

# Sex in the Workplace: The Evolving Law of LGBT and Pregnancy Discrimination

Pittsburgh Employment Law Conference

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# LGBTQ DISCRIMINATION

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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

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## 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

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## DISCRIMINATION: CASE LAW UNDER TITLE VII

- No federal statute explicitly protects LGBTQ persons from discrimination in the workplace
- However, Title VII under the Civil Rights Act of 1964 has increasingly been relied upon by federal government agencies to target allegations of discrimination based on sexual orientation
- 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

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## DISCRIMINATION: CASE LAW UNDER TITLE VII

- Courts have routinely applied the *Price Waterhouse* sex stereotyping theory to claims of discrimination based on gender identity
- *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) held that a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender

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## **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
  - Post updated notices

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## 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”
- 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

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## DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

- EEOC's tracking of charges filed alleging discrimination related to gender identity and/or sexual orientation
  - In 2013, EEOC received 765 LGBT charges
    - Found reasonable cause in 1.2% of those cases
    - Had merit resolutions in 15.4%
    - Facilitated payment of \$897,271
  - In 2014, EEOC received 1,093 LGBT charges
    - Found reasonable cause in 2.5% of those cases
    - Had merit resolutions in 16.3%
    - Facilitated payment of \$2,197,149
  - Through the first quarter of 2015, EEOC received 603 LGBT charges
    - Found reasonable cause in 3.4% of those cases
    - Had merit resolutions in 16.8%
    - Facilitated payment of \$1,044,408

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## 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

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## DISCRIMINATION: EEOC ENFORCEMENT ACTIVITY

- In July 2015, the EEOC built on its prior decisions in *Complainant v. Anthony Foxx, Secretary, Department of Transportation (Federal Aviation Administration)*, holding
  - An air traffic controller’s claims of discrimination based on the gender of the employee’s spouse or partner constitutes discrimination based on sex under Title VII
  - The EEOC’s decision states that allegations that an employer “took [an employee’s] sexual orientation into account in an employment action necessarily alleges that the [employer] took his or her sex into account”

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## 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

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## **DISCRIMINATION: STATE AND LOCAL LAWS**

- Eighteen states and the District of Columbia have statutes that protect against both sexual orientation and gender identity discrimination
- Allegheny County and the City of Pittsburgh have municipality protections for LGBTQ civil rights

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## 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

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## 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

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## PROTECTION UNDER OTHER LAWS: ERISA & AFFORDABLE CARE ACT

- Neither ERISA nor the Patient Protection and Affordable Care Act (ACA) require an employer group health plan to cover an employee's spouse or domestic partner
  - Prior to the Supreme Court's decision in *Windsor*, many employers offered domestic partner coverage to employees and their same-sex domestic partners, but such coverage was often not treated as pre-tax for federal or state tax purposes
  - After the *Windsor* case, the federal government recognized coverage of same-sex spouses as pre-tax as long as the couple were legally married under state or foreign law
  - In 2015, the Supreme Court ruled in *Obergefell v. Hodges* that same sex couples had a constitutional right to marry and the states were obligated to recognize such marriages

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## PROTECTION UNDER OTHER LAWS: ERISA & AFFORDABLE CARE ACT

- While the Supreme Court's decision in *Obergefell* does not relate to ERISA and does not require employers to offer coverage to same sex spouses, such coverage is likely to be required by state insurance law for fully funded plans or may be deemed to violate Title VII for self-insured plans
- For example, a class action complaint was recently filed against Walmart alleging discrimination under Title VII for Walmart's failure to offer domestic partner coverage to same sex spouses prior to 2014
- In addition, the Department of Health & Human Services issued a proposed rule under the ACA prohibiting insurers and other administrators who receive any federal funding or assistance from including blanket exclusions for coverage related to gender dysphoria or gender transition
- It remains to be seen whether religious-based or affiliated employers will be exempt from some of these rules

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## TAKEAWAYS

- Explicitly include protection against discrimination or harassment on the basis of sexual orientation and gender identity
- 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
- Dress codes and policies
  - 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
- Ensure that benefit plans include same-sex spouses
- Apply policies consistently

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# RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

- 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
- Discuss communication of the transition with the employee
- 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)

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## 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

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# 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

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# 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

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# 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

# PREGNANCY DISCRIMINATION AND ACCOMMODATION

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## BACKGROUND

- Title VII
  - Original language did not explicitly cover pregnancy
- *General Electric Co. v. Gilbert*
  - U.S. Supreme Court held that a disability plan that allowed non-occupational sickness and accident benefits for all employees, but denied benefits for disabilities arising from pregnancy did not discriminate on the basis of sex 429 U.S. 125 (1976)
- Pregnancy Discrimination Act
  - Passed by Congress in 1978 in response to *Gilbert*
  - Explicitly covers pregnancy and pregnancy-related discrimination under Title VII

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## PREGNANCY DISCRIMINATION ACT

- The terms “because of sex” or “on the basis of sex” include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work 42 U.S.C.A. Section 2000e(k)

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## PREGNANCY DISCRIMINATION ACT

- “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work”
  - To what extent does this clause guarantee pregnant employees the same accommodations extended to other employees under a pregnancy-neutral policy, such as one that reserves light duty work for employees injured on the job?

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## ***YOUNG V. UNITED PARCEL SERVICE***

- Facts
  - Plaintiff, a female part-time driver for UPS, brought suit claiming that UPS' unwillingness to accommodate her inability to lift over 20 pounds during her pregnancy violated the PDA
  - UPS policy provided light duty work only for employees who
    - Were injured on the job
    - Had lost commercial drivers certification
    - Who were covered under the ADA

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## ***YOUNG V. UNITED PARCEL SERVICE***

- Arguments
  - Young claimed that the PDA's second clause required UPS to extend her the same light duty accommodations extended to any other similarly able employees under UPS' light duty policies
  - UPS argued that because Young did not qualify under pregnancy-neutral policies, she was denied accommodations on the same basis as non-pregnant employees, and therefore, was not discriminated against on the basis of pregnancy

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## ***YOUNG V. UNITED PARCEL SERVICE***

- Supreme Court's framework for analyzing a failure-to-accommodate claim under the PDA
  - Prima facie case
    - Plaintiff is or was a member of the protected class
    - She requested accommodation
    - The employer denied her request for accommodation
    - The employer accommodated others similar in their ability to work

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## ***YOUNG V. UNITED PARCEL SERVICE***

- Supreme Court's framework for analyzing a failure-to-accommodate claim under the PDA
  - Employer's burden to show legitimate, non-discriminatory reason for denying the accommodation request
    - The employer's reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates

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## ***YOUNG V. UNITED PARCEL SERVICE***

- If the employer can articulate a legitimate, non-discriminatory reason for denying the accommodation request, then a plaintiff may respond by showing that the stated reason is a pretext
- May show pretext by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers and that the employer's legitimate, non-discriminatory reasons are not sufficiently strong to justify the burden

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## ***YOUNG V. UNITED PARCEL SERVICE***

- With respect to UPS' policies, the Court asked the question, "why, if the employer accommodated so many, could it not accommodate pregnant women as well?"
- The Court did not answer the question. Remanded case to the Fourth Circuit
- No bright line rule, but does give framework that did not exist before

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## EEOC GUIDANCE

- EEOC issued guidance on June 26, 2015, in light of Supreme Court's decision
- Pregnant employees may prove unlawful pregnancy discrimination by showing that the employer accommodated some employees with work restrictions but not pregnant employees with the same work restrictions
- The employee's burden of establishing a discrimination claim is not "onerous"

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## EEOC GUIDANCE

- An employer's policy of accommodating a large percentage of non-pregnant employees while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees
- Guidance makes clear that an employer may still be subject to liability for denying an accommodation, even if the employer has a legitimate, nondiscriminatory reason for doing so

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## AMERICANS WITH DISABILITIES ACT

- Normal pregnancy is not a disability under ADA
- But, pregnancy-related physical or mental impairments can be disabilities
  - Gestational diabetes
  - Preeclampsia
- *Young* Court noted that the ADA would not affect Young's claim, but a pregnant employee like Young may qualify for ADA protection in the future

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## LACTATION BREAKS

- FLSA was amended in 2010 to required covered employers to provide additional accommodations to covered employees who are nursing
  - Generally applies only to non-exempt employees
- Lactation-related accommodations may be required if the employer provides similar accommodations for coworkers with similarly limiting conditions
  - Applies to all employees, not just non-exempt employees

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# LACTATION BREAKS

- Physical accommodation
  - A private room or partition of a room, other than a bathroom, that is shielded from view and free from intrusion
  - Create a permanent, dedicated space, but still must have privacy
  - Create a temporary space that is available whenever it is needed

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# LACTATION BREAKS

- Working time accommodation
  - Reasonable break time to express breast milk each time a nursing employee needs to for one year after birth
  - Employers are generally not required to pay employees for time spend expressing milk, except if
    - Compensated breaks are otherwise available
    - The employee is not completely relieved from duty

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# LACTATION BREAKS

- Key points to remember
  - Frequency of breaks and duration of breaks will vary
  - Breaks must be provided whenever the employee needs to express breast milk
  - The duration of the break must be reasonable, which will depend on the employee and the occasion

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## LACTATION BREAKS

- *EEOC v. Houston Funding II LLC*, 717 F.3d 425 (5th Cir. 2013)
  - Female employee claimed she was terminated for asking if she could pump milk at work
  - Lower court granted summary judgment to the employer, stating “[f]iring someone because of lactation or breast-pumping is not sex discrimination” and that lactation is not a related medical condition of pregnancy

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## LACTATION BREAKS

- Fifth Circuit Court of Appeals unanimously reversed and held
  - Firing a female employee because she is lactating or expressing milk is unlawful sex discrimination under Title VII
  - Lactation is a medical condition of pregnancy for purposes of the PDA

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# LACTATION BREAKS

- No retaliation
- Situations to avoid
  - Complaints by breastfeeding employee
  - Adverse employment against her
  - Insensitivity about breastfeeding

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## TAKEAWAYS

- Ensure policy compliance with the law
- Train managers and Human Resources to ensure that pregnancy-related requests for light duty or accommodations are reviewed, addressed and recorded
- Train managers and Human Resources to recognize and accommodate requests for lactation breaks
- Consider how similar requests for accommodation have been handled in the past
- Have a good reason for justifying denial (other than cost/convenience)
- Make sure all processes are documented

QUESTIONS?

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# THANK YOU



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