

A Management Approach to LGBT Employment: Diversity, Inclusion and Respect

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Despite the recent hostility shown by the federal executive branch and new efforts by some states to legalize discrimination against LGBT individuals, there is a private sector trend toward inclusion and nondiscrimination. Particularly larger US firms have responded with policies of nondiscrimination and support for their LGBT employees while recognizing the benefits that flow from management practices which encourage both workplace diversity and respect. As significant parts of federal support for LGBT workplace rights appear in retreat, inclusive nondiscriminatory employer practices gain importance. This article will examine the changing landscape of LGBT employment discrimination and address the question of how managers should respond.

INTRODUCTION

For years, most Americans have favored equal employment rights for LGBT workers. Yet, whether legal protection is afforded a LGBT employee in the U.S. is a matter of zip code. (Bruni, 2017) At this time, less than half of the U.S. LGBT population live and work under law that provides equal employment rights. The issue is not an insignificant one for prospective employers. There are an estimated 12 million Americans who identify themselves as gay, bisexual, lesbian or transgender. (Newport, 2015) Further, this group of prospective employees is well dispersed throughout the country. Yet, while recent US Supreme Court decisions have established a nationwide Constitutional basis for protecting gay couples' marriage and their spousal benefits, LGBT employment protection has largely been left for state and local government to decide, presenting a significant legal compliance challenge for employers and especially those with multistate operations.

The Court's gay marriage decisions, together with federal executive and agency actions designed to mandate LGBT nondiscrimination and accommodation taken during the Obama Administration have ignited the unintended consequence of outright hostility toward the LGBT community expressed by state laws authorizing LGBT discrimination, frequently passed using the rationale of protecting freedom of religion or conscience of those who believe LGBT persons are immoral or abnormal. Trump's administration actions designed to negate existing federal protection in the name of promoting religious liberty, further confounds the picture for employers trying to navigate the law.

Aside the problem of legal compliance presented by the complex and unsettled law during past administrations that had increases federal protection LGBT employment rights, is the important challenge to employers of how best to approach employment issues presented by LGBT employees in the workplace when Federal efforts, at least in part appear to be turning back away from protection. Private employers can take note of the progressive stance taken, particularly by larger firms, that have embraced principles of workplace equality and inclusion for LGBT workers, through their established internal policies and external efforts. The solutions reached by those firms may not always be a perfect fit for medium and small employers, but they can serve as a starting point for consideration.

This article will examine the continuing evolution employment law toward LGBT employees in the era of President Trump, when what employers must do legally and should do practically have become more complicated than ever. The status of initiatives taken by business organizations aimed at protecting employees who are either known or believed to be LGBT will be considered along with the benefits from a more diverse workforce. Finally, recommendations will be offered to assist organizations which are still undecided in terms of what actions to take.

FEDERAL AUTHORITIES AND LGBT DISCRIMINATION

Supreme Court Marriage Decisions

During three recent sessions, the Supreme Court decided to enforce the most personal rights of LGBT individuals first with two landmark cases. Whether LGBT partners could legally marry and whether employers would be required to recognize the myriad of federal benefits that would accrue as a result of marriage, were questions that had been left to each state to decide until *Obergefell v Hodges* (2015). At the time of the decision the states were divided but trending toward full equal domestic rights for LGBT. Holding that the Constitution's guarantees of equal protection and due process were violated because there was no rational basis for any state to discriminate and deprive gays the fundamental right of marriage, the Court struck down contrary state measures as well as a section of the Defense of Marriage Act (DOMA, 1996) that had authorize states to ignore valid gay marriages from other states. *Obergefell* was preceded by the Court's other landmark decision in *US v Windsor* (2013), that invalidated another section of DOMA which had made all spouse based Federal benefits unavailable to gay and lesbian couples.

The impact on employers of these two key decisions was simply that those who hire married LGBT individuals, married anywhere, are now required to regard them as legally married and treat them the same as they do married heterosexual employees, with respect to all federal and state benefits and all firm policies.

Recent Supreme Court LGBT Decisions

Unfortunately the Supreme Court's marriage equality decisions gave no direction to employers concerning their legal obligations with respect to the hiring, firing, or accommodating LGBT applicants and employees, and the Court has yet to address them. Instead, the Court has addressed non employment issues. It let stand a California law banning gay conversion practices in that state. (*Welch v. Brown*, 2017). The also Court agreed to hear an appeal of a Colorado baker's right to refuse service to a LGBT couple based on his religious beliefs. (*Masterpiece Cake v. Colorado*, 2017). The case should further illuminate the reach of developing First Amendment religious and free speech grounds to justify discrimination by private businesses and professionals open to the public.

However, the Court vacated (*Barnes*, 2017) a lower court ruling in favor of a transgender graduating high school senior (*G.C.C. v. Gloucester*, 2017) on the question of whether federal law (Title XI of the Civil Rights Act), as interpreted by the Department of Education, (DOE, 2016) required his public school to provide restroom accommodations consistent with his sexual identity. The Court's remand of the case was based on the recent DOE's withdraw of its previous interpretation that required the accommodation. (DOE, 2017). The decision appears to signal a reluctance by the Court to become involved with

transgender identity accommodation, which is currently required of employers by several other federal agency regulations and guidances, and a number of state and local laws.

Executive Orders and LGBT Employment Rights

Granting Employment Protection

President Obama's executive orders and strategic plans for diversity and inclusion in Federal hiring were built on the executive orders multiple administrations increasing nondiscrimination against LGBT working in most federal jobs and for federal contractors and subcontractors. The later had a significant impact on private sector employers.

Federal Agencies were required to protect LGBT employees. In 2010 Obama authorized the Equal Employment Opportunity Commission (EEOC) to begin processing discrimination claims based on sexual orientation and identity, and then in 2011, issued a second executive order "Establishing a Coordinated Government wide Initiative to Promote Diversity and Inclusion in the Federal Workforce". The EO announced and published a strategic plan and agency specific guidance for hiring employees free of discrimination based on sexual orientation, by all Executive branch agencies and departments, in coordination with the EEOC.

Private sector federal contractors were likewise directed to protect LGBT employees. Starting in 2014, Obama issued a third EO, known as "fair pay and safe workplace", amending a previous EO of President Clinton, by adding sexual identity to protected classes for employees in the competitive civil service and amending a previous EO of President Johnson applicable to Federal Contractors, by adding both sexual origin and identity to the classes of protected employees of those employers and imposing compliance reporting. The intended effect of these executive measures was clear; no discrimination of LGBT workers by federal agencies or by any private sector employer serving as a government contractor or subcontractor.

Withdrawing Protections

The retreat from federal protection for LGBT employment rights has been demonstrated most clearly by executive orders of the Trump Administration. While President Trump had campaigned as a "real friend" to gay and LGBT groups, (Diamond, 2016) within the first three months of taking office President Trump signed two executive orders. Both have the apparent intent to reverse protection of LGBT individuals.

First was the highly controversial "Presidential Executive Order Promoting Free Speech and Religious Liberty" (EO, 2017). Likely to grant broad rights to discriminate against LGBT individuals by refusing services, public accommodations, or employment whenever religious freedom would be compromised, the "Religious Liberty" EO is a self-described guide to the executive branch directing all agencies and departments to "vigorously enforce Federal Law's robust protections for religious freedom to the greatest extent practicable". To guide agency compliance, the attorney general was ordered to issue guidance interpreting such religious liberty protections. Although little has yet resulted by way of specific agency action, the implication of this EO is clear: Obama's EO nondiscrimination mandate toward federal agencies has been implicitly compromised. Internal executive agency policies and their external regulations that have protected LGBT individuals from employment and public services and accommodation discrimination must now be balanced against the religious freedom of those who object to LGBT individuals on personal religious grounds and subject to complete negation by a religious liberty defense whenever a religious based objection is made. The implications go further than federal regulation. Though the EO is not binding on the states directly, state laws legalizing LGBT discrimination have frequently been based on religious grounds. And a directive from the President with guidances from the attorney general authorizing federal discrimination based broadly on individually held religious beliefs could serve to encourage newly minted discriminatory measures by states and localities.

Trump's second EO effectively eliminated the Obama nondiscrimination obligations for private sector federal contract employers. Called "The Revocation of Federal Contracting Executive Orders",

(EO, 2017) it let stand Obama's "fair pay" EO mandating nondiscrimination in hiring and pay by federal contractors and subcontractors but revoked all of the compliance reporting obligations, effectively defeating the mandate and its enforcement. Thus in a matter of months, the new administration has put in place two sweeping EO's that have reversed newly established nondiscrimination mandates by the federal government.

LGBT Discrimination in Military Service

The gradual progress toward the opportunity for gays to serve in military that began with the "Don't Ask Don't Tell" rule, was followed by its repeal (Don't Ask, 2010) which ushered in the right for gays to openly serve. In 2016 President Obama, directed that transgender members in particular could also openly serve, pending a study due in 2017. (Rosenberg, 2016)

However, in July of 2017, via a series of messages on Twitter, President Trump announced a ban on transgender individuals serving or applying for military service, citing "Tremendous medical costs and disruption" caused by transgender service members. (Phillip, 2017) While the Pentagon is cooperating with development of a policy for current service members, the President's position has been met with push back by military officials that question the underlying rationales of cost containment and inability to serve. (Jenkins, 2017) Federal court litigation brought on behalf of transgender service members and applicants also question the discriminatory ban for the same reasons. (Chase, 2017) Regardless of the ultimate outcome, the President's actions represents yet another breach of his campaign promise to be an ally of the LGBT community and another reversal of federal efforts to eliminate discrimination against transgendered individuals.

LGBT as a protected class under The Civil Rights Act

Enacted in 1964, the Civil Rights Act has served as the bulwark of anti-discrimination employment legislation, proscribing all employers with 15 or more employees from discriminating on the basis of race, national origin, color, sex, or religion with respect to hiring, firing, or any terms or conditions of employment. Subsequent discrimination legislation followed in order to protect older workers, pregnant women, and those employees with disabilities. No federal legislation has yet passed forbidding discrimination against LGBT employees or applicants.

For over 40 years, and despite proposed legislation submitted on nearly an annual basis, Congress has failed to amend Title VII of the Civil Rights Act to include LGBT as a protected class. (Reed, 2015) The originally proposed "Employment Non-Discrimination Act" (ENDA) and subsequent attempts failed to gain sufficient support to pass and were also criticized by the LGBT community for the numerous compromises, especially the exclusion of transgender employees. In 2016, bills supporting broader legislation were introduced in both chambers to require equal LGBT rights in matters of employment, housing, and access to public places, federal funding, credit and education. Time will tell whether popular support for LGBT economic equality can overcome the gridlock of a politically polarized Congress. In any case, employers who have so far determined not to treat LGBT equally should be vigilant of this possible change in the law, were gridlock to yield toward extending protection.

Lower Federal Court Decisions

Employment discrimination against a female accountant viewed to be overly masculine in *Price Waterhouse v Hopkins* (1989), and a sexual assault and workplace harassment by coworkers of an oil rigger motivated by their view that he possessed overly feminine characteristics in *Oncale v Sundowner* (1998) served to provide a basis for the Supreme Court to find liability for sex discrimination under Title VII the Civil Rights Act. The Court's decisions have lead a number of lower Courts to the view allegations of employer discrimination due to an employee's nonconformance to gender stereotypes, as claims of discrimination "on the basis of sex", and therefore covered by Title VII. The extension of coverage for employment discrimination due to gender nonconformance has in turn presented some federal courts with a rationale for extending extend Title VII protections to terminated and harassed LGBT employees, because they do not conform to gender stereotypes, because their marriage partner is

not heterosexual or their outward appearance, dress or mannerisms don't conform to their gender at birth. Since the Executive Orders of the Obama administration, directing EEOC enforcement actions for LGBT discrimination, there are an increasing number of newer cases in Federal litigation that have adopted the view that Title VII does covers LGBT discrimination, relying either on the Supreme Court's established stereotype approach, or on the basis that LGBT discrimination is sex discrimination covered by Title VII. See *Hively v Ivy Tech*, 2017. Still, some Federal courts have disagreed, suggesting a future split in the courts and the possibility of an appeal to the Supreme Court.

EEOC Enforcement Actions

The most likely source for a legal challenge to private employers that continue to discriminate against LGBT employees and applicants is an enforcement suit brought by or through the EEOC. For decades the EEOC took the position that Title VII did not provide protection for LGBT employees. Within the last five years, the Commission's position has become the opposite: employment discrimination against LGBT employees in either the public or private sector constitutes sex discrimination prohibited by Title VII.

Macy v Holder (2012), was the first case where the Commission declared employment discrimination based on sexual identity was a violation of Title VII. In *Macy*, a transgender woman was denied a position by the Alcohol Tobacco, and Firearms (agency). *Macy* filed an EEO claim with the agency based both on sex discrimination via stereotypes non-conformity, and on discrimination caused by her sexual identity, because she was transgender. The agency refused to consider the sexual identity claim and *Macy* appeal the decision to the Commission. The EEOC ruled discrimination based on sexual identity states a sufficient separate claim of sex discrimination under Title VII. The Commission concluded that intentional discrimination against a transgender individual because that person is transgender is, by definition "based on sex", and such discrimination therefore violates Title VII.

Later, in *Baldwin v Department of Transportation* (2015) the EEOC held that employment discrimination based on sexual orientation was likewise a violation of Title VII. *Baldwin* was a part-time air traffic controller passed over for promotion because he was gay filed an EEO complaint against the Federal Aviation Administration (FAA), agency. The agency had found the filing untimely and also held that Title VII would not apply to reach discrimination based on sexual orientation. On review, the Commission reversed on both grounds finding that *Baldwin's* timely claim of employment discrimination based on sexual orientation was forbidden by Title VII.

The number of charges filed for sexual orientation and/or identity discrimination has accelerated since the Commission began tracking these claims in 2013. In 2015, 1412 charges were filed, representing a 28% increase over 2014. (EEOC-Recent Litigation, 2016) For employers that continue to discriminate, this aggressive enforcement policy requires attention to both local EEOC office enforcement actions and Federal Court opinions siding with the Commission wherever the firm employs its workers.

Federal Directives Requiring Transgender Workplace Accommodations

Federal Employers

A 2011 guidance sent to federal employers by the Office of Personnel Management (OPM), recommends that transgender employees who are transitioning be treated with sensitivity and confidentiality. Agencies are encouraged to allow these employees to dress in a way that is consistent with their identified gender. Managers and coworkers should use names and pronouns appropriate to the gender the employee is now presenting. If specific duties or assignments are different for male and female, the employee who is transitioning should be given work assignments that are normal for persons of that gender. Finally, the OPM guidance directed that transitioning employees be allowed to access restrooms and locker rooms that are consistent with his/her gender identity. (OPM, 2011)

In *Lusardi v Dept. of the Army* (2015), the EEOC held that an agency's denial of equal access to a restroom that corresponds with an employee's gender identity constituted sex discrimination and that an employer cannot condition this access on an employee's undergoing transition surgery or any other

medical procedure. It further ruled an employer cannot avoid the requirement of equal access to a common restroom by restricting a transgender employee to a single user restroom. Finally, the Commission held that gender stereotypes or coworker comfort levels cannot interfere with anyone's ability to work in an environment that is free from discrimination and harassment.

Private Sector Employers

Private sector employer's obligations, in terms of providing restroom and locker room access for employees who are transgender identifiers has also been addressed. The EEOC followed up with its own guidance on transgender accommodations for employers with 15 or more employees, consistent with the Lusardi decision. (EEOC-Bathroom Access, 2016).

The Occupational Safety and Health Administration (OSHA) regulates many employers of all sizes, for health and safety in the design and use of workplace facilities. In line with EEOC decisions and then existing Department of Labor requirements for Federal Contractors, a 2015 OSHA "best practices" guidance states that an employer's general duty to provide employees with healthy and safe restroom facilities includes a number of accommodations to transgender employees. The OSHA guidance specifically finds that restroom restrictions, inconsistent with gender identity can result in a variety of negative consequences, both psychological and physical to transgender employees. For these and other reasons many companies are encouraged to have written policies that insure that all employees including transgender employees have prompt access to facilities that correspond to their gender identity and provide additional options that employees may or may not choose but impose no requirement like single occupancy gender neutral facilities, and use of multiple occupant gender neutral facilities with lockable single occupant stalls and facilities that are an unreasonable distance or travel time from employee's worksite. (OSHA, 2015)

The Question of Future Enforcement

The Obama administration's interest that discrimination of LGBT employees by public and private employers be stopped has not carried over to active enforcement of the OSHA facilities guidance. And given the rescission of the DOE directive by the Departments of Education and Justice, legal commentators have expressed doubt that the OSHA guidance will remain and believe it may likewise be withdrawn by the Trump administration. Conversely, there is no indication at this date that the EEOC or other federal agencies have changed their view that LGBT employees are covered by Title VII and transgendered employees be accommodated. (Rolfsen, 2017)

STATE AND LOCAL LAWS

Progressive Measures

Pennsylvania was the first state to ban public sector employment discrimination based on sexual orientation. Later, Wisconsin was first to prohibit sexual orientation discrimination in both public and private employment, and Minnesota was first to ban discrimination based on both sexual orientation and identity in all employment. Since then 20 states and the District of Columbia have banned discrimination against LGBT workers in all employment in their states. (HRC, 2016) In addition, by 2015, over 200 cities and counties have passed measures forbidding LGBT discrimination in all employment, though most are within states that already provide such protection. (HRC, 2016)

While the trend toward state and local protection continues, the current status of the law leaves a significant number of LGBT workers with incomplete or no protection at all. It is estimated that 52% of the LGBT community lives in states that do not prohibit employment discrimination based on sexual orientation or identity. (HRC, 2016) So, while the Court's decisions, noted earlier made same sex marriage with full federal benefits the law of the country, employees who are legally married one day can still be fired the next simply for being LGBT.

Regressive Measures

An unintended consequence of the Courts landmark decisions and EO's of the Obama Administration has been a backlash of proposal of measures in some states that legalize the denial of services, otherwise authorize discrimination against LGBT individuals, or refuse to accommodate them. In 2016, over 175 new anti-LGBT bills were filed. Rationales included protection of religious freedom, personally held beliefs, public health and safety, and personal privacy. (HRC, 2016). Perhaps the most infamous state law has been North Carolina's "Bathroom Bill" resulting in a statute that denied localities the right to make rest room accommodations for transgendered along with other civil rights protections. The measure was partially repealed but only after costing the state at least \$630 million dollars in lost business and tourism revenues during the first year since its passage according to Forbes. (Jurney, 2016) A number of other measures are religious based. For instance, in July of 2017, a Federal court in Mississippi upheld that state's anti LGBT law allowing service providers the right to refuse service to LGBT individuals on religious grounds. The law applies widely from health care to public businesses. (Barber v Bryant, 2017) However, similar religion based laws have failed to pass in a number of other states. (ACLU, 2017) Future state efforts to use religion freedom to authorize LGBT discrimination may find encouragement from Trump's recent "Religious Liberty" EO and be further authorized (or restricted) by the Court's decision in Masterpiece Cakes v Colorado due in 2018. While such state laws may be the subject of legal challenge on a variety of grounds and generally may not directly affect employers workplace obligations, they serve to further complicate an otherwise apparent legal trend toward nondiscrimination toward LGBT individuals.

PRIVATE EMPLOYERS PROGRESS AND IMPLICATIONS FOR MANAGERS

Private Employers Progress

Unlike the increasing number of industrialized countries that have established a nationwide legal mandate of non-discrimination towards LGBT employees in the workplace, private firms in the U.S., in the face of conflicting law, will have to make their own decisions about the issue. Many large firms now pursue firm practices and policies that promote diversity by providing protection from discrimination and inclusion for LGBT employees beyond that required by law. Large firm progressiveness is demonstrated by the Corporate Equity Index (CEI), a report produced by the Human Rights Campaign (HRC), showing the dramatic strides taken toward equal treatment for LGBT employees in the workplace. Since 2002 the HRC has used an annual Corporate Equality Index Survey (CEI) to rate companies that are part of the Fortune 1000, Fortune 500, and Forbes 200 on key criteria to assess protection from discrimination and provision of benefits. (HRC, 2016) A perfect 100% rating is achieved only if the firm prohibits discrimination based on both sexual orientation and identity, requires firm contractors and vendors to do the same, maintains firm wide competency and training programs, provides health and medical insurance and other benefits for partners that are also transgender inclusive, establishes a standing resource group, and demonstrates positive external engagement in support of the LGBT Community. (HRC, 2016). The number of companies achieving a 100% index rating has grown at an accelerated pace. When the index began in 2002, only 13 companies satisfied all of the CEI survey criteria to receive a 100% rating. In 2012 the number was 189, and in 2016 it was 407. (HRC, 2016)

Implications for Managers

Aside from policy and practice adjustments that have been made by larger firms, all employers with LGBT applicants and employees need to remain flexible and adapt to the changing legal and social environment. The ability to do so can be more difficult for small and medium size firms than large ones that have established in house human resource and legal functions.

While employers may have some reason to believe civil rights and regulatory enforcement efforts supporting LGBT rights could be diminished during the Trump administration, they should not ignore the documented benefits of an inclusive firm. Surveys and studies show Americans in general are very supportive of LGBT rights (Wheeler, 2015), that commitment to LGBT equality and inclusion in a

diverse workplace is good for a firm's consumer brand support (Schraeder, 2017), and that the millennials now populating the workforce overwhelmingly support comprehensive LGBT rights (McBride, 2015) and consider an inclusiveness of equivalent value to other traditional benefits. (Ariss, 2016).

Similarly, LGBT advocates such as the Gay and Lesbian Alliance against Defamation (GLAAD) argue that respecting diversity in terms that include sexual orientation and gender identity will result in a number of tangible benefits for the business. (Krejcova) Such benefits include:

- lower legal fee related to discrimination lawsuits
- improved firm public image
- attracting customers who want to do business with social responsible firms
- reduction in turnover of LGBT staff, thus reducing costs of recruitment and training
- Increased creativity leading to innovation and new ideas.

So while a major concern is going to continue to be avoidance of legal liability arising from LGBT discrimination, employers also need to attract and retain the best people. To do the latter, the workplace needs to be inclusive and welcoming for everyone. The question then is how to achieve both objectives.

First, company policies dealing with discrimination need to be updated to include sexual orientation and identity and as always their policies need to be widely disseminated and enforced. As was noted above many larger US companies have taken such measures, though some have not, and clearly there is more to do.

Training of supervisors should be upgraded so that people are more sensitive to discrimination based on sexual orientation and identity. Specifically, supervisors should learn how to recognize behaviors that may lead to problems and differentiate them from something that may be relatively innocent. They need to understand how to investigate and act promptly on complaints so as to not make matters worse. It is important that supervisors not ignore the situation.

Beyond the use of policies and training, firm need to work toward the creation of an environment of mutual respect. A cornerstone of this relies on the clear and consistent message that all managers are responsible for ensuring that every employee is treated with respect and are able to work in an environment that is free of discrimination and harassment.

All of this, however, is far easier said than done. It is one thing to change policies, but it is something very different to implement them without generating conflict. In fact one of the major challenges to workplace harmony comes from those whose religious beliefs and values define lesbian gay bisexual and transgender as inappropriate and abnormal lifestyles. Often this leads to severe interpersonal problems and ultimately litigation as people who hold such views are placed in situations where they must work with others who seem to be or are in fact LGBT. Ironically, these problems are often triggered by claims of religious discrimination arising from enforcement of diversity training, anti-harassment policies and other efforts designed to discourage workplace discrimination based on sexual orientation or identity. Given the recent "Religious Liberty" EO and those current state laws that support a religious basis for LGBT discrimination, these problems may be a significant legal concern for some managers.

Aside from the legal implications that managers must attend to, managers more importantly need to understand that deep seated value based bias can present a difficult challenge. Creative accommodation of all parties may be necessary to avoid interpersonal conflict and maintain a workplace environment that is conducive to positive interaction and behavior. And though it is true that employers may not be able to change the basic values or beliefs of every employee, they can still expect standards of behavior to be observed. Employers should by example demonstrate respect for everyone in the workplace and also hold all employees accountable.

CONCLUSION

This article has reviewed the complex issue of LGBT workplace discrimination. What makes the issue more difficult is the rapidly changing legal landscape, which still varies from state to state. However, the more important question for employers is how best to respond. In the US, the problem of how to deal with current as well as potential employees who are LGBT has fallen to a large degree directly upon the private sector. As evidenced by clear trends, especially in the larger firms, human resource policies have been expanded to protect the rights of sexual minorities in the workplace beyond the measure called for by domestic U.S. law. It is worthwhile for employers to take basic steps including worker education and policy reviews and updates. But employers can do more and many have become far more proactive. If sexual orientation is part of the anti-discrimination policy, gender identity should be added. Health insurance and family leave policies should be adjusted. Employers can also affirmatively raise awareness by advocating workplace equality and creating a culture in which differences are respected.

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