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Issue Brief: The LGBT Community and Affirmative Action in the United States

Key Words:

Affirmative action, homosexuals, preferential treatment, employment, universities

Description:

Although they are not a protected class under the current definition of affirmative action, this issue brief examines the possibility of giving preferential treatment to members of the LGBT community.

Key Points:

- Affirmative action was originally conceived to end workplace discrimination
- As a historically oppressed minority, there is debate about extending affirmative action rights to gays and lesbians in college admissions and in the workplace
- Unlike race and gender, sexual orientation is not necessarily a visible characteristic
- There is currently no national non-discriminatory protection for LGBT workers

The term *affirmative action* first appeared in President John F. Kennedy's 1961 Executive order 10925, and was reinforced in the Civil Rights Act of 1964 and Lyndon B. Johnson's Executive Order 11246 in 1965. At its inception, its purpose was to end racial and gender discrimination in the labor sector by setting "numerical hiring goals" for contractors. Although affirmative action was originally defined as "positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded,"¹ in recent years there has been debate on expanding the list of protected factors to include sexual orientation.

The debate on affirmative action for sexual minorities has been especially important among universities. Expanding the list of protected factors to include sexual orientation would make sexuality a decisive factor in college admissions. The goal of affirmative action is to increase the representation of certain groups in areas where they have not had access historically. But to consider if lesbian, gay, bisexual, and transgender (LGBT) students should get preferential treatment in admissions and hiring practices, it is necessary to see if they meet the criteria of discrimination and underrepresentation. Although it cannot be denied that homosexuals have been and continue to be a persecuted group in America, where they differ critically from racial and gender groups is the issue of visibility: while skin color and gender cannot be easily hidden, sexuality is not a visibly marked feature. This is demonstrated by the many number of students and professionals who go through college life and their careers without ever disclosing their sexualities. Additionally, the fact that sexuality is not an easily identifiable marker would make it very easy to exploit in the admissions process. There would be too much risk of "bisexuals until graduation"² (individuals claiming to be not heterosexual to increase their chances of admission) taking advantage of the system in a way that could not be easily replicated with gender and ethnicity.

Since sexual minorities could still be considered oppressed or disadvantaged groups, one proposed way to end prejudice is to actively "recruit" homosexuals into the workplace and universities. Even though the Supreme Court case *Regents of the University of California v. Bakke* upheld the legal use of preferential selection in college admissions, the idea that affirmative action could be a form of "preferential hiring" justifiable as a form of compensation for past wrongs or as a social good was not the original intent of affirmative action. That did not emerge until the early 1970s with essays by American philosophers Judith Jarvis Thomson and Thomas Nagel. While liberal colleges do want to see more

¹ <http://plato.stanford.edu/entries/affirmative-action/>

² <http://www.insidehighered.com/news/2006/10/09/gay>. See comment "Question for Amaz-ING"

diversity on campuses, there seems to be a greater focus on finding ways to encourage gay students to apply rather than in giving them admissions advantages.³ But the growing number of “out” students on campuses has resulted in the fact that gay identification is not as significant of a detail as it once was.

Many homosexuals find corporate America, on the other hand, rampant with homophobia and discriminatory practices.⁴ The Employment Non-Discriminatory Act (ENDA) has been a proposed bill in Congress since 1994. If passed, it would legally make homosexuals a protected class and prohibit workplace discrimination on the basis of sexual orientation. But as of now harassment and other forms of discrimination are a reality for some openly gay professionals and a fear for those still in the closet. Affirmative action in the workplace would help to abate these fears by giving gays and lesbians legal tools. Being able to interact with self-identifying homosexuals would serve as a form of education and help break down the prejudices in society.⁵ In this way affirmative action would return to its initial goal, not of preferential selection, but rather to end discrimination.

Other Web Sites:

- http://advocate.com/Politics/Commentary/Tripping_Over_a_Leg_Up/
- <http://www.nytimes.com/2007/09/30/magazine/30affirmative-t.html>
- http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act

barney frank and the slippery split-ENDA slope

<http://www.mikhaela.net/cgi-bin/showpic.cgi?picdir=toons&picname=bw071025ENDA300C.gif>

Current U.S. LGBT Employment Discrimination Laws

All employment:

- Sexual orientation and gender identity
- Sexual orientation only

State employment:

- Sexual orientation and gender identity
- Sexual orientation only
- No state-level protection for LGBT employees

http://commons.wikimedia.org/wiki/File:US_LGBT_civil_rights_February_2010.svg

³ <http://www.dailypennsylvanian.com/node/50753>

⁴ http://money.cnn.com/magazines/fortune/fortune_archive/1991/12/16/75874/index.htm

⁵ <http://www.jstor.org/stable/pdfplus/40239394.pdf?acceptTC=true>