



## What Hinders Diversity Efforts?

By Gary Howard

**D**efinition of “cover”:  
“to hide from sight or  
knowledge: CONCEAL.”

Merriam-Webster Online

# Covering— Bearing the Burden of Secrecy

In June 1969, the Stonewall Riots took place in New York’s Greenwich Village. This series of spontaneous demonstrations against police harassment and raids on gay establishments is generally seen as the catalyst for the

gay rights movement in the United States. Despite the passage of fifty years since Stonewall, and despite advances in gay rights, many lesbian, gay, bisexual, and transgender individuals still face bona fide concerns that force them to decide each day whether they should try to “pass” as straight or try to “cover” the characteristics seen most likely as not straight.

### The Federal Circuit Split on Title VII Protection

For many LGBTQ persons, the primary reasons for deciding whether to try to pass or to cover are the perceived threat of losing a job or of not having the same opportunities at work as straight counterparts. Until recently, LGBTQ Americans had no legal protections in the workplace based on their sexual orientation or gender identity. But in the past few years, the question of whether LGBTQ individuals are protected under Title VII of the Civil

Rights Act of 1964 has become muddled. 42 U.S.C. §2000 e-2. Some federal courts have recently determined that the law does afford protections, but other federal courts have squarely rejected any attempt to extend Title VII rights to LGBTQ persons. The U.S. Circuit Courts of Appeals for the Second, Sixth, and Seventh Circuits all have issued opinions determining that discrimination based on sexual orientation or gender identity is discrimination under Title VII. *See Zarda v. Altitude Express, Inc.*, 883 F. 3d 100 (2nd Cir. 2018); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F. 3d 560 (6th Cir. 2018); *Hively v. Ivy Tech Cmty. College*, 853 F. 3d 339 (7th Cir. 2017). Conversely, the Fifth and Eleventh Circuit Courts of Appeals determined that Title VII’s protections do not extend to LGBTQ persons. *See Wittmer v. Phillips 66 Co.*, 915 F. 3d 328 (5th Cir. 2019) (affirming the holding of *Blum v. Gulf Oil Corp.*, 597 F. 2d 936 (5th Cir. 1979), that Title VII does not prohibit discrimination on the basis of sexual orientation); *Bostock v. Clayton County Board of Commissioners*, 723 Fed. Appx. 964 (11th Cir. 2018). So while LGBTQ persons in Connecticut, Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Tennessee, Vermont, and Wisconsin may have enjoyed recently extended



■ Gary Howard is a member of Bradley’s commercial litigation practice group and serves as the insurance team leader. He represents companies nationwide in class actions, contract cases, business and lost-profits disputes, and fraud and bad-faith litigation. He was the 2019 DRI Diversity for Success Seminar co-chair, and currently serves as the DRI Alabama State Membership chair, and the DRI Life, Health and Disability Committee social media chair.

Title VII protections at work, those who live in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas expressly have not. Further, given that some federal circuit courts of appeals have not joined the recent discussion on the issue, and given that some states and other jurisdictions have enacted their own laws or ordinances, whether LGBTQ individuals are protected from discrimination in the workplace has hinged on something as simple as where an individual lives.

On April 22, 2019, the United States Supreme Court announced that it would consider two cases that will determine whether Title VII precludes discrimination based on sexual orientation. *Bostock v. Clayton County, Georgia* (11th Cir. 2018), cert. granted (U.S. Apr. 22, 2019) (No. 17-1618); *Zarda v. Altitude Express, Inc.* (2nd Cir. 2017), cert. granted (U.S. Apr. 22, 2019) (17-1623). *Bostock v. Clayton County* found that sexual orientation was not covered under Title VII, and *Zarda v. Altitude Express* found that Title VII protections extended to LGBTQ persons. By consolidating the cases, the Supreme Court will resolve the split that has arisen in the circuits on the issue.

Additionally, by agreeing to consider the case *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.* (6th Cir. 2018), the Supreme Court also will address whether Title VII prohibits discrimination against transgender individuals (1) based merely on the fact that they are transgender, or (2) based on some form of sex stereotype.

### Workplace Demands to Cover

This trio of cases will have a direct effect on the civil rights of LGBTQ persons in the workplace. But even if the Supreme Court determines that Title VII affords protection against workplace discrimination, it does not mean that LGBTQ persons won't still face demands to subvert those attributes that the majority may deem to be out of the mainstream, odd, or queer. Our civil rights laws currently only protect immutable characteristics, such as race or gender, and arguably not those that can be suppressed or covered. This failure of the law to protect the LGBTQ community from the demands to cover in the workplace is not unique to that community. Anyone who is

“other” or “different” may face demands to cover her or his uniqueness and to assimilate into the mainstream. For instance, in 2016, the Eleventh Circuit Court of Appeals rejected claims made by the Equal Employment Opportunity Commission (EEOC) on behalf of a black female whose job offer was rescinded by an employer because she wore dreadlocks, a style traditionally worn by African Americans. In rejecting the claim, the court allowed the rationale to stand that the woman's hair would “tend[] to get messy,” and therefore, the style was not acceptable for the workplace. *EEOC v. Catastrophe Mgt. Solutions*, 852 F.3d 1018 (11th Cir. 2016).

The term “covering” in the context of one's identity appears to have been coined by social scientist Erving Goffman in 1963. Goffman noted:

It is a fact that persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large. The individual's object is to reduce tension, that is, to make it easier for himself and the others to withdraw covert attention from the stigma... This process will be referred to as covering.

Erving Goffman, *Stigma* 125 (1963).

Unlike passing, when someone pretends to be something she or he is not (such as a totally closeted gay man), someone who covers is attempting simply to minimize (or hide from obvious sight) her or his traits or actions to blend in or to make the majority feel less uncomfortable.

Why are demands placed on minorities to cover? Professor Kenji Yoshino posits that “white supremacy,” “patriarchy,” and “homophobia” are reasons why racial minorities are pressured to “act white,” women have to “downplay their child-care responsibilities,” and gays are told not to “flaunt it.” K. Yoshino, *Covering* (Random House 2007). Professor Yoshino has categorized four axes along which individuals can cover: appearance, affiliation, activism, and association. *Id.* at 79–91.

*Appearance-based covering* relates to how individuals present how they look to blend in with what the mainstream deems normal. For instance, a person from a different country may refrain from wearing

clothing that could be perceived as foreign or a black woman may choose not to wear her natural hair.

*Affiliation-based covering* relates to avoiding behavior that is attributed largely to one specific minority group. For instance, an individual may refrain from discussing at work that he plays in an LGBTQ softball league on weekends or black individu-

■ ■ ■ ■ ■  
**Unlike passing, when**  
someone pretends to be something she or he is not (such as a totally closeted gay man), someone who covers is attempting simply to minimize (or hide from obvious sight) her or his traits or actions to blend in or to make the majority feel less uncomfortable.

als may be reluctant to discuss prominent black social or political leaders.

*Activism-based covering* relates to how willing an individual would be to challenge disparaging or improper remarks about her or his group. For instance, a person might not challenge someone else who makes jokes about her or his accent, heritage, or orientation for fear of coming across as too strident.

*Association-based covering* relates to how individuals may limit their associations. For instance, women of color may deliberately choose not to spend time together so as not to appear as a clique, or a lesbian may choose not to bring her wife to work functions so as not to make others feel uncomfortable.

But how prevalent is the demand to cover? The answer to this question certainly is not absolutely known. However, a



report, entitled *Uncovering Talent—A New Model of Inclusion*, analyzes data from a survey designed to measure the prevalence of covering. Deloitte (2018). The survey of 3,129 respondents, from across ten different industries, included a mix of various ages, races, genders, ethnicities, and orientations. *Id.* Based on the survey, the following percentages of people reported covering across at least one of Professor Yoshino's covering axes:

- 83 percent of lesbian, gay, and bisexual individuals;
- 79 percent of blacks;
- 67 percent of women of color;
- 66 percent of women;
- 63 percent of Hispanics; and
- 45 percent of straight white men.

As organizations strive for diversity, the question that arises time and again is what is hindering our diversity efforts? Could it be that the demands to cover are making employees not feel included? As the *Uncovering Talent* report noted,

[h]aving identified the incidence of covering across these populations, it is time to turn to describing the impact such covering has on individuals and organizations. The impact of certain kinds of covering behavior will be immediately evident, such as the physical pain suffered by the person who foregoes a cane to cover his disability, the juggling act conducted by the woman who must not only care for her children but also pretend she is not doing so, or the personal humiliation suffered by the gay person who feels he should not bring his spouse to an event where significant others are invited.

If an organization is not truly inclusive and is not welcoming its workers' authentic selves at work, the organization and the individual will likely continue to suffer. The workers will never be able to commit their talents fully because they are forced to toggle back and forth between their differing identities. The energy invested in covering is valuable energy lost. If individuals are losing more of themselves, the organization for which they work is likely losing opportunities to tap into each individual's full talent and experience—the single greatest benefit of diversity and inclusion. While some degree of commonality among team members may be required for the team to

function, determining the proper balance between individuality and assimilation should be considered so that the individuals and the organization can both flourish in an inclusive environment full of diverse ideas. **FD**