

Employment Discrimination Claims Based on Sexual Orientation and Gender Identity

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LINGO

LGBTQ: Stands for lesbian, gay, bisexual, transgender, and queer (and/or questioning)

- **Lesbian:** An individual who identifies as a woman and who is predominantly sexually and romantically attracted to other women.
- **Gay:** An individual who identifies as a man and who is predominantly sexually and romantically attracted to other men.
- **Bisexual:** An individual who is sexually and romantically attracted to men and women.
- **Transgender:** An individual who identifies as the opposite sex from the sexual genitalia that he/she was born with.
- **Queer:** Commonly thought of as a term that is fluid and inclusive of diverse sexual orientations and/or gender identities.
- **Questioning:** An individual who is unsure about his/her sexual orientation and/or gender identity and prefers to identify as “questioning” rather than adhering to a label that does not designate how he/she feels.

LINGO

- **Transgender Man:** Female at birth and lives as a male.
- **Transgender Female:** Male at birth and lives as a female.
- **Transsexual:** People whose gender identity differs from sex at birth. Often wish to alter their bodies through hormones or surgery.
- **Gender Identity:** Individual's internal sense of being male or female.
- **Transition:** Period when a person begins to live as their new gender. May include name change, change in physical presentation, or taking hormones.

SOCIAL BACKGROUND

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LGBTQ ISSUES IN THE HEADLINES

“Supreme Court Delivers Tacit Win to Gay Marriage”

New York Times, October 6, 2014

Bruce Jenner Is ‘Transitioning into a Woman’

People.com, January 30, 2015

“Indiana: Bill Signed Allowing Denial of Service to Gays”

New York Times, March 26, 2015

“Michael Sam (Rams, pick No 249) is first openly gay player drafted”

CBSSports.com May 10, 2014

“Supporters rally for gay, pregnant teacher fired

Lansing State Journal, Sept. 8, 2014

Obama signs repeal of 'don't ask, don't tell' policy

CNN.com, Dec 27, 2010

LGBTQ INDIVIDUALS REPORT HIGH RATES OF DISCRIMINATION

In 2012, researchers from Michigan State University conducted a state-wide survey on LGBTQ attitudes and experiences:

- Over half the participants (54.8%) reported experiencing discrimination or harassment on the basis of sexual orientation; nearly twenty percent (19.3%) reported experiencing gender expression discrimination, and 15.9% reported discrimination based on gender identity.

A COMMITMENT TO DIVERSITY AND INCLUSION IS VIEWED AS A BEST PRACTICE

Businesses now see diversity and inclusion as necessary to:

- Attract and retain the individuals that are most qualified for the job;
- Foster productivity, innovation and creativeness;
- Improve job satisfaction and employee morale;
- Establish a strong corporate reputation.

LEGAL LANDSCAPE

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DISCRIMINATION: CASE LAW UNDER TITLE VII

- No federal statute explicitly protects LGBTQ persons from discrimination in the workplace.
- Title VII prohibits discrimination because of an individual's sex:
 - In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the United States Supreme Court ruled that “sex” within the context of Title VII encompasses both the biological differences between men and women as well as a person's failure to conform to stereotypical gender norms.

DISCRIMINATION: CASE LAW UNDER TITLE VII

Courts have applied the *Price Waterhouse* sex stereotyping theory to claims of discrimination based on sexual orientation under certain limited circumstances.

- Cases involving claims of discrimination against an LGBTQ individual without any allegation that his or her workplace appearance and/or “gender non-conformity” played any role in the discrimination are routinely dismissed. See, *Gilbert v. Country Music Ass’n, Inc.*, 432 F. App’x 516, 519 (6th Cir. 2011); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006).
- *But see: Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012) (summary judgment denied where homosexual male took his spouse’s name and his supervisor refused to use his married name, telling him that she did not recognize same-sex marriage); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014).

DISCRIMINATION: CASE LAW UNDER TITLE VII

Courts have routinely applied the *Price Waterhouse* sex stereotyping theory to claims of discrimination based on gender identity:

- *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004): “Discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination [in *Price Waterhouse*]. . . a label, such as “transsexual” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”
- See also, *Lewis v. High Point Reg'l Health Sys.* (E.D.N.C. 2015); *Glenn v. Brumby* (11th Cir. 2011); *Schroer v. Billington* (DDC 2008); *Michaels v. Akal Security, Inc.* (D. Colo. 2010); *Lopez v. River Oaks Imaging & Diag. Group* (SD Tex 2008); *Mitchell v. Axcan Scandiphram* (WD Pa. 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp* (W.D.N.Y. 2003); *Doe v. United Con. Fin. Serv.* (ND Ohio 2001).

DISCRIMINATION: EXECUTIVE ORDER 13672

- On July 21, 2014, President Obama signed EO 13672, which prohibits discrimination on the bases of sexual orientation and gender identity in the federal contracting workforce.

- In December 2014, the DOL Issued a Final Rule implementing EO 13672. To satisfy their affirmative action obligations under the final rule, contractors must:
 - Include an updated equal opportunity clause in new or modified subcontracts and purchase orders;

 - Ensure that applicants and employees are not discriminated against by reason of their sexual orientation and gender identity;

 - Update the equal opportunity language in job solicitations, and;

 - Post updated notices.

DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

In *Macy v. Holder*, Appeal No. 0120120821 (EEOC Apr. 20, 2012), the EEOC stated:

- “[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex, and such discrimination therefore violates Title VII.”
- “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim.”

DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

- The EEOC has identified furthering “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply,” as a top enforcement priority in its December 2012 Strategic Enforcement Plan.
- In 2013, the EEOC started tracking charges filed alleging discrimination related to gender identity and/or sexual orientation.
 - In the final three quarters of FY 2013 (January through September), the EEOC received 667 charges raising allegations of sex discrimination related to sexual orientation and 161 charges alleging sex discrimination based on gender identity/transgender status.
 - In the first three quarters of FY 2014, the EEOC had received 663 charges alleging sex discrimination related to sexual orientation and 140 charges alleging sex discrimination on the basis gender identity/transgender status.

DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

On September 25, 2014, the EEOC filed two lawsuits alleging discrimination against transgender individuals:

- *EEOC v. Lakeland Eye Clinic*: According to the EEOC's lawsuit, the defendant's employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her.
- *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*: The EEOC alleges that the plaintiff was terminated from her employment after she disclosed to the defendant that she would be transitioning from male to female. The defendant allegedly stated that the reason she was fired was because her proposed transition was “unacceptable.”

DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

On April 8, 2015, the EEOC announced its decision in *Lusardi v. McHugh*, Appeal No. 0120133395 (EEOC Apr. 1, 2015), where it held:

- The Army violated Title VII when it prohibited a transgender female civilian employee from using her workplace's common restroom for women.
- This was true even though the Army had provided the employee with access to a single-user executive bathroom. On the few occasions that the bathroom was not available, the employee used the common restroom. She was told by her supervisor not to do so because it made the other employees uncomfortable.

DISCRIMINATION: DOJ ENFORCEMENT ACTIVITY

On March 30, 2015, the DOJ filed a lawsuit alleging discrimination against a transgender individual:

- *United States v. Southeastern Oklahoma State University (Southeastern) and the Regional University System of Oklahoma (RUSO)*: the DOJ alleges the employer violated Title VII when it denied a transgender Assistant Professor promotion and tenure. As evidence of discrimination, the DOJ alleges that the Vice President referred to the individual as “he” or “him,” even though the employee presented as female. The DOJ also alleges that the employee was treated differently than non-transgender employees.

DISCRIMINATION: STATE AND LOCAL LAWS

- Eighteen states and the District of Columbia have statutes that protect against both sexual orientation and gender identity discrimination.
- Elliott-Larsen Civil Rights Act does not explicitly protect against discrimination on the basis of sexual orientation or gender identity.
- East Lansing, Ann Arbor and other cities have local municipality protections for LGBTQ civil rights.

PROTECTION UNDER OTHER LAWS: ADA

The ADA explicitly exempts from coverage:

- “... transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.” 42 USC § 12211(b)(1).
- However, some transgender individuals may suffer from depression or other medical conditions that could be covered under the law.

PROTECTION UNDER OTHER LAWS: FMLA

- Employee's Own Serious Health Condition:
 - Some treatments and procedures for transgender employees may qualify for leave under the FMLA, such as treatment related to gender identity disorder, overnight hospital stays related to sex-reassignment surgeries, or counseling with a mental health professional.
 - The same rules apply: Is the employee eligible? Does the employee have a serious medical condition as defined by the FMLA?
- Care for a Spouse With a Serious Health Condition:
 - In light of the United States Supreme Court's decision in *United States v. Windsor*, which found the Defense of Marriage Act (DOMA) to be unconstitutional, the Department of Labor announced that the definition of "spouse" under the FMLA will be revised to include employees in legal same-sex marriages regardless of where they live.
 - Federal court stayed enforcement of the new regulations in several states.

PRACTICAL CONSIDERATIONS IN THE WORKPLACE

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POLICIES: EEO AND ANTI-HARASSMENT

- Consider whether to explicitly include protection against discrimination or harassment on the basis of sexual orientation and gender identity.

INVESTIGATING EMPLOYEE COMPLAINTS

- Regardless of whether your policy explicitly prohibits discrimination or harassment on the basis of sexual orientation or gender identity, you should investigate these complaints exactly like you would any complaint:
 - Follow the complaint procedure in your policies.
 - Prompt, unbiased investigation.
 - Prompt remedial action if appropriate.

POLICIES: DRESS CODE

- Dress codes and policies should be gender neutral.
- Avoid policies that specifically define the kinds of attire males and females may wear, which tend to be based on sexual stereotypes and expectations.
- Transgender employees should be permitted to dress in accordance with their chosen gender.
- Apply consistently!

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

Your Approach:

- No two transitions are exactly alike, so treat each transition individually.
- Designate an HR official to oversee transition process.
- Set up a time to talk with the employee about what the company can expect during the transition.
- Set up separate meetings with the employee's supervisor and immediate co-workers to inform them of the transition and what to expect, and remind them of the company's respect and non-discrimination and non-harassment policies as applicable (supervisors have a responsibility to enforce observed policy violations).
- Maintain confidentiality; share only limited/necessary information with those that need to know (i.e., treat like an ADA/FMLA issue).

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

The employee's name on administrative and personnel records:

- Be prepared to update or change employee's name and sex in certain records.
- Consider which records must reflect the employee's name and sex at birth, and which records can be modified to assist the employee in the transition, such as email addresses, name plates, business cards and security badges.

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

Use of pronouns:

- Be mindful to use the appropriate pronoun consistent with employee's gender presentation.
- If there is uncertainty, respectfully communicate with employee regarding his/her preference and agree with employee on communications plan for notifying co-workers and customers of any change to pronoun or name use.

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

Communications with managers and co-workers:

- Consult with the employee regarding a communications plan.
- Remind managers and co-workers to use appropriate pronouns consistent with the employee's gender presentation.
- All employees should be expected to follow company policy and maintain respectful behavior to everyone in the workplace.

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

Restroom and locker room use during and after transition:

- Discuss with the employee his/her preference.
- Often, the employee will prefer to use a gender-specific facility that matches the employee's current gender presentation.
- Employers may want to consider creating or making available a single-use, unisex restroom facility for all employees to use in an addition to gender-specific facilities.
- Alternative changing area can be made available to all employees and/or allowing use of locker room corresponding to gender identity before or after other employees.

QUESTIONS?

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Thank You



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