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- Very Much an Open Question -
LGBTQ Employees May Find a Way to Sue You**

Prepared by:
John S. Lord Jr.
Foley & Lardner LLP

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Even If Sexual Orientation and Gender Identity Are Not Covered by Title VII - Very Much an Open Question - LGBTQ Employees May Find a Way to Sue You

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Some pretty horrifying facts about workplace conduct at the Providence, R.I., Fire Department involving co-workers: calling a female lieutenant firefighter “bitch” “c—t,” “lesbian lover,” and “lesbo”; telling her, “I don’t normally like to work with women, but, you know, we like the same thing, so I think we’re going to get along”; spitting on and shoving her; and throwing the blood and brain matter of a suicide-attempt victim at her. Based on these and other facts, a jury found the female employee was discriminated against based on her gender and in retaliation for complaining.

Of course, no reasonable employer would countenance the type of behavior described above. However, what if the behavior occurs in a state or locale in which sexual orientation discrimination in employment is not expressly prohibited? Can an employer in such a location successfully argue that this type of harassment is not illegal?

We have written recently about the evolving case law concerning whether the federal anti-discrimination law, Title VII, prohibits discrimination based on sexual orientation or gender identity. One federal court of appeals, covering the states of Illinois, Indiana, and Wisconsin, has

ruled that Title VII's prohibition on sex or gender discrimination also prohibits discrimination based on sexual orientation. Not all federal courts of appeal agree, however, and the Supreme Court will almost surely decide the issue in the future. In the meantime, employers must consider how to deal with the issue of discrimination against LGBTQ employees, and the case of the female firefighter is instructive.

The firefighter in the Providence case is a lesbian. The federal court of appeals covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island ruled she could keep the \$806,000 the jury and judge awarded her. In doing so, the court found the employee had stated a claim under Title VII's "sex plus theory" – that is, when an employer classifies an employee on the basis of sex plus another characteristic. For example, an employer may not legally weed out women with children from hiring because doing so creates a subclass of women who are treated differently than others; hence, the "sex plus" factor of having children.

In the Providence case, the "plus" characteristic was being a lesbian. As one of its defenses, the city argued the firefighter had presented little to no evidence of gender discrimination and focused too much on sexual orientation discrimination. According to the city, because sexual orientation is not considered a Title VII claim within the jurisdiction where the case was heard, the firefighter should not have been able to recover on her claim.

In disagreeing with this argument, the court reasoned that even if sexual orientation is not expressly protected under Title VII, an employee may still bring a "sex plus" claim when the alleged conduct involves the person's sex plus the additional factor of being LGBTQ. Bottom line, in sex plus claims, if the alleged discriminatory conduct is even in part

based on gender, the employer could be liable. Being called a “bitch” and a “c—t” were among the many examples of gender-based evidence the firefighter presented to the jury.

The case shows that even if Title VII does not preclude sexual orientation, or gender identity, discrimination, employees may still find a way to bring claims that cover these categories. Because an increasing number of state and local laws, as well as the laws and regulations applicable to federal contractors, already expressly include protections for LGBTQ workers, many employer anti-discrimination and anti-harassment policies already include these categories. Such employers already train on these issues and already discipline or fire employees who discriminate or harass LGBTQ co-workers. Refusing to tolerate harassment or discrimination of LGBTQ workers is the right thing to do for the workplace. Because Title VII claims are possible from LGBTQ employees, the smart employer will prohibit this type of discrimination and enforce such policies in the same way as it would for claims such as race or national origin discrimination.

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