

LGBT RIGHTS UNDER THE LAW

Marie Verduyck Welch

248)-988-1810

welch@clarkhill.com

CLARK HILL

DIVERSE WORKFORCE

About 9 million U.S. adults identify as LGBTQ

About 1.4 million U.S. adults identify as transgender

Adults who identify as LGBTQ and/or transgender are more racially and ethnically diverse than the U.S. general population

One study says 20% of Millennials identify as LGBTQ

New estimates show that 150,000 youth ages 13 to 17 identify as transgender in the U.S.

A NATIONAL CONVERSATION



CLARK H

LGBTQ INDIVIDUALS REPORT HIGH RATES OF DISCRIMINATION

8-17 % of gay and transgender workers report being passed over for a job or fired because of their sexual orientation or gender identity

10-28 % report receiving a negative performance evaluation or being passed over for a promotion because they were gay or transgender

7-41 % of gay and transgender workers report being verbally or physically abused or had their workplace vandalized

DEFINITIONS

LGBTQ: Stands for lesbian, gay, bisexual, transgender, and queer. In use since the 1990s. Activists believed that the term *gay community* did not accurately represent all those to whom it referred.

Transgender Person: A person whose gender identity and/or gender expression differs from what is typically associated with the sex that they were assigned at birth.

Cisgender Person: A term used to describe people who are not transgender. "Cis-" is a Latin prefix meaning "on the same side as," and is therefore an antonym of "trans-."

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.

See GLAAD (formerly the Gay & Lesbian Alliance Against Defamation) – www.glaad.org

THE LAW

CLARK HILL

EQUALITY ACT OF 2019

Equality Act of 2019 would amend Title VII to clarify that discrimination based on sex (currently unlawful) would also include discrimination based on sexual orientation and gender identity

Additionally, it would ban discrimination based on these protected classes in areas including:

- Public accommodations and facilities
- Education
- Federal funding
- Housing
- Credit
- The jury system

EQUALITY ACT OF 2019

On May 17, 2019, The House of Representatives passed the Equality Act

Will the Senate pass the Equality Act?

- Not likely
- Lack of built in religious protections

Federal protections for LGBT rights, if any, will likely have to wait until the Supreme Court addresses a trio of cases it is set to hear later this year

SEX STEREOTYPING

No federal statute *explicitly* protects LGBTQ people from discrimination in the workplace

Individuals who allege discrimination on the basis of LGBTQ status or gender identity or gender expression have pursued claims under a theory of “**sex stereotyping**”

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 in *Hopkins* 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”

PAST SUPREME COURT DECISIONS

Romer v. Evans (1996): 6-3 decision finding that Amendment 2 to Colorado State Constitution precluding any judicial, legislative, or executive action designed to protect persons from discrimination based on their “*homosexual, lesbian, or bisexual orientation, conduct, practices or relationships*” violated Equal Protection Clause

Lawrence v. Texas (2003): 6-3 decision holding that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause

PAST SUPREME COURT DECISIONS

United States v. Windsor (2013): 5-4 decision holding that that the purpose and effect of DOMA is to impose a “disadvantage, a separate status, and also a stigma” on same-sex couples in violation of the Fifth Amendment’s guarantee of equal protection

Burwell v. Hobby Lobby Stores, Inc. (2014): 5-4 decision holding that the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations

Obergefell v. Hodges (2015): 5-4 decision in favor of marriage equality stated that under the Fourteenth Amendment’s Equal Protection Clause the states must provide marriage licenses to same-sex couples and must recognize marriages that were legally licensed and performed in other states

PAST SUPREME COURT DECISIONS

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n (2018): 7-2 decision in favor of a Christian baker who refused to bake a custom wedding cake for a same-sex couple

CASES GOING UP TO THE U.S. SUPREME COURT

On April 22, 2019, the United States Supreme Court agreed to review three cases on LGBT rights

What does “because of sex” include?

Cases will be heard on October 8, 2019

CASES GOING UP TO THE U.S. SUPREME COURT

In *Zarda v. Altitude Express*, 139 S. Ct. 1599 (2019)

Plaintiff skydiving instructor alleged that he was fired both because his employer discovered he told a female client he was gay and because he did not conform to the “straight male macho stereotype”

2nd Circuit ruled *en banc* in favor of the EEOC’s expansive interpretation of Title VII

CASES GOING UP TO THE U.S. SUPREME COURT

Bostock v. Clayton County Georgia, 139 S. Ct. 1599 (2019)

The child welfare services coordinator plaintiff alleges he was terminated after he became involved with a gay recreational softball league and was openly criticized by those who influenced his employer's decision making

11th Circuit Court of Appeals, citing past precedent, declined to extend Title VII protection to Bostock's sexual orientation discrimination claim

CASES GOING UP TO THE U.S. SUPREME COURT

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes Inc., 139 S. Ct. 1599 (2019)

Plaintiff was fired after she informed her employer that she intended to transition from male to female and would represent herself and dress as a woman while at work

6th Circuit Court of Appeals found in favor of the plaintiff

Supreme Court will address protections afforded under Title VII and sex stereotyping theories

WHO WILL BE THE DECIDING VOTE?



CONFLICTING VIEWS ON TITLE VII

Until the Supreme Court issues a definite decision, the question of coverage of sexual orientation and gender identity discrimination claims under Title VII depends on where the employee lives and works

STATE LAW – TRANSGENDER PROTECTIONS

There are 22 states and the District of Columbia that prohibit discrimination against transgender people. Their protections vary.

- California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington

More than 200 cities and counties have explicitly banned gender identity discrimination for public and private employers

- Examples include: Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio

STATE LAW – LGBTQ PROTECTIONS

State and Municipal Laws Prohibiting Discrimination Based on Sexual Orientation

Comprehensive laws barring bias in employment, housing, and public accommodations



Note: Utah's law only covers employment and housing.

Source: Movement Advancement Project

Bloomberg Law

EEOC AND OFCCP

CLARK HILL

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”

EEOC ENFORCEMENT ACTIVITY

In *Baldwin v. Dep't of Transportation*, EEOC appeal no. 0120133080 (July 15, 2015), the EEOC held:

- Discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII
- An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it:
 - Involved treatment that would not have occurred but for the individual's sex
 - Was based on the sex of the person(s) the individual associates with
 - Was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex

THE EEOC'S POSITION

The EEOC's Strategic Enforcement Plan for 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, yearly increase:

- 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 2017, EEOC received 1,762 LGBT charges
- In 2018, EEOC received 1811 LGBT charges

DOJ has taken a position opposite to the EEOC

EEOC AND LGBT RIGHTS

May 2019: The Senate confirmed Janet Dillon as head of EEOC finally reaching a quorum. This means the EEOC can now issue guidance to employers.

What does this mean for LGBT rights in the workplace?

- Dillon wrote, “June is LGBT Pride Month [a] fitting opportunit[y] to remember, with pride, the EEOC's role in defending everyone's rights to be treated fairly at work, no matter who they are – as long as "who they are is a qualified worker who can do the job right”
- Because The Supreme Court is set to hear three cases on LGBT rights, the EEOC's stance will become moot after it rules

OFCCP & RELIGIOUS EXEMPTION

Executive Order (E.O.) 11246 – Equal Employment Opportunity

Prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin

- Prohibits anti-LGBT discrimination among employers

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

OFCCP & RELIGIOUS EXEMPTION

On August 10, 2018, the Department of Labor issued *a religious exemption directive*:

- Instructions seem aimed at allowing religiously-affiliated employers to discriminate against workers for being LGBT despite the executive order
- Supersedes DOL's FAQs on sexual orientation and gender identity
 - (1) Cannot pass judgment on illegitimacy of religious beliefs
 - (2) Cannot condition opportunities on willingness to surrender religious status
 - (3) Must comply with Religious Freedom Restoration Act
 - (4) Must allow faith based organizations to compete on a level playing field
 - (5) Must respect right of religious people and institutions to practice faith without fear of discrimination or retaliation

FMLA & ADA

CLARK HILL

FMLA & ADA & THE TRANSGENDER EMPLOYEE

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?

FMLA & ADA & THE TRANSGENDER EMPLOYEE

he ADA explicitly exempts from coverage:

“... 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

RESTROOMS

CLARK HILL

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:

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.

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
- 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

BEST PRACTICES

CLARK HILL

POLICIES & HANDBOOKS

EO & ANTI-HARASSMENT

Consider explicitly including protection against discrimination or harassment on the basis of sexual orientation or gender identity (especially if required by Executive Order)

Consider revising handbook and written policies to reflect gender neutral pronouns

Consider having a written policy addressing questions and concerns that may arise

Allow employees to use the restroom consistent with their gender identity, but be sure to inform and discuss this policy with all employees before implementing it

POLICIES & HANDBOOKS

EO & ANTI-HARASSMENT

Err on the side of caution. Many states have passed laws explicitly prohibiting discrimination based on gender identity and sexual orientation. EEOC is aggressively pursuing charges.

Goal: To ensure all employees feel safe and respected at work

POLICIES & HANDBOOKS

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

OUR APPROACH

Respond to a request, do not single an employee out

Case-by-case, treat each transition individually

Designate an HR official to oversee transition process

Offer to 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 (treat like an ADA/FMLA issue)

RESPONDING TO A TRANSGENDER EMPLOYEE'S TRANSITION

ADMINISTRATIVE RECORDS & COMMUNICATION

Be prepared to update or change employee's name and sex in certain records (i.e., email addresses, nameplates, business cards and security badges)

Consult with the employee regarding notifying managers and co-workers

Remind managers and co-workers to use appropriate pronouns consistent with the employee's gender presentation

If there is uncertainty, respectfully communicate with employee regarding his/her preference

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

How you could ask:

“What pronouns do you use?”

“What pronouns would you like me to use?”

Ways to make language more inclusive:

“Folks,” “Everyone,” “How are you all?” in group settings

Transgender should be used as an adjective, not as a noun

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

Manager training, if needed

QUESTIONS?



Anne-Marie Vercruysse Welch

(248)-988-1810

awelch@clarkhill.com

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.

CLARK HILL