
Contemporary LGBT challenges in Texas: Marriage and the Workplace

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26-5-2015

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Introduction

The so-called 'Great Paradigm Shift' took place in the West over a hundred years ago, when homosexuality was no longer seen as an activity, but rather as an identity (Howard, introduction). Still homosexuality remained to be illegal and was according to many a sin for long after. It was not until the mid-twentieth century that constructive gay rights movements started to form. Beginning with the Stone Wall riots in the 1960s that are seen as a starting point for modern day LGBT (lesbian, gay, bisexual, transgender) rights groups. The socially more conservative states took years longer to develop such significant rights movements. Gay rights would become as significant as the Civil Rights and Feminist movements were, in the years after the Stone Wall riots in New York City (Howard, 234). For decades, only very gradual progress was made by these rights groups.

It was not until the beginning of the 21st century that LGBT rights slowly started to gain momentum in the United States. Vermont was the first US state that granted gay and lesbian couples recognition with civil union. Three years later, in March 2004, Massachusetts would be the first state to introduce same-sex marriage. More than a decade after these accomplishments, the struggle for same-sex marriage remains ongoing. President Obama is the first American president to openly support LGBT rights. In several speeches, Obama has compared the fight for equality by LGBT Americans, with the Civil Rights movement. In spite of the rapidly growing support, sexual minority groups in the United States are still confronted with discrimination on local and national levels.

Texas, a Southern economic powerhouse and by population the second largest state, remains very conservative on all parts of gay equality. The population of the state consists of over 60 percent that identify as Evangelical Protestants. Other affiliations that are common in Texas are Roman Catholics who make up about 20 percent, and Mainline Protestants with 8 percent of nearly 27 million Texans. LGBT workers in Texas are not protected against discrimination on the basis of their sexual orientation or gender identity. The state, where you thus can get legally fired for being gay, has a ban on same-sex marriage. The Republican Party and conservative advocacy groups successfully put social change on hold in most part of the state. In contrast to the general absence of LGBT protections, a growing number of urban centers in Texas have active anti-discrimination ordinances to protect sexual minorities from discrimination by both private and state employers.

Zooming in on the Lone Star State, this thesis details the contemporary LGBT achievements and challenges in the state of Texas through the eyes of federal and nationwide developments and changes. Texas represents predominantly the more traditional religious values in a time that liberal social values on for instance gay and transgender issues gain momentum in a large part of the nation. By explaining nationwide developments on LGBT challenges in the past two decades, the state perspective on Texas can be understood through a national context. In this thesis, researches on discrimination, law review, policy analysis will be consulted, as well as various books and articles from local newspapers such as the Dallas Morning News and the Houston Chronicle. It will focus on the prevailing issues of marriage equality and workplace discrimination, plus the outlook for these matters in the short run.

1. Marriage

To the gay-rights movement marriage is essential, for it gives their relationships both social and legal significance (Kirk, 33). For conservatives, the institution of marriage is an important battleground because according to some, it represents heterosexual superiority. A changed definition of marriage would mean a major defeat for the 'oppositional social categories of heterosexual and homosexual' (Kirk, 33). The legalization of same-sex marriage means a changed definition of marriage as an institution, as well as a different reality in the conservative frame of heterosexuality 'opposing' homosexuality. Opponents generally view the tradition of a male/female marriage as something that is immutable, though history has shown that traditions are not permanent. Another human 'tradition', slavery, was abolished in the United States in the 1860s.

The 1990s meant a shift in the vision of gay marriage as oxymoron (Earl, 118). Two court cases challenged the perception of marriage as a rigid institution between one man and one woman. The first landmark court case was *Baehr v. Milkie* (later *Baehr v. Lewin*) starting in 1991. A group of same-sex couples filed a case against the state of Hawaii, arguing that denying gays the right to marry was against state law. The case appealed to the Hawaiian Supreme Court. In 1996, the state's Supreme Court sent the case to a lower court, which ruled that Baehr's claim of discrimination could not be refused and it argued that the state had not shown how refusing same-sex couples to marry was of interest of the state (Earl, 118). A referendum denying marriage equality was approved on the island in 1998, and same-sex marriage would not be legal there until 2013. However, that first court case was the start of the road towards marriage equality.

A second significant case in the 90s was *Baker v. Vermont* in 1999. Here, gay advocacy groups wanted to follow up the success of Hawaii. The Supreme Court of Vermont stated that the Equal Benefits Clause in its Constitution was violated by not granting same-sex couples equal rights as heterosexuals. The Court ruled that the same state protections should count for both heterosexual as homosexual couples. Even though, the state did not grant marriage licenses to gay couples in Vermont, a parallel system with the same rights and privileges was set up: the civil union (Earl, 120).

The *Baehr v. Lewin* case resulted in anti-gay legislation throughout the nation. The most well-known example was the Defense of Marriage Act, enacted by the federal government in

1996. It became strikingly clear that striving for constitutional equality without successful grassroots mobilizations led to severe backlash (Eskridge Jr., 285-2013). The court case in Vermont had a more positive outcome because here the LGBT movements had successfully built alliances and political support for equality (Eskridge Jr., 285-2013). Slowly, the LGBT rights moved into politics of recognition in the beginning of the new century.

Massachusetts would be the first state to legalize same-sex marriage. In the court case *Goodridge v. Department of Public Health*, the judges ruled in favor of the legalization of gay marriage. “The Supreme Judicial Court held today that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution” (Teaching Tolerance). The Massachusetts Supreme Court also stated that the state Constitution “affirms the dignity and equality of all individuals,” and “forbids the creation of second-class citizens” (Teaching Tolerance). From 2004 onwards, gay couples in Massachusetts could legally obtain of a marriage license. In the 2004-2008 period, more than 10,000 couples of the same sex got married in Massachusetts (Eskridge Jr., 287-2013).

After 2003, the topic of gay marriage remained very controversial in most of the United States. The Defense of Marriage Act was in effect until 2013 and was mainly an act of backlash politics. Backlash politics, says Eskridge, is put in motion when the government takes position on something that is viewed in a negative way by a significant part of the people while in contrast, normal politics focus on the effects of various laws and regulations for different groups in society (Eskridge Jr. 293-2013). The symbolic piece of legislation stipulated that states refused same-sex marriages from other states, and that none of the federal statutes that involve marriage could incorporate same-sex marriage (Eskridge Jr., 298-2013). The legislation was clearly symbolic since at the time it was enacted, none of America’s states had legalized same-sex marriage. The DOMA circulated around politics of disgust, a category of identity politics in which legislators are driven by their own rejection or disgust of something (Eskridge Jr., 299-2013). Identity politics as a category “involve the expression of different personal or community identities” (Eskridge Jr. 293-2013).

California struck down its ban on same-sex marriage in 2008 as a consequence of a judicial procedure. In 2004, the San Francisco mayor started granting gay couple’s marriage licenses in the city, inspired by the legalization in Massachusetts. It eventually led to the California Supreme Court decision over marriage four years later. Yet in the same year that the Court redefined the definition of marriage in the state, Proposition 8 was adopted with a referendum by the Californian voters. As a result of the approval of Proposition 8, the Constitution of California was amended to limit marriage to one woman and one man (Eskridge Jr., 290-2013). California

officials refused to defend the new law in place. The Proposition was challenged in the California Supreme Court and later passed over to the US Supreme Court.

In 2013, the US Supreme Court decided two important cases concerning same-sex marriage. First, the Court ruled in *United States v. Windsor* that the federal Defense of Marriage Act was unconstitutional as it was the task of the states themselves to decide on marriage equality, the judges argued. In addition, California’s Proposition 8 was also dismantled. The Supreme Court decided that the verdict of the lower court in California was valid and thus the challenging of the law was upheld, making the way free to legalizing gay marriage in California (Philips Erb, 2013).

The battle over same-sex marriage in the United States is an issue that goes back and forth. Several important political actors have transformed the gay marriage debate from backlash politics into normal politics. President Barack Obama has been crucial for the recognition of LGBT couples. Jane S. Schacter writes in an essay on LGBT rights during the first year of the Obama administration that there was a striking difference between the outspoken promises Obama made to the LGBT community during the 2008 campaign and the policy he conducted in his first two years as elected president. In his 2008 presidential campaign, Obama supported civil unions for same-sex couples, but not gay marriage (159). However, Barack Obama has transformed into a true advocate to the expansion of civil rights for the LGBT community. In 2012, he declared in an interview that he fully supported same-sex marriage. It would be the first time that an American president spoke out in favor so vocally on the issue of gay marriage.

In the same year, voters in Maine, Maryland and Washington approved the legalization of same-sex marriage with a referendum (Eskridge Jr. 2013-307). Furthermore, voters in Minnesota dismissed a proposition to ban marriage equality in their state. The year 2012 would turn out as a meaningful year in the battle over gay marriage in the United States. The issue was normalized and moved away from backlash politics (Eskridge Jr. 2013-307).

Support for Legal Same-Sex Marriage by Political Subgroup, 1996, 2013, and 2014

	% Should be legal, 1996	% Should be legal, 2013	% Should be legal, 2014	Change, 1996-2013 (pct. pts.)
All Americans	27	53	55	+28
Democrat	33	69	74	+41
Independent	32	58	58	+26
Republican	16	26	30	+14
Liberal	47	80	82	+35
Moderate	32	60	63	+31
Conservative	14	28	31	+17

GALLUP

(Gallup, 2014).

The normalization and rising acceptance of same-sex marriage is unmistakable in all layers of American society. Americans that defined themselves as supporters of the Democratic Party have seen the most dramatic change in backing same-sex marriage over the period 1996-2013. In Republican communities too, acceptance is steadily rising. Overall, this Gallup poll shows that the percentage of Americans that are in favor of legalizing gay marriage has increased 28 percent points from 27 percent in 1996 to 55 percent of Americans polled in 2014.

Academic Michael Klarman, highlights that 72 percent of the Americans see same-sex marriage as inevitable. The 2013 Pew Research Center poll that Klarman uses, indicated that 59 percent of the opponents of marriage equality that they see it as unavoidable as well (Klarman, 157). Klarman further argues that the 'coming out' phenomenon has been crucial to the upward going trend of acceptance; people do generally not prefer discriminating people who they know and love. More and more gays and lesbians have come out of the closet in the last few decades. Every lesbian or gay American who openly expresses their sexuality leads to more supporters of equality for LGBT people and thus same-sex marriage (Klarman, 133).

In despite of the rising acceptance, backlash politics is often still a consequence of pro-gay rulings at the state level. After the invalidation of the Defense of Marriage Act in 2013, there is a visible trend in the particularly the socially conservative Southern and Midwest states of adapting 'religious freedom' bills. These bills are said to protect the free exercise of religion in the state. It safeguards people's religious freedom and only allows the government to intervene in those beliefs if there are justified grounds to do so. In most cases these laws are a state-level variant of the 1993 federal Religious Freedom Restoration Act (Nazworth, 2015). While it is originally meant as a protection, it can potentially be used as a tool to discriminate against people. On grounds of a religious freedom law, the owners of a bakery could for instance reject baking a cake for a gay wedding on the basis of religious beliefs. Taking further, people could potentially exempt themselves from all kinds of laws, declaring that their personal religious freedom is being violated (Robinson, 2015).

Objections to a proposed religious protection bill in Indiana in March 2015 stirred a lot of debate. Large businesses and public officials in the state demanded an amendment of the law, which happened and included LGBT protections (Blow, 2015). It is clear that backlash legislative measures are still present in the contemporary marriage equality debate, although they are not easily enacted anymore. LGBT advocacy groups, public officials, large corporations and citizens actively challenge backlash policies.

LGBT acceptance in the state of Texas has gradually progressed since the beginning of the 21st century. Even though same sex marriage is still unlawful, over the last decade there has been a lot of effort in the state to change this. In 2003, the US Supreme Court ruled that state laws which prohibit homosexual intercourse were unconstitutional. According to the highest American court, these sodomy laws violated the fundamental right of privacy.

The case *Lawrence v. Texas* had its original starting point five years earlier, in 1998, after two Texas men were arrested in their private home. John Geddes Lawrence and Tyron Gardner were accused of having had sexual intercourse in Lawrence's apartment. They were found guilty and subsequently filed a lawsuit at a Texas court and later at the federal Supreme Court. At the time of the ruling, Texas was one of the four American states that still prohibited same-sex couples from engaging in sexual intercourse. Justice Scalia said in the Court's ruling that the two men had the full right to engage in sexual intercourse without any intervention of the government: "This case involves two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. The Texas statute furthers no legitimate state interest, which can justify its intrusion into the personal and private life of the individual" (Stein, 273).

Lawrence v. Texas was a landmark court case for Texas and the entire country. The decriminalizing of homosexual activity was an important step towards the acceptance of gay and lesbians as equals in society. However, the 'homosexual lifestyle' as stated by Judge Scalia, was and is by a lot of people still seen as a choice rather than a genetic predisposition. In the Lone Star State, religion plays an important part in this distinction. Ending the criminalization of sexual activity between members of the same sex in Texas opened up a new objective in the state: same-sex marriage.

In 2005, the state experienced severe backlash on the developing issue of same-sex marriage. In November of that year, Texans had the opportunity to vote for a referendum that would protect marriage in its traditional definition. The amendment stated that marriage in Texas only consisted of an agreement between one woman and one man. Furthermore it had the capacity to prevent the recognition of any other legal status similar to marriage (Blumenthal, 2005). Proposition 2, as it was called, was enacted with an overwhelming 72 percent of the votes (Human Rights Campaign, resources). It followed a trend of marriage bans in state constitutions that spread throughout the West, Midwest and the South in the years 2004-2006 (Blumenthal,

2005).

In the Texas campaign for and against Proposition 2, pro and contra groups both invested significant amounts of money, especially on statewide television commercials. Opposing groups included not only Texas based advocacy groups, but also nationwide ones such as the National Gay and Lesbian Task Force. On the other hand the supporters were represented in groups like Save Texas Marriage. The funds of the supporters were mainly provided by a handful of conservative businessmen living in the state (Ross Hughes, 2005). The LGBT community clearly invested significant time and resources in the campaign, for the proposition directly targeted their civil rights. The only county to vote against the proposition was Travis County, which includes Austin, a more progressive and liberal student city. Nonetheless, the extensive campaign by the opponents was not reflected in the overall referendum results.

In an official letter to the Texas House of Representatives and Senate in 2005, the Attorney General of the state wrote that traditional marriage is not 'identical or similar' to marriage but that it is the only possible form of marriage (Attorney General of Texas). Greg Abbott, the chief legal official of Texas in 2005, declared gay marriage as an oxymoron in his letter to the House and Senate. Before the 1990s same-sex marriage was defined as oxymoron, but that changed after two landmark court cases. Still, the Attorney General of Texas declared heterosexual marriage the only possible form two decades later.

Proposition 2 was abundantly present in political commercials and print, influential Texas newspapers also discussed the issue extensively in the months before the polling. Journalist James Campbell wrote an article with a simple overview of how the *Houston Chronicle* dealt with Proposition 2: "Here's what we've done - We first published an Associated Press story on Prop. 2 in late August. In ensuing months, we have generated several staff-written stories and columns on the subject. The last week of October we published a story or some mention of Prop. 2 almost daily" (Campbell, 2005). Media like the *Houston Chronicle* and the *Dallas Morning News* attempted to show both the arguments in favor and against. On the other hand, the *Austin Chronicle* could be seen as more opposing the proposition and newspapers outside the largest cities had less coverage and were usually more supportive of the traditional form of marriage.

Texas Values and Texas for Marriage are two organizations that vocally advocate on the issue of same-sex marriage. Texas Values is a non-profit organization established in 2012. It is devoted to preserving and promoting, in their eyes, the most important values for Texans: faith, family, freedom (Scharrer). The lobby group's background which is at the foundation of their interest points, are based on biblical and Judeo-Christian beliefs. On their official website, Texas Values states and explains their position on marriage. According to the group, the combination of

family and marriage are the bedrock of civilization and crucial for a strong society. The group is committed to education on marriage, in which marriage between one man and one woman is taught to be the norm. The group seeks to expose the negative consequences of legalizing gay marriage, especially the 'destructive impact' it has on children (Texas Values). The organization sees LGBT activists as people 'waging war on marriage' and argue that the American family is under attack (Texas Values). In February 2015, the Court of Travis County - the only county against Proposition 2 - declared the ban of same-sex marriage to be unconstitutional and granted a female couple who filed the lawsuit a marriage license. Soon after, the Texas Supreme Court stopped the issuing of licenses to gay couples, but the marriage of the two women from Austin remained valid (KXAN News). Texas Values reacted on the situation as an illegal decision made by 'rogue' judges (Walls).

The language use by an organization such as Texas Values is an example of the militarized terminology used in the 'culture war' over same-sex marriage that is described by Katherine Kirk (8). There is no place of neutrality in the debate, both opponents as proponents use terms like 'war', 'under attack', 'rogues'. Furthermore, the origins of this sharp division were shaped in the 1960s and '70s, in times of increased opposition to the establishment by liberal movements (Kirk, 13). In a reaction to the 'Counter Culture', conservatives claimed that the traditional culture of America was under attack. These rivaling political views on society still play a dominant role in US politics and in the public debate on issues including LGBT rights (Kirk, 13).

Yet, these intensely different views on norms and values do not cause disintegration of the system. "American political culture has the ability to accommodate apparently deep divisions over the role of government in society, without challenging the constitutional order" (Kirk., 13). The autonomy of the fifty US states of course has an important part in this last observation by McKay. On the topic of gay marriage, the state laws differ a lot. The 'trend' of legalizing marriage for same sex couples in combination with the shifting public opinion puts pressure on the thirteen states that have not legalized it yet.

On the other side of the spectrum, there are advocacy groups that are vocally campaigning in favor of same-sex marriage. For instance Texas for Marriage; a campaign initiated by the nonprofit organization Freedom to Marry. The latter actively promotes marriage equality throughout the country. Texas for Marriage argues that marriage is important for Texas same-sex families. First of all, they want to enjoy the same rights as heterosexual families, and secondly, in their opinion the government should not intervene in people's private lives when it concerns consenting adults. Also they believe it will benefit the state's economy by presenting itself as a diverse and open minded state to the outside world, something that can help in attracting

competitive businesses and employees. Texas for Marriage advocates to restructure the meaning of marriage but with accepting “clergy and religious institutions to refuse to perform marriages inconsistent with their religious beliefs” (Texas for Marriage). Allowing religious institutions to refuse marrying same-sex couples can be partly compared to the regulations of the religious freedom bills discussed earlier. In spite of the of course larger discriminative effect the religious freedom bills can have, seems surprising that an advocacy group for equality would include this in their objectives. But, forcing clergy’s and religious institutions to perform such ceremonies would, according to these groups, negatively impact the expression of their beliefs.

A local Texas court of the San Antonio district concluded in February 2014 in the case *De Leon v. Perry* that the set definition of marriage in the state was not in line with the US Constitution. The Court argued that “Texas its prohibition of same-sex marriage conflicts with the United States Constitution’s guarantees of equal protection and due process” (*De Leon v. Perry - District Court Ruling, 2*). Denying same-sex couples equal treatment affects gay people’s dignity in a negative way, said the court (*De Leon v. Perry - District Court Ruling, 2*).

The plaintiffs in this case are two same-sex couples, one unmarried and the other legally married in the state of Massachusetts. The marriage of the latter couple is not valid in Texas, therefore the couple sought recognition of their relationship via a judicial procedure. Alongside of the feeling of social exclusion, De Leon and her partner Dimetman had a practical reason that triggered their lawsuit: a child. As of the law in Texas, Dimetman was not considered the legal parent besides De Leon who is the biological mother. Obtaining acknowledgment would force the couple into a long and expensive adoption process (*De Leon v. Perry - District Court Ruling, 3*). The other couple, Holmes and Phariss had been in a monogamous relationship for over sixteen years at the time of the lawsuit. The two men, one active in the Air Force and the other a working attorney in Texas, applied for a marriage license at Bexar County, which was refused because they were both men (*De Leon v. Perry - District Court Ruling, 4*). The defendants consisted of Texas’ Governor Rick Perry, Texas’ Attorney General Greg Abbott, now governor, and others.

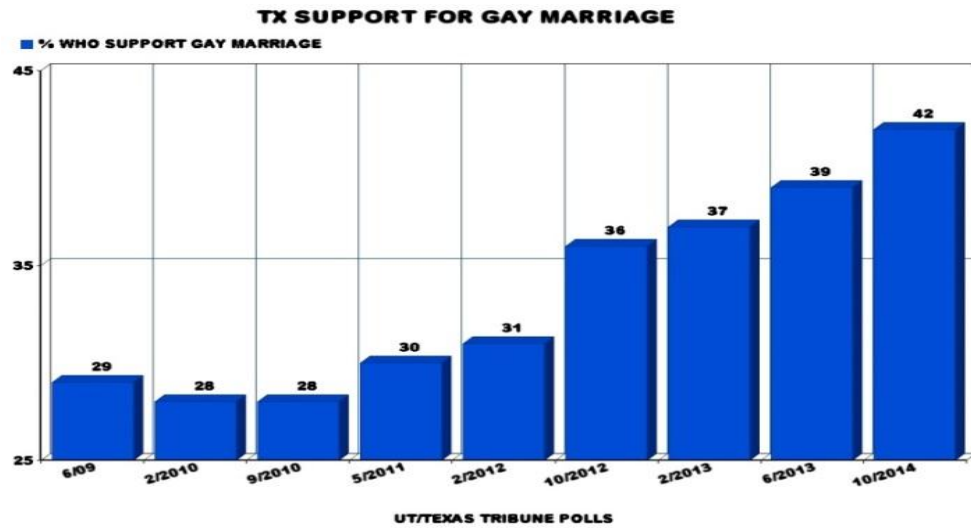
The district court analyzed the three main arguments of the defendants: childrearing, procreation and tradition. For the first argument, the judges argued that based on research, children that are raised by same-sex parents do not differ in terms on health and success to children raised by heterosexual parents (*De Leon v. Perry - District Court Ruling, 25*). For the procreation argument, the court stated that procreation is not a ‘qualification’ for marriage since heterosexual couples marry for reasons that do not incorporate procreation and are allowed to stay married. The plaintiffs rightfully argued that same-sex couples cannot naturally procreate but

they can have children (De Leon v. Perry - District Court Ruling, 28). A third argument brought in by the defendants is heterosexual marriage as the traditional definition. “However”, the court ruled, “tradition alone cannot form a rational basis for a law” (De Leon v. Perry - District Court Ruling, 29). The defendants failed to show on what basis the restrictive measures for same-sex couples could be maintained. Together these factors led the district court and Federal District Judge Orlando Garcia to invalidate the same-sex marriage ban in Texas (De Leon v. Perry - District Court Ruling, 31).

Even though the ban on gay marriage was invalidated, couples in Texas could not get married because of an appeal by the defendants. The case was taken on by the highest court for appeals in the region: The Fifth Circuit Court in New Orleans. The Court has had its first hearings in the case in April, 2015. Analysts expect the Fifth Circuit Court of Appeals to delay its decision on the matter until the United States Supreme Court decides over the question if gay marriage bans are unconstitutional in the summer of 2015 (Levin).

The Texas gubernatorial election of 2014 was won by Greg Abbott. The former Attorney General of Texas paved the way for the state’s legal ban on gay marriage in the years prior to his election. Abbott’s Democratic opponent Wendy Davis said during the campaign that if she would become governor, she would work on the invalidation of the 2005 amendment that banned gay marriage. Abbott responded that Davis “was mimicking President Barack Obama’s style of governing” (Dallas News). If Davis had elected, supporting the LGBT community would not have gone much beyond vetoing potentially discriminating legislation, since the Republicans still dominate the Texas House and Senate. With Abbott in office, conservative views can potentially slow down LGBT legal advancement in Texas in the coming years.

Nonetheless, in Texas there has been a gradual change in the support of same-sex marriage. The watershed year 2012 can also be seen as a turning point in Texas. A poll conducted by the University of Texas shows a 11 percent points growth (31 to 42 percent) of support in the state over the 2011-2014 period. Republican John Carona, former Texas Senator, said: “I’m very undecided on the issue and I struggle with it, I think the whole country is evolving, and I know for a fact that our young people are evolving including young Republicans” (Wright). The issue of same-sex marriage is rapidly developing across all layers of American society, and is clearly gradually evolving: in Texas.



(University of Texas, Tribune)

2. Workplace

Academics Frank J. Cavico, Stephen C. Muffler and Bahaudin G. Mujtaba write in a 2012 piece on sexual orientation and gender identity discrimination in the American workplace that an estimate of over eight million Americans in the domestic workforce identify themselves as lesbian, gay, transgender or bisexual (2). The data originates from a study by the Williams Institute of the University of California in Los Angeles. It argues that around 15 percent of this group works for the government; on local, state or federal level. Yet, the majority of LGBT employees can be found in the private sector (Cavico et al., 2).

A significant proportion of LGBT workers are not protected against discrimination on the basis of sexuality or gender identity due to state laws. There is no federal legislation in the United States that clearly prohibits discrimination against sexual orientation and gender identity to people that identify as such in the workforce. In fact, Title VII of the US Civil Rights Act does provide protection from discrimination on the basis of religion, national origin, race, gender, but not on the basis of gender identity or sexual orientation (Barron and Hebl, 2).

In Texas, there is currently no state law enacted that protects LGBT workers from discrimination, in spite of several protection regulations on county level throughout the state. The difference of legal protection within the state is remarkable and the situation has evolved over the past decade. The various layers of authority together with the contrast between the more progressive urban areas and the Texas country makes it interesting material to incorporate in this dissertation.

According to a poll by General Social Survey conducted in 2008, 37 percent of lesbian and gay people had experienced discrimination in the workplace and 12 percent reported having experienced losing a job due to their sexuality. Of the people that were open about their sexuality, more than half had reportedly faced discrimination in the workplace at some point (Hunter et al., 722). Another 2011 survey of transgender men and women at work, showed that around 90 percent of them had experienced “harassment or mistreatment”(Hunter et al., 722). As for the government-employed LGBT workers, about 25 percent experienced a form of discrimination over the last five years. The sort of discrimination most regularly reported by participants was harassment of any form. Of the LGBT people, only around one third was reportedly ‘out’ at work, for the bisexual respondents this number was as low as 5,8 percent (Hunter et al., 723).

Discrimination in the workplace can be split into categories with the two main ones being

interpersonal and formal discrimination. Formal discrimination includes unconcealed types such as discrimination in hiring, promotion, access, and resource distribution (Barron & Hebl, 192). On the contrary, there is interpersonal discrimination which is more difficult to define; it includes “nonverbal and indirect verbal behaviors that occur during interactions with others” (Barron & Hebl, 192).

András Tilcsik researched discrimination to openly gay men and found that states with active antidiscrimination policies had lower tendencies of discrimination (614). Tilcsik describes that the stereotyping of gays is likely to be an important instrument in hiring discrimination. Employers that searched for typical ‘male characteristics’ were in many of the cases the ones to reject gay applicants. “This finding suggests that employers’ implicit or explicit stereotypes of gay men are inconsistent with the image of an assertive, aggressive, and decisive employee” (616).

Stereotypes are a relevant part in the struggle against discrimination. LGBT people are often a target because according to the heteronormative norm, they do not fit the stereotypes of their gender and the behavior that is expected of women and men (Romero Jr.). Much research shows that heterosexuals perceive homosexuals as more feminine and less masculine than ‘traditional’ men (Fingerhut & Peplau, abstract).

The Social Role Theory focusses on the way individuals and groups in society interact with the social systems in which they live. The theory is based on the notion that society has ‘shared expectations’ about women and men. These expectations consist of male and female gender roles (Dulin, 105). These gender stereotypes are for a part responsible for discrimination towards LGBT workers and especially gay men. Since they are woven into traditions and the social systems in which people worldwide and in the United States function, it is not an easy task to change these. However, Social Role Theory concludes for one part that “social roles appear to be dynamic” (Dulin, 108). This entails that these social roles could shift and change in a country like America which has a thriving resistance against these social roles by not only gay people, but also by women and Afro-Americans. Eventually, adapted social roles can contribute to a decrease in discrimination on the basis of gender identity and sexual orientation.

There are a lot of negative consequences tied to discrimination. In a research paper mentioned before, the authors argue that the 25 to 50 percent of the LGBT workers were not open about their sexuality in the workplace due to the fear of discrimination and for their personal safety (Hunter et al., 736). This fear is reasonable because studies points to a higher percentage of discrimination to people that are openly LGBT than people who are hiding their sexuality or gender identity. The workers that fear discrimination the most also experience higher levels of stress and physical complaints. LGBT Americans that hide their sexuality, feel more

isolated, uncomfortable, had less trust in their employers, were more likely to miss out on promotions, and were in general paid about 10 to 32 percent less than their heterosexual colleagues (Hunter et al, 736).

A model to which the study by Hunter et al. refers is the Minority Stress Model. This suggests that “prejudice, stigma, and discrimination create a social environment characterized by excess exposure to stress, which in turn, results in health disparities for sexual minorities compared with heterosexuals” (Hunter et al, 739). Factors that can affect the state of being and the mental health of LGBT people have to do with for instance their families, the workplace, but usually also with themselves. Discrimination directly leads to various health risks (Hunter et al, 739). The dynamic of gender roles and the shifting norms for men and women could possibly be some of the factors that will lead to change in the coming decades. Stress as a consequence of social roles can hereby be relieved. And thus also the health disparities from stress related issues that are tied to each other according the Minority Stress Model.

One of the proposed federal legislative measures to lower discrimination is the Employment Non-Discrimination Act (ENDA). Senator Edward Kennedy introduced it in 1994 (McCreery, 40). It was set up as a protection to ban discrimination in hiring and employment on the basis of sexual orientation and later gender identity. In its current version, the Employment Non-Discrimination Act would be enforced in all states on government bureaus and also private businesses with more than 15 employees. Yet, it excuses religiously marked hospitals and charities, churches and other faith-based organizations (Peterson). The law did not get through Congress. Despite being backed by President Clinton, congressional Democrats, advocacy groups as the Human Rights Campaign, and also the National Council of Churches (McCreery, 40).

After the defeat in 1996, lawmakers introduced the ENDA in nearly all new compositions of American Congress. One of the main reasons many Republicans have voted against the bill repeatedly is that not enough exceptions are made for religious organizations and consequently according to House Speaker John Boehner, the bill could lead to “frivolous litigation and ultimately force employers to cut jobs” (Peterson). Nevertheless, a growing number of Republican Congressmen and women are supportive of ENDA (Peterson). This partially is a result of gay rights issues moving into normal politics. In contemporary America, some years after the demolition of the Defense of Marriage Act and of the Don’t Ask Don’t Tell policy in the military, there is less to lose for US lawmakers by supporting anti-discrimination legislation (Goldstein).

Scholars Patrick McCreery and Kitty Krupat argue in the study ‘Out Front: Lesbians, Gays, and the Struggle for Workplace Rights’ that the eventual implementation of the ENDA is

not the end point in the struggle of LGBT groups against discrimination in the workplace. They state that the law does not challenge the attitudes and morals people express against fellow gay coworkers, about especially sexual practices (6). They call for long term goals and a vision of social change. Some academics, like McCreery, point at the relevance of 'heteronormativity'. This entails the view of heterosexuality as the norm in society and as the natural way. The notion of heteronormativity fits with the dominant social systems earlier described. "It includes the social structures and cultural institutions that give heterosexuality a monolithic coherence and reinscribe its hegemonic status" (McCreery, 40). Heteronormative culture clashes with everything that is out of the ordinary. According to McCreery, the Employment Non-Discrimination Act relies on the "historically contingent orientations", namely heterosexual, bisexual and homosexual. By doing this, it fosters heteronormative culture (41). Without the destruction of normative structures, he argues, society will never get rid of for instance workplace discrimination.

The Human Rights Campaign reports that there are presently 21 states in America that have active laws against discrimination on sexual orientation in the workplace. Of these states, eighteen also include gender identity in these anti-discrimination laws (Human Rights Campaign, ENDA). According to a poll in 2013 by the Public religion Research Institute, a rate of at least 70% of the American citizens see discrimination of LGBT workers as something negative and therefore support such anti-discrimination measures (O'Keefe).

Tim Cook, the CEO of Apple, one of the biggest technology companies globally, has expressed his concern over the resistance to the Employment Non-Discrimination Act. In *The Wall Street Journal*, he wrote that the legal acceptance of people's identities is a civil right. In his opinion embracing diversity, fosters creativity within a corporation and stimulates productivity (Cook). The anti-discrimination regulations Apple has implemented are extensive. Many other large American businesses have done the same. Of the 500 largest corporations in the United States, 91 percent have active antidiscrimination policies and about 62 percent offers health insurance benefits to same-sex partners or spouses (New Republic).

In July 2014, President Obama signed an order that would extensively protect federal employees from discrimination on the basis of gender identity and sexual orientation. Both people that work directly for the federal government and federal contractors will be faced with the updated policy. It is expected to protect around 1.5 million federal workers specifically on the two notions that were added in already existing anti-discrimination regulations. The majority of the companies, 86 percent, that are contracted by the federal government already rule out discrimination and about 60 percent of the contractors do so too with gender identity (Kasperowicz).

Next to the states where discrimination based on gender identity and/or sexual orientation leads to legal consequences for the employer, there are 10 other states that safeguard the rights of sexual minorities through “executive policies that can be rescinded and do not provide any legal recourse for discrimination” (Hunt, 7). In these states, the governors often have taken measures against discrimination through an executive order. Even though an executive order can certainly contribute to lower the level of discrimination, the LGBT worker that is discriminated against cannot sue his or her employer in these particular states (Hunt, 7). One of these ‘in between’ states is Arizona. Here, the executive policy on sexual orientation entails that an Arizona worker that has been discriminated against cannot take private action, but the individual that caused the discrimination can be confronted with a punishment or be fired (Hunt, 7). An example of a state that fully protects employees against gender identity and sexual orientation discrimination is Colorado. In this state there is an active law on sexual orientation and gender identity. Employers here can be forced to stop discriminative treatment and can be compelled to compensate by for instance granting the employee past wages and benefits, reinstating, or hiring a person after he or she got refused (Hunt, 8).

With over 8 million LGBT workers in the American workforce, a significant group of politicians, citizens and corporations view it as a pressing need to enact federal anti-discrimination laws and regulations. The Employment Non-Discrimination Act could for instance help bring an end to the widespread discrimination lesbian, gay, bisexual and transgender workers face in the workplace. Stereotyping can be seen as a one of the factors that lead to discrimination however social role are considered to be dynamic and changed social roles could eventually contribute to ending discrimination in the workplace as well.

In the summer of 2014, Casey Stegall, a social worker living in Texas openly came out for being gay to the children he worked with. Stegall brought his partner a day trips he organized with the religious organization Children’s home of Lubbock. The young man was fired that day. Stegall claims it happened because of his sexual orientation, the Lubbock based organization argued it fired their employee due to him showing public affection with another male (Wright-2014). Director of the faith-based organization Lynn Harms stated that the fact of Casey Stegall being gay was not a “fireable” offense however the way gay workers behave in the organization is. Harms compared homosexuality to other lifestyle ‘choices’ that could potentially be damaging to the children in the organization (Wright-2014). Stegall was not in a position to defend his point of view. Even though the largest cities of Texas have active anti-discrimination policies, Lubbock County is one of the many districts in the state that does not grant LGBT employees protection.

In an article by one of the leading newspapers in Texas, the *Houston Chronicle*, it becomes

clear that as for 2015, most Texas citizens (62 percent) think that LGBT workers should be protected from discrimination in the workplace (McGaughy). Texas is one of the about 20 states in America that allows employers to fire an employee on the basis of someone's gender identity or sexual orientation. Job rejection, unequal pay, and difficulties in obtaining promoting are other categories for which sexual orientation or gender identity is a legit reason to disadvantage workers.

Marieke Klawitter and Victor Flatt describe in a study on state and local anti-discrimination policies that local authorities have been more successful in passing anti-discrimination rules in areas with higher education levels and urban population, plus more non-family households (664). They further state that a successful implementation of anti-discrimination measures depends on well-designed policy, active gay advocacy groups and the lack of strong opposition. "The policies have been more often successful when framed as incremental expansions of civil rights rather than as a contest over community morals" (665). Even though local anti-discriminative policies generate positive results, state policies have usually a bigger effect due to more publicity and more available enforcement resources (666). The two academics argue that the enactment of such policies firstly have important social consequences. It can help LGBT people "to be open about their lives and to participate more fully as citizens in their communities, affirming the sense of citizenship" (677).

In Texas, there are currently nine cities with more than 100,000 people that have installed a form of anti-discrimination legislation to LGBT workers (Swicegood et al.). These bills for the most part also include protections in other areas like housing and public accommodations (Ford, Zack). The two major cities in the state, namely Dallas and Houston both have added LGBT protections to their city constitutions alongside several other places in the Texas. In late 2014, the city of Dallas added sexual orientation and gender identity in its City Charter via a popular vote. It was the second time, after El Paso, that Texas citizens voted in favor of LGBT protections (Wright-2014). Discrimination to this minority was already ruled out by the equal employment opportunity policy (Wright-2014). The City Charter protects employees that work for the city against unequal treatment.

Houston was the only major US city without protections for LGBT people until May 2014, when the Houston Equal Rights Ordinance passed. People that live in Houston can count on protections in city employment, housing, and private employment with over 50 workers (City of Houston). The mayor of Houston that pushed the ordinance was elected in 2009 as the first openly gay mayor of the city (CNN). The election of Annise Parker, in the same year that the city rejected same-sex benefits by referendum, says something about the interesting dynamic in Texas'

largest cities. Dallas had added sexual orientation and gender identity to equal employment opportunity legislation in 2002, from that year until 2015 there have been 76 complaints from employees that felt discriminated on one of these two notions. The majority of the closed cases have found to be unjustified, 15 of the 70 closed complaints were “resolved through conciliation or settlement”, and the rest were settled outside the city’s area of authority (Hundley).

The passing of anti-discrimination policies in several Texas communities quickly after each other, led several Republican representatives for the state decide to focus on the nullification of these ordinances. The bills proposed would make it impossible for cities to adopt protective measures to groups that are not covered by the state constitution (Hundley-March). One of the people supporting these kinds of nullifications is Texas Senator Donna Campbell who expresses her concern about hostility towards Christians in Texas, particularly when it comes to local protection measures to groups of minorities (Blanchard).

The American Civil Liberties Union of Texas, states that in 2015 there are over 20 bills proposed by lawmakers in the state of Texas that would limit the protection of the LGBT worker community. The civil rights organization grouped the proposed legislation: six proposed laws use religion as justification to fire people in an organization, five bills to nullify the existing protections, six proposals to more firmly uphold the Texas ban on gay marriage, and three proposed laws to criminalize transgender people for using the ‘wrong’ public bathroom (ACLU).

In contrast, in May 2015, Texas Democrats in the House prevented the passing of a state law that would halt Texas from issuing marriage licenses even if a federal (court) decision would uplift marriage bans nationwide (Stein-2015). As well as over 35 proposed bills were proposed that would grant extensive protection to LGBT employees in the state (ACLU). Bills in favor of LGBT Texans that were filed in 2015 were for example statewide non-discrimination regulations in education, employment, housing, state contracting, insurance and public accommodation (Appendix A). The lawmakers that filed these bills were almost without exception member of the Democratic Party and representing one of the large urban areas in Texas. Texas law academic Penrose sees religious freedom as the new divide in the coming years (Blanchard).

Equality Texas President Rudner argues that the defensive behavior of equality opponents increases for every step towards inclusion the LGBT community takes (Blanchard). The dynamic surrounding LGBT marriage demonstrates that gay rights still come with backlash. The religious freedom bills discussed before are an example of backlash policies just as the proposals to nullify antidiscrimination measures are. The latter, presented as a protection to religious freedom.

Nevertheless, in Texas backlash policies meet strong opposition. The Texas business

community took a stand against proposals that would limit or end protection of LGBT workers. Large Texas based companies such as Dell and Southwest Airlines all support equality for gay and transgender employees (Theis). A board member of the coalition of Texas businesses, Texas Competes, stated that the competitiveness of the state would come under serious pressure if LGBT employees and their families would not be welcomed and protected in the state (Theis).

On the question of how freedom of religion and freedom from discrimination should be balanced, Texas Baptist and theologian Jim Denison has expressed that as long as consumers or employees can find products or jobs elsewhere, sellers or employers should have the rights to do business in a way that fits their religious beliefs (Slater). On the contrary, other religious specialists like Howard Cohen who lectures in Jewish/Christian relations and believes that the use of religion in order to discriminate against others, goes against the Constitution and the Title VII of the Civil Rights Act (Slater). Geoffrey Dennis, Rabbi and active for the North Texas Jewish Studies Program argues that LGBT equality has entered its last phase. Religious Freedom Bills, nullification measures, and other backlash policies are seen by him as the last defenses of a group of opponents that know they have lost the battle over gay rights. “It’s the Spring of 1945 and the forces of equality are moving forward on virtually every front. They understand that. So, while grudgingly yielding the battlefield, these religious liberty exemptions are attempts to create legally fortified intolerance bunkers” (Slater). This last quote is a lively example of Katherine’s Kirk earlier described militarized terminology in the ‘culture war’ over both gay marriage as other attempts of LGBT inclusion.

Thus, in spite of the growing number of Texas cities with anti-discrimination ordinances, the increasing support by citizens and businesses in favor of protection in the Lone Star State, full equality in the workplace is still to be achieved. Texas lacks statewide protective measures against discrimination and it is likely that these sorts of laws will not pass for some time to come, due to the entrenched conservative Republican leadership in the state.

Conclusion

Marriage has been a cultural battleground in the United States for over two decades. LGBT advocacy groups see gay marriage as something important: it gives same-sex relations social and legal significance. From the 1990s onwards, same-sex marriage moved away from being seen as oxymoron, to a distinct human rights issue that was battled over mainly in court rooms. The public support slowly increased in particularly the “blue” states in these years.

The first landmark court case was *Baehr v. Lewin* in Hawaii. Even though it did not legalize same-sex marriage on the island, it was the first victory for marriage equality and it paved the way for other legislative procedures around the nation. In 1999, the case *Baker v. Vermont* led to recognition and acknowledgment of civil rights by the creation of the first civil unions for same-sex partners in Vermont. With these first successes for the LGBT community in America, backlash politics is what followed. Striving for constitutional equality without the needed grassroots mobilization resulted indirectly in proposals and policies restricting gay and lesbians, and it still does in the more socially conservative states.

Same-sex marriage was firstly legalized in Massachusetts where its Supreme Court proclaimed that the constitution of the state prohibits the creation of second-class citizens (Teaching Tolerance). The movement towards marriage equality can be seen as a process of ‘two steps forward, one step back’. The election of President Obama would turn out as vital to the LGBT community. The first US President to fully support lesbian, gay, bisexual and transgender people in America. The year 2012 is generally seen as the ‘watershed’ year for same-sex marriage, in which it moved from backlash politics into normal politics. With the normalization of gay marriage, the public support also grew: from 27 percent in 1996 to a majority of 55 percent in 2014 (Gallup).

It was not until 2003 that sexual intercourse between people of the same sex in the US state of Texas became legal. *Lawrence v. Texas* turned out to be a turning point for gay rights in both Texas as the entire nation; it opened up the road to marriage equality. In Texas, the road to the legalization of gay marriage is, more so than in many other states, a road full with hurdles in the form of backlash policies.

In 2014, a Texas court stated in *De Leon v. Perry* that the prohibition of gay marriage in Texas goes against the US Constitution’s guarantees of equal protection and due process. The judges furthermore argued that children brought up in same-sex families do not differ from peers raised in a ‘traditional’ way. Also, the court found that “tradition alone cannot form a rational basis for a law” (De Leon v. Perry - District Court Ruling, 29). The *De Leon v. Perry* case is

currently, in 2015, reviewed by the Fifth Circuit Court and could possibly change the definition of marriage in the state. If not, the United States Supreme Court might do so in the summer of 2015, possibly dismantling all remaining bans on gay marriage in the country. Support for marriage equality is steadily increasing towards a majority under Texans, the approval of same-sex marriage has grown from 28 percent in 2010 to 42 percent in 2014.

With over 8 million gay, lesbian, bisexual and transgender workers in the American workforce, regulations are sought by LGBT workers on both local and federal level. Around 37 percent of gay and lesbian workers have faced discrimination in the workplace. For transgender men and women this percentage is as high as 90 percent. Research shows that in the process of hiring, gay men that were 'out' had 40 percent less chance to get invited for a job interview than heterosexual applicants. In states with active antidiscriminative regulations, tendencies of discrimination are less common. In the struggle against discrimination, social roles that arise from stereotypes play a role. However since these social roles are seen as dynamic, therefore could the rise of gay acceptance very well lead to adapted social roles and thus a decrease of discrimination in the workplace.

Less workplace discrimination is something LGBT advocacy groups strive for, as it not only affects salaries and hiring but also comes with both physical and mental difficulties for the people affected by it. The Employment Non-Discrimination Act is a proposed instrument that can tackle discrimination on a federal scale. Even though most Republicans oppose such nationwide legislation, there is a growing group within the GOP that supports it.

With nationwide opinion firmly supporting anti-discrimination laws, federal legislation on the protection of sexual minorities is likely to be incorporated in the near future. Nevertheless, also with federal laws, the gay rights issue continues in the United States. Gay rights activists argue that the society's dominant heteronormative view on matters foster discrimination. To them, there is need for a more extensive social vision on how the American society as a system can change for the better. Minorities have to strive for total inclusion.

In 2015, the majority of the Texans agree that sexual minorities have to be protected from discrimination at work, but this is not the case in most of the state. Local communities with large urban population and many non-household families are more successful in enacting ordinances against discrimination. This applies to Texas as well, where large cities as Austin, Houston, Dallas, and others all have laws preventing discrimination in their city constitutions. Such protections stimulate LGBT people "to be open about their lives and to participate more fully as citizens in their communities, affirming the sense of citizenship" (Klawitter & Flatt, 677).

New local restrictions on LGBT discrimination are sometimes followed with backlash.

Recently, Texas lawmakers proposed a nullification bill that would undo all LGBT protections in Texas cities. With a newly chosen conservative Republican governor and both the House and Senate ruled by Republicans, it is not likely that Texas will incorporate LGBT protections in its constitution any time soon. On the other hand, backlash politics such as the proposed nullification act are not expected to be implemented on a statewide level either because of the massive and influential support of the Texas business community for sexual minority inclusion.

Religious Freedom Bills, nullification laws and other forms of backlash are seen as the last lines of defense by conservative opponents that fight against social equality for LGBT Americans. As the LGBT rights movement is gaining momentum and while it looks like this development will not stop any time soon, the battle between progressive and conservative Americans continues, with Texas at the center stage.

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Appendices



Appendix A. Pro-LGBT bills filed in the 84th Texas Legislature's Regular Session. Equality Texas. 2015.