



Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
Phone: 617.426.1350
Fax: 617.426.3594
Website: www.glad.org

Sexual Orientation Discrimination in Employment **— Massachusetts —**

Many gay, lesbian and bisexual people experience discrimination in their workplace. Employment discrimination can take many forms. Some people are called homophobic names by co-workers. Some are denied promotions by a boss who suspects they are gay. Sometimes they are given the unfair assignments and evaluations. Sometimes they are fired because they are gay. If you feel you have been discriminated against because of your sexual orientation, you will find this brochure a useful tool.

DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN EMPLOYMENT IS ILLEGAL IN THE COMMONWEALTH OF MASSACHUSETTS

Massachusetts General Law Chapter 151B makes it unlawful to discriminate against someone because of his or her sexual orientation in employment. This law protects self-identified gay, lesbian and bisexual people, as well as those perceived to be gay, lesbian or bisexual.

Some examples of actions that might constitute illegal discrimination include refusal to hire, firing, demotion, failure to promote, unequal compensation, differential treatment, and creating a hostile work environment.

Companies are bound by this law if they have 6 or more employees who are not family members of the owner. The law exempts certain religious organizations from the law.

What You Can Do If You Face Employment Discrimination

Choose To Take No Legal Action

There are circumstances in which people need to tolerate the discrimination because of economic necessity, or because of the personal repercussions of making a complaint, or because there are non-litigation alternatives worth pursuing. If you are in such a situation you can seek support for yourself from family and friends to help you deal with the effects of the discrimination. This circumstance can mean staying in the situation and tolerating the discrimination or leaving your job without challenging the discrimination.

Seek Internal Resolutions

An employer may have an internal grievance procedure in place. Sometimes, stopping discriminatory conduct of a supervisor or a co-worker is as simple as notifying human resources personnel who may be responsible for ensuring a workplace free from discrimination. There may be reasons to follow internal grievance procedures even if you are convinced an employer is unwilling to redress your concerns. A court or administrative agency that later hears your claim may determine that your failure to follow internal procedures deprived your employer of an

opportunity to rectify the situation. Recent case law suggests that an employer may successfully defend itself against a charge of sexual harassment if you unreasonably fail to take advantage of opportunities provided to you for making an internal company complaint about the misconduct. An employer with a sexual harassment policy would likely vigorously defend against a charge of sexual harassment where an employee failed to follow internal grievance procedures.

File Union Grievances

If you are a member of a union, make sure you meet all deadlines for your union grievance process. Union grievance procedures can require people to initiate grievances within days or weeks of the incident. Failure to follow these guidelines can mean forfeiting your rights to lodge legal claims.

File A Complaint At The MCAD

You have a right, under Massachusetts law, to file a complaint at the Massachusetts Commission Against Discrimination (MCAD) if you feel you have been discriminated against because of your sexual orientation. Complaints of discrimination arising after November 5, 2002 must be filed at the MCAD within 300 days of the last discriminatory act or acts. (Claims of discrimination arising prior to November 5, 2002 must be filed with 6 months). There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims.

What Must I Show To Prove I Have Been Discriminated Against?

You must prove that sexual orientation was a motivating factor in whatever employment decision forms the basis of your discrimination claim. Once you do that, your employer has to show that it would have taken the same action even if your employer did not know or perceive that you are gay. If you can show that your sexual orientation was a motivating factor for your employer's discriminatory conduct, your employer will likely attempt to avoid liability by showing that it would have taken the same action even if it had not taken your sexual orientation into account.

Proving Discriminatory Conduct

Some discriminatory employers actually admit that they are taking action because of your sexual orientation. More often, it is tricky to prove that discrimination is taking place. In the absence of direct evidence, there are several other things you can look for.

1. **Timing:** In many cases, people will be fired, harassed or demoted right after it becomes known or widely suspected that they are gay.
2. **Different Treatment:** The more you can document that you are being treated differently than similarly situated peers, the stronger your case for discrimination will be.
3. **Conflicting Reasons for Employer's Actions:** Sometimes, an employer will give different reasons for their actions against you at different times, or different managers within the company will give different reasons. Any discrepancies that can be uncovered can be used to discredit the employer's claim that their action was non-discriminatory.
4. **Deviations from Generally Followed Procedures:** Sometimes when an employer's real motive for a discharge is discrimination, it fails to follow its own policies and procedures.
5. **Inadequate Paper Trail:** Sometimes there is nothing in your personnel record to justify adverse treatment.

Massachusetts Commission Against Discrimination (MCAD) – Step By Step

- Filing a complaint at the MCAD is fairly simple and you do not need an attorney.
- Complaints can be filed by mail, although it is best to go in person and have an MCAD representative fill out the complaint with you.
- Complaints must be filed within 300 days of the last discriminatory act (or within six months after the last discriminatory act if the claim arose prior November 5, 2002).
- The MCAD will investigate your complaint and determine whether or not there is “probable cause” to believe that an act of discrimination took place.
- If “probable cause” is found, the MCAD will seek to reach a mediated settlement between the parties, or resolve the dispute at a public hearing.
- If “probable cause” is not found, even after appeals, the case will be closed at the MCAD. If probable cause is not found, you have the right to take the matter to state court.
- Up until a finding of probable cause, the MCAD is a neutral investigatory body. Once they have found probable cause in your claim, the MCAD becomes your advocate in the matter.

Protection from Retaliation

It is illegal for an employer to take any adverse action against an employee because he or she has filed a discrimination complaint. Despite this, be aware that retaliation is common and can make an employee’s situation very unpleasant. However, the retaliatory action is a violation of the law unto itself, and there is a high success rate for retaliation claims at the MCAD.

Constructive Discharge

In Massachusetts, if an employee’s job becomes so unpleasant that any reasonable person would believe it is necessary for them to quit, that person may still have a discrimination claim. This situation is referred to as a “constructive discharge”. The determination of whether the work conditions meet the definition of constructive discharge is made by a judge and is not based solely on the employee’s feelings.

Right to Your Personnel Record

You have the right to view and obtain copies of your personnel file. M.G.L. c. 149, sec. 52C requires employers to allow employees to review their personnel files upon written request. The law also specifies what kinds of records should be in a personnel file and what you can do if you disagree with something in the personnel file.

Sexual Harassment

Sometimes anti-gay harassment can constitute illegal sexual harassment if the comments or conduct include sexual language or gestures.

There are two kinds of sexual harassment under the law:

Harassment by a Supervisor occurs where submission to or rejection of sexual advances, requests or conduct is used as a basis for employment decisions affecting the individual, or if sexual conduct is explicitly a term or condition of employment.

Harassment by a non-Supervisor/Hostile Work Environment occurs where someone who is not the person’s supervisor is interfering with their job performance or creating an intimidating, hostile, or offensive work environment.

Your Duty to Report, Their Duty to Investigate

Even though it may be difficult, the burden is on the employee to take action in the face of harassment. If you are being harassed it is important that you explicitly inform the harasser that the comments and conduct are unwelcome. It is also very important to inform your employer of the harassment. Get in touch with the human resources department at your company. If there is no human resources department, inform your supervisor. If your supervisor is the harasser and there is no HR dept., inform a vice president or president of the company. Inform the company in

writing, keeping a copy of your complaint for yourself. Once informed of the harassment, employers have a legal duty to investigate and remedy the situation.

WHAT YOU CAN DO:

1. Make a chronology of events: Include as much detail as possible. This not only helps you become clear on all of the details while they are fresh in your mind, it also helps you reflect on patterns of behavior you may have not noticed before.
2. Get a letter of recommendation from the employer: If you have been fired for the wrong reasons, employers may give you a letter of recommendation just to get rid of you. Such a letter can be extremely useful if the case goes to a hearing because the employer will be forced to explain their reasons for firing you.
3. Get the personnel file: You should request your file in writing and send the request certified with a return receipt. Getting a complete copy of the file provides information for your claim and prevents the employer from back-dating negative evaluations and putting them into the file. Do not disturb the order of contents of the file in any way once you receive it! Remember that this is often a tip to employers that you intend to file a complaint.
4. Get copies of the written policies and procedures: This is important in order to assess whether the employer is following its own written guidelines.
5. Apply for unemployment: Even if you think you are not eligible for unemployment because you were fired, applying for unemployment sends a clear signal that you do not agree with the employer's actions. More importantly, the application process requires the employer to give information about the firing and provides you an opportunity to tell your side of the story.
6. Protect yourself from harassers: If you are being sexually harassed you should try not to be alone with your harasser. This is both for your protection and so that there will be witnesses to any future harassment.

File Complaints at:

The Massachusetts Commission Against Discrimination

One Ashburton Place
Boston, MA 02108
617-727-3990

436 Dwight Street
Springfield, MA 01103
413-739-2145

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