# So – Are LGBTQ Rights Protected Under Federal Employment Law or Not?

Prepared by:
Dabney Ware
Foley & Lardner LLP

LORMAN®

Published on www.lorman.com - April 2018

INTRODUCING

Lorman's New Approach to Continuing Education

# ALL-ACCESS PASS

**The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:**

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

**Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.**

## Get Your All-Access Pass Today!

# SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

# So – Are LGBTQ Rights Protected Under Federal Employment Law or Not?

*Written by Dabney D. Ware – 3/27/17*

The most accurate answer to this question is, "it depends."

On March 10, 2017, the Eleventh Circuit Court of Appeals (covering Alabama, Georgia, and Florida) weighed in on LGBTQ protections – but the decision is not as clear as some of the headlines make it seem. For instance, some reports proclaimed that the court ruled sexual orientation is NOT a protected characteristic under federal law (Title VII). While that is technically correct, it could also be considered misleading.

We know – "it depends" is a typical "lawyer" statement, and even though this blog is written by attorneys, we try to avoid making you feel as though you are sitting in a law school class yourself. But, for today's post, we need the help of a bit more lawyerly precision or obfuscation – as the case may be.

Start with the basic facts – the female employee, Evans, worked as a security guard for a hospital. While Evans did not make a point to tell people she was a lesbian, she argued that her "male uniform, low male haircut, shoes, etc." made her sexual orientation obvious. Relevant here, Evans believes she was treated differently from other employees, because she failed to match female stereotypes and because of her sexual orientation.

The legal issue being decided was whether Title VII's protections against sex discrimination allowed her to pursue a claim that she was treated improperly because: (1) she failed to match female stereotypes and (2) because of her sexual orientation. The court here was not deciding whether she actually was treated differently or if she could establish why – the decision was focused on whether her legal theories were valid under Title VII.

To understand why this decision is important – you have to recognize that Evans presented two different reasons for her treatment – (1) not matching stereotypes and (2) sexual orientation. The court concluded that the first theory, not matching stereotypes, was allowed, but the second theory, sexual orientation, was not valid under Title VII.

At least for this author, this outcome raises several questions, including

- Why is one theory of discrimination allowed to support a Title VII claim, but not the other?
- How are the two theories different?
- How does this impact your business and employees?

Why one claim is allowed but not the other depends on what is considered to be sex discrimination, prohibited under Title VII. Neither sexual orientation nor gender stereotyping are explicitly identified as protected categories under Title VII. The difference is due to binding case precedent (earlier cases that are from the same court or a court with higher authority). The court allowed the "stereotype" theory because such stereotypes were at the heart of the Supreme Court's 1989 Price Waterhouse case. That decision made it clear that a

negative impact at work because someone did not match the expectations for his or her gender is a type of sex discrimination and therefore a violation of Title VII. In contrast to this concept of gender stereotyping, the recent court case cited one of its earlier decisions from 2010, in which the court decided that sexual orientation was not protected under Title VII.

But, how are these two theories really different? Even the court acknowledged there is likely to be a lot of overlap. For example, if a woman is treated differently because she prefers women as sexual partners, it can also be said she is not matching gender stereotypes.

Accordingly, while the intellectual distinction between gender stereotyping and sexual orientation may properly exist, it is not clear there is much of a practical difference in how it should impact your treatment of employees. Gay or lesbian employees in states covered by the Eleventh Circuit may not (currently) be able to bring a claim based on sexual orientation, but since they can claim their desire for a same sex partner is against gender stereotypes, they should be able to still make a claim under Title VII.

Moral of this story – don't assume sexual orientation is not protected. It is too fine a line to draw – unless you are an appellate court judge. Keep in mind, this discussion is about a single case dealing with federal law protections, in one region of the country There will be other federal decisions (similar cases are pending in the Seventh and Second Circuits) addressing this issue. Moreover, the Equal Employment Opportunity Commission (EEOC) has taken the firm position that sexual orientation is protected under Title VII. The Supreme Court will inevitably decide the issue. In the meantime, the

safe option is for employers to include sexual orientation (and gender identity or expression) in their list of protected categories in EEO policies and train employees that such discrimination is prohibited under company policy.

Finally there are also many states and local jurisdictions which have already clearly acted to protect LGBTQ status. If you operate in a place with state or local protections, LGBTQ status is protected – even if that is not necessarily the case under federal law.