



CHAPTER 3

WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION

Some federal, state or local laws prohibit discrimination based on sexual orientation, gender identity or expression or HIV status, but in many states there are few laws that provide such protections. In some circumstances, even where there is no specific antidiscrimination law, a company is legally responsible for the conduct of its supervisors and managers, and this may include being responsible for any discriminatory or harassing behavior. Even if your city, state or employer doesn't expressly prohibit discrimination based on sexual orientation or gender identity, when faced with discrimination, you should consider contacting Lambda Legal or a local attorney with experience in employment discrimination law to see if you have any other legal options.

IF YOU FACE DISCRIMINATION

The sections below provide details about the steps you can take if you feel that you have been discriminated against on the job. Some of the specific laws and procedures will vary

from state to state or from town to town, so it is important for you to contact an attorney, Lambda Legal's Help Desk or some other expert to learn about the particular options available in your case.

Here are some basic steps to take if you believe you have been discriminated against on the job:

- Collect evidence about the discriminatory conduct and a list of any witnesses.
- Always keep your favorable personnel reviews and any nonofficial commendatory remarks (such as congratulatory emails). You should do this at all times, because documentation of your good job performance can sometimes vanish from the company records once trouble begins.
- Obtain and read your employer's personnel policies and/or your union contract to learn about contractual rights and any complaint procedures.
- Consider any grievance procedures available to you through your employer and/or your union.
- If state or local laws apply to you, consider filing a complaint through your state or local civil rights enforcement agency; contact an attorney for advice or representation and be aware of any deadlines for filing complaints.
- With an attorney's assistance, consider whether any other legal actions in state or federal court can help to protect your rights.

Documenting and Reporting Discriminatory Treatment

Any investigation or later resolution of a complaint will often depend on proof of the actual conduct. Whether you witness discrimination or you are subjected to it yourself, always keep a written record. If a co-worker or a supervisor sexually harasses, abuses or discriminates against you in any way, write down your experience in a journal

or memo as soon as possible. After all, it is much more compelling to produce a detailed memo or journal entry that was written three months ago than it is to attempt to recall an occasion of discrimination that occurred three months ago.

If there is a legal claim, other people will be able to read what you wrote, so don't say anything that is inaccurate or that you wouldn't want others to read later. In your notes, include a chronology of events leading up to and fol-

IF YOU THINK YOU ARE EXPERIENCING DISCRIMINATION IN THE WORKPLACE, CONSIDER THE FOLLOWING QUESTIONS:

- ◆ What makes you think that you were treated differently because of your sexual orientation, gender identity or HIV status? What kind of evidence do you have?
- ◆ How were other LGBT or non-LGBT people or people with HIV treated in similar situations?
- ◆ How long have you worked for this employer? (The longer you've been at a job, the more credibility you may have.)
- ◆ How have your performance evaluations been? (It helps if you have a good record.)
- ◆ How do people at work know your sexual orientation, gender identity or HIV status? (Employers may claim that they couldn't be guilty of discrimination because they weren't aware of an employee's sexual orientation, HIV status or transgender identity.)
- ◆ Has your employer treated other LGBT or HIV-affected employees well? (If so, it may be harder to prove that the employer discriminated against you.)
- ◆ Has your employer treated other LGBT or HIV-affected employees badly or fired them? (If so, this might be seen as a "pattern" of discrimination and therefore help your case.)
- ◆ Have you complained to your supervisor or to a union or human resources representative? If so, what was the response?
- ◆ Does your employer have a nondiscrimination policy that includes sexual orientation, gender identity and health or HIV status?

FINDING AN ATTORNEY

Lambda Legal's Help Desks (www.lambdalegal.org/help or toll-free 866-542-8336) are a good resource if you think you are experiencing workplace discrimination because of sexual orientation, gender identity or HIV status. If Lambda Legal is not able to take your case, the Help Desk may be able to help you find an attorney in Lambda Legal's cooperating attorney network or elsewhere.

Some questions to keep in mind when interviewing prospective attorneys:

- ◆ Do they or their firm have experience with employment cases involving sexual orientation, gender identity or HIV status?
- ◆ Do they have any doubts about the equality rights of LGBT people and people with HIV?
- ◆ Do they know what kinds of arguments will be used against you in a case?
- ◆ For additional insights, see Lambda Legal's fact sheet "Some Suggested Questions to Ask a Prospective Attorney" available at www.lambdalegal.org.

lowing any problems you've had at work. List as many details as possible, including:

- The date, time, location, people involved and a description of what took place
- What was said, who said it, when and where it was said, who was in the room or vicinity or heard it
- Any different treatment (i.e., if straight employees were treated differently in a similar situation)
- Any procedures or policies that weren't followed
- Any witnesses
- Any reasons the employer gave for what happened
- Timing (for example, if problems seemed to start after you came out to your boss or co-workers)
- Copies or photographs of any offensive material
- Documentation of any attempts you or others made to address the situation (often

the best practice is to put such requests in writing and keep a copy)

You should keep this documentation at home, not in the workplace, and your records should also include a current copy of your employee manual or union contract and related emails, correspondence and other paperwork to the extent that company policies allow. You should also try to obtain a copy of your personnel file, including performance evaluations. (You are sometimes legally entitled to this material.) Obtaining a copy of this file early in the process prevents an unscrupulous employer from backdating negative documents and placing them in your file.

SOME FORMS OF DISCRIMINATION

Employment discrimination may occur at various points in the process of getting and



TAYLOR V. RICE

“Being HIV-positive has impacted my life in countless ways since I was diagnosed, but it has never kept me from being able to do a job. I’m still hopeful that I can be judged based on the skills and experiences I bring, along with my overall long-term health status, rather than just on whether I have HIV.”

— LORENZO TAYLOR

Lorenzo Taylor was denied employment by the U.S. Foreign Service because he has HIV. Taylor is fluent in three languages, holds a Foreign Service degree from Georgetown University and easily passed the rigorous application process required to be a Foreign Service Officer. Since 2003, Lambda Legal has represented Taylor in his efforts to seek justice in this case, which is now in the trial phase. We contend that the State Department’s policy barring all HIV-positive Foreign Service candidates violates the federal Rehabilitation Act. The Act prohibits the federal government from discriminating against

people with disabilities. Lambda Legal aims to change the State Department’s outdated policy by challenging it in court – and in the court of public opinion through a grassroots public education campaign.

LAMBDA LEGAL’S IMPACT

Lambda Legal’s discrimination complaint aims to end HIV discrimination in the U.S. Foreign Service once and for all. Under the current policy, the Department of State denies candidates for Foreign Service Specialist or Foreign Service Officer the individualized consideration they’re entitled to under federal antidiscrimination law.

keeping a job — and a person may experience more than one type of discrimination. Generally, employment discrimination may unfairly affect decisions about hiring, promotion, termination or may create a hostile workplace environment. Each of these types of discrimination is explained below.

Hiring and Promotion

Ideally, employers would hire or promote the person with the best qualifications for a job

without regard to personal characteristics unrelated to job performance. But this is not always the case.

You may believe you have been discriminated against in a hiring or promotion decision because one or more of the decision makers said derogatory or hostile things about LGBT people or people living with HIV, or because you observed others not known to be LGBT or living with HIV who were less qualified than you hired or promoted ahead of you. It is easier to prove a

claim of discrimination when someone has made explicitly discriminatory remarks or has demonstrated discriminatory attitudes (with posters or literature, for example, that denigrate LGBT people or people living with HIV). Hiring or promotion discrimination can sometimes be proved by detailed analysis of the qualifications of candidates and statistical analyses of the employer's

practices, but such cases may be difficult and complex.

Wrongful Termination

One of the most common types of employment discrimination cases Lambda Legal handles is wrongful termination of LGBT



DUNBAR V. FOOT LOCKER, INC.

“I am very pleased to have this over and to be able to move on with my life. The support I’ve gotten throughout this ordeal, sometimes from complete strangers, gave me confidence to persevere.”

— KEVIN DUNBAR

As an employee at Foot Locker (the athletic footwear and apparel chain), Kevin Dunbar suffered severe antigay harassment and discrimination at the hands of his co-workers, supervisors and a customer. Foot Locker promises a harassment-free workplace and includes sexual orientation in its policies on discrimination and harassment, but when Dunbar formally complained, the discrimination only intensified. Dunbar was transferred from one store location to another and eventually fired. In cooperation with the South Carolina Equality Coalition, Lambda Legal filed a lawsuit against Foot Locker on Dunbar's behalf. Lambda Legal argued that Foot Locker breached its contract with Dunbar by violating its own antiharassment, antidiscrimina-

tion and open-door policies. A settlement agreement provided a monetary settlement for Dunbar, along with a commitment from Foot Locker to more vigorously train its managers and employees about antigay harassment and to provide information on support and services to handle such harassment.

LAMBDA LEGAL'S IMPACT

As a result of Dunbar's case, Foot Locker employers nationwide will be trained in the dangers of antigay harassment and given resources to help combat it. Additionally, the case sent a message to employers in South Carolina and beyond that companies must take measures to enforce their own antiharassment and antidiscrimination policies.

employees or employees with HIV. In the recent past, we have won cases on behalf of athletes, food-industry workers and auto-glass specialists who were fired because their employers believed their HIV status made them dangerous to themselves or others on the job. We have also successfully represented a variety of people who were fired because of their sexual orientation.

Wrongful termination claims can also include circumstances where an employee is officially laid off or downsized but the employer unfairly singled the employee out for a discriminatory reason or used the layoff as a pretext for discrimination. Employers sometimes eliminate jobs or change job assignments because they are reducing the size of their workforce or reorganizing it. Such “layoffs” or “downsizing” are generally legal, even though they usually feel very unfair to the employees who lose their jobs. Sometimes an employer also uses a layoff unfairly to target an employee who would not otherwise lose his or her job. In other words, the employer does not have a real business reason for laying off the employee beyond discrimination on the basis of sexual orientation, gender identity or expression or HIV status. These actions can sometimes be challenged under the law.

Employers often have a great deal of latitude and discretion when it comes to terminating staff, and wrongful termination claims are often more subtle and complex than they appear on the surface. A wrongful termination claim may be complicated if an employee was terminated after encountering a pattern of harassment or abuse related to sexual orientation, gender identity or HIV status that made it difficult to perform the job effectively, or if the termination was in retaliation for complaining or speaking up about discrimination or harassing conduct.

Under the law, employers may not need to present compelling or rational reasons for terminating employees; even though their actions might be arbitrary or unfair, they might not be illegal. If you are laid off or fired, you will have a lot to think about. Your employer might offer you a severance package that provides more money to you but requires you to sign an agreement that you will not bring a legal complaint. Each person must consider the advantages and disadvantages of such an agreement — the advice of an attorney might be very helpful in deciding whether or not to accept such a severance agreement. If you believe you were fired or let go for a discriminatory reason, speak with an attorney familiar with employment law or call Lambda Legal’s Help Desk for more information.

A Hostile Workplace

People often assume that job discrimination is only related to hiring, promotion or firing, but other kinds of employment discrimination exist. Workplace discrimination against people because of their sexual orientation, gender identity or HIV status can also create a hostile work environment that effectively makes it impossible for an employee to do his or her job. Overt harassment and violence on the job are examples of such a hostile environment.

Employees also may suffer from their employer’s ignorance or disregard for the actual needs of lesbian, gay, bisexual, transgender and HIV-affected employees and their families. For example, while straight employees routinely wear a wedding ring, display pictures of their spouse and family and discuss their private life with co-workers (from dating to cultural activities to political involvement), when LGBT people do the same, some co-workers may complain that

IF YOU GET FIRED OR LAID OFF

- ◆ Ask your employer to put the reason you were terminated in writing.
- ◆ Obtain copies of your employment record, including evaluations and disciplinary actions.
- ◆ Study your employee manual's sections on employment termination. If your employer did not follow its own guidelines, you may be in a better position to contest or negotiate better terms for your termination.
- ◆ Consider reporting your termination to your union if you have one.
- ◆ If you are asked to sign any paperwork, carefully read it and consider consulting an attorney first because you may have fewer options later. For example, you may be asked to sign a severance agreement that includes a waiver of any future claims against your employer.
- ◆ Request a letter of reference. Try to negotiate about the information you do or do not want shared with prospective employers if they call.
- ◆ Ask about continuing health insurance coverage for yourself and your dependents under COBRA or other laws. If your partner or partner's legal children were covered under your insurance policy, their coverage often will end on your last day of work unless your employer has arranged for a different plan with the insurer.
- ◆ Collect statements of co-workers who may have witnessed discriminatory treatment against you and other LGBT or HIV-affected employees.
- ◆ Don't make angry accusations or threats, but you may want to send a professional letter of complaint to the company's human resources department, especially if you know the company has an equal employment opportunity officer or ombudsman. If you are considering a lawsuit, talk to an attorney first, as your statements can affect your claim.

these actions are inappropriate, offensive or contrary to their moral or religious views. Some employers may support a co-worker's complaint or institute restrictive policies. In the same vein, employers may deny transgender workers the right to use restrooms

corresponding to the gender they present because it may make some co-workers uncomfortable.

If your employer has an inclusive nondiscrimination policy, it is much easier to bring hostile conditions to someone's attention. But

if you feel isolated in your workplace, you may feel more limited about your options. You may need to begin by reaching out to co-workers who are offended by any cruelty even if they do not yet understand sexual orientation and gender identity issues. You may also wish to seek outside support to learn how and in what circumstances you can best stand up for yourself when the need arises.

Sexual Harassment

Sexual harassment always involves unwanted or unwelcome sexual behavior. In its most obvious form, it occurs when an employee is required to provide sexual favors as a condition of employment, compensation or job advancement. It can also include being subjected to sexual words or conduct that interfere with a reasonable employee's ability to do his or her job, particularly when the behavior is persistent and grossly offensive. Inappropriate invitations, unwanted touching, sexually explicit gestures, pornographic pictures, sexist jokes and sexual overtones may constitute sexual harassment. The laws prohibiting sexual harassment apply equally to behavior between individuals of the same or different sexes.

If you are the victim of sexual harassment on the job, you have options: If you feel safe enough to do so, you can choose to confront the harasser and ask him or her to stop the behavior. It can be helpful to report any incidents of sexual harassment to your immediate supervisor or to the human resources department and/or your union representative, and to document the harassment and any steps you take to address it. Your employer needs to be aware of the harassment in order to take action. Most workplaces have a sexual harassment policy that explains how to make a complaint. If your supervisor is the harasser, report

the behavior to the next appropriate manager or to the human resources department and/or your union representative. As with other forms of harassment and discrimination, copy and maintain a record of any complaint you make.

If you cannot reconcile the problem at your workplace, you may want to file a complaint with the U.S. Equal Employment Opportunity Commission (www.eeoc.gov) and/or with your state's fair employment practices agency, if one exists.

Gender-nonconforming Conduct or Appearance

Sometimes employees face discrimination because of gender-nonconforming conduct or appearance or the perception by others that they do not fit within cultural norms for males and females. For example, employees may face discriminatory actions or a hostile work environment when supervisors or co-workers believe a male acts or looks effeminate or a female acts or looks masculine. Transgender employees often face this type of discrimination. Lambda Legal believes employees should be judged on their work performance and not be required to fit within other people's gender stereotypes. In some cases, employees who face this type of discrimination can seek a remedy under laws and policies prohibiting discrimination on the basis of sex or sexual orientation.

OTHER IMPORTANT JOB RIGHTS

Violations of Privacy

Earlier in this kit, we discussed privacy and confidentiality laws that protect employees with HIV (pages 23-25) and highlighted some of the inappropriate questions that

prospective employers are not allowed to ask during interviews or as part of the application process (page 15). In addition, federal legislation like the 1988 Employee Polygraph Protection Act severely limits an employer's ability to use polygraph equipment on employees. But there has been a trend toward less privacy in the workplace. Some employers routinely monitor employee telephone calls, emails and Internet usage. Some conduct video surveillance of employees (even in locker rooms or restrooms) and review computer files. Some employers review their employees' computer files, and even conduct physical searches as well as searches of their offices and possessions.

As part of their work, human resources personnel review and maintain current employee records detailing benefits, Social Security and family information. However, employers can also easily access additional confidential employment, financial and medical records about their employees from computer databases. Employees may also be asked to take written "personality" tests that question them about very personal matters, including sexual orientation. Some of these tests may violate the law. The absence of laws on workplace privacy means that unscrupulous employers and unethical individuals can collect and use this information for inappropriate reasons as well.

Employees with HIV also often experience ostracism and invasions of privacy because of ignorance about HIV. For disclosures made outside of the protections of the Americans With Disabilities Act (i.e., disclosure outside of the hiring or reasonable accommodation process), your state's HIV confidentiality law may not require that all employees at your job keep all information about your HIV status confidential, so be very careful about disclosure.

Honoring Religious Freedom and Workplace Diversity

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion. This means that all employees, including LGBT people and people living with HIV, are free to hold religious views without interference from their employers. However, it does not mean that people in the workplace may freely express hostile or discriminatory views that affect the working conditions of others. In 2004 one appeals court ruled that an employee disciplined for posting Biblical passages condemning homosexuality in his cubicle did not have a religious discrimination claim; that is to say, accommodating his views would create undue hardship on his employer's efforts to create a diverse, nondiscriminatory workplace. In 2004 the same court also rejected a religious discrimination claim brought by a Christian fundamentalist supervisor who was fired after inappropriately expressing her religiously based disapproval of her subordinate's sexual orientation.

If you experience religiously-motivated harassment in the workplace, you may be able to file a complaint if your employer has a nondiscrimination policy that covers sexual orientation, gender identity and HIV status. If your employer encounters resistance from employees who claim that the employer's action violates their religious beliefs, please contact Lambda Legal or suggest us as a resource to your employer.

The false dichotomy between religious rights and other forms of diversity rights is only one of many emerging workplace issues facing the LGBT and HIV-affected communities. Although this kit seeks to

inform you on as many topics as possible,
you are encouraged to keep updated
by visiting Lambda Legal's website at
www.lambdalegal.org.