

# BEHIND CLOSED DOORS

A Testing  
Investigation  
into Bias  
Against LGBT  
Job Applicants  
in Virginia



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# About the Equal Rights Center

The Equal Rights Center is a civil rights organization that identifies and seeks to eliminate unlawful and unfair discrimination in housing, employment, and public accommodations in its home community of Greater Washington, D.C. and nationwide. The ERC's core strategy for identifying unlawful and unfair discrimination is civil rights testing. When the ERC identifies discrimination, it seeks to eliminate it through the use of testing data to educate the public and business community, support policy advocacy, conduct compliance testing and training, and if necessary, take enforcement action.

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## Executive Summary

In most states, including Virginia, a lesbian, gay, bisexual, and/or transgender (LGBT) person can, as a recent 7th Circuit decision points out, “be married on Saturday and then fired on Monday for just that act.” In the United States, there is no federal law that explicitly prohibits discrimination based on sexual orientation or gender identity. Polling of LGBT people indicates employment discrimination on these bases is a significant threat to their livelihoods. However, modern discrimination in hiring tends to be covert and is therefore notoriously difficult to detect. Hiring processes for different employers vary, and applicants are often unaware of the decision-making processes that take place behind closed doors.

Civil rights testing offers a unique way to explore the problem of discrimination against LGBT job applicants. It typically involves one or more people covertly engaging in a transaction or interaction in order to uncover discrimination or compare conduct to legal and policy requirements. Matched pair civil rights testing provides a unique remedy to the disadvantages real job applicants experience in the hiring process due to their lack of access to information. By conducting tests using pairs of similarly positioned job applicants and controlling for as many variables as possible, testing has the potential to evaluate hiring practices in a manner impossible for most job candidates and to detect discrimination that might otherwise go unnoticed. Through a comprehensive system of standardized testing and careful documentation, testing has the potential to both detect disparate treatment and to provide a detailed picture of what hiring discrimination looks like in a modern context.

The investigation that forms the basis of this report used live testing to help uncover examples of how job applicants face sexual orientation discrimination during the hiring process at companies in Virginia. Live testing relies on people, known as testers, going to a location or partaking in an interpersonal interaction to collect data that can later be analyzed for the presence of differential treatment. It is extremely time consuming and resource intensive; therefore, sample sizes in live testing projects tend to be small. For this investigation, the ERC conducted a total of 10 tests at companies in Virginia. Overall, some form of discrimination was suspected in three out of 10 comprehensive tests.

In two tests, results point to possible “formal discrimination” in which the straight-identified tester and gay/queer-identified tester’s application process had objectively different outcomes. In both of these tests, the straight tester was offered a job and the gay/queer tester was not—even though there was an extremely high level of standardization when it came to their applications, qualifications, and interviews. None of the testers in these tests suspected that they were being discriminated against, a potential testament to the covert nature of present-day discrimination.

A final test documented an instance of “informal” or “interpersonal” discrimination. Though the test produced no evidence of a discriminatory hiring decision, as neither tester received a job offer, the LGBT-identified tester reported that he was openly ridiculed by two employees when he disclosed his sexual orientation. Though this test did not detect any formal discrimination, it provides important information about the potential experiences of LGBT individuals in the hiring context. This type of interpersonal discrimination during a job interview could serve as a powerful deterrent to LGBT job applicants as it may create a reasonable fear about entering a hostile work environment.

This effect may be especially powerful in a state such as Virginia, where many LGBT job applicants know that state law provides them no legal recourse in case of mistreatment on the basis of sexual orientation.

Near term prospects for additional non-discrimination protections on the basis of sexual orientation and gender identity at the federal level appear dim. However, the testing conducted as part of this investigation, especially when coupled with the self-reported experiences of LGBT people, indicate that state officials in Virginia should act to enact such protections at the state level. Furthermore, companies and foundations should invest in additional employment testing to better understand how discrimination can play out in the hiring process, thereby strengthening efforts to end it.

## Introduction

In the United States, there is no federal law that explicitly prohibits discrimination based on sexual orientation or gender identity. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples may legally marry in every state in the country.<sup>1</sup> Despite this landmark ruling, discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals is still not prohibited in many of those states. In fact, even though some states have protections in place, nearly half of LGBT individuals live in states that do not protect them from discrimination in employment, housing, or public accommodations.<sup>2</sup>

Additionally, recent polls suggest that the public is unaware of the pervasiveness of anti-LGBT discrimination<sup>3</sup> or even erroneously assumes that this type of discrimination is already banned by federal or state law.<sup>4</sup> A 2014 YouGov poll found that 62 percent of respondents in the U.S. believed that it was already illegal for an employer to fire a worker for being gay or lesbian.<sup>5</sup> But in reality, as the 7th Circuit Court of Appeals noted in 2016, someone can “be married on Saturday and then fired on Monday for just that act.”<sup>6</sup> Indeed, a Pew Research Center survey found that 21 percent of LGBT respondents reported facing workplace discrimination<sup>7</sup> and a 2017 study from the Center for American Progress found that 53 percent of LGBT individuals surveyed reported discrimination negatively impacted their work environment.<sup>8</sup> In reality, 26 states across the country lack any explicit

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<sup>1</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015) <https://www.scotusblog.com/case-files/cases/obergefell-v-hodges/>

<sup>2</sup> LGBT Movement Advancement Project et. al. “Are LGBT Workers Protected from Discrimination?” October 2018. <http://www.lgbtmap.org/file/Brief-Employment-Landscape-Final.pdf>

<sup>3</sup> “Nondiscrimination”, Georgia Equality. <http://georgiaequality.org/issues/nondiscrimination/>

<sup>4</sup> Hasenbush, Amira and Christy Mallory. “Employment Discrimination Based on Sexual Orientation and Gender Identity in Ohio,” The Williams Institute, January 2014. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/OhioNDReport-Jan-2014.pdf>

<sup>5</sup> Moore, Peter. “Poll Results: Discrimination,” YouGov, June 18, 2014. <https://today.yougov.com/topics/legal/articles-reports/2014/06/18/poll-results-discrimination>

<sup>6</sup> *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 33, (7th Cir. 2016) [https://www.lambdalegal.org/sites/default/files/hively\\_in\\_20160728\\_reply-brief\\_1.pdf](https://www.lambdalegal.org/sites/default/files/hively_in_20160728_reply-brief_1.pdf)

<sup>7</sup> Brown, Anna. “As Congress considers action again, 21% of LGBT adults say they faced workplace discrimination,” FactTank, Pew Research Center, Nov. 4, 2013. <http://www.pewresearch.org/fact-tank/2013/11/04/as-congress-considers-action-again-21-of-lgbt-adults-say-they-faced-workplace-discrimination/>

<sup>8</sup> Singh, Sejal and Laura E. Durso. “Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways,” Center for American Progress, May 2, 2017. <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>

state laws against discrimination on the basis of sexual orientation and 27 states lack protections for gender identity.<sup>9</sup>

In recent years, opponents of LGBT rights have moved to frame demands for basic civil equality as threats to individual liberties such as religious freedom. For example, in the wider debate around *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, opponents of LGBT rights argued that a shop owner's refusal to bake a wedding cake for a gay couple is protected by the First Amendment.<sup>10</sup> In a similar case, *Arlene's Flowers Inc. v. Washington*, opponents of LGBT rights claimed that requiring a florist to create a flower arrangement for a same-sex wedding violates both free speech and free exercise of religion.<sup>11</sup>

Creating such narratives that portray the LGBT struggle for civil rights as centered primarily in a desire to gain access to non-essential items such as wedding cakes and flowers makes it easier for opponents of LGBT rights to argue that the individual liberties of store owners matter more than equal treatment of LGBT customers. Further, cherry-picking cases that touch on the religious connotations associated with marriage and wedding imagery serves to support an argument rooted in the preeminence of religious liberty and ignores the fact that at its root, refusal of service in public accommodations constitutes harmful discrimination and has implications for LGBT equality across many areas of life. LGBT individuals still face barriers to medical care, mistreatment by law enforcement, and housing and employment discrimination. The larger effect of this rhetoric obscures what is truly at stake—discrimination threatening the health, basic dignity, and livelihoods of LGBT individuals.<sup>12</sup> Thus, despite recent high-profile gains in rights such as marriage equality, the lack of LGBT anti-discrimination laws continues to threaten the basic human rights of LGBT individuals.

Employment discrimination against LGBT individuals has been a focal point of LGBT advocates for years. In a 2013 survey, Pew Research Center found that 57 percent of LGBT respondents stated that equal employment rights should be a “top priority” policy issue.<sup>13</sup> It is through viable employment that individuals are able to make a living, support their families, and survive on a day-to-day basis. Without protections in place, LGBT individuals may struggle to find jobs, face harassment in the workplace, and can even be fired for being gay or transgender.

This study seeks to provide a unique form of detailed, objective information about employment discrimination faced by LGBT job applicants to supplement self-reported instances of discrimination. It uses civil rights testing to provide further insight about the realities of discrimination faced by applicants during the hiring process, specifically on the basis of sexual orientation.

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<sup>9</sup> “Non-Discrimination Laws,” LGBT Movement Advancement Project, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws/employment](http://www.lgbtmap.org/equality-maps/non_discrimination_laws/employment)

<sup>10</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. \_\_\_\_ (2018) <http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/>

<sup>11</sup> *Arlene’s Flowers Inc. v. Washington*, No. 117-108, U.S. (2018) <http://www.scotusblog.com/case-files/cases/arlenes-flowers-inc-v-washington/>

<sup>12</sup> Scott, Kate and Elias Cohn. “Beyond Wedding Cake: Regardless of SCOTUS Decision, Discrimination Remains a Scourge to LGBT People Across the Country,” Equal Rights Center, June 6, 2018. <https://equalrightscenter.org/beyond-wedding-cake/>

<sup>13</sup> “A Survey of LGBT Americans,” Pew Research Center, June 13, 2013. <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/8/#top-issues>

Civil rights testing is an investigative tool used to gather evidence by having one or more people covertly engage in a transaction or interaction with an entity such as a landlord or employer. This investigation relies on a civil rights testing methodology to explore employment discrimination on the basis of sexual orientation in Virginia.

## Background

In the current political climate, expanded protections against discrimination are unlikely to come through the executive branch, federal legislation, or the federal court system.

The Trump administration has repeatedly demonstrated opposition to LGBT equal treatment. In fact, it has actively enacted policies that infringe on LGBT rights, including attacks on healthcare and a ban on transgender military service.<sup>14</sup> Moreover, in the past two years, the Department of Justice (DOJ) has intervened in lawsuits at the circuit court level to argue against an interpretation of the Civil Rights Act that would expand protections to LGBT employees.<sup>15</sup>

Since 2015, the Human Rights Campaign has pushed for the passage of the Equality Act, a federal bill that would amend the Civil Rights Act of 1964, the Fair Housing Act, and other civil rights laws by adding sexual orientation and gender identity as protected classes.<sup>16</sup> While Speaker of the House Nancy Pelosi has announced a renewed commitment to this bill, given the current makeup of Congress and the Trump Administration's posture toward these issues, it seems unlikely that legislative advances to curtail anti-LGBT discrimination at the federal level will be adopted in the near future.<sup>17</sup>

## Current Legal Context

Given the lack of legislative protections on the federal level, some LGBT rights advocates have pursued protections through the judicial system. However, the current administration has demonstrated its opposition to expanding LGBT anti-discrimination protections; thus, state and local level protections may be an important strategy in protecting LGBT rights in the near future.

In its high profile *Masterpiece Cakeshop* decision handed down in June 2018, the U.S. Supreme Court issued a decision in favor of a small business owner who claimed a First Amendment right to refuse to create a custom wedding cake for a marriage between two men. *Masterpiece* attracted extensive media attention and the Court's decision is likely to have a chilling effect on potential future complainants. However, while the Supreme Court ruled that Colorado had mishandled the case against the business owner, they did not actually make any decisions regarding the constitutionality of the state's civil rights protections. Thus, the 7-2 decision was ultimately limited in

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<sup>14</sup> "The Discrimination Administration, "National Center for Transgender Equality, <https://transequality.org/the-discrimination-administration>

<sup>15</sup> Moreau, Julie, "Transgender workers not protected by civil rights law, DOJ tells Supreme Court," NBC News, Oct. 25, 2018. <https://www.nbcnews.com/feature/nbc-out/transgender-workers-not-protected-civil-rights-law-doj-tells-supreme-n924491>

<sup>16</sup> Equality Act, S. 1006, 115th Cong. (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/1006>

<sup>17</sup> Johnson, Chris. "Pelosi vows to pass Equality Act as new House speaker," Washington Blade, Jan. 3, 2019. <https://www.washingtonblade.com/2019/01/03/pelosi-vows-to-pass-equality-act-as-new-house-speaker/>

its legal scope and left many important questions about the legality of certain forms of discrimination undecided, including employment discrimination.<sup>18</sup>

Arguably of more legal consequence are a series of cases civil rights advocates have pursued in the federal court system in order to cobble together basic protections for LGBT employees from existing statutes. These cases, which involve important debates over Title VII of the Civil Rights Act of 1964, have broad implications for employment rights and may be heard by the Supreme Court in the coming year.

Title VII protects against discrimination on the basis of sex, which advocates have argued, by definition, also applies to gender identity and sexual orientation, two categories that are not explicitly protected by the Act. The legal argument relies on the claim that an action or type of treatment is discriminatory if such treatment would be different “but for” that person’s sex.<sup>19</sup> In the context of sexual orientation, the 2nd Circuit Court explained the connection as such: “A woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women.”<sup>20</sup> Thus, advocates argue that sexual orientation discrimination is a subset of sex discrimination. Similarly, transgender individuals face discrimination when their gender presentation does not conform with the sex they were assigned at birth, and thus suffer from discrimination based on sex stereotypes, which advocates argue should be understood as sex discrimination.

As shown in Figure 1.1, the 1st, 6th, 7th, 9th, and 11th Circuit Courts have issued rulings that expand the interpretation of “sex” in Title VII to include gender identity and transgender status, and the 2nd and 7th Circuits have ruled that this protection against sex discrimination covers sexual orientation.<sup>21</sup> However, given the current political climate and state of the federal courts, legal advocates worry that such victories at the circuit level may be reversed in the coming years.

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<sup>18</sup> Scott, Kate and Elias Cohn. “Beyond Wedding Cake,” <https://equalrightscenter.org/beyond-wedding-cake/>

<sup>19</sup> *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) <https://supreme.justia.com/cases/federal/us/435/702/>

<sup>20</sup> *Zarda v. Altitude Express*, No. 15-3775, 37, (2nd Cir. 2018) <https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/document.pdf>

<sup>21</sup> “LGBT Employees & Title VII,” LGBT Movement Advancement Project, June 2018. <https://www.lgbtmap.org/file/Title-VII-Two-Pager.pdf>

# TITLE VII COURT RULINGS

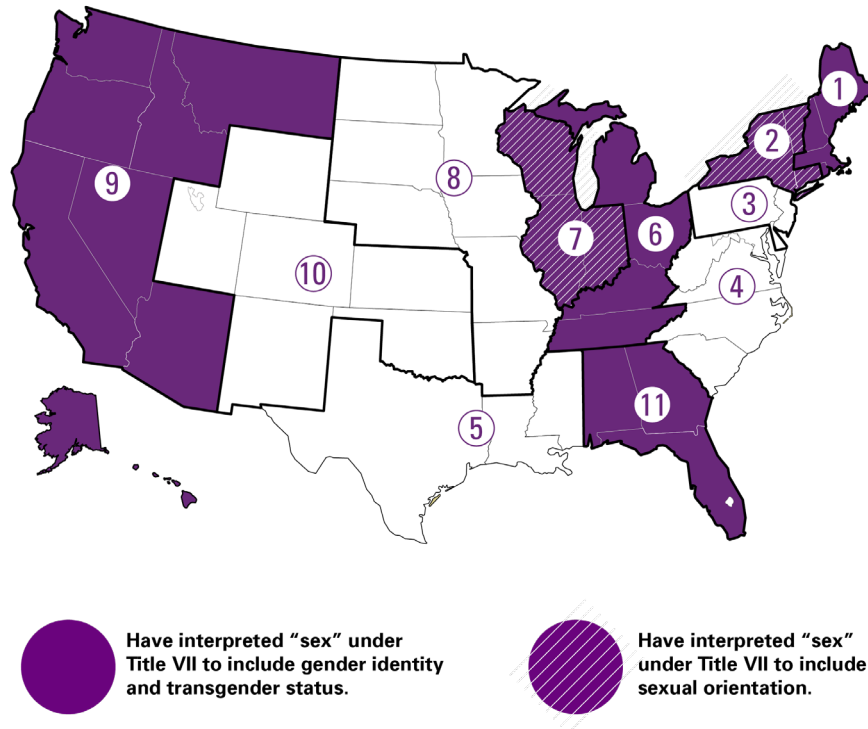


Figure 1.1

The Trump Administration's appointments to the federal judiciary, including the Supreme Court, are of long-term concern to equality advocates. According to the Pew Research Center, President Trump has appointed federal appeals court judges at a faster rate than any other president before him. He appointed more judges from the start of his tenure through June 2018 than Presidents Barack Obama and George W. Bush had appointed in the same amount of time, combined.<sup>22</sup>

According to the LGBT legal advocacy organization Lambda Legal, many of President Trump's judicial appointments have poor judicial records on LGBT rights.<sup>23</sup> Additionally, the appointment of Justice Brett Kavanaugh to the Supreme Court, whose record on LGBT rights has been questioned by leading civil rights organizations, may play a pivotal role in overturning important favorable circuit court decisions affirming that Title VII prohibits discrimination on the basis of sexual orientation and gender identity.<sup>24</sup>

<sup>22</sup> Gramlich, John. "With another Supreme Court pick, Trump is leaving his mark on higher federal courts," FactTank, Pew Research Center, July 16, 2018. <http://www.pewresearch.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts/>

<sup>23</sup> "Trump's Judicial Assault on LGBT Rights," Lambda Legal, Dec. 20, 2017. [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final\\_trumps\\_judicial\\_assault\\_on\\_lgbt\\_rights\\_28129.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final_trumps_judicial_assault_on_lgbt_rights_28129.pdf)

<sup>24</sup> "We Reviewed All of Judge Kavanaugh's Record. Here's What We Found." Lambda Legal, July 9, 2018. [https://www.lambdalegal.org/blog/20180709\\_brett-kavanaugh-record](https://www.lambdalegal.org/blog/20180709_brett-kavanaugh-record)

Three cases currently pending review from the Supreme Court involve the Title VII argument. *Zarda v. Altitude Express*, *Bostock v. Clayton County*, and *EEOC v. R.G. & G.R Harris Funeral Homes* are centered around legal debates over the applicability of Title VII's sex discrimination clause to sexual orientation (*Zarda* and *Bostock*) and gender identity (*Harris Funeral Homes*). Involvement from the Supreme Court could have major implications for the current patchwork of legal rulings and protections of LGBT rights.

The future is uncertain when it comes to protecting LGBT rights in the realm of federal courts, and there is no permanent federal law in place to protect LGBT individuals against discrimination. Rulings against the expanded applicability of Title VII in the potential Supreme Court cases mentioned above could have disastrous consequences for LGBT equality. In addition, through interventions in both *Zarda*<sup>25</sup> and *Harris Funeral Homes*,<sup>26</sup> Trump's DOJ has openly expressed its hostility toward expanding anti-discrimination protections to cover LGBT employees. As such, shoring up explicit protections at the state and local levels may prove to be a critical strategy in the fight to protect LGBT individuals against discrimination in the coming years.

## State and Local Protections: Virginia

Some states and localities have their own laws that protect individuals against discrimination on the basis of sexual orientation and/or gender identity. Twenty-two states explicitly prohibit discrimination in housing, employment, and public accommodations based on sexual orientation, and 20 do so for gender identity.<sup>27</sup>

Virginia is one of 26 states that offer no explicit state protections against discrimination on the basis of sexual orientation or gender identity. This has prompted various LGBT advocacy organizations to prioritize discrimination in employment, housing, and public accommodations as a top issue. Organizations such as Equality Virginia have been working to pass protections for LGBT individuals for years. Newer groups have also formed, such as Virginia Beach for Fairness, a coalition dedicated to the passage of statewide non-discrimination protections.<sup>28</sup>

Employers and businesses have also begun to understand the importance of non-discrimination policies. Virginia Fairness, a project of Equality Virginia, manages two initiatives—Virginia Competes and Equality Means Business—to encourage businesses to voluntarily adopt non-discrimination policies and to commend companies that have protections for LGBT employees in place.<sup>29</sup> As of April 2018, 12 major Virginia-based companies, including Capital One and Northrop Grumman, are part of Virginia Competes.<sup>30</sup> Additionally, dozens of smaller businesses across the state have signed

<sup>25</sup> Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775, (2nd Cir. 2017) <https://static.reuters.com/resources/media/editorial/20180226/zardaenbanc--dojamicus.pdf>

<sup>26</sup> Brief for the Federal Respondent in Opposition, *Harris Funeral Homes v. Equal Employment Opportunity Comm'n*, No. 18-107 (U.S. 2018) <http://src.bna.com/CKM>

<sup>27</sup> LGBT MAP. "Are LGBT Workers Protected from Discrimination?" <http://www.lgbtmap.org/file/Brief-Employment-Landscape-Final.pdf>

<sup>28</sup> Stahl, Shane. "'Virginia Beach for Fairness' Coalition Launches to Fight for Statewide Nondiscrimination Protections in VA," Freedom For All Americans, July 18, 2018. <https://www.freedomforallamericans.org/virginia-beach-for-fairness-coalition-launches-to-fight-for-statewide-nondiscrimination-protections-in-va/>

<sup>29</sup> Virginia Fairness, <http://virginiafairness.org/>

<sup>30</sup> "Participating Companies," Virginia Fairness, April 4, 2018. <http://virginiafairness.org/virginiacompetes/>

the Equality Means Business pledge, declaring that they do not discriminate against LGBT customers or employees.<sup>31</sup> These coalitions are rooted in an understanding that prioritizing diversity and inclusion will lead to better workforces, strong brand identities, and overall growth and success. Relatedly, in 2017, then-Governor Terry McAuliffe issued an executive order that banned state contracts with companies that discriminate against LGBT individuals.<sup>32</sup>

Because of recent advocacy, legislative efforts, and a unique local policy-making environment, Virginia is a battleground state when it comes to the promise of LGBT anti-discrimination protections.

## Existing Protections and Guidance Are Subject to Change

The Virginia Human Rights Act protects against employment discrimination on the basis of categories including race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, and disability. Sexual orientation and gender identity are not included in the list of categories protected from discrimination.<sup>33</sup> In 2016, State Attorney General Mark Herring issued a legal opinion regarding the Human Rights Act in response to a request by General Assembly lawmakers, in which he stated that the prohibition against sex discrimination in the Act does cover discrimination on the basis of sexual orientation and gender identity as well.<sup>34</sup> While this was an important step in the interest of LGBT rights, it arguably does not hold the force of law and there is still no statewide law that prohibits such discrimination in private employment.<sup>35</sup>

Similarly, under current governor Ralph Northam, an executive order protects LGBT state employees from discrimination, but this protection is also subject to fluctuation.<sup>36</sup> The measure is based on an executive order that Virginia governors have traditionally signed at the start of their tenure over the past several terms. Democratic governor Mark Warner was the first to include protections against discrimination on the basis of sexual orientation in 2005,<sup>37</sup> but his Republican successor Bob McDonnell omitted those protections in the version of the order he enacted.<sup>38</sup> Governor Terry McAuliffe, who was in office prior to Northam, also chose to include LGBT state employees in the anti-discrimination order enacted during his governorship.

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<sup>31</sup> “EMB Online Directory,” Virginia Fairness. <http://virginiafairness.org/equality-means-business-2/emb-online-directory-2/>

<sup>32</sup> Vozella, Laura. “McAuliffe bans state contracts with firms engaged in anti-LGBT discrimination,” Washington Post, Jan. 5, 2017. [https://www.washingtonpost.com/local/virginia-politics/mcauliffe-bans-state-contracts-with-firms-engaged-in-anti-lgbt-discrimination/2017/01/05/5f701dc0-d35f-11e6-945a-76f69a399dd5\\_story.html?utm\\_term=.9fd9da5fae52](https://www.washingtonpost.com/local/virginia-politics/mcauliffe-bans-state-contracts-with-firms-engaged-in-anti-lgbt-discrimination/2017/01/05/5f701dc0-d35f-11e6-945a-76f69a399dd5_story.html?utm_term=.9fd9da5fae52)

<sup>33</sup> Virginia Human Rights Act, Va. Code § 2.2-3900 (2001) <https://law.lis.virginia.gov/vacodepopularnames/virginia-human-rights-act/>

<sup>34</sup> Nolan, Jim. “Herring: Gay, transgender discrimination also violates Va. rules,” The News Virginian, May 10, 2016. [https://www.dailypress.com/newsvirginian/news/herring-gay-transgender-discrimination-also-violates-va-rules/article\\_d6d784a6-16e6-11e6-adea-5f59cdfa14b.html](https://www.dailypress.com/newsvirginian/news/herring-gay-transgender-discrimination-also-violates-va-rules/article_d6d784a6-16e6-11e6-adea-5f59cdfa14b.html)

<sup>35</sup> “Virginia’s Equality Profile,” LGBT Movement Advancement Project. [http://www.lgbtmap.org/equality\\_maps/profile\\_state/VA](http://www.lgbtmap.org/equality_maps/profile_state/VA)

<sup>36</sup> Stahl, Shane. “Virginia Governor Signs Executive Order Protecting LGBTQ State Workers and Contractors,” Freedom For All Americans, Jan. 17, 2018. <https://www.freedomforallamericans.org/virginia-governor-signs-executive-order-protecting-lgbtq-state-workers-contractors/>

<sup>37</sup> Shear, Michael D. and Chris L. Jenkins. “Warner Protects Gays in Va. Hiring,” Washington Post, Dec. 17, 2005. <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601908.html>

<sup>38</sup> Helderma, Rosalind S. “Virginia governor’s anti-bias order removes language regarding sexual orientation,” Washington Post, Feb. 10, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020903739.html>

Finally, there are some local employment discrimination protections for LGBT individuals, but these are limited in scope and can be difficult to enact and/or enforce even when they are in place. Two cities in Virginia prohibit discrimination in private employment on the basis of both sexual orientation and gender identity, and two localities provide protections on the basis of sexual orientation only.<sup>39</sup>

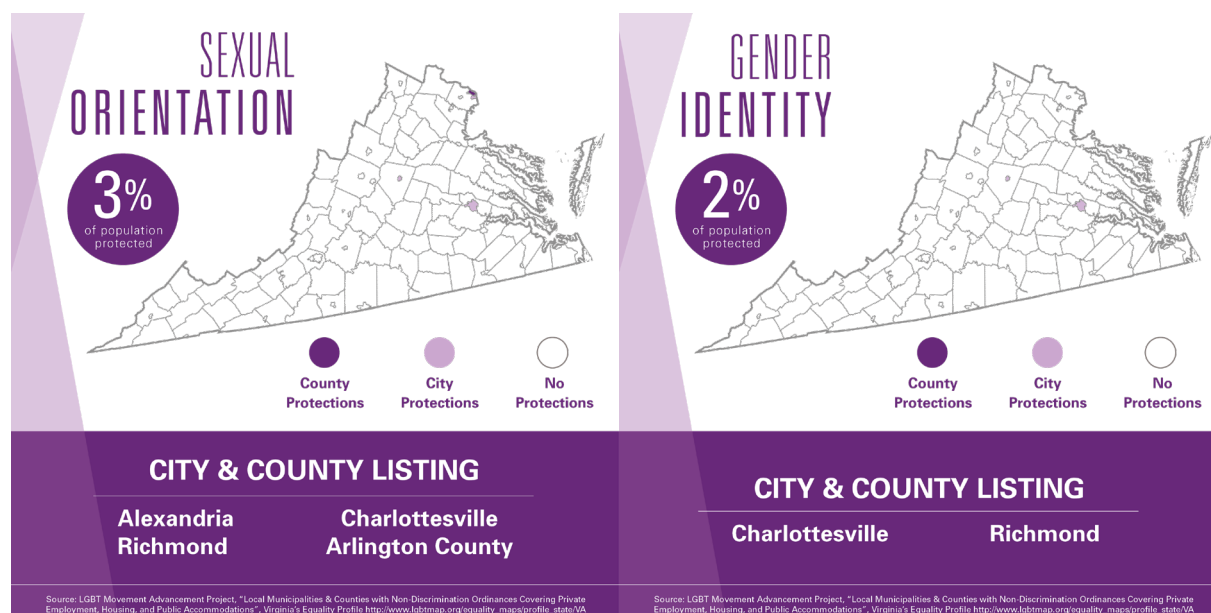


Figure 1.2

However, like many other states, Virginia operates under the Dillon Rule, a doctrine holding that localities may only exercise those powers delegated to them by the state.<sup>40</sup> This legal principle prevents local authority from exceeding state authority and permits localities to only pass laws expressly allowed by the state legislature. Thus, in effect, it can be difficult for localities to pass and enforce anti-discrimination laws. Ultimately, while Virginia does not have an outright ban on cities and counties passing non-discrimination ordinances, the Dillon Rule has made it harder for cities and counties to pass and effectively enforce these kinds of measures.

## Recent Efforts to Pass Statewide Protections

The Virginia General Assembly is comprised of a Senate and a House of Delegates. A number of anti-discrimination bills have been circulating in the Virginia General Assembly in recent years. These bills would protect LGBT individuals from discrimination in employment and other domains.

- ❖ **SB 998/HB 2067** would have banned discrimination against public employees on the basis of sexual orientation and gender identity, codifying into law the executive orders that recent Democratic governors have thus far had to reaffirm with each new term. Bill sponsor Senator Adam P. Ebbin first introduced a version of this bill to the General Assembly in 2007.<sup>41</sup> In the

<sup>39</sup> "Virginia's Equality Profile," LGBT MAP. [http://www.lgbtmap.org/equality\\_maps/profile\\_state/VA](http://www.lgbtmap.org/equality_maps/profile_state/VA)

<sup>40</sup> "Cities 101: Delegation of Power," National League of Cities, Dec. 13, 2016. <https://www.nlc.org/resource/cities-101-delegation-of-power>

<sup>41</sup> HB 2550, Va. Gen. Assemb. Reg. Sess. (2007) <http://lis.virginia.gov/cgi-bin/legp604.exe?071+sum+HB2550>

2019 legislative session, it successfully passed the Senate but did not make it out of the House after it was removed from the agenda of the Committee on General Laws.<sup>42</sup>

- ❖ **SB 1109/SB 1232/HB 2677/HB 1823** would have declared housing discrimination on the basis of sexual orientation and gender identity unlawful. Versions of this legislation date back to 2014.<sup>43</sup> In 2019, the bill successfully passed the Senate, as it had in the previous year's session, but was removed from the agenda of the House General Laws committee along with SB 998.<sup>44</sup>
- ❖ **HB 2421** is similar to but more comprehensive than SB 998. It would have prohibited discrimination on the basis of sexual orientation and gender identity in private employment as well as public accommodations, public contracting, apprenticeship programs, housing, banking, and insurance. This far-reaching bill was introduced in the House by Delegate Mark Levine but did not make it out of the Chamber in 2019.<sup>45</sup>

The General Assembly failed to pass any of these protections in the 2019 legislative session, which ran from January 9 to February 24. The two chambers of the Virginia General Assembly are both currently held by a Republican majority (21-19 in the Senate and 51-49 in the House of Delegates). In 2017, a major Democratic sweep flipped 15 Republican seats in the House of Delegates and signified a changing political landscape in the state.<sup>46</sup> The shift encouraged advocacy groups to proactively push for more progressive measures, including expanded non-discrimination laws.<sup>47</sup>

## Civil Rights Testing

Civil rights testing, also known as discrimination auditing, gained traction as a social science research method and tactic for activism during the Civil Rights Movement during the 1950s and 60s.<sup>48</sup> Civil rights testing typically involves one or more people covertly engaging in a transaction or interaction in order to uncover discrimination or compare conduct to legal and policy requirements.<sup>49</sup> Generating both qualitative and quantitative data, civil rights testing can uncover discrimination that is otherwise difficult to detect or report and help people understand how various groups experience discrimination. Social science researchers, advocates, and government agencies, among others, use it. Though testing has most often been used to uncover discrimination in housing, it can be adapted to other contexts including public accommodations and the focus of this study, employment.

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<sup>42</sup> SB 998, Va. Gen. Assemb. Reg. Sess. (2019) <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB998>

<sup>43</sup> HB 418, Va. Gen. Assemb. Reg. Sess. (2014) <http://lis.virginia.gov/cgi-bin/legp604.exe?141+sum+HB418>

<sup>44</sup> SB 1109, Va. Gen. Assemb. Reg. Sess. (2019) <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=sb1109>

<sup>45</sup> HB 2421, Va. Gen. Assemb. Reg. Sess. (2019) <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2421>

<sup>46</sup> Nirappil, Fenit. "Democrats make significant gains in Virginia legislature; control of House in play," Washington Post, Nov. 8, 2017. [https://www.washingtonpost.com/local/virginia-politics/democrats-poised-to-make-significant-gains-in-virginia-legislature/2017/11/07/9c2f4d24-c401-11e7-aae0-cb18a8c29c65\\_story.html?utm\\_term=.4b2802bb71df](https://www.washingtonpost.com/local/virginia-politics/democrats-poised-to-make-significant-gains-in-virginia-legislature/2017/11/07/9c2f4d24-c401-11e7-aae0-cb18a8c29c65_story.html?utm_term=.4b2802bb71df)

<sup>47</sup> Nirappil, Fenit. "With Democratic sweep in Virginia, progressives hopeful," Washington Post, Nov. 23, 2017. [https://www.washingtonpost.com/local/virginia-politics/with-democratic-sweep-in-virginia-progressives-hopeful/2017/11/23/ba4fca40-cbb8-11e7-b0cf-7689a9f2d84e\\_story.html?utm\\_term=.d49c19b6471f](https://www.washingtonpost.com/local/virginia-politics/with-democratic-sweep-in-virginia-progressives-hopeful/2017/11/23/ba4fca40-cbb8-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.d49c19b6471f)

<sup>48</sup> Cherry, Frances and Mark Bendick. "Making it Count: Discrimination Auditing and the Activist Scholar Tradition," In *Audit Studies: Behind the Scenes with Theory, Method, and Nuance*, edited by S.M. Gaddis. Springer: 2017 [https://www.researchgate.net/publication/316628625\\_Making\\_It\\_Count\\_Discrimination\\_Auditing\\_and\\_the\\_Activist\\_Scholar\\_Tradition](https://www.researchgate.net/publication/316628625_Making_It_Count_Discrimination_Auditing_and_the_Activist_Scholar_Tradition)

<sup>49</sup> "Civil Rights Testing," Equal Rights Center. <https://equalrightscenter.org/wp-content/uploads/civil-right-testing.pdf>

Civil rights testing is not limited to academic research. For example, since the late 1970s, the Department of Housing and Urban Development has conducted and published Housing Discrimination Studies using paired-testing methods to uncover racial discrimination, and it has conducted similar studies to investigate housing discrimination on the basis of sexual orientation.<sup>50</sup> In the past, the Equal Employment Opportunity Commission (EEOC) also issued guidance stating that testers have legal standing to file charges of employment discrimination.<sup>51</sup>

One common method of conducting civil rights tests is matched pair testing. Matched pair testing is used to detect discrimination by pairing two testers together who engage in the same transaction or interaction one at a time. It compares treatment between two people based on one variable because all other differences are controlled for. One tester possesses or presents as possessing the attribute that is under investigation, such as a specific ethnicity or gender. The other tester serves as a neutral, control tester so that the two experiences can be compared and evaluated.



Figure 2.1

## Employment Testing

Employment testing typically takes one of two forms: correspondence testing or live testing. Correspondence testing does not require the assistance of testers. It can involve, for example, a researcher developing multiple resumes under different names, sending them out to employers, and waiting to observe actions that could indicate differential treatment. Live testing, on the other hand, involves people, known as testers, going to a location or partaking in an interpersonal interaction to collect data that can later be analyzed for the presence of differential treatment.

Live testing is less often used in contemporary social science due to the time and labor needed to undertake such methodology.<sup>52</sup> Live testing usually relies on much smaller sample sizes than can be

<sup>50</sup> "Paired Testing and the Housing Discrimination Studies," U.S. Department of Housing and Urban Development, 2014. <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>

<sup>51</sup> "EEOC Issues New Guidance on Legal Standing of 'Testers'", U.S. Equal Employment Opportunity Commission, May, 24, 1996. <https://www.eeoc.gov/eeoc/newsroom/release/5-24-96a.cfm>

<sup>52</sup> Cherry, Frances and Mark Bendick. "Making it Count," [https://www.researchgate.net/publication/316628625\\_Making\\_It\\_Count\\_Discrimination\\_Auditing\\_and\\_the\\_Activist\\_Scholar\\_Tradition](https://www.researchgate.net/publication/316628625_Making_It_Count_Discrimination_Auditing_and_the_Activist_Scholar_Tradition)

achieved with correspondence testing; thus, correspondence testing is often preferred because its larger sample sizes allow researchers to more easily generalize their findings. It is also easier for researchers to control for various factors in correspondence testing, as opposed to live testing where the nuanced characteristics of human testers can be difficult to hold constant.

However, live testing also has its advantages. In employment testing, for example, resume testing (correspondence testing) can only detect discrimination during the “callback” phase of the hiring process, during which an employer decides which resumes or applications to respond to. On the other hand, live testing has the potential to uncover discrimination at any point in the hiring process up until the point of hire. For example, an employer may feel compelled to interview diverse candidates, but may eventually end up offering the position to the non-minority candidate. At that stage, only live testing could identify differential treatment.<sup>53</sup>

Live testing can also be extremely useful for uncovering informal or interpersonal discrimination, something undetectable by most forms of correspondence testing. During the Civil Rights Movement, as *de jure* segregation was gradually outlawed and replaced by *de facto* discrimination, civil rights testing became increasingly important to continuing the fight for equality.<sup>54</sup> While formal discrimination could include job offers or rejections, informal discrimination may encompass body language, tone of voice, and other interpersonal factors that may signal hostility or discomfort toward the tester.<sup>55</sup>

Employment testing is useful for detecting discrimination specifically in the hiring process, during which discrimination can be difficult for job-seekers to identify because of the lack of information about how employers make hiring decisions. In contemporary cases of employment discrimination, claims of on-the-job discrimination, such as wage discrimination or discriminatory firings, are much more common than discrimination claims at the point of hire.<sup>56</sup> This may be because of the difficulty that job-seekers face when gathering substantive evidence to prove that they were discriminated against in the hiring process.<sup>57</sup> Hiring processes for different employers vary, and applicants are often unaware of the decision-making processes that take place behind closed doors.

Employment testing, in the form of both correspondence and live testing, has been used extensively by social scientists to detect hiring discrimination on the basis of many factors, including race (Pager 2003<sup>58</sup>; Pager, Western & Bonikowski 2009<sup>59</sup>), age (Bendick, Brown & Wall 1999<sup>60</sup>), and gender

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Hebl, Michelle R. et. al. “Formal and Interpersonal Discrimination: A Field Study of Bias Toward Homosexual Applicants,” *Personality and Social Psychology Bulletin* 28, no. 6 (2002): 815-825.  
<https://pdfs.semanticscholar.org/dded/244d61d10907b1270d5caf5428fb8cc2c12b.pdf>

<sup>56</sup> Pager, Devah and Bruce Western. “Identifying Discrimination at Work: The Use of Field Experiments,” *Journal of Social Issues* 68, no. 2 (2012): 221-237. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3807133/>

<sup>57</sup> Ibid.

<sup>58</sup> Pager, Devah. “The Mark of a Criminal Record,” *American Journal of Sociology* 108, no. 5 (2003): 937-975.  
[https://scholar.harvard.edu/files/pager/files/pager\\_ajs.pdf](https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf)

<sup>59</sup> Pager, et. al. “Discrimination in a Low-Wage Labor Market: A Field Experiment,” *American Sociological Review* 74 (2009): 777-799 <https://scholar.harvard.edu/files/bonikowski/files/pager-western-bonikowski-discrimination-in-a-low-wage-labor-market.pdf>

<sup>60</sup> Bendick, Mark, et. al. “No foot in the door: an experimental study of employment discrimination against older workers,” *Journal of Aging & Social Policy* 10, no. 4 (1999) <https://www.ncbi.nlm.nih.gov/pubmed/10724770>

identity (Make the Road NY 2010<sup>61</sup>). Numerous testing investigations of hiring discrimination in regard to sexual orientation have also been published (Hebl et. al. 2002<sup>62</sup>; Tilcsik 2011<sup>63</sup>).

This investigation uses live testing to help uncover examples of how job applicants face sexual orientation discrimination during the hiring process at companies in Virginia.

## Methodology

Matched pair civil rights testing provides a unique remedy to the disadvantages real job applicants experience in the hiring process due to their lack of access to information. By conducting tests using pairs of similarly positioned job applicants and controlling for as many variables as possible, testing has the potential to evaluate hiring practices in a manner impossible for most job candidates and therefore has the potential to detect discrimination that might otherwise go unnoticed. Through a comprehensive system of standardized testing and careful documentation, testing has the potential to both detect disparate treatment and to provide a detailed picture of what hiring discrimination looks like in a modern context.

### Tester Selection

Project staff selected a small team of highly qualified testers and provided them with extensive training for this project. The team consisted of two pairs of testers—one pair of cisgender men and one pair of cisgender women. Within each pair of testers, the “control tester” identified as heterosexual, while the “treatment tester” identified as gay or queer.

Each treatment tester was matched as closely as possible to their control tester in terms of multiple characteristics, including age (within one year), race, ethnicity, nationality, education level, physical appearance, and professional experience. In addition, the testers used in this project all had extensive previous civil rights testing experience—mostly in housing and public accommodations testing—and had demonstrated during the interview process both a commitment to and an understanding of civil rights testing procedures and protocol.

### Target Selection

Companies were selected for testing based on publicly available information about their business practices, including the following sources:

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<sup>61</sup> Make the Road New York, “Transgender Need Not Apply: A Report on Gender Identity Job Discrimination,” 2010.

<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1020&context=institutes>

<sup>62</sup> Hebl, “Formal and Interpersonal Discrimination.”

<https://pdfs.semanticscholar.org/dded/244d61d10907b1270d5caf5428fb8cc2c12b.pdf>

<sup>63</sup> Tilcsik, András. “Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States,” *American Journal of Sociology* 117, no. 2 (2011): 585-626.

<https://pdfs.semanticscholar.org/67bd/c037e3490d6d1a04482fe2066b86882999b3.pdf>

- ❖ The 2018 Buying for Workplace Equality Guide, an online index published by the Human Rights Campaign (HRC).<sup>64</sup> This online resource ranks Fortune 1000 companies in the U.S. based on their stated business policies toward LGBT employees. Companies receive credit in this rating system if they maintain official company policies that encourage equal treatment of LGBT employees—including official non-discrimination policies that prohibit discrimination on the basis of sexual orientation and gender identity. Companies that received a low score from this guide (75 out of 100 or lower) were prioritized as targets in the study.
- ❖ News articles from reputable media outlets that included information about company policies and practices in regard to LGBT employees or customers.
- ❖ Litigation-related records that raised concerns about company policies and practices in regard to LGBT employees or customers.

After putting together a list of companies to target for testing, test coordinators identified geographic areas in which to focus testing. All tests took place in Loudoun County and in the Richmond area. The ERC avoided testing in Arlington County and the City of Alexandria, where established laws against employment discrimination based on sexual orientation and gender identity have been in effect since the early 90s.<sup>65</sup>

Testing focused on businesses offering jobs in any of the three most common occupations in Virginia according to the Bureau of Labor Statistics: Office and Administrative Support, Sales and Related Occupations, and Food Service and Preparation. Together, these three occupations make up over one-third (33.5 percent) of all jobs in Virginia.<sup>66</sup>

Finally, companies participating in Virginia Competes were eliminated as potential test targets.

Several times a week, test coordinators searched major online job sites for job listings using the targeting system described above. Test coordinators disregarded any listings more than seven days old. They also prioritized “front-of-house” jobs involving direct interactions with customers. Each time a job listing from one of these companies was found within a targeted geographical area, the test coordinator reviewed the job listing and qualifications to make sure that testers—at least according to their test profiles—would be strong candidates. Positions that seemed to require a level of experience or technical knowledge beyond which the testers could convincingly be expected to claim were eliminated as targets. As a result, most of the positions tested were entry-level positions.

## Tester Training

Training for each tester required eight hours of classroom instruction and extensive practice work, including mock interviews. Through training, test coordinators facilitated a collaborative approach in which each test pair worked directly with their test coordinator to customize and refine

<sup>64</sup> “Buyer’s Guide,” Human Rights Campaign. <https://www.hrc.org/apps/buyersguide/how-to-use.php>

<sup>65</sup> Arlington Co. Code, Ord. No. 92-51, 11-14-92 [https://commissions.arlingtonva.us/wp-content/uploads/sites/5/2014/01/HRC\\_Countycode-ch13.pdf](https://commissions.arlingtonva.us/wp-content/uploads/sites/5/2014/01/HRC_Countycode-ch13.pdf) ; “Human Rights Code,” City of Alexandria. <https://www.alexandriava.gov/humanrights/info/default.aspx?id=526>

<sup>66</sup> Bureau of Labor Statistics, “May 2017 State Occupational Employment and Wage Estimates Virginia,” Occupational Employment Statistics. [https://www.bls.gov/oes/2017/may/oes\\_va.htm](https://www.bls.gov/oes/2017/may/oes_va.htm)

the specific test protocol. Training focused on ensuring that testers were fully prepared to fulfill three key responsibilities:

### **1. Participate in a controlled and standardized experiment**

Test coordinators took great care to train testers to present themselves in a fashion that was similar in every possible way to their counterpart tester. Each pair worked extensively with their test coordinator to develop test profiles which would be used to answer interview and application questions. These profiles included background information such as employment and educational experience as well as detailed biographical information. As much as possible, test profiles relied on the testers' real-life professional and personal experience so that testers could easily memorize their profile and would feel comfortable and confident answering interview questions. But where necessary, test profiles were adjusted so that the profile of each tester matched that of their paired counterpart as closely as possible.

In addition, test coordinators coached testers on how to standardize both their answers to interview questions and their general presentation during job interviews. Testers observed each other as they underwent mock job interviews and were encouraged to emulate each other's general manner, body language, energy level, and style of answering questions. In addition, testers were required to attend training in appropriate interview attire and made decisions together about how to standardize their style of dress for job interviews.

### **2. Perform as effective and viable job applicants**

Employment testing can only work if testers are able to present themselves as viable job candidates. If testers perform poorly in job interviews it may be impossible to attribute the treatment they receive from potential employers to discrimination or any other cause. Accordingly, testers were coached and trained on effective job interview strategies, advised about how to answer common job interview questions, and critiqued on their performance in mock interviews both by each other and by their test coordinator.

Testers also received supplemental information about the industries and specific jobs they were assigned to test.

### **3. Accurately and objectively document test results**

Testers were trained to thoroughly and accurately report on their experiences in job interviews and any interaction they had with potential employers. Testers were equipped with and trained to use digital audio recording devices to record interviews and phone interactions with potential employers. They were also trained to accurately and objectively report on all aspects of their interactions with potential employers. This included reporting such details as where the interview was held (for instance, in a private office or on the sales floor), what hospitality was offered, and the general demeanor of the staff they encountered.

## **Testers and Test Profiles**

After training a team of testers, ERC test coordinators developed a tester resume, customizable cover letter template, and complete profile for each tester. In this study, two pairs of testers

completed a total of 10 matched pair tests over the course of four months. Table 1.1 shows the personal characteristics of the testers used in each of these tests. As the table shows, these testers were very evenly matched in terms of their real-life personal characteristics so that confounding variables could be limited as much as possible.

**Table 1.1: Tester Characteristics**

Test Group	Pair A		Pair B	
	Treatment Tester	Control Tester	Treatment Tester	Control Tester
Gender	Cisgender Man	Cisgender Man	Cisgender Woman	Cisgender Woman
Race/ Ethnicity	Latino/Hispanic (Born in Peru, U.S. Citizen)	Latino/Hispanic (Born in Peru, U.S. Citizen)	White	White
Age	43	42	24	24
Highest Education Level	Graduate Degree	Graduate Degree	Bachelor's Degree	Bachelor's Degree
<b>Sexual Orientation (Self- Identified)</b>	<b>Gay/ Homosexual</b>	<b>Straight/ Heterosexual</b>	<b>Queer/Pansexual</b>	<b>Straight/ Heterosexual</b>

Table 1.2 shows the characteristics of the profiles each tester used to apply for jobs. Though these profiles were loosely based on testers' real-life educational and work experiences, certain details were changed in order to present both testers as well-qualified, equally positioned candidates for the jobs for which they were applying. In order to eliminate the possibility that the control tester profile might somehow appear more qualified than their paired treatment tester, each treatment tester profile was given a very slight advantage over their matched control tester. Other than the slight advantages given to the treatment tester, profiles were designed so that each tester appeared substantially equal to their matched pair in every respect except sexual orientation.

**Table 1.2: Tester Profiles**

Test Group	Pair A		Pair B	
	Treatment Tester	Control Tester	Treatment Tester	Control Tester
Work Experience	5 years office experience; 4 years retail experience including low-level management experience	4 years office experience; 5 years retail experience including low-level management experience	2 years office clerical experience; 2.5 years food service experience including low-level management experience	2 years office clerical experience; 2.5 years food service experience including low-level management experience
Highest Education Level	Bachelor of Arts 1999	Bachelor of Arts 1999	Bachelor of Arts 2015	Bachelor of Arts 2015
Treatment Tester Advantage	Managed larger team in previous retail job. Retail experience was more recent and relevant to test jobs.	--	Higher college GPA	--
<b>Sexual Orientation Signal</b>	<b>Married to a Man</b>	<b>Married to a Woman</b>	<b>Married to a Woman</b>	<b>Married to a Man</b>

## Conducting Tests

Test coordinators equipped each tester with an email account and linked web-based voice account for making phone calls. These accounts were managed and carefully monitored by test coordinators throughout the project. All job applications for the project were submitted by test coordinators using testers' test email accounts. Test coordinators worked to ensure that answers to application questions were carefully standardized for each pair so that neither tester would have an advantage based on their application.

Testers' jobs began at the point that a potential employer responded to a job application with a "callback" such as an email, phone call, and/or text message. At the point that a test coordinator detected a callback on tester email or voice accounts, they issued an assignment to the tester to

follow up with the employer and pursue the hiring process. At each stage in the process, the responses of the testers were carefully coordinated to ensure standardization and proper documentation. Testers were given a timeframe during which to interact with employers and were required to document every interaction with potential employers through correspondence forms and digital audio recordings.

Testers received a detailed briefing before each job interview, including screenshots of the job application submitted for the particular job and additional information about the company. Testers were debriefed by a test coordinator after every test and relevant information, such as unexpected interview questions, were incorporated into tester briefings for their matched tester and used to adjust testing methodology when necessary.

## Disclosure of Sexual Orientation

Testers were instructed to disclose their sexual orientation early in each interview using a very simple and straightforward protocol. When interviewers asked basic questions such as why they were seeking employment or why they had left their previous job, each tester stated that they had recently moved to town because their “husband” or “wife” received a job in the area. The only difference between the disclosure made by treatment testers and that made by control testers was the gender of their spouse. While treatment (gay/queer-identified) testers mentioned a partner of the same gender as the tester, control (straight-identified) testers mentioned a partner of the opposite gender. All testers wore rings meant to be perceived as wedding rings to their in-person interviews and were given basic information to share about their spouse if asked.

Testers were instructed to present themselves as genuine, enthusiastic job applicants. They pursued each job application as far into the hiring process as possible short of accepting job offers and documented as much information as possible about the hiring process at every step.

All of these procedures were put in place in order to produce and document the most accurate and controlled comparison possible. By positioning testers in each pair as substantially similar in every possible way, employment tests were designed to detect whether differential treatment in the hiring process could be attributed to the sole independent variable under examination: sexual orientation.

## Test Evaluation

Project staff conducted a detailed analysis of each test based on the following documentation:

1. A short verbal debrief conducted over the phone with each tester after each test.
2. A post-test report questionnaire completed by each tester after every interaction with a potential employer.
3. A test narrative written by each tester following each job interview.
4. Digital recordings of each spoken interaction between testers and potential employers.
5. Every email and text message exchanged between testers and potential employers.

Staff evaluated how rigorously the testers followed test protocol. Tests during which one or both of the testers failed to adequately adhere to test protocol (for instance, by arriving late to an interview

or failing to disclose their sexual orientation) were discarded and not included in the results. Staff evaluated tester performance based on the following:

1. Whether testers arrived for their interviews on time and dressed appropriately.
2. Whether testers appropriately disclosed their sexual orientation early in the interview.
3. Whether testers gave similar, appropriate responses to interview questions and effectively stated their qualifications for the job.

Finally, project staff evaluated the conduct of potential employers toward testers based on five criteria:

1. *Job-Related Questions:* The substantive job-related questions the employer asked during the interview.
2. *Information Provided:* The substantive, job-related information the potential employer provided to the tester about the job and/or hiring process. This evaluation also took into account whether the employer provided information about additional job openings or opportunities for professional advancement.
3. *Hospitality:* This includes various objectively observable factors, such as whether the tester was offered food or drink during the interview, the setting of the interview (for instance, whether the interview was held in a public area or private office), the duration of the interview, and/or whether the interviewer offered the tester their direct contact information (for example, by giving the tester a business card or cellphone number).
4. *Demeanor:* The interviewer's general behavior toward the tester and reaction to learning the tester's sexual orientation as perceived by the tester and test coordinator. This criterion also took into account whether the interviewer shared personal information about themselves during the interview.
5. *Formal Outcome:* The formal result of the job interview—whether or not the tester received a follow-up callback and/or job offer. The specific position and wage offered were also considered as part of this evaluation.

## Data Analysis

At the conclusion of testing, project staff carefully analyzed data collected from all tests for evidence of possible discrimination.

Two general categories of discrimination, formal discrimination and interpersonal (or informal) discrimination, as described by Hebl in 2002, were incorporated in this analysis.<sup>67</sup> Formal discrimination refers to actions made on a discriminatory basis that affect “hiring, promotions, access, and resource distribution.”<sup>68</sup> In the context of this investigation, evidence suggesting that an employer had made a hiring decision based on a tester's perceived sexual orientation was considered an example of potential formal discrimination. Other types of formal discrimination may include an employer's decision to selectively provide information about additional job openings or opportunities for career advancement. In contrast, interpersonal discrimination involves disparate

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<sup>67</sup> Hebl, “Formal and Interpersonal Discrimination.”

<https://pdfs.semanticscholar.org/dded/244d61d10907b1270d5caf5428fb8cc2c12b.pdf>

<sup>68</sup> Ibid.

treatment of job candidates that does not necessarily directly affect a hiring decision or the provision of valuable career-related information. Evidence of interpersonal discrimination may involve discriminatory statements or inappropriate questions during the interview process and/or subtler non-verbal or paraverbal indications of the interviewer's bias.

## Results

Project staff conducted a detailed analysis of each test based on the following documentation:

1. A short verbal debrief conducted over the phone with each tester after each test.
2. A post-test report questionnaire completed by each tester after every interaction with a potential employer.
3. A test narrative written by each tester following each job interview.
4. Digital recordings of each spoken interaction between testers and potential employers.
5. Every email and text message exchanged between testers and potential employers.

Staff evaluated tester performance based on the following:

1. Whether testers arrived for their interviews on time and dressed appropriately.
2. Whether testers appropriately disclosed their sexual orientation early in the interview.
3. Whether testers gave similar, appropriate responses to interview questions and effectively stated their qualifications for the job.

Project staff also evaluated the conduct of potential employers toward testers based on five criteria: job-related questions, information provided, hospitality, demeanor, and formal outcome.

In this study, 10 matched pair tests were completed over the course of four months. Test Pair A (male testers) completed four tests, while Test Pair B (female testers) completed six tests. Seven out of 10 tests revealed no evidence of discrimination or disparate treatment on the part of potential employers. However, in the remaining three tests, possible evidence of discrimination was detected involving one or more of the criteria described above. The following summaries outline the evidence of possible discrimination in those three tests.

### Test A Summary

Test Pair B (cisgender female testers) met with the same male owner-operator of an independently-owned chain restaurant to interview for a team member position. Applications were submitted on behalf of both testers by test coordinators using their matched test profiles, resumes, and cover letters. Identical answers were provided on the test applications for the two testers.

### Tester Conduct

Both testers arrived on time for their interviews. The treatment tester arrived 15 minutes early for her scheduled interview time while the control tester arrived just two minutes before her scheduled interview time. Both testers arrived in similar, appropriate job interview attire and wearing similar wedding rings.

Both testers disclosed their implied sexual orientation by mentioning their spouse (“wife” for the treatment tester, “husband” for the control tester) within about one minute of the beginning of the interview. Both testers gave very similar answers during the job interview and effectively communicated their work experience and qualifications, which more than qualified them for the position in question. Both testers asked similar questions about job responsibilities and work environment.

Both testers stated that they were hoping to make \$10-11/hour as an entry level wage and said their schedules were flexible. This wage was generally in line with those offered to entry level employees at the chain restaurant.

## Treatment Received

- ❖ *Job-Related Questions:* Both testers were asked almost identical job-related questions, but in slightly different order.
- ❖ *Information Provided:* The interviewer provided similar basic information about the job the testers had applied for, as well as similar information about the hiring process and work environment. However, the interviewer provided detailed information to the control tester about catering jobs associated with the position, which he described very positively as one of the “perks” of the job. These opportunities were never mentioned at all during the treatment interview. The interviewer also provided more detailed information about opportunities for advancement into managerial roles in the control interview, though this information was briefly mentioned in the treatment interview as well.
- ❖ *Hospitality:* Both testers were offered water at the beginning of the interview and interviews were held at a table in the public area of the restaurant. The control test lasted about 15 minutes longer than the treatment test—approximately 35 minutes versus approximately 20 minutes.
- ❖ *Demeanor:* The interviewer maintained a polite, professional demeanor with both testers. When the testers mentioned the gender of their respective spouses, the interviewer responded by asking how long each of them had been married and briefly mentioned his own wife but made no further comments concerning sexual orientation or gender identity. Neither tester reported that the interviewer noticeably changed his demeanor after the gender of their spouse was disclosed. However, subjective analysis of the test recordings suggested that the interviewer adopted a warmer, more amiable tone with the control tester throughout most of the interview. The control tester reported that the interviewer seemed “somewhat interested” in hiring her, while the treatment tester said she was “not sure” whether the interviewer was interested in hiring her.
- ❖ *Formal Outcome:* The formal outcome of the interview differed. The control tester received a job offer via voicemail three days after her interview. The treatment tester never received any contact following the interview. After the control tester called back to decline the offer, the treatment tester still received no contact from the interviewer. The online job listing for the position remained active and was re-posted 20 days after the control tester turned down the job offer.

## Results Summary

Test protocol was rigorously followed during the test and potential confounding variables were well controlled. Some degree of both formal and interpersonal discrimination was suspected in this test. The control tester was formally offered a job while the treatment tester was never contacted after the interview, even after the control tester had turned the job offer down, which is an example of potential formal discrimination. Moreover, the interviewer provided the control tester with information about various job perks and opportunities that he did not mention to the treatment tester. On the interpersonal level, though the interviewer maintained a polite demeanor with both testers, there were some subjective indications that he preferred the control tester.

## Test B Summary

Pair A (cisgender male testers) met with the same male store manager at a chain retailer to interview for a sales associate position. According to information obtained through anonymous calls, this employer was only accepting paper applications for entry level jobs and conducts its initial interviews for these positions on a walk-in basis. ERC test coordinators gave the testers an assignment to walk in for an interview during normal business hours and ask to speak to a manager in order to obtain an application.

## Tester Conduct

Both testers walked into the store on the same day, several hours apart wearing interview-appropriate attire and wedding rings. As directed, both testers asked to speak to a store manager about employment. Both testers signaled their sexual orientation early in the interaction with the manager by mentioning that they had recently moved to the area because their spouse (“husband” for the treatment tester, “wife” for the control tester) had recently started a job nearby. The store manager had a short, 3–4-minute conversation with each tester on the sales floor. Neither tester was given an opportunity to discuss their qualifications or answer substantive questions about their job experience. However, both testers stated that they were ready to work and had open schedules. Both testers successfully filled out and turned in paper applications as directed.

## Treatment Received

- ❖ *Job-Related Questions:* The store manager asked neither tester any substantive questions about their work experience, and their interactions were limited almost exclusively to the store manager talking about the work availability and the application process.
- ❖ *Information Provided:* The manager told both testers that he was currently hiring for short-term, seasonal work, and that they could likely get 35-40 hours of work per week through the holiday season, after which he would consider them for long-term employment. The store manager provided similar information about the hiring process to both testers, requesting that they fill out and turn in a paper application, after which they would be contacted by phone for a follow-up interview.
- ❖ *Hospitality:* Both testers were granted a very brief basic interview on the sales floor. Neither was offered personal contact information or any other form of hospitality.
- ❖ *Demeanor:* The store manager made no comments and asked no questions concerning sexual orientation after the testers revealed the gender of their respective spouses. The treatment

tester did note that when he signaled his sexual orientation, the interviewer's "eyes widened" and very briefly he seemed visibly surprised, but maintained a polite, professional tone. Because all test interactions with the employer were extremely short and limited, it was difficult to glean detailed qualitative data concerning the employer's demeanor.

- ❖ *Formal Outcome:* The control tester received a callback several days after the initial interaction, inviting him to an interview. The tester went to the follow-up interview the following week and was offered a part-time, temporary position by the employer. The treatment tester never received a callback from the employer and was not invited to a follow-up interview.

## Results Summary

Test protocol was rigorously followed during the test and because interactions with the employer were very limited, a high degree of standardization was achieved. Formal discrimination was suspected in this test as the control tester was invited to a follow-up interview and received a job offer, while the treatment tester received no follow-up communication from the employer.

## Test C Summary

Pair A (cisgender male testers) met with the same male site manager to interview for positions as retail sales associates. Applications were submitted on behalf of both testers by test coordinators using their matched test profiles, resumes, and cover letter templates. Identical answers were provided on the test applications for the two testers.

## Tester Conduct

Both testers arrived on time and interviewed with the same branch manager. Both testers signaled their sexual orientation by mentioning the gender of their spouses within five minutes of the start of the interview. Both testers provided similar answers to job-related questions and asked similar questions regarding the job and the hiring process. The only notable difference in tester conduct was that the treatment tester did not text the employer to confirm his appointment the morning of the interview.

## Treatment Received

- ❖ *Job-Related Questions:* The interviewer asked similar substantive job-related questions to both testers.
- ❖ *Information Provided:* The interviewer gave a similar, detailed description of the job to both testers. He described the position as a great opportunity to make money but cautioned both testers that it was difficult work and that pay was 100 percent based on commission so it was not for everyone. He also shared some personal information about his career history with both testers and concluded both interviews by advising the testers to "think about it" and talk to their respective spouses about whether they should pursue the job.
- ❖ *Hospitality:* Testers were interviewed in a private training room. Neither was offered food or drink. Two additional employees were present in the room while the treatment tester was interviewed.
- ❖ *Demeanor:* The hiring manager displayed a similar polite and enthusiastic demeanor with both testers. Though he initially seemed irritated that the treatment tester had not texted to confirm

his appointment the morning of the interview, he quickly became animated and enthusiastic when describing the job. However, notably, two other employees joined the hiring manager in the room during the treatment tester's interview. The treatment tester reported that when he signaled his sexual orientation by mentioning his "husband" the two other employees looked at each other in what the tester described as open and obvious disbelief. The tester reported that the employees made no attempt to hide that they apparently found the disclosure of his sexual orientation to be shocking information.

❖ *Formal Outcome:* Neither tester received a formal job offer from this employer.

## Results Summary

Formally, the testers received consistent information about the job and very similar treatment from the interviewer. However, the treatment tester reported unprofessional conduct on the part of other employees of the company that seemed to be directly related to the disclosure of his sexual orientation.

## Test Outcomes

Figure 3.1 breaks down the job offers received by testers during all ten tests. In total, there were six tests in which both testers received job offers. There were two tests in which neither tester received a job offer, and there were two tests in which the control tester received a job offer while the treatment tester did not. There were no completed tests in which the treatment tester received a job offer while the control tester did not.



Figure 3.1

## Discussion

Overall, some form of discrimination was suspected in three out of 10 comprehensive tests. Though this is an extremely small sample size and the results do not say anything statistically significant about the prevalence of discrimination in Virginia, the results do provide some valuable insight into the types of discrimination LGBT job applicants may currently face and how these forms of discrimination may go undetected outside of a matched pair testing context.

In two tests—one conducted with female testers and another conducted with male testers—results point to possible formal discrimination in which the control (straight-identified) tester and treatment (gay/queer-identified) tester's application process had objectively different outcomes. In both of these tests, the control tester was offered a job, while the treatment tester was not.

Test A provides rich qualitative information about how modern employment discrimination may look. The interviewer in this test was polite and cordial to both testers and never expressed any opinions concerning sexual orientation or asked any inappropriate questions. However, differential treatment was documented during this test in terms of *information provided*, *hospitality*, *demeanor*, and *formal outcome*. The interviewer shared information about additional job perks and opportunities with the control tester that he did not share with the treatment tester. The interview with the control tester lasted 15 minutes (75 percent) longer than the interview with the treatment tester. Moreover, the interviewer was perceived by both the control tester and the test coordinator who analyzed the audio file as having a more comfortable and laid back demeanor with the control tester, which seemed to have a positive effect on the entire tenor of the interview. Finally, the formal outcome of the test differed in that the control tester received a job offer while the treatment tester did not.

The results of this test suggest discrimination based on sexual orientation may create subtle disadvantages in the hiring process for some people that have meaningful effects on their ability to find work. The results also suggest that these forms of discrimination may be extremely difficult if not impossible to detect outside of a matched pair testing context. Though employers may give no indication that they have a preference for employees of a certain sexual orientation, treatment during the interview and the formal outcome of the test favored the control tester.

Further, the test may also exemplify a “feedback loop” effect, in which differences in interpersonal treatment in job interviews give certain job applicants a practical advantage by putting them at ease and allowing them to establish a better connection with the interviewer. Though this part of the analysis is more subjective, the test coordinator who analyzed the test recording believed that the interviewer adopted a more friendly, informal tone with the control tester early in the interview. This seemed to have an effect on the control tester, who also started to adopt a more informal, relaxed tone. It is possible that this interpersonal dynamic—which may have been related to the tester's disclosure of sexual orientation—played a role in the employer's decision to offer the control tester a position while electing not to contact the treatment tester.

Test B presents an example of how discrimination may be detected through testing in the context of a very short, simple interaction between applicant and employer. The interviews conducted in this test—each of which lasted only about three minutes—do not provide the same level of detail as the

more thorough interviews detailed in Tests A and C. In Test B, the only substantive information the testers had an opportunity to disclose was their sexual orientation and their availability. However, because the interactions were so brief and simple, this test provides an extremely high level of standardization and thus perhaps the strongest evidence that a discriminatory hiring decision was made. Once again, this is the type of discrimination that may be undetectable outside the context of matched pair testing.

A relatively blatant incident of interpersonal discrimination was documented in Test C. Though no formal discrimination was documented in this test—as neither tester received a job offer—the informal discrimination it appeared to uncover provides important information about the potential experiences of LGBT individuals in the hiring context. When interpersonal discrimination is encountered during an initial job interview, the fear of entering a hostile work environment may serve as a reasonable deterrent to LGBT job applicants. Moreover, this fear may be especially powerful when a job seeker knows that they would have no legal recourse under state laws if they encountered workplace discrimination based on their sexual orientation.

Results show that the forms of discrimination encountered by LGBT job applicants may be very difficult to detect outside the context of a matched pair test. In the two cases of suspected formal discrimination found in this investigation, neither tester was subjected to overtly discriminatory statements or questioning. Neither tester reported that they believed the interviewer they met with was discriminating against them. In both cases, compelling evidence of discrimination was only revealed by comparing the experience of the treatment to that of a carefully matched control tester. These findings illuminate ways in which covert discrimination may go unnoticed by LGBT job applicants who, in real life, do not usually have the opportunity to compare their job seeking experiences to those of similarly positioned straight job applicants.

The specific forms of discrimination suspected in two out of 10 tests—covert discrimination which may be difficult or impossible to detect outside of a matched pair investigation—suggest the need for further investigation. Though this investigation does not allow us to draw statistical conclusions about the level of discrimination in Virginia, it does suggest the possibility that discrimination is more frequent than reported on surveys that rely on self-reported data.

## Conclusion and Recommendations

Evidence suggests that despite recent victories like marriage equality and shifting public opinion toward the value of equal treatment regardless of sexual orientation, many LGBT Americans still face myriad threats to their livelihoods because of discrimination on precisely that basis. Employment discrimination on the basis of sexual orientation prevents LGBT Americans from having an equal opportunity to meet their own basic needs through earning an income. However, hiring processes for most companies are shrouded in mystery, and it is difficult to detect employment discrimination as a result.

Civil rights testing offers an important tool to use in understanding how modern employment discrimination against lesbian and gay Americans transpires. By comparing the experiences of closely matched job applicants who only differ on the basis of sexual orientation, it may be possible

to pierce the shroud of mystery that often surrounds the hiring process. This investigatory method is extremely resource and time intensive but has the potential to provide a wealth of data.

Though the sample size in this investigation was too small to achieve statistical significance, the information gathered through testing companies in Virginia raises serious concerns about the prevalence of hiring discrimination against LGBT job applicants in the state. Two tests indicate that discrimination may be preventing LGBT job applicants from accessing employment opportunities due to formal discrimination—straight testers were offered jobs while equally or more qualified LGBT testers were not.

In another instance, testing revealed the specter of a potentially hostile work environment, a reminder that access to employment is not enough. This is particularly true in light of the fact that there are no explicit state or federal protections in place to offer relief if individuals do encounter employment discrimination on the basis of sexual orientation.

In light of this investigation's findings, the ERC makes the following recommendations to a diverse set of stakeholders to better actualize the ideal of equal treatment for all Virginians:

- ❖ Government officials at all levels who value basic fairness should take action to make it clear that employment discrimination on the basis of sexual orientation and gender identity is unacceptable.
  - At the federal level, lawmakers should continue fighting for passage of the Equality Act, a federal bill that would amend the Civil Rights Act of 1964, the Fair Housing Act, and other civil rights laws by adding sexual orientation and gender identity as protected classes. Though the outlook is dim for passage of such protections in light of the current political reality in Washington, it is important that federal lawmakers stake out their positions on such critical legislation.
  - The Virginia General Assembly should pass statewide laws that prohibit discrimination on the basis of sexual orientation and gender identity in housing, employment, and public accommodations. The most recent bill to prohibit discrimination on these bases in public employment made it far in the legislative process during the 2019 session of the General Assembly but ultimately did not pass. However, the testing in this investigation indicates that discrimination on the basis of sexual orientation may be a problem in the private employment sphere as well, and leaders should act to pass protections that apply to all employees. State leaders in Virginia should also make it easier for local governments to enact provisions against discrimination in the absence of more uniform statewide protections.
  - Local governments interested in addressing discrimination on the basis of sexual orientation or gender identity could fund additional civil rights testing to ascertain how it operates in their communities.
- ❖ Businesses and private foundations can continue acting strategically to ensure fairness for LGBT Virginians:
  - Businesses in Virginia should join Virginia Fairness if they have not done so already.<sup>69</sup> According to its website, Virginia Fairness “is a group of employers who respect and value the diversity of their customers and employees. Because we believe in full equality

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<sup>69</sup> Virginia Fairness, <http://virginiafairness.org/>

- for all citizens, we have non-discrimination policies in place that include protections based on sexual orientation and gender identity”.
- Funding additional civil rights testing will help all stakeholders better understand how discrimination plays out in Virginia. Businesses that are committed to LGBT equal treatment can engage in compliance testing to ensure that all employees abide by related policies.
  - ❖ Finally, concerned individuals also have important roles to play when it comes to stamping out discrimination on the basis of sexual orientation and gender identity in Virginia. Two ways to get involved are to:
    - Stay informed. As discussed, efforts to enact statewide protections against discrimination have been years long. Two organizations that have been leading this fight are Equality Virginia<sup>70</sup> and Housing Opportunities Made Equal of Virginia.<sup>71</sup> Both organizations provide updates and action alerts during the General Assembly every year to make it possible for individuals to get involved. You can join their mailing lists to become part of the effort.
    - Become a tester. The ERC has a robust testing program, and is always in need of diverse, detail-oriented people willing to participate as testers and help further the ERC’s mission. Interested parties can visit the ERC’s Become a Tester page in order to get more information about the application process.<sup>72</sup>

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<sup>70</sup> Equality Virginia, <https://www.equalityvirginia.org/>

<sup>71</sup> Housing Opportunities Made Equal of Virginia, <http://www.homeofva.org/>

<sup>72</sup> “Become a Tester”, Equal Rights Center, <https://equalrightscenter.org/become-a-tester/>