexuals in Los Angeles County (n = 244)	NA	29% fired  47% difficulty getting job
<b>Sykes (1999)</b>	1998	Transsexuals in Northern California (n = 232)	25% difficulties with getting a job because of gender issues	
<b>Minter and Daley (2003)</b>	2002	Transgender people in San Francisco (n = 155)	49%	
<b>Plotner <i>et al.</i> (2002)</b>	1995- 2001	Transgender people in Illinois (n = 108)	37-42%	56% fired  13% denied employment  31% harassed

34. *Id.*

Study	Year(s) Data Collected	Population	Method	% Reporting Discrimination Ever (unless oth- erwise noted)
San Francisco Bay Guardian and Transgender Law Center (2006)	2006	Transgender people in San Francisco (n = 194)	57%	18% fired 40% denied employment 19% denied a promotion 22% verbally harassed 24% sexually harassed 11% health coverage issues 14% appropriate restroom access 23% use of old name/pronoun 12% questions about surgery 4% other
Sugano <i>et al.</i> (2006)	2000-2001	Transsexual Women (MTF) of Color in San Francisco (n = 327)	39% report loss of job or career opportunity	
Xavier <i>et al.</i> (2000 & 2005)	1999-2000	Transgender People of Color in Washington, D.C. (n = 248)	NA	15% fired (another 8% "unsure" if job lost due to discrimination)
Xavier <i>et al.</i> (2007)	2005-2006	Transgender People in Virginia (N = 350)	20%	13% fired 20% denied employment 31% harassed

## 2. Methodology and Limitations of Surveys of Transgender People

The surveys of transgender people summarized in Table 3 have many of the same limitations as the surveys summarizing the LGB population. For example, they were all based on convenience samples and are generally limited to surveying one city, San Francisco. In fact, only one was a na-

tional in scope. Although some surveys varied in how they defined discrimination, many of these surveys were based upon each other and deliberately used the same definition of discrimination. Thus, there may in fact be greater consistency among these surveys results than in others reviewed by this study.

These surveys also have some additional limitations. Perhaps the most notable one is the variance of the definition of the transgender population among the surveys. Some of the studies focused only on MTFs (male-to-female) or only on FTMs (female-to-male). Some only included those who self-identify as transsexuals; one only included pre-operative and post-operative transsexuals, while others included anyone who is visibly "gender variant," including those who identify as cross-dressers, drag queens, drag kings, effeminate males and gender queers. Some studies explicitly excluded those who identify in these groups from their definition of transgender.

Only three of these surveys focused specifically on employment discrimination or violence and discrimination against transgender people. Most are focused on HIV prevention, prevalence, and risk behaviors. Some even required participants to take an HIV-test. Others are more generally focused on the health and social service needs of the transgender population. As a result, many of these surveys deliberately over-represent clients of AIDS service organizations, other social services organizations, low income people, and commercial sex workers.

Finally, many of the samples may over-represent transgender people of color, although this is difficult to assess with the extremely limited information available about the demographics of the transgender population. Many of the studies had samples with high percentages of African-American and Latino/a respondents, and some were designed to focus on people of color. On the other hand, two of the surveys noted that they underrepresented people of color.

Another difference between the transgender studies in Table 3 and the LGB surveys summarized in Table 2 is that over half of the transgender studies were based on face-to-face interviews, and all of the LGB studies were based on written questionnaires. It is difficult to assess the impact of the interview method on the responses collected. On the one hand, interviews might have resulted in less accurate information about employment discrimination if respondents were reluctant to admit experiences of discrimination. On the other hand, given that most of the surveys were also asking highly personal questions, such as about HIV-status, risky sexual behaviors, drug use, and suicide, respondents might have been desensitized

to reporting stressful information such as experiences of discrimination and were, therefore, more likely to report discrimination they have experienced.

However, what was most notable about the entire set of transgender studies was the commitment of researchers to having transgender people included in every phase of their research—design of the survey instrument, recruitment, and interviewing. Almost all of the studies based on interviews used transgender people to conduct all or most of the interviews.

### 3. Glossary of Terms

Table 3 and the studies it summarizes use a variety of terms to describe all or parts of the transgender community. These terms represent real differences in how the researchers defined the populations which they surveyed. Below is a short glossary of these terms.<sup>35</sup>

**Transgender:** An umbrella term for people whose gender identity, expression, or behavior is different from that typically associated with their assigned sex at birth, including but not limited to transsexuals, cross-dressers, androgynous people, genderqueers, and gender non-conforming people.

**Gender Identity:** An individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others.

**Transsexual:** A term for people whose gender identity is different from their assigned sex at birth. Often, but not always, transsexual people alter their bodies through hormones or surgery in order to make it match their gender identity.

**Cross-dresser:** A term for people who dress in clothing traditionally or stereotypically worn by the other sex, but who generally have no intent to live full-time as the other gender.

**Genderqueer:** A term used by some individuals who identify as neither entirely male nor entirely female. Genderqueer is an identity more common among young people.

**Gender non-conforming/gender variant:** A term for individuals whose gender expression is different from the societal expectations based on their assigned sex at birth.

35. These definitions are influenced by a variety of sources. See PATRICK LETELLIER, INTERSEX SOCIETY OF NORTH AMERICA, BEYOND HE AND SHE: A TRANSGENDER NEWS PROFILE, THE GOOD TIMES (2003), <http://www.tgcrossroads.org/news/archive.asp?aid=584>; and Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3 (2000); The Gay and Lesbian Alliance Against Defamation Homepage, <http://www.glaad.org> (last visited June 4, 2009); The Gay, Lesbian and Straight Education Network Home Page, <http://www.glsen.org> (last visited June 4, 2009).

**FTM:** A person who has transitioned from “female-to-male,” meaning a person who was assigned female at birth, but now identifies and lives as a male.

**MTF:** A person who has transitioned from “male-to-female,” meaning a person who was assigned male at birth, but now identifies and lives as a female.

**Drag Queen:** Generally used to refer to men who dress as women (often celebrity women) for the purpose of entertaining others at bars, clubs, or other events.

**Drag King:** Used to refer to women who dress as men for the purpose of entertaining others at bars, clubs, or other events.

## II. ADMINISTRATIVE COMPLAINTS FILED ABOUT DISCRIMINATION

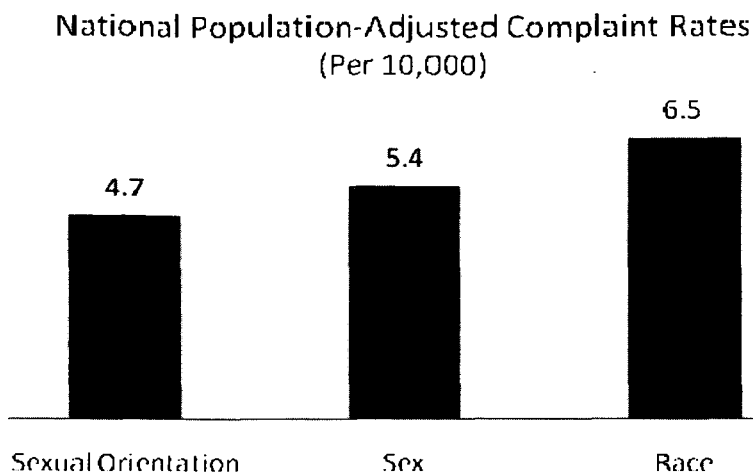
Surveys are not the only one way to study people’s perception of discrimination. In those states that already prohibit sexual orientation discrimination, individuals can file complaints of discrimination, which provide a different way of measuring perceived discrimination. Reports by the General Accounting Office (now the Government Accountability Office) have summarized the number of complaints filed in states that outlaw sexual orientation discrimination.<sup>36</sup>

In a report published in 2008, Ramos, M.V.L. Badgett, and Sears examined legal complaints filed in states that had outlawed sexual orientation discrimination. The report examined data from sixteen state-level agencies, in addition to the District of Columbia, that recorded complaints regarding sexual orientation discrimination in employment. The authors found that the raw number of complaints for each state was small.

Although the actual number of sexual orientation discrimination complaints per gay person was small, they were roughly equivalent to the number of sex-based discrimination complaints per woman. The average for the sixteen states and the District of Columbia was five complaints per 10,000 LGB people under the assumption that the proportion of same-sex couples for a given state is equal to its proportion of the LGB population, compared with five gender-related complaints per 10,000 women and seven

36. JAMES REBBE, VERONICA SANDIDGE & RICHARD BURKARD, U.S. GEN. ACCOUNTING OFFICE, GAO-02-878R, SEXUAL ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCES WITH STATUTORY PROHIBITIONS (2002), available at <http://www.gao.gov/new.items/d02878r.pdf>; STEPHANIE WELDON & DAYNA K. SHAH, U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-00-27R, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS SINCE 1997 7–8 (2000), available at <http://archive.gao.gov/f0502/575711.pdf>.

race-related complaints per 10,000 people of color.



This research showed that complaint rates of sexual orientation discrimination were similar to complaints of sex or race discrimination. Because the complaints studied were not necessarily substantiated through adjudication, though, the study—like the survey-based studies—only measured perceived discrimination.

No similar study has been conducted for the states that currently prohibit gender identity discrimination. Inadequate data collection is the main barrier to a larger discussion around transgender discrimination in general and to their inclusion in this study in particular.<sup>37</sup> Of the twenty states and the District of Columbia, which currently protect LGB individuals from workplace discrimination, only twelve also include gender identity or gender expression. Of those twelve that do include gender identity/expression, nine passed the statute within the past three years.

However, the most recent survey of transgender people in San Francisco found that although 57% of respondents had experienced employment discrimination on the basis of gender identity, only 12% had filed a complaint about the discrimination they experienced, and of those, only 3% had filed their complaint with an independent agency having the authority to enforce California's anti-discrimination law.<sup>38</sup>

37. Roddrick A. Colvin, *The Rise of Transgender-Inclusive Laws: How Well Are Municipalities Implementing Supportive Nondiscrimination Public Employment Policies?* 27 R. PUBLIC PERSONNEL ADMIN. 336, 339 (2007).

38. SAN FRANCISCO BAY GUARDIAN & TRANSGENDER LAW CTR. *supra* note 27, at 4–5.

### III. INCOME DISPARITY STUDIES

#### *A. Background*

Economists and sociologists have used survey data on wages and sexual orientation to look for associations between LGB status and earnings, just as they have studied race and sex discrimination.<sup>39</sup> The basic idea is that people who have the same job and personal characteristics should, on average, be paid the same wage. Applying this theory, if no discrimination exists, members of two different social groups who have the same characteristics should have the same average pay. If, after controlling for productive characteristics (education, occupation, location, experience, training, etc.) and other relevant social characteristics (marital status, sex, race), members of one group earn less than members of the other group, then most economists and sociologists would conclude that employers are discriminating against the lower earning group. In addition to providing another perspective on the existence of discrimination, these studies also allow researchers to see whether discrimination translates into income loss and economic hardship.

Wage analyses are important but difficult to conduct because only a few of the studies that survey random population samples ask questions related to sexual orientation. Those that include questions on income and some measure of sexual orientation include the National Health and Social Life Survey (NHSLs), the General Social Survey (GSS), the United States Census, and the National Health and Nutrition Examination Survey (NHANES III).

Conducted by the National Opinion Research Center at the University of Chicago, the NHSLs questioned participants in 1993 about their sexual attraction, sexual behavior, and sexual identity. The main drawback of NHSLs is its relatively small sample size of 3,432.<sup>40</sup> Therefore, many studies combine the NHSLs with the GSS

The National Opinion Research Center has conducted surveys regularly over the past two decades to assess the general public's social and political attitudes. In the late 1980's, the GSS began asking both men and women how many male and female sex partners they have had since the age of eighteen, and for a sub-sample, the sex of their partners in the last

39. M.V. Lee Badgett, *Discrimination Based on Sexual Orientation: A Review of the Literature in Economics and Beyond* in *SEXUAL ORIENTATION DISCRIMINATION: AN INTERNATIONAL PERSPECTIVE* 19-43 (M.V. Lee Badgett & Jefferson Frank eds., 2007).

40. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN UNITED STATES* (1994).



five years and in the past year.

One drawback of both the GSS and NHANES III is that the surveys only ask questions on sexual behavior, not sexual identity. Using sexual behavior data poses a challenge for interpretation: how many same-sex partners should be required before researchers categorize an individual as gay or lesbian? Researchers have taken different approaches to this question. For example, Badgett put individuals in the LGB category if they listed at least as many same-sex partners and opposite-sex partners since the age of eighteen.<sup>41</sup> In 2003, Dan Black et al. ran three sets of analyses, defining LGB differently each time. They defined LGB based on (1) sexual behavior since age eighteen, (2) sexual behavior in the past year, and (3) sexual behavior in the last five years.<sup>42</sup>

The Census provides the largest dataset for analyses of wages. In both the 1990 and 2000 Censuses, individuals had the option of indicating that they lived with a same-sex “unmarried partner.” Researchers use that cohabitation status as a proxy for LGB sexual orientation.

### B. Patterns in the Findings

The studies of sexual orientation’s impact on wages reveal different patterns for gay men and for lesbians, as summarized in Table 4.<sup>43</sup> The studies support the conclusion that sexual orientation discrimination lowers the wages of gay men. For lesbians, the findings are less clear, since the differential between lesbian and heterosexual women has varied across studies. Some explanations for that variance are considered below. One

41. M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (2001); M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 730–31 (1995).

42. Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 456 (2003).

43. Table 4: REZA G. ARABSHEBANI ET AL., VARIATIONS IN GAY PAY IN THE USA AND THE UK 44–61 (2007); Sylvia A. Allegretto & Michelle M. Arthur, *An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differentials: Unmarried and Unequal?*, 54 INDUS. & LAB. REL. REV. 631, 644 (2001); Badgett, *supra* note 39; Badgett, *supra* note 41, at 736; Nathan Berg & Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL’Y 394, 411 (2002); Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 152 (2000); Black et al., *supra* note 42, at 462; John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 INDUS. & LAB. REL. REV. 622, 640 (2003); Christopher Carpenter, *Self-Reported Sexual Orientation and Earnings: Evidence from California*, 58 INDUS. & LAB. REL. REV. 258, 265–66 (2005); Christopher Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence from NHANES III*, 14 LAB. ECON. 25, 30–31 (2007); Suzanne Heller Clain & Karen Leppel, *An Investigation into Sexual Orientation Discrimination as an Explanation for Wage Differences*, 33 APPLIED ECON. 37, 42 (2001); Marieka M. Klawitter & Victor Flatt, *The Effects of State and Local Antidiscrimination Policies on Earnings for Gays and Lesbians*, 17 J. POL’Y ANALYSIS & MGMT 658 (1998).

finding regarding lesbians is clear: lesbians consistently earn less than men. It seems that gender discrimination has a greater impact on lesbians' wages than sexual orientation discrimination. Nine studies using different datasets consistently show that gay and bisexual men earned 10% to 32% less than heterosexual men.<sup>44</sup> Accounting for differences in occupations between gay/bisexual men and heterosexual men does not influence the wage gap much in either direction.

However, a recent study of California data finds a somewhat different pattern. This study finds that gay men in California earn 2% to 3% less than heterosexual men (a statistically insignificant difference), and bisexual men earn 10% to 15% less than heterosexual men.<sup>45</sup> However, these findings seem to be unique to California, as a subsequent study conducted by the same author using NHANES III data, which like the GSS data ask questions about sexual behavior, found a 23% to 30% income disadvantage for men who engage in same-sex sexual behavior.<sup>46</sup>

**Table 4: Employment and Income Data for Gay Men from Wage Analyses Studies**

Survey	Data Source	Wage Differential	LGB Definition
Allegretto & Arthur (2001)	1990 U.S. Census (5% PUMS)	14.4% penalty for gay unmarried partnered men compared to married heterosexual men; and 2.4% penalty compared to unmarried partnered heterosexual men.	Men with male unmarried partners.
Arabshehani <i>et al.</i> (2007)	2000 U.S. Census (5% PUMS)	9% penalty for gay men.	Men with male unmarried partners
Badgett (1995)	GSS 1989-1991	24% penalty for gay/bisexual men.	At least as many same-sex as different-sex sex partners since age 18.
Badgett (2001)	GSS & NHSLs 1989-1994	17% penalty for gay/bisexual men.	At least as many same-sex as different-sex sex partners since age 18.

44. Allegretto, *supra* note 43; Badgett, *supra* note 39; Badgett, *supra* note 41, at 736; Berg *supra* note 43; Black *et al.*, *supra* note 42; Black *et al.*, *supra* note 43; Blandford, *supra* note 43; Clain, *supra* note 43; Klawitter & Flatt, *supra* note 43.

45. Carpenter, *supra* note 43.

46. *Id.*

Survey	Data Source	Wage Differential	LGB Definition
Berg & Lien (2002)	GSS 1991-1996	22% penalty for gay/bisexual men.	Any same-sex sexual behavior in the past five years.
Black <i>et al.</i> (2000)	1990 U.S. Census (5% & 1% PUMS)	10% to 32% penalty for gay partnered men to married men.	Men with male unmarried partners.
Black <i>et al.</i> (2003)	GSS 1989-1996	13% to 19% penalty for gay men.	Various measures of same-sex sexual behavior.
Blandford (2003)	GSS & NHLS 1991-1996	30% to 32% penalty for gay and bisexual men.	Various measures of same-sex sexual behavior plus marital status
Carpenter (2005)	2001 California Health Interview Survey; GSS 1988-2000	2% to 3% penalty for gay men (not statistically significant) and 10% to 15% penalty for bisexual men.	Self-reported gay, lesbian or bisexual sexual orientation (CHIS); same-sex partners in past five years (GSS).
Carpenter (2007)	1998-1994 NHANES III	23% to 30% penalty for gay men.	Any same-sex sexual behavior.
Clain & Leppel (2001)	1990 U.S. Census (1% PUMS)	22% penalty for men in same-sex couples compared to men not living with partners; and 16% penalty (if college educated) compared to married men.	Same-sex unmarried partners.
Klawitter & Flatt (1998)	1990 U.S. Census (5% PUMS)	13% to 31% penalty for male same-sex couples.	Men with male unmarried partners.

Comparing the wages of lesbians and heterosexual women yields less consistent results (see Table 5).<sup>47</sup> Only one study, limited to the earliest GSS data, finds that being a lesbian or bisexual woman affects wages negatively, but that wage difference was statistically insignificant.<sup>48</sup> All subsequent studies show that lesbians do not earn less than heterosexual women.<sup>49</sup> However, the studies' conclusions vary on whether lesbians earn

47. Table 5: REZA G. ARABSHEBANI ET AL., VARIATIONS IN GAY PAY IN THE USA AND THE UK 44-61 (2007); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (2001); M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 730-31 (1995); Nathan Berg & Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL'Y 394, 411 (2002); Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 456 (2003); John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 INDUS. & LAB. REL. REV. 622, 640 (2003); Christopher Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence from NHANES III*, 14 LAB. ECON. 25, 30-31 (2007); Suzanne Heller Clain & Karen Leppel, *An Investigation into Sexual Orientation Discrimination as an Explanation for Wage Differences*, 33 APPLIED ECON. 37, 42 (2001); Marieka M. Klawitter & Victor Flatt, *The Effects of State and Local Antidiscrimination Policies on Earnings for Gays and Lesbians*, 17 J. POL'Y ANALYSIS & MGMT 658 (1998).

48. Badgett, *supra* note 41, at 735.

49. ARABSHEBANI, *supra* note 43; Badgett, *supra* note 39; Badgett, *supra* note 41; Berg, *supra*

more than heterosexual women.

The studies' different results seem to depend on their definitions of lesbianism.<sup>50</sup> The studies that define sexual orientation on the basis of recent same-sex behavior (i.e., behavior within the past one to five years) find that lesbians earn more than their heterosexual counterparts, while studies of behavior since age eighteen find no earnings advantage for lesbians.<sup>51</sup> Studies using Census data on unmarried partners in 1990 show no statistically significant difference between earnings of lesbians and heterosexual women who work full-time.<sup>52</sup> The fact that lesbians generally do not earn less than heterosexual women does not imply the absence of employment discrimination. First, lesbians might make different decisions than heterosexual women since they are less likely to marry men—who on average have higher wages—or put their careers on hold to have children. As a result, lesbians might invest in more training or actual labor market experience than do heterosexual women. This increase in “human capital” may mask the effects of discrimination. Unfortunately, it is impossible to separate out those effects in existing data. Second, some evidence suggests that women are less likely to disclose their sexual orientation at work.<sup>53</sup> Thus, the findings above might be different had there been a way to measure these factors for lesbians. With better controls, it is possible that we would see that lesbians earn less than heterosexual women with the same actual experience.

Finally, we note that this kind of statistical method has been used in studies of race and sex discrimination to see if differences in other important job outcomes also differ by group membership. In particular, economists and sociologists have analyzed the probability of receiving a promotion, of having a high status occupation, of being employed, and of being unemployed to see if members of stigmatized groups experience a disadvantage. To date, we know of only one such study related to sexual orientation. In a 2007 study using Census 2000 data, Arabshehani et al. found that gay men are less likely to be employed than heterosexual men after controlling for age, education, race, and health status, but lesbians are more likely to be employed than are heterosexual women.<sup>54</sup> However, the lesbian employment difference probably resulted from choices made by

note 43; Black et al., *supra* note 42, at 463; Blandford, *supra* note 43, at 640; Carpenter, *supra* note 43, at 265; Clain, *supra* note 43; Klawitter & Flatt, *supra* note 43.

50. Badgett, *supra* note 41; Black et al., *supra* note 42.

51. Black et al., *supra* note 42, at 462.

52. Klawitter & Flatt, *supra* note 43.

53. Badgett, *supra* note 41.

54. ARABSHEHANI, *supra* note 43; Badgett, *supra* note 39.

heterosexual women to withdraw from the labor force rather than from employers favoring lesbians for jobs.

**Table 5: Employment and Income Data for Lesbian Women from Wage Analyses Studies**

Survey	Data Source	Wage Differential	LGB Definition
Arabshehani <i>et al.</i> (2007)	2000 U.S. Census (5% PUMS)	14% premium for lesbian women.	Women with female unmarried partners
Badgett (1995)	1989-1991 GSS	18% less (evaluating the interaction between GLB and potential experience term at mean – not statistically significant).	At least as many same-sex partners as different-sex partners since age 18.
Badgett (2001)	1989-1994 GSS & NHLS	11% premium for lesbian/bisexual women (not statistically significant).	At least as many same sex partners as different-sex partners since age 18.
Berg & Lien (2002)	1991-1996 pooled GSS	30% premium for lesbian/bisexual women.	Any same-sex sexual behavior in the past five years.
Black <i>et al.</i> (2003)	1989-1996 GSS	6% to 27% premium for lesbian women.	Various measures of same-sex sexual behavior.
Blandford (2003)	1991-1996 pooled GSS	17% to 23% premium for lesbian and bisexual women.	Various measures of same-sex sexual behavior plus marital status
Carpenter (2005)	2001 California Health Interview Survey	CHIS: 2.7% penalty (statistically insignificant) for lesbians and 10.6% penalty for bisexual women; GSS: 31% premium for lesbians and 7% penalty for bisexual women (not statistically significant).	Self-reported gay, lesbian or bisexual sexual orientation (CHIS); same-sex partners in past five years (GSS).
Clain & Leppel (2001)	1990 U.S. Census (1% PUMS)	2.2% penalty compared to women without partners or spouses.	Women with female unmarried partners
Klawitter & Flatt (1998)	1990 U.S. Census (5% PUMS)	No statistically significant difference for those working full-time.	Women with female unmarried partners

### *C. Measuring the Effects of Antidiscrimination Laws: A Wage-Based Approach*

There have been very few attempts to measure the effectiveness of sexual orientation anti-discrimination laws. In 1998, Klawitter and Flatt used Census data to compare wages of gays and lesbians in various jurisdictions—some had sexual orientation antidiscrimination laws while others did not.<sup>55</sup> After controlling for individual and location characteristics, the study found no evidence of a direct relationship between antidiscrimination laws and average earnings for people in same-sex couples or on the wage gap between partnered gay men and married heterosexual men.<sup>56</sup>

Since many of the laws had not been in force for very long when the 1990 Census was administered, Klawitter and Flatt's study does not necessarily mean that antidiscrimination laws have no effect. In addition, the laws' positive effects may not be quantifiable through wage analyses. For example, the laws may make it easier for gays and lesbians to come out at work, improve intra-office dynamics, or help gays and lesbians to achieve a greater sense of dignity.

### *D. Incomes of Transgender People*

***Transgender people report high unemployment rates and low earnings, and 22% to 64% report incomes of less than \$25,000 per year***

There have been no published studies to date like those described above analyzing the wage differences between transgender and non-transgender people. The most significant obstacle is the lack of available data. The NHLS, the GSS, and the United States Census do not ask questions about gender identity, so researchers cannot identify transgender people.

However, a number of convenience samples of transgender people, including some of those summarized in Table 3 above, indicate that large percentages of the transgender population are unemployed and have incomes far below the national average. Although these surveys share the limitations described above—overrepresentation of clients of AIDS service organizations, other social service organizations, people of color, and commercial sex workers—the studies are consistent in their findings. In all, between

55. Klawitter & Flatt, *supra* note 43.

56. *Id.*

6% and 60% of transgender people report being unemployed, and 22% to 64% report incomes of less than \$25,000 per year (see Table 6).<sup>57</sup>

**Table 6: Employment and Income Data from Surveys of Transgender People**

Survey	Year(s) Data Collected	Sample	Unemployment	Annual income
<b>Bockting <i>et al.</i> (2005)</b>	1997-2002	Transgender People in Minnesota (n = 207)	NA	<b>22% below poverty line</b>
<b>Clements K. <i>et al.</i> (1999)</b>	1997	MTFs and FTMS in San Francisco (n = 515)	<b>19%</b> of FTM <b>60%</b> of MTF (most common way of "obtain money in past 6 months" was part- or full-time employment for 40%)	
<b>Lombardi <i>et al.</i> (2001)</b>	1996-1997	Transgender people in the U.S. (n = 402)	<b>6%</b>	<b>37% less than \$25,000</b>
<b>Kenagy (2005)</b>	1997	Transgender People in Philadelphia (n = 81)	<b>59%</b> (do not currently have an employer)	<b>56% less than \$15,000</b>
<b>Kenagy and Bostwick (2005)</b>	2000-2001	Transgender People in Chicago (n = 111)	<b>34%</b> (do not currently have an employer)	<b>40% less than 20,000</b>
<b>Minter and Daley (2003)</b>	2002	Transgender people in San Francisco (n = 155)	NA	<b>64% less than \$25,000</b>
<b>Reback <i>et al.</i> (2001)</b>	1998-1999	MTF Transsexuals in Los Angeles County (n = 244)	<b>50%</b>	<b>50% less than \$12,000</b>

57. Table 6: SHANNON MINTER & CHRISTOPHER DALEY, SAN FRANCISCO: NAT'L CTR FOR LESBIAN RIGHTS AND TRANSGENDER LAW CTR., *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* (2003); CATHY J. REBACK ET AL., *THE LOS ANGELES TRANSGENDER HEALTH STUDY: CMTY. REPORT* (2001); SAN FRANCISCO BAY GUARDIAN & TRANSGENDER LAW CTR., *supra* note 27, at 1-3; SAN FRANCISCO DEPT OF PUB. HEALTH, *THE TRANSGENDER COMMUNITY HEALTH PROJECT* (1999), <http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.461e>; XAVIER & SIMMONS, *supra* note 27; XAVIER ET AL., *supra* note 27, at 14; Walter Bockting et al., *Are Transgender Persons at Higher Risk for HIV Than Other Sexual Minorities? A Comparison of HIV Prevalence and Risks*, 8 INT'L J. TRANSGENDERISM 123, 128 (2005); Emilia L. Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89 (2001); Gretchen P. Kenagy, *The Health and Social Service Needs of Transgender People in Philadelphia*, 8 INT'L J. TRANSGENDERISM 49 (2005); Gretchen P. Kenagy & Wendy B. Bostwick, *Health and Social Service Needs of Transgender People in Chicago*, 8 INT'L J. TRANSGENDERISM 57 (2005); Deanna L. Sykes, *Transgendered People: An "Invisible" Population*, 12 CAL. HIV/AIDS UPDATE 1 (1999).

Survey	Year(s) Data Collected	Sample	Unemployment	Annual income
San Francisco Bay Guardian and Transgender Law Center (2006)	2006	Transgender people in San Francisco (n = 194)	35% (defined as not included those on SSI or SSDI, but include indicating unemployment insurance, general assistance, other source of income or no income) (only 25% working FT and 16% working PT)	59% less than \$15,300
Sykes (1999)	1998	Transsexuals in Northern California (n = 232)	28%	NA
Xavier <i>et al.</i> (2005)	1999-2000	Transgender People of Color in Washington, D.C. (n = 248)	35% (of the sample over 19)	64% less than \$15,000 (of the sample over 19)
Xavier <i>et al.</i> (2007)	2005-2006	Transgender People in Virginia (N = 350)	9%-24%	39% less than \$17,000

#### IV. CONTROLLED EXPERIMENT

##### *A. Background*

Researchers have looked for ways to assess more directly whether discrimination exists. In controlled experiments, researchers compare treatment of LGB people and treatment of heterosexuals by manufacturing scenarios in which research subjects interact with actual or hypothetical people who are coded as gay or straight. Those interactions are then observed and analyzed for differences. For instance, in some studies researchers distribute profiles of job applicants (including résumés, photographs, and/or other materials) to subjects. Each profile is controlled to reveal the applicant's sexual orientation. In other words, gay and non-gay profiles are designed to be exactly the same, except for the labeling of one or more job applicants or customers as gay. Therefore, researchers can be confident that differential treatment is motivated by discrimination. Researchers then compare the rate of interview offers and other outcomes that might differ by sexual orientation if discrimination occurs.

This method is used extensively in studies of racial housing discrimi-



nation and has been applied more frequently in recent years in studies of racial employment discrimination. A review of the academic literature found several controlled experiments that assessed differential treatment on the basis of sexual orientation. Most of these experiments focus on differential treatment in employment; two studies focused on public accommodations.

### *B. Studies of Employment*

A survey of the published literature on employment discrimination found five audited experiments which showed sexual orientation discrimination; a sixth did not. Because each of the studies were context-specific, they are difficult to compare.

***Experiments show consistent discrimination against gay and lesbian applicants***

The first known audit experiment was conducted by Barry Adam in 1981, who sent out two nearly identical résumés from fictitious law students to Ontario law firms.<sup>58</sup> One résumé was coded as gay by stating that the candidate was active in the “Gay People’s Alliance.” The gay-coded candidate received fewer interview invitations. Unfortunately, Adams did not test for statistical significance, thus limiting the persuasiveness of his report. And as discussed later, the measured discrimination effect may have been skewed by bias against social activists.

Following Adam’s study, Horvath and Ryan conducted one of the three employment-focused experiments conducted in the United States to date.<sup>59</sup> They designed résumés for a technical writer position. The résumés were then rated by undergraduate students—not by actual employers. The demographics of the participants—77% of the 236 participants were white women—were also not representative of the undergraduate population or the larger U.S. population. The students rated the heterosexual man the highest (84.87 on a 100-point scale), followed by the homosexual woman (80.76), the homosexual man (80.38), and then the heterosexual woman (76.2).<sup>60</sup> Like the wage studies, gay men and lesbians were disadvantaged relative to heterosexual men, but lesbians were perceived as more qualified than heterosexual women. The small advantage for heterosexual men might

58. Adam D. Barry, *Stigma and Employability: Discrimination by Sex and Sexual Orientation in the Ontario Legal Profession*, 18 CANADIAN REV. SOC. & ANTHROPOLOGY, 216, 217 (1981).

59. Michael Horvath & Ann Marie Ryan, *Antecedents and Potential Moderators of the Relationship Between Attitudes and Hiring Discrimination on the Basis of Sexual Orientation*, 48 SEX ROLES 115 (2003).

60. *Id.* at 115.

have resulted from the fact that college students show less prejudice toward lesbians and gay men than the general population.

Another study by economist Doris Weichselbaumer in 2003 found evidence of discrimination against Austrian lesbians when compared with heterosexual women.<sup>61</sup> The study sent responses to job ads in Austria for four applicants: a feminine heterosexual woman, a masculine heterosexual woman, a feminine lesbian, and a masculine lesbian. Conforming to local practice, Weichselbaumer included a photograph, school transcript, reference letters, and a résumé for each applicant. The femininity or masculinity of the applicants was represented in the photographs and in hobbies listed in the résumés. Lesbianism was represented by a résumé listing of past managerial experience within a gay organization. Both masculine and feminine lesbians received fewer interview invitations than heterosexuals.<sup>62</sup> There was no statistically significant difference between the two groups of lesbians, suggesting that even feminine lesbians experience discrimination in the labor market.

The fourth experiment was conducted by Crow, Fok, and Hartman in 1988.<sup>63</sup> Unlike the previous experiments, this study measured bias but not necessarily discrimination. Managers and supervisors in both private and public sector industries of a southern U.S. city were asked to select six out of eight candidates for a fictitious accounting position. The researchers only gave the subjects information on the candidates' race, sex, and sexual orientation, and the subjects were told that all affirmative action guidelines had been fulfilled, leaving them free to discriminate. In other words, this study forced subjects to resort to biases to determine which two candidates to exclude. This experiment found that, regardless of sex and race, homosexuals were less likely to be selected than heterosexuals.<sup>64</sup> In contrast to wage analyses, this experiment showed that white heterosexual women were the most likely to be selected—more likely than white homosexual women and even white heterosexual men.

In a study published in 2002, Michelle Hebl and colleagues sent eight male and eight female undergraduate and graduate students to apply for jobs at retail stores.<sup>65</sup> The interactions were taped by a concealed recording

61. Doris Weichselbaumer, *Sexual Orientation Discrimination in Hiring*, 10 *LABOUR ECON.* 629 (2003).

62. *Id.*

63. Stephen M. Crow, Lillian Y. Fok & Sandra J. Hartman, *Who is at Greatest Risk of Work-related Discrimination—Women, Blacks, or Homosexuals?* 11 *EMP. RESPS. & RTS. J.* 15, 20 (1988).

64. *Id.*

65. Michelle R. Hebl et al., *Formal and Interpersonal Discrimination: A Field Study of Bias Toward Homosexual Applicants*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 815, 817 (2002).

device. Half of the time the confederates wore a baseball cap with the words “Gay and Proud”; the other half of the time the same confederates wore caps that read “Texan and Proud.” The researchers analyzed measures of “formal discrimination”: job availability, permission to complete a job application, job callbacks, and permission to use the bathroom. They also analyzed measures of “interpersonal discrimination”: interaction duration, number of words spoken during the interaction, negativity perceived by the confederates, employer interest perceived by the confederates, and employer negativity perceived by reviewers of the recorded tapes. The researchers found that, on average, confederates wearing the gay cap did not suffer from formal discrimination, perhaps because the outcome measures captured only a few measures available at the beginning of the job hiring process. But the researchers did find that the gay-labeled applicants experienced interpersonal discrimination. Because all of the stores were in the same mall area of a Texas city, this study’s results may not be indicative of broader discriminatory patterns.<sup>66</sup>

The sixth study, conducted by Van Hoya and Lievens in Belgium, found no significant signs of sexual orientation discrimination.<sup>67</sup> The researchers distributed candidate profiles to human resource professionals in consultancy firms and companies’ internal human resource departments. The subjects were given extensive information on both the candidates (personal data, education and professional experience, and personality) as well as an extensive job description (a description of the company, a car parts manufacturer; the job title, Human Resources Manager; the job contents, knowledge, skills, and abilities required; and the benefits offered by the company).<sup>68</sup> The study found that sexual orientation did not have a significant effect on hiring rates.

There are some possible explanations why this Belgian study found no discrimination, unlike the other experimental studies. Commentators have hypothesized that decision-makers are most likely to resort to bias and stereotypes when they have limited information regarding the job candidate and/or the job opening.<sup>69</sup> Because this study provided its subjects with so much information—perhaps an unrealistic amount of information—the

66. *Id.*

67. Greet Van Hoya & Filip Lievens, *The Effects of Sexual Orientation on Hirability Ratings: An Experimental Study* 18 J. OF BUS. & PSYCHOL. 15, 22 (2003).

68. *Id.* at 19–21.

69. Kristl H. Davison & Michael J. Burke, *Sex Discrimination in Simulated Employment Contexts: A Meta-analytic Investigation*, 56 J. VOC. BEHAV. 225, 237 (2000); Henry L. Tosi & Steven W. Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis*, 28 ACAD. MGMT. J. 712, 713 (1985); Van Hoya & Lievens, *supra* note 67, at 24.

subjects may have been less inclined to resort to biases than usual. Another explanation for the apparent lack of discrimination is that human resource professionals are not representative of other people who make interviewing and hiring decisions, for example hiring managers, and human resource managers might be particularly attuned to laws forbidding discrimination. Similarly, the fictitious job opening was in the field of human resources, which again, may not be representative of other fields. Finally, the geographic location—Belgium—may be particularly hospitable to gay people; after all, Belgium was the second country to legalize same-sex marriage.

### *C. Studies of Public Accommodations*

In a study published in 1996, Walters and Curran sent three couples—male/male, female/female, and female/male—and an observer to 20 retail stores in an indoor mall.<sup>70</sup> All couples followed the same script, which directed them to hold hands, smile at each other, and request help from sales staff, etc. The couples and the observer found that, on average, retail staff waited longer before helping female/female (4 min. 18 sec.) and male/male (3 min. 51 sec.) couples, compared to female/male couples (1 min. 22 sec.).<sup>71</sup> In addition, retail staff talked about the same-sex couples and subjected them to staring, pointing, laughter, and rudeness. When same-sex couples interacted with staff, the above signals of negative feelings emerged 10% to 75% of the time (staff were rude to female/female couples 10% of the time; staff stared at male/male couples 75% of the time).<sup>72</sup> None of the male/female couples were subjected to any of those negative signals.

In a second 1996 study, Jones took the auditing methodology and applied it to another public accommodations context.<sup>73</sup> He sent letters to 320 hotels around the country. The letters were signed by either a same-sex couple or an opposite-sex couple, who requested a room with one bed. Jones found that same-sex couples received less positive responses than opposite-sex couples; the difference was statistically significant.<sup>74</sup>

70. Andrew S. Walters & Maria-Cristina Curran, "Excuse Me, Sir? May I Help You and Your Boyfriend?": Salespersons' Differential Treatment of Homosexual and Straight Customers, 31 *HOMOSEXUALITY* 135 (1996).

71. *Id.*

72. *Id.*

73. David A. Jones, *Discrimination Against Same-Sex Couples in Hotel Reservation Policies in GAYS, LESBIANS, AND CONSUMER BEHAVIOR: THEORY, PRACTICE AND RESEARCH ISSUES IN MARKETING* (Daniel L. Wardlow ed., 1996) (published simultaneously in 31 *J. HOMOSEXUALITY* 153 (1996)).

74. Jones, *supra* note 73.

#### *D. Issues Related to Interpretation of Results*

While well-designed experiments have provided convincing evidence of differential treatment of LGB as compared with heterosexuals, controlled experiments also have some limitations. They are generally limited to a single context (such as entry-level jobs or retail interactions) or geographic location. They do not work well for studying discrimination in some important contexts, such as access to high status jobs that involve internal hiring processes or the presence of relatively rare skills or experience.

Furthermore, designing controlled experiments can be difficult. One particular challenge is determining how to code the confederates' sexual orientation. Researchers use certain traits to code confederates as either LGB or heterosexual. However, those traits may be coded for more than just sexual orientation. For example, a researcher may choose to code a confederate as gay by having him wear a pin reading "gay and proud." However, that pin may actually also indicate political activism as well as sexual orientation, and some subjects may discriminate on the basis of political activism.

Therefore, the experimental studies provide convincing evidence that sexual orientation discrimination exists, but we cannot use these studies to predict the likelihood of discrimination in other contexts.

#### CONCLUSION

Overall, the existing research on sexual orientation discrimination provides consistent and compelling evidence that discrimination against LGBT people exists:

- LGBT individuals have reported experiences of discrimination based on their own sexual orientation and gender identity, both to researchers and, in some cases, to enforcement agencies charged with investigating claims of discrimination.
- Heterosexual people have reported observing discrimination based on sexual orientation.
- Wages of gay men are lower than wages of heterosexual men with the same personal and job characteristics.
- The best available data suggests that transgender people experience very high unemployment rates and that large percentages have very low incomes.
- Employers, sales clerks, and other observers have treated LGB job applicants or customers differently from heterosexu-

als.

The wage studies and experiments also demonstrate that discrimination is not benign. Lower incomes and difficulty in getting or keeping a job create direct disadvantages for LGBT people who have experienced discrimination in the workplace.