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Waitress Fired for Failing to Serve Transphobic Customers

Last month, a waitress, Brittany Spencer, was fired after refusing to serve transphobic customers at a Fat Joe's Bar and Grill in Fond du Lac, Wisconsin, raising questions as to whether the restaurant engaged in impermissible discrimination by doing so. During her shift, Spencer was asked by a couple of patrons sitting at one of her tables what she thought of a transgender customer sitting at the bar. According to Spencer, the couple asked her if she thought it was "disgusting and wrong," and asked why the restaurant would "let someone like that into the establishment," to which Spencer answered that she did not agree and walked away. When Spencer asked her manager if another employee could serve the table because she was uncomfortable, her manager said no, and Spencer decided to leave. That night, Spencer shared what had happened on Facebook, stating that she was sent home for refusing to serve the customers, and the following day, Spencer was alerted by restaurant management that she had been fired. The restaurant claims that it fired Spencer for "refusing to do the duty [it] hired her for." Spencer has filed a complaint with the Equal Employment Opportunity Commission (EEOC). 

Before diving into the analysis of Spencer's potential discrimination claim, it is important to understand what she would be required to show. As we have [previously posted](#), as with almost all claims of discrimination, Spencer will likely seek to prove her case through the use of indirect evidence under the *McDonnell Douglas* burden-shifting framework, requiring her to show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gave rise to an inference of discrimination. The question, however, will likely turn on the first element – whether Spencer is a member of a protected class. Although it would be tempting to consider this incident an act of sex-based discrimination because of gender identity, which the EEOC explicitly describes as including [transgender status](#), the fact is that Spencer herself is not transgender, and therefore, not part of the protected class. In other words, that Spencer acted on behalf of a protected class simply does not pass muster under the first element of *McDonnell Douglas*. Accordingly, any claim of discrimination that Spencer makes must be based on some class for which *she* – not the person whom she was defending – is provided protection. Assuming the customer's transgender status is the basis of Spencer's claim, it will likely fail.

Nevertheless, Spencer's case provides a helpful reminder to employers of the protections afforded by the EEOC to transgender (and more broadly, LGBT) applicants and employees. The EEOC's [What You Should Know About Enforcement Protections for LGBT Workers](#) lays out the rules and applicable case law background. Importantly,

the EEOC states that it interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation, and that these protections apply *regardless of any contrary state or local laws*. It also provides specific examples of LGBT-related sex-based discrimination, including failing to hire an applicant because she is a transgender woman, firing an employee because he is planning or has made a gender transition, denying an employee equal access to a common restroom corresponding to the employee's gender identity, and harassing an employee because of a gender transition (e.g., intentionally and persistently failing to use the name and gender pronoun that corresponds to the gender identity with which the employee identifies, and which the employee has communicated to management and employees). Additionally, it describes EEOC decisions which laid the groundwork for interpreting sex-based discrimination as covering LGBT workers. These include [Macy v. Department of Justice](#), in which the EEOC held that intentional discrimination against a transgender individual because that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII, and [Baldwin v. Department of Transportation](#), where the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. [Charge data](#) for Fiscal Year 2018 indicates that there were 1,811 LGBT-based sex discrimination charges received, and that the EEOC provided \$6.1 million in monetary relief for workers and achieving changes in employer policies.

Employer Takeaways

Although Brittany Spencer's potential claim may not succeed in proving LGBT-related discrimination based on sex because Spencer is not a member of the protected class, the incident provides a useful reminder to employers of the type of conduct that is prohibited toward LGBT workers. Accordingly, employers are advised to update their employee policies and procedures, including specifically their EEO policies in their employee handbooks, to reflect that discrimination against an applicant or employee because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII. They are also advised to train managers and supervisors on these policies to avoid potential problems down the road. The EEOC's [Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Workers](#) provides a helpful place to start.