

Sex Stereotyping and Gender Identity in the Workplace

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July 20, 2016

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LINGO

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

“Tension over LGBT angle to Orlando massacre”

POLTICO, June 12, 2016

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

New York Times, June 30, 2016

“North Carolina revokes transgender and gay protections”

BBC, March 24, 2016

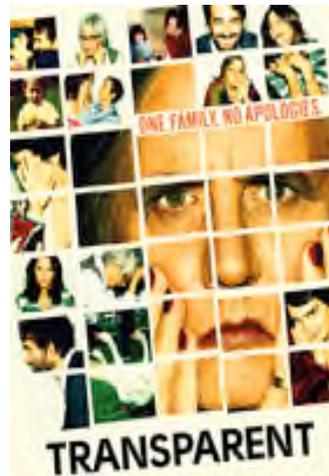
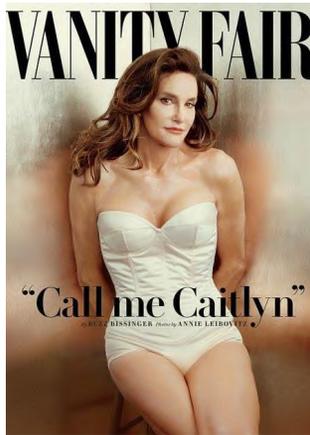
“Eleven states sue Obama administration over bathroom guidance for transgender students”

Washington Post, May 25, 2016₅

LGBTQ ISSUES IN POPULAR CULTURE



“The Modern Family Effect: Pop Culture’s Role in the Gay-Marriage Revolution”
The Atlantic, June 26, 2015



LEGAL PROTECTIONS AGAINST WORKPLACE DISCRIMINATION

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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 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)

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, 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).

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

- 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 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.

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

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.”

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 alleged 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 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.
- *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.

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

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

OTHER LEGAL PROTECTIONS

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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 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, though this is likely moot after the Supreme Court's decision in *Obergefell*

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: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX prohibits sex discrimination in educational programs and activities operated by recipients of federal financial assistance:

- On May 13, 2016, the Department of Education and Department of Justice released “significant guidance” regarding transgender students.
- A student’s gender identity is the student’s sex for the purposes of Title IX. A school must not treat transgender students any differently from the way it treats other students of the same gender identity. Applies to: (i) maintaining a safe and non-discriminatory environment; (ii) identification documents, names and pronouns, and; (iii) sex-segregated facilities.
- No medical diagnosis or treatment requirement.
- The desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

DUTY TO ACCOMMODATE?

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DUTY TO ACCOMMODATE RESTROOM CHOICE?: EEOC'S POSITION

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; and,
- 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).

DUTY TO ACCOMMODATE RESTROOM CHOICE?: OSHA'S POSITION

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, and/or
 - 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

DUTY TO ACCOMMODATE RESTROOM CHOICE?: EEOC'S POSITION

On May 3, 2016, the EEOC issued "Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964":

- Reiterated holding in *Lusardi*
- "Gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment... Supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."
- "Like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination."

DUTY TO ACCOMMODATE RESTROOM CHOICE?: CASE LAW DEVELOPMENTS

Education Context:

- In *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, -- F.3d --, 2016 WL 1567467 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit deferred to the Department of Education's position that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity

DUTY TO ACCOMMODATE RESTROOM CHOICE?: CASE LAW DEVELOPMENTS

Gym Membership Context:

- *Cormier v. Planet Fitness*. Planet Fitness locker room policy allows members and guests to use the facilities that correspond with their "sincere self-reported gender identity." Cormier's suit was based upon her seeing a transgender person in the locker room. The lawsuit was dismissed: (i) "there was no intrusion upon the solitude or seclusion of the plaintiff by the presence of the clothed male in the common area of the restroom; (ii) the plaintiff failed to show she was subjected to "quid pro quo" sexual harassment since she did not receive unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or communication of a sexual nature.

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)