

LGBT Discrimination in the Federal Workplace



Sexual Orientation & Gender Identity

- Title VII does not *explicitly* include the term “sexual orientation” as a basis for protection under the law.
- Although Title VII does not explicitly include sexual orientation, gender stereotyping and gender identity, the EEOC and courts have interpreted Title VII to mean that sex discrimination includes discrimination because an applicant or employee does not conform to traditional gender-based expectations, stereotypes or otherwise.

For example, it is illegal for an employer to deny employment opportunities or permit harassment because:

- a woman does not dress or talk in a feminine manner.
- a man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
- a female employee dates women instead of men.
- a male employee plans to marry a man.
- an employee transitions from female to male or male to female.

Understanding Gender Identity and Gender Expression

- Sex – the *biological/ physical* aspect of our body
- Gender Expression – demonstrates a person's individual sense of their gender to others
- Gender Identity – the term for an individual's *internal psychological sense* of their gender



Chaz Bono



Lana Wachowski – Director of the Matrix



Jenna Talackova – Ms. Canada 4

Sexual Orientation/Sexual Preference Vs. Gender Stereotyping Vs. Gender Identity – What's the difference?

The growing trend is the courts and at the EEOC is to draw a distinction between discrimination based on sexual orientation or preference and cases based on gender stereotyping.

What is meant by “sexual orientation or sexual preference”?

- “Sexual orientation” is the preferred term used when referring to an individual's physical and/or emotional attraction to the same and/or opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations.
- A person's sexual orientation is distinct from a person's gender identity and expression.

What does “gender expression” mean?

- Gender expression refers to all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns and social interactions.
- Social or cultural norms can vary widely and some characteristics that may be accepted as masculine, feminine or neutral in one culture may not be assessed similarly in another. (Human Rights Campaign)
- Cross-dressing is a form of gender expression.
- **Title VII protects gay, lesbian and bisexual individuals against sex discrimination, which includes adverse actions taken because of a person's failure to conform to sex or *gender stereotypes*.**

What is meant by “gender identity”?

- The term "gender identity," is distinct from the term "sexual orientation," and refers to a person's innate, deeply felt psychological identification as a man, woman or some other gender, which may or may not correspond to the sex assigned to them at birth (e.g., the sex listed on their birth certificate). (Human Rights Campaign)
- **Transgender** – or trans – is an umbrella term for people whose gender identity or expression is different from those typically associated with the sex assigned to them at birth (e.g., the sex listed on their birth certificate).

Transgender

- A transgender individual is a person who internally identifies with a gender other than the biological gender they were born with



Above is a transgender symbol, a combination of the male and female sign with a third, combined arm representing transgender people.

Understanding the Transition Process

- Some transgender individuals will find it necessary to transition from living and working as one gender to another.
- These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery.
- Some individuals, however, will not pursue some (or any) forms of medical treatment.
- The transition process is different for every individual

The Transition Process Continued

- Confidentiality
- Dress & Appearance
- Record Keeping
- Names and Pronouns

Transgender Terms: Know What To Say

Non-Offensive Language

Transgender Woman

Transgender Man

Gender Transition

Gender Identity

Transgender People

LGBT

Transgender Terms: Know What Not To Say

Offensive:

Sex Change

Transvestite

She-Male or He-She

Shim

Tranny

It

A Transgender

Gender bender

Potentially Offensive*:

Transgenders

Transsexual

Pre-Operative/Post Operative

Cross Dresser

*These terms are sometimes used by LGBT community members, so in some contexts it may be socially acceptable for them to use. However, in the workplace employees should avoid these terms because most people do not consider them respectful.

Gender Stereotyping & Gender Identity Case Law

Gender Stereotyping - Case Law

Price Waterhouse v. Hopkins, 490 U.S. 228(1989)



Ann Hopkins, the plaintiff in Price Waterhouse v. Hopkins

Price Waterhouse v. Hopkins

The Supreme Court ruled that individuals can establish violations of Title VII based on evidence that an employer discriminated against them for failure to conform to gender-stereotypes such as traditional notions of masculinity or femininity.

Gender Stereotyping – Not a One-Way Street

- *Caldwell v. Postmaster General*, EEOC Appeal No. 01880601 (1988)
- Commission found that gender stereotyping discrimination where male complainant was found “reserved” but two female applicants were “cheerful.”

Gender Identity – The Law

- The EEOC has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964. *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012)



Mia Macy, the Complainant in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012)

- Macy filed a complaint with the Agency on June 13, 2011.
- Checked the box for "sex" as the basis of her discrimination claim.
- In addition, Macy typed onto her complaint form that "gender identity" and "sex stereotyping" also formed the basis of her complaint against the Agency.
- Macy further explained in her complaint that she had been discriminated against on the basis of her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."

- Each of these formulations of Macy's claims were merely different ways of stating the same claim for discrimination "based on . . . sex," which clearly was cognizable under Title VII.
- Most of the courts affording protection to transgender individuals under Title VII relied on a theory of "gender stereotyping," gender stereotyping was only one way to prove sex discrimination under Title VII.
- A transgender person who has experienced discrimination based on his or her gender identity may be able to establish a prima facie case of sex discrimination in a number of ways, all of which simply are different ways of describing discrimination "based on . . . sex" under Title VII.

Effect of *Macy*

- Binding on all Federal agencies and departments and has a direct impact on all government employers
- May also be entitled to at least some deference by Federal courts.
- As a decision of the Commission, though, *Macy* also represented the interpretation of the commission in its own enforcement activities in the private sector.

EEOC's Actions Post *Macy*

- 2014, the EEOC filed lawsuits against two companies accused of discriminating against transgender employees.
- This is the first time the Federal government has brought suit under the Civil Rights Act of 1964 to protect transgender workers.

Expanding Protections – Victories in 2014

- February 2014, Facebook added more than 50 custom gender options for users who don't identify as simply "male" or "female".
- March 2014, the Fairness for All Marylanders Act.
- June 2014, the Office of Personnel Management (OPM) announced it was removing the exclusion of transition-related health services for Federal Employee Health Benefits plans.
- July 2014 Barack Obama signed an executive order banning workplace discrimination against millions of lesbian, gay, bisexual and transgender employees of federal contractors and the federal government.
- April 2014, the U.S Department of Education issued guidance clarifying that Title IX prohibits discrimination against transgender students.

LGBT Facts and Stats

- There are roughly 9 million LGBT people in the US and more than 650,000 same-sex couples.
- 19% of same-sex couples are raising children according to the US Census Bureau's 2011 American Community Survey.
- 59% of Americans support the equal right to marry for same-sex couples, according to a 2014 Washington Post-ABC News poll.
- Seventy-eight percent of transgender children in grades K-12 reported being harassed in school, 35 percent physically assaulted, and 12 percent sexually assaulted, according to a 2011 report from the National Center for Transgender Equality and the National Gay and Lesbian Task Force.
- According to the EEOC, in 2013 the commission received 834 charges alleging sexual orientation-based discrimination.
 - 199 charges alleging gender identity-based discrimination.
 - In the first half of 2014, the Commission received 459 charges alleging sexual orientation-based discrimination.
 - 81 charges alleging gender identity-based discrimination.

- There is no federal law that consistently protects LGBT individuals from employment discrimination.
- States that prohibit discrimination based on sexual orientation and gender identity (18 states and D.C.): California (1992, 2003), Colorado (2007), Connecticut (1991, 2011), Delaware (2009, 2013), District of Columbia (1977, 2006), Hawaii (1991, 2011), Illinois (2006), Iowa (2007), Maine (2005), Maryland (2001, 2014), Massachusetts (1989, 2012), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Nevada (1999, 2011), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007) and Washington (2006).
 - *State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Florida and New York.
- States that prohibit discrimination based on sexual orientation only (3 states): New Hampshire (1998), New York (2003) and Wisconsin (1982).
- **Laws and Policies Covering Public Employees Only** - The laws referenced above apply to public and private employers (with some limitations) in the respective states. Additionally, there are 9 states that have an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity, and 3 states prohibit discrimination against public employees based on sexual orientation only (Missouri order only covers executive branch employees). In 23 states and the District of Columbia state employees are provided with domestic partner benefits. In 3 states state employees are provided with benefits based only on marriage, and same-sex spouses are eligible for benefits.