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Authors

Baumle, Amanda K.
Badgett, M.V. Lee
Boutcher, Steven

Publication Date

2019-04-25

Data Availability

The data associated with this publication are not available for this reason: Licensing Restrictions

Peer reviewed

New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC

Amanda K. Baumle^a, M. V. Lee Badgett^b, and Steven Boucher^c

^aDepartment of Sociology, University of Houston, Houston, Texas, USA; ^bDepartment of Economics, University of Massachusetts Amherst, Amherst Center, Massachusetts, USA; ^cLaw & Society Association, University of Massachusetts Amherst, Amherst Center, Massachusetts, USA

Abstract

In 2013, the Equal Employment Opportunity Commission (EEOC) began allowing anyone who believed that they experienced sexual orientation or gender identity (SOGI) discrimination to file charges of sex discrimination under Title VII of the Civil Rights Act. Very little is known about the impact of the EEOC's decision and whether it has enhanced protections for LGBT people. In this brief report, we present preliminary findings on trends and patterns in charge filing, paying particular attention to differences that emerge in charges filed in states with and without SOGI employment nondiscrimination laws. Differences in the characteristics of charging parties, allegations, and charge outcomes suggest that legal protections operating at the state level shape the experiences and disputing behaviors of LGBT individuals in pursuing Title VII remedies.

KEYWORDS: Employment discrimination, sexual orientation, gender identity

Studies from a variety of social science disciplines have found that lesbian, gay, bisexual, and transgender people face employment discrimination in the United States (e.g. Badgett, 2001; Baumle & Poston, 2011; Klawitter, 2015; Pew Research Center, 2013; Schilt, 2006; Tilcsik, 2011). Other than President Obama's 2014 Executive Order forbidding sexual orientation and gender identity (SOGI) discrimination by federal contractors, federal law has no explicit ban on SOGI discrimination in employment in the private sector. Only twenty-one states plus the District of Columbia outlaw SOGI employment discrimination, and one other outlaws sexual orientation discrimination.

However, in 2013 the Equal Employment Opportunity Commission (EEOC) began allowing anyone who believed that they experienced SOGI-based discrimination to file charges of sex discrimination under Title VII of the Civil Rights Act, arguing that discrimination against LGBT employees is rooted in gender stereotypes and other sex-based considerations. Aside from anecdotal evidence from specific cases, very little is known about the impact of the EEOC's decision and whether it has enhanced protections for LGBT people. This paper presents preliminary findings on trends and patterns in charge filing that come from a larger ongoing study of how federal policy has influenced employment discrimination disputes involving LGBT people. Given the variation in state-level nondiscrimination laws, we focus on examining how characteristics of

charging parties, the charge allegations, and charge outcomes vary between states with SOGI protection and those without such laws.

We might expect state-level laws to be related to differences in charge patterns for several reasons. Herek (2007) observes that sexual stigma is reinforced and perpetuated through institutional and ideological practices. This “heterosexism” operates through institutions to generate disadvantage for sexual minorities, irrespective of the presence or absence of individual discrimination. Further, Herek notes that heterosexism operating through institutions such as the law serves to legitimate individual level prejudice. Within the employment context, therefore, LGBT individuals are disadvantaged due to both individual acts of discrimination and the ideological and institutional practices that uphold heteronormativity through the legal system and sociopolitical environment in which individuals are nested.

The scientific premise of this study was to test the proposition that legal protections operating at the state level are associated with the experiences and disputing behaviors of LGBT individuals who pursue Title VII remedies. Despite the availability of legal recourse at the federal level, we expect that variations in heterosexism, which was operationalized by state-level variation in the presence or absence of SOGI nondiscrimination laws, would be associated with the types of disputes that arise and are pursued. In this brief report, we describe the differences associated with Title VII SOGI charges filed in states with and without nondiscrimination laws.

Method

This study uses data from the Equal Employment Opportunity Commission, the agency that enforces federal civil rights laws. Discrimination charges may be filed with the EEOC directly or with one of the state or local Fair Employment Practices Agencies (FEPA) that have agreements with the EEOC to share the processing of charges. In this paper, we report preliminary findings from a quantitative dataset of all charges filed between 2012 and 2016 by individuals located in any of the 50 states or Washington, D.C. that allege SOGI discrimination. The 9,121 charges in our dataset, therefore, comprise the total population of charges. The EEOC data are highly confidential and are not publicly available, but can be used for research purposes if the researcher is detailed to the EEOC through the Intergovernmental Personnel Act (“IPA”) to conduct research on SOGI discrimination with these data.

In this preliminary analysis, we examine the overall trends in filing over time and the relationship between individual and charge characteristics with state-level nondiscrimination laws. Our primary independent variable was the presence or absence of a SOGI or SO nondiscrimination law at the time of filing; during this timeframe, 22 states and D.C. prohibited discrimination.¹ We examined the relationship between this

independent variable and several dependent variables including individual characteristics of the charging parties, charge allegations, and charge outcomes.

Characteristics of charging parties

We first examined demographic characteristics of the charging parties. FEPA's are less likely to have recorded complete demographic data on charging parties, thus we specify in our results the proportion of charges with valid responses on demographic characteristics. We include the variable of sex, measured as male or female; race, including White, Black, Asian, Hawaiian/Pacific Islander, and Native American; and Hispanic ethnicity. Race and ethnicity are not mutually exclusive, meaning an individual could identify as both Black and Hispanic.

Charge allegations

We then examined characteristics of the charges, including other bases of discrimination and issues alleged; for these variables, we include the total 9,121 charges in the dataset. Along with a SOGI claim, charging parties might allege discrimination based on another protected category, such as race, disability, or retaliation.

We also examined the specific discriminatory employer practice, or issue, alleged by the charging party, such as termination, unequal compensation, or harassment. A particular issue can be difficult to link to only one basis, given that an issue such as harassment could be tied to multiple stigmatized characteristics (e.g. sexual orientation and race). Accordingly, we report issues contained in a charge of discrimination that includes at least one allegation of SOGI discrimination.

Charge outcomes

Finally, we examined whether a charge received a favorable outcome resulting in the charging party receiving a monetary or nonmonetary benefit. For this subset of charges, we look only at the 7,851 charges that have been closed, meaning that they have been resolved. Monetary benefits include items such as back pay, fringe benefits, punitive damages, or attorney's fees; nonmonetary benefits include items like policy changes, training, or accommodations.

Results

This present analysis reports univariate and bivariate descriptive statistics for the entire population of charges. As reflected by Figure 1, there was a sharp increase in the number of charges in 2013 – the year when the EEOC began to formally accept SOGI charges.

(Some charges filed in 2012 may have had a SOGI charge added later.) As expected with a change in federal policy, most of these charges were filed with EEOC offices, but there was also an increase in charges filed with state FEPAs during this period. The increase in charges occurred for both sexual orientation and gender identity discrimination (Figure 2). These data reflect a rapid increase in LGBT individuals invoking federal nondiscrimination law during the three years following the EEOC’s policy change.

Figure 1. Number of federal sexual orientation and gender discrimination charges filed with the Equal Employment Opportunity Commission and Fair Employment Practice Agencies, 2012–2016.

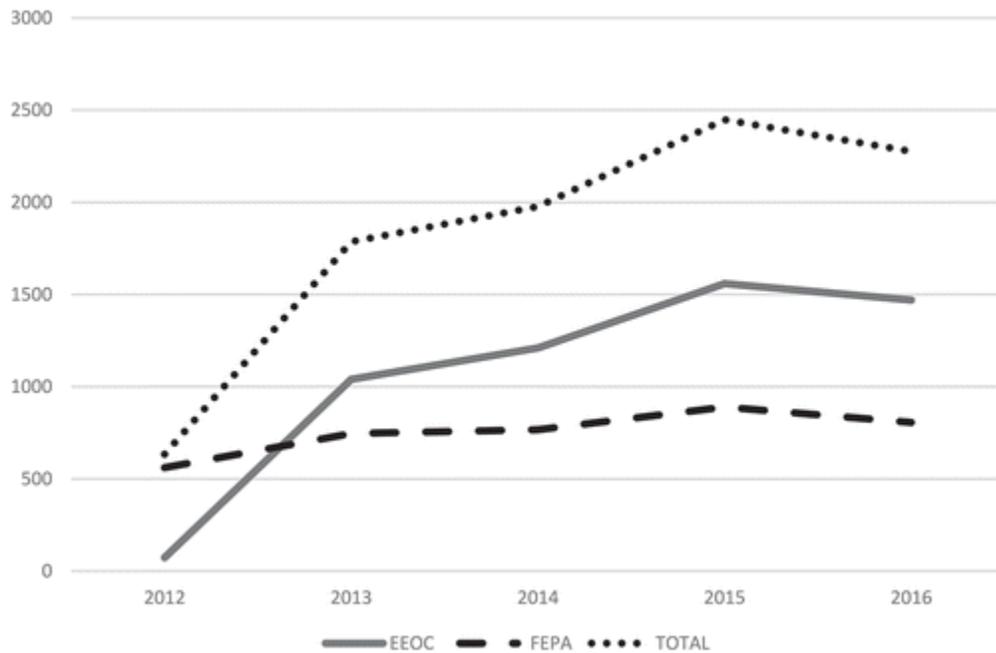
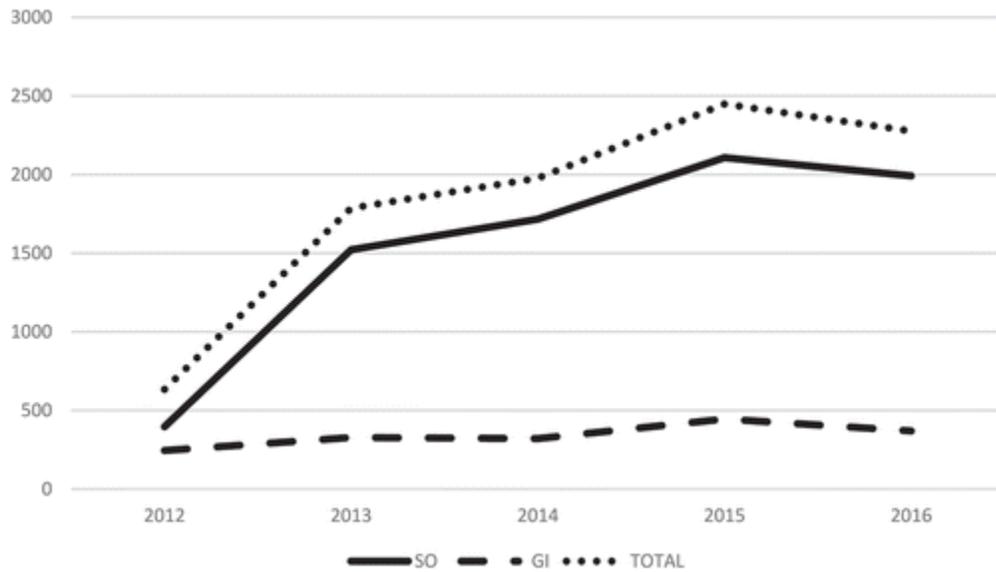
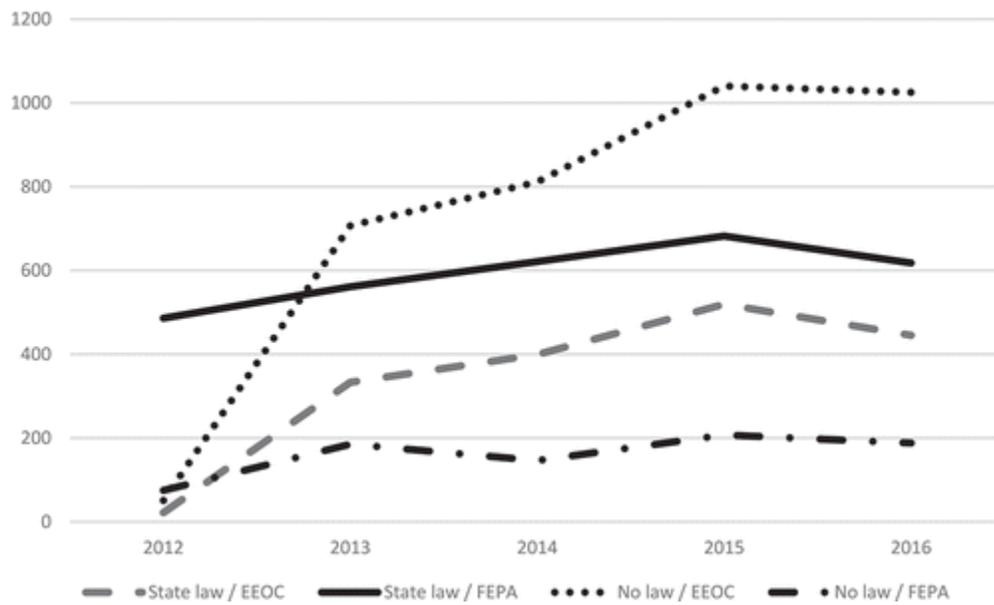


Figure 2. Number of federal sexual orientation (SO) and gender identity (GI) discrimination charges filed, 2012–2016.



Notably, the greatest increase in charges was seen in states without SOGI laws, where charges grew from 126 filed in 2012 to 1,213 in 2016, a 10-fold increase in filing (Figure 3). In states with nondiscrimination policies, charge filings increased more modestly, doubling from 508 filed in 2012 to 1,063 in 2016. Further, although charging parties may file their federal complaint with either an EEOC or FEPA office, the charge data reveal a division of labor between states with SOGI nondiscrimination laws and those without such laws. In states with nondiscrimination laws, the state FEPAs handled 63% of SOGI charges, whereas in states without SOGI protection the EEOC offices handled approximately 80% of SOGI charges.

Figure 3. Number of federal sexual orientation and gender discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) and Fair Employment Practice Agencies (FEPA), by state nondiscrimination law, 2012–2016.



Characteristics of charging parties

Demographic data on charging parties show distinct patterns by race and sex. Approximately 16% of charges contain no information on the sex of the charging party. For those charges with available data, more are filed by men (55%) than by women (45%). Men particularly dominate charges of discrimination based on sexual orientation, with 58% of these charges being filed by men in contrast to only 42% filed by women; approximately 14% of sexual orientation charges have no data on sex. For gender identity, in contrast, women comprise a greater proportion of charges at 63% with men at 37%; approximately 25% of gender identity charges have missing data on sex. There is very little difference in filing by sex between states with SOGI laws and those without such laws, with approximately 56% of charges in SOGI states filed by men compared to 55% in non-SOGI states.

Approximately 41% of charges are missing data on the race/ethnicity of the charging party, mostly from FEPAs. For those with data on race/ethnicity, approximately 52% are White, 43% are Black, and 10% are Hispanic (Table 1). For charges based on sexual orientation, 50% are White, 44% Black, and 10% Hispanic. For gender identity, 55% of charging parties are White, 39% Black, and 7% Hispanic. Differences emerge in the race of charging parties in non-SOGI states compared to SOGI states. A greater proportion of charging parties in non-SOGI states are Black, at 47%, compared to 38% in SOGI states. Also, 11% of charging parties are Hispanic in non-SOGI states and 9% in SOGI states.

Table 1. Race and ethnicity of charging parties in Federal SOGI charges, 2012–2016 (percent of total valid responses).

Race	SOGI States	Non-SOGI States	Total
Black/African American	37.6%	46.6%	43.2%
Hawaiian/Pacific Islander	1.5%	*	0.7%
American Indian/Alaska Native	3.1%	2.0%	2.4%
Asian	4.1%	1.0%	2.1%
White	53.7%	50.3%	51.6%
Hispanic	9.0%	10.6%	9.9%

* Cell size is not reported because it falls below the EEOC’s cut-off of 30 charges.

Charge allegations

Charging parties often allege employment discrimination based on more than one protected category. The most common alleged bases of discrimination besides sexual orientation or gender identity were other gender bases (55%), followed by retaliation (42%), race (17%), and disability (14%) (Table 2). Other gender bases include other discrimination based on sex (i.e. being male or female, pregnancy; or equal pay). Both retaliation (46% vs. 39%) and gender (59% vs. 52%) bases were included in a greater proportion of charges in states without SOGI nondiscrimination laws than in those with laws. In addition, a slightly larger proportion of charges included a race basis in states without SOGI protection (19% vs. 16%).

Table 2. Other bases of discrimination in Federal SOGI charges, 2012–2016 (percent of all charges).

Basis	SOGI States	Non-SOGI States	Total
Gender	51.9%	58.9%	55.3%
Race/Color	15.6%	18.7%	17.1%
Religion	3.9%	4.7%	4.3%
National Origin	6.1%	5.2%	5.7%
Age	8.1%	6.7%	7.4%
Retaliation	38.7%	45.5%	42.0%
Disability	13.5%	14.8%	14.2%
Other Basis**	14.6%	4.5%	9.7%

* Some charges allege several bases, resulting in values summing to more than 100%.

** The other basis category includes many listed bases that have only a small number of charges, such as genetic information. Most of the other alleged bases in the “other” category are not bases that are protected by civil rights laws, such as ancestry or abortion.

The most common issues alleged in SOGI charges were discharge² (54%), harassment (47%), terms and conditions³ (29%), discipline (15%), and sexual harassment (14%) (Table 3). In states without SOGI laws, in contrast to those with such laws, a greater proportion of charges included allegations of harassment (52% vs. 41%) and discharge (58% vs. 51%). In addition, charges in states without SOGI laws had a slightly higher proportion of constructive discharge (11% vs. 8%) issues alleged, meaning that the employee quit due to an intolerable work environment. In states with SOGI protection, terms and conditions (31% vs. 27%) and sexual harassment (15% vs. 13%) were the only issues that emerged as comprising a slightly greater proportion of charges than in non-SOGI states.

Table 3. Issues alleged in Federal SOGI charges, 2012–2016 (percent of charges citing issue).

Issue	SOGI States	Non-SOGI States	Total
Benefits	3.0%	2.4%	2.7%
Constr. Discharge	7.9%	11.1%	9.5%
Demotion	2.9%	2.9%	2.9%
Discharge	50.9%	57.9%	54.3%
Discipline	14.1%	15.4%	14.7%
Harassment	41.4%	52.4%	46.7%
Hiring	5.4%	5.2%	5.3%
Intimidation	5.4%	6.3%	5.8%
Layoffs	1.0%	0.9%	0.9%
Promotion	6.1%	6.2%	6.2%
Sexual Harassment	14.6%	12.5%	13.6%
Suspension	4.9%	5.1%	5.0%
Terms/Conditions	31.0%	27.1%	29.1%
Wages	4.9%	5.1%	5.0%
Other Issue**	32.4%	16.8%	24.8%

* Some charges allege several issues, resulting in values summing to more than 100%.

**The other issue category includes many listed issues that are reported in a small number of charges, such as apprenticeship, assignments, or severance pay. The largest category within other is the EEOC's own "other" issue code.

Charge outcomes

We are also able to ascertain whether a benefit accrued to the charging party during the EEOC or FEPA's handling of the case. Overall, approximately 15% of closed SOGI charges resulted in a benefit. Benefits were slightly more likely in states without SOGI protections at 17% of closed charges, whereas 13% of closed charges incurred a benefit in states with SOGI protection.

Discussion

Our preliminary findings reflect trends associated with the emergence of a federally protected category based on sexual orientation and gender identity that vary based on the presence or absence of a nondiscrimination law at the state level. People in states without a SOGI nondiscrimination law appear to have benefitted greatly, with the largest increase in charges filed with the EEOC offices occurring in these states.

Our findings also provide evidence that legal and sociopolitical context are likely shaping the discriminatory experiences and disputing behaviors of LGBT individuals. A greater proportion of charges in states without SOGI laws alleged more serious issues of discrimination, including harassment and discharge, and contained retaliation as a basis. The prevalence of harassment in SOGI discrimination charges was a full 10 percentage points higher in states without SOGI laws.

In addition, our findings suggest that legal context plays a role in the experience of discrimination and/or disputing behaviors for those with other stigmatized identities, particularly race. Given that approximately 12% of the U.S. population is Black, it is notable that over 40% of SOGI charges are filed by individuals who identify as Black. The disproportionate number of SOGI charges filed by Black individuals could indicate differences in the legal consciousness of this group, given that past research on race discrimination suggests that African Americans are more likely to perceive discrimination and enter into the dispute process (Hirsh & Lyons, 2010). In states without SOGI laws, a higher proportion of SOGI charges were filed by Black individuals and a slightly higher proportion included charges of race discrimination. This is likely at least partially attributable to the higher proportion of Black residents within southern states, which lack nondiscrimination laws. It is also possible that the intersectionality of

individual characteristics could operate differently within states with a negative sociopolitical environment.

Our findings support Herek's (2007) proposition that social stigma is reflected and reinforced through heterosexism in institutions and ideological practices, including the law. In states with a nondiscrimination law, LGBT individuals have operated in both workplace and legal environments that provide protection against discriminatory employment practices. This could result in LGBT individuals in these states encountering different types of discriminatory practices than those residing in states without any protection; in particular, they might face less overt discrimination than individuals in states without nondiscrimination laws. In contrast, those LGBT individuals in states without nondiscrimination laws could encounter a more negative sociopolitical environment, facing greater social stigma that results in more egregious types of discrimination. Further, their embeddedness within such an environment can foster skepticism of the legal system and a hesitancy to use it to seek redress. Thus, while we see an increase in charges in both states with and without SOGI laws, states with nondiscrimination laws have higher charge rates than states without such laws.

Our preliminary results suggest that a more visible federal enforcement of Title VII laws, or an explicit nondiscrimination law, could result in more favorable workplace environments for LGBT individuals residing in states without state-level protection. This report, however, presents only descriptive statistics regarding the relationship between state context and charging patterns, so future research employing multilevel modeling is needed to examine the relationship between charging patterns and both individual and state-level characteristics, as well as the interactions between the two.

Acknowledgments

We thank Ron Edwards, Kelly Trindel, Mo Willow, Patrick Davis, and the U.S. Equal Employment Opportunity Commission for access to the data. We thank the U.S. Department of Labor for their support. This workforce product was funded by a grant awarded by the U.S. Department of Labor's Employment and Training Administration. The product was created by the recipient and does not necessarily reflect the official position of the U.S. Department of Labor. The Department of Labor makes no guarantees, warranties, or assurances of any kind, express or implied, with respect to such information, including any information on linked sites and including, but not limited to, accuracy of the information or its completeness, timeliness, usefulness, adequacy, continued availability, or ownership. This product is copyrighted by the institution that created it.

Notes

1. States with a nondiscrimination law during this period were California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire (sexual orientation only until 2018), New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin (sexual orientation only).
2. “Discharge” indicates termination from employment by the employer.
3. “Terms and conditions” includes the employment conditions agreed upon between the employer and employee, such as job title, starting date, job responsibilities, training, and dress code.

References

1. Badgett, M. V. L. (2001). *Money, myths, and change: The economic lives of lesbians and gay men*. Chicago, IL: University of Chicago Press. [Google Scholar]
2. Baumle, A. K., & Poston, D. L. (2011). The economic cost of homosexuality: Multilevel analyses. *Social Forces*, 89, 1005–1031. [Crossref], [Web of Science ®], [Google Scholar]
3. Herek, G. M. (2007). Confronting sexual stigma and prejudice: Theory and practice. *Journal of Social Issues*, 63, 905–925. [Crossref], [Web of Science ®], [Google Scholar]
4. Hirsh, E., & Lyons, C. J. (2010). Perceiving discrimination on the job: Legal consciousness, workplace context, and the construction of race discrimination. *Law & Society Review*, 44, 269–298. [Crossref], [Web of Science ®], [Google Scholar]
5. Klawitter, M. (2015). Meta-analysis of the effects of sexual orientation on earnings. *Industrial Relations*, 54, 4–32. [Crossref], [Web of Science ®], [Google Scholar]
6. Pew Research Center. (2013). *A survey of LGBT Americans: Attitudes, experiences and values in changing times*. Washington, DC: Pew Research Center. Retrieved from https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf [Google Scholar]
7. Schilt, K. (2006). Just one of the guys? How transmen make gender visible at work. *Gender & Society*, 20, 465–490. [Crossref], [Web of Science ®], [Google Scholar]
8. Tilcsik, A. (2011). Pride and prejudice: Employment discrimination against openly gay men in the United States. *American Journal of Sociology*, 117, 586–626. [Crossref], [PubMed], [Web of Science ®], [Google Scholar]

Additional information

Funding

This work was supported by the U.S. Department of Labor: [Grant Number EO-30272-17-6O-5-25].