

Sexual Orientation, Gender Identity and Gender Expression in the Workplace

33rd Annual Labor & Employment Conference

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LINGO

- **LGBTQ:** Stands for lesbian, gay, bisexual, transgender, and queer (and/or questioning)
 - **“T” – Transgender:** An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth
 - **“Q” – Queer:** Commonly thought of as a term that is fluid and inclusive of diverse sexual orientations and/or gender identities. Can be considered offensive if used in the wrong context; should only be used if someone self-identifies as queer.
 - **“Q” – 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
- **Gender Identity:** Individual's internal sense of gender
- **Gender Expression:** External manifestations of gender, expressed through one's name, pronouns, clothing, haircut, behavior, voice, or body characteristics
- **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

“Supreme Court sends Virginia transgender case back to lower court”

Washington Post, March 6, 2017

“Transgender People Will Be Allowed to Serve Openly in Military”

New York Times, June 30, 2016

“North Carolina repeals 'bathroom bill' ”

CNN, March 30, 2017

“Trump Rescinds Rules on Bathrooms for Transgender Students”

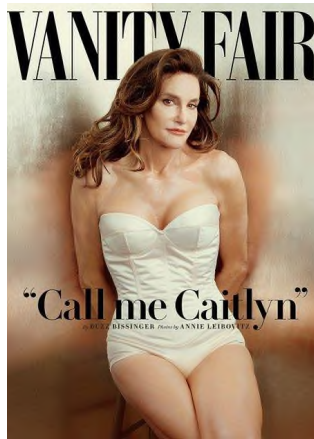
New York Times, February 22, 2017

LGBTQ ISSUES IN THE HEADLINES



“The Modern Family Effect: Pop Culture’s Role in the Gay-Marriage Revolution”

The Atlantic, June 26, 2015



FEDERAL CASE LAW IS IN FLUX

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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"

SEX STEREOTYPING

- Historically, courts have not been willing to include sexual orientation, gender identity, or gender expression discrimination within the meaning of the word “sex”
- Instead, individuals who allege discrimination on the basis of sexual orientation, gender identity or gender expression have pursued claims under a theory of “sex stereotyping”:
 - 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
 - The plaintiff was told that in order to increase her chances of promotion she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”

SEX STEREOTYPING

- Courts have routinely applied the *Price Waterhouse* sex stereotyping theory to claims of discrimination based on gender identity or gender expression:
 - *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, *Chavez v. Credit Nation Auto Sales* (11th Cir. 14, 2016); *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)

SEX STEREOTYPING

- Courts have been more hesitant to apply *Price Waterhouse* to cases involving claims of sexual orientation discrimination:
 - Cases involving claims of discrimination against a 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)

MOVING BEYOND SEX STEREOTYPING?

- Today, there is a conflict among federal courts as to whether discrimination on the basis of sexual orientation is discrimination based on sex:
 - *Evans v. Georgia Regional Hospital* (03/10/17): The Eleventh Circuit reaffirmed its prior precedent and held that termination based on sexual orientation is not prohibited by Title VII. Evans filed a petition for en banc review.
 - *Christiansen v. Omnicom Group Inc.* (03/27/17): The Second Circuit (somewhat reluctantly) affirmed lower court's decision that the plaintiff's claim based on sexual orientation discrimination was not viable, but revived his sex stereotyping claim
 - *EEOC v. Scott Medical Health Center, P.C* (11/04/16): The United States District for the Western District of Pennsylvania held discrimination on the basis of sexual orientation is discrimination based on sex for the purposes of Title VII
 - *Hively v. Ivy Tech Community College* (04/04/17): The Seventh Circuit overturned its prior precedent and held that discrimination on the basis of sexual orientation is discrimination based on sex for the purposes of Title VII

MOVING BEYOND SEX STEREOTYPING?

- There is also a conflict among federal courts as to whether discrimination on the basis of gender identity or expression is discrimination based on sex:
 - *Grimm v. Gloucester County School Board* (04/19/16): Fourth Circuit deferred to the Department of Education’s interpretation of the word “sex” under Title IX to require schools to “treat transgender students consistent with their gender identity.” U.S. Supreme Court granted petition for Writ of Certiorari in October 2016. Since then, the U.S. Supreme Court has vacated the decision in light of DOE guidance document reversing its position.
 - *See also, Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio Sept. 26, 2016)(transgender student likely to succeed on the merits of her Title IX sex discrimination claim)
 - *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (09/24/15): Eastern District of Michigan Judge Cox ruled Title VII does not prohibit discrimination on the basis of transgender status, except in the case of a viable sex stereotyping theory. The decision is currently on appeal to the Sixth Circuit.

EXECUTIVE AND ADMINISTRATIVE AGENCY ACTION IS MIXED

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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
- On January 31, 2017, the White House issued a press release stating that President Trump intends to continue to enforce EO 13672

OTHER EXECUTIVE ACTION

- On February 22, 2017, the DOE and DOJ released a “Dear Colleague Letter” stating that the agencies were revoking two guidance documents that took the position that the prohibition on discrimination “on the basis of sex” in Title IX required access to sex-segregated facilities based on gender identity

EEOC STRATEGIC ENFORCEMENT PLAN

- The EEOC SEP for Fiscal Years 2017-2021 identifies “protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex” as a key emerging and developing issue
- In 2013, the EEOC started tracking charges filed alleging discrimination related to gender identity and/or sexual orientation
 - In 2013, EEOC received 808 LGBT charges
 - In 2014, EEOC received 1,100 LGBT charges
 - In 2015, EEOC received 1,412 LGBT charges
 - In 2016, EEOC received 1,768 LGBT charges
- In 2016, the EEOC had merit resolutions in 15.3% of LGBT charges. Facilitated payment of \$4.4 million.

EEOC ACTIVITY: GENDER IDENTITY AND EXPRESSION

- 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”

EEOC ACTIVITY: GENDER IDENTITY AND EXPRESSION

- On April 8, 2015, the EEOC announced its decision in *Lusardi v. McHugh*, Appeal No. 0120133395 (EEOC Apr. 1, 2015), where it held:
 - Denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination
 - An employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure
 - An employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it)

EEOC ACTIVITY: GENDER IDENTITY AND EXPRESSION

- Since September 2014, the EEOC has pursued numerous lawsuits alleging discrimination against transgender individuals:
 - *EEOC v. Lakeland Eye Clinic*: According to the EEOC's lawsuit, after the transgender female began to present as a woman and informed the clinic she was transgender, she was fired. Settled: \$150,000.
 - *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*: EEOC alleged the plaintiff was terminated from her employment after she disclosed to the defendant she would be transitioning from male to female. On Appeal.
 - *EEOC v. Bojangles Restaurants, Inc.*: EEOC alleges the employee was subject to a hostile work environment because of her gender identity. Pending.
 - *Broussard v. First Tower Loan LLC*: EEOC alleged the plaintiff was terminated because he is transgender and because of his inability to conform to gender stereotypes. After moving to private arbitration, the arbitrator awarded the worker \$43,162 in economic damages and \$10,000 in emotional damages.

EEOC ACTIVITY: SEXUAL ORIENTATION

- In *Baldwin v. Dep't of Transp.*, Appeal No. 0120133080 (July 15, 2015), the EEOC stated:
 - “[W]e conclude that sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII”
 - “Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex”

EEOC ACTIVITY: SEXUAL ORIENTATION

- On March 1, 2016, the EEOC filed two lawsuits alleging discrimination against individuals on the basis of their sexual orientation:
 - *EEOC v. Scott Medical Health Center*: EEOC charged that a gay male employee was subjected to harassment because of his sexual orientation
 - Court denied the employer's motion to dismiss
 - *EEOC v. IFCO Systems*: EEOC charged that a lesbian employee was harassed by her supervisor because of her sexual orientation. The employee complained to management and called the employee hotline about the harassment. IFCO fired the female employee just a few days later in retaliation for making the complaints, EEOC charged.
 - Settlement: \$202,200 in damages (\$182,200 for the former employee and \$20,000 to the Human Rights Campaign Foundation)

OTHER LEGAL PROTECTIONS

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DISCRIMINATION: STATE AND LOCAL LAWS

- 23 states and the District of Columbia have statutes that protect against sexual orientation and/or gender identity discrimination
- Many cities have local municipality protections for LGBTQ civil rights

PROTECTION UNDER OTHER LAWS: FOURTEENTH AMENDMENT

- On June 26, 2015, the United States Supreme Court issued a landmark ruling in *Obergefell v. Hodges*, in which it held that same sex couples have a Constitutional right to marry in every state
- While the decision does not directly impact employment, it has impacted:
 - Employee welfare benefit plans
 - Employer recordkeeping
 - FMLA leave

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 U.S. Supreme Court's decision *in United States v. Windsor*, which found the Defense of Marriage Act (DOMA) to be unconstitutional, the Department of Labor revised the definition of "spouse" under the FMLA to include employees in legal same-sex marriages

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: OSHA

- On June 9, 2015, OSHA issued “A Guide to Restroom Access for Transgender Workers”:
 - Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity
 - As a best practice, employers may offer (but should not require) use of:
 - Single-occupant gender-neutral facilities
 - Multiple occupant gender-neutral restroom facilities with lockable single occupant stalls
 - As a best practice, employers should not ask employees to present medical or legal documentation of their gender identity
- Unclear if the Trump administration will rescind this document

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

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!

POLICIES: TRANSGENDER GUIDELINES

- Consider whether to have a written policy addressing questions and concerns that may arise regarding transgender employees in the workplace
- A good policy will:
 - Provide guidance for a transitioning employee, managers, and co-workers
 - Address frequently asked questions relating to name changes, pronoun use, dress codes, facilities use, etc.

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

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
 - 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
 - The employee will likely 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

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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