

Shifting Landscape of Transgender Rights and Sex Discrimination

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Scenario One

- A surgeon applies for a senior position at a large international medical center in Minnesota
- The surgeon's application materials, including medical school transcripts, exam score documents, recommendation letters, and personal statement refer to the surgeon as male
- The surgeon successfully completes a phone screening interview and is informed that only two other applicants are still candidates for the position

Scenario One, cont.

- The surgeon is scheduled for an in-person interview. No other candidates are scheduled for an in-person interview
- The surgeon is informed that the interview is just a formality and is provided with an employment contract and start date
- The surgeon executes the contract and returns it to the medical center. The surgeon also prepares to move from Connecticut to Minnesota

Scenario One, cont.

- During the interview, the surgeon informs the interviewers that she is transitioning and will present as a female at work
- What are the employer's options?

Overview

- 1.4 million adults identify as transgender in the United States
- Most report discrimination
- Popular culture
 - High-profile transitions
 - Media
- Workplace impact is inevitable

Emerging Workplace Issues

- Restroom and locker room access
- ADA accommodation requests
- Employer-provided health insurance
- Sex as a BFOQ
- Non-binary gendered individuals

Terminology

- Sex
- Sexual orientation
- Gender identity
- Gender expression

Terminology, cont.

- Gender transition
 - Social transition
 - Medical transition
- Transgender
- TGNC / GNC

Federal Law

Title VII of the 1964 Civil Rights Act:

“It shall be an unlawful employment practice for an employer—

- (1) to fail or **refuse to hire or to discharge** any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, **sex**, or national origin; or
- (2) to limit, segregate, or classify his **employees or applicants** for employment in any way which would deprive or tend to deprive any individual of **employment opportunities** or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, **sex**, or national origin.”

42 U.S.C. § 2000e-2(a)

Sex Discrimination

- Price Waterhouse v. Hopkins, 490 U.S. 228 (1989): Discrimination based on sex includes making an employment decision as a result of “sex stereotyping.”
- Fabian v. Hosp. of Cent. Connecticut, 172 F. Supp. 3d 509, 527 (D. Conn. 2016): “Employment discrimination on the basis of transgender identity is employment discrimination “because of sex” and constitutes a violation of Title VII of the Civil Rights Act.”

Scenario Two

- Diane was a long-time employee of a “family friendly” box store
- She informed her supervisor that she planned to transition from male to female during her 6th year of employment
- Diane was required to use single-use restrooms until she underwent medical surgery
- It has been a year since Diane’s transition, but a supervisor repeatedly refers to Diane by her previous male name and uses male pronouns
- What are the employer’s options?

EEOC

- Position: Title VII prohibition against sex discrimination protects lesbian, gay, bisexual, and transgender people
- Top priority in 2013-2016 enforcement agenda
- Recent cases
 - Intentional misuse of name/pronoun
 - Failure to revise records to reflect gender identity
 - Denial of restroom use
- Enforcement guidance
 - Gender-identity discrimination is sex discrimination
 - Response to bathroom bills

Other Federal Developments

- Employment Non-Discrimination Act
- Recent action
 - Executive Order 13672
 - Applies to all federal contractors
 - Agency guidance
 - Department of Labor / OFCCP
 - OSHA
 - Department of Education – Title IX
 - Department of Health and Human Services
- Trump Administration developments

State Law Protections

States that include gender identity as a protected class:

California	Colorado*	Connecticut
Delaware	Hawaii	Illinois*
Iowa	Maine*	Maryland
Massachusetts	Minnesota*	Nevada
New Jersey	New Mexico	New York
Oregon*	Rhode Island	Utah
Vermont	Washington, D.C.	Washington*
*Gender identity and/or gender expression included in definition of sexual orientation		

Best Practices

PLAN AHEAD



Policies

- Maintain inclusive nondiscrimination policies
- Consider implementing a specific transitioning employee policy
- Review dress codes
 - Gender-neutral preferred
 - At least not unduly burdensome
- Review background-check procedures
 - Be prepared for other past names
 - Be discreet
- Review insurance benefits

Restrooms and Other Facilities

- Transgender employee may use gender-specific facility of choice
- *Everyone* likes privacy
- Assess facilities and provide options
 - Single-stall restrooms help everyone
 - Multi-stall, single-gender restrooms with enhanced privacy
 - Dressing areas and single shower stalls in locker rooms

Use Correct Names and Pronouns

- Do this regardless of legal name status
- Adapt workplace systems and employment records to allow for preferred names
- Know how to correct employment records
- Ask what pronouns to use...and use them
- Train managers to model appropriate behavior
- Practice
- Lastly, apologize if you slip up

Be Proactive With Your Workforce

- Include gender identity in regular trainings
- Address trans issues before a specific transition occurs
- Normalize the discussion
- Provide a safe environment for questions
- Determine whether additional training is necessary

Be Proactive in Communicating / Working With Transitioning Employee

- Be discreet
- Use trusted ambassadors
- Create a plan
 - Timing
 - Who will communicate and how?
 - Name and records changes
 - Insurance coverage
- Honor the transitioning employee's wishes

Resources

- GLAAD: <http://www.glaad.org>
- Trans Employment Program: <http://transemploymentprogram.org>
- Transgender Law Center: <https://transgenderlawcenter.org>
- The Human Rights Campaign: www.hrc.org
- Lambda Legal: <http://www.lambdalegal.org>

Thank You

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