



EMPLOYERS AND LAWYERS,

WORKING TOGETHER

Colorado SHRM

Diversity and Inclusion Webinar Series


Accommodating Gender Transition in the Workplace

Presented by: David L. Zwisler
Ogletree Deakins
Of Counsel

July 11, 2018

What This Presentation Is NOT

pros·e·lyt·ize

/ˈpräsələˌtīz/ 

verb

1. convert or attempt to convert (someone) from one religion, belief, or opinion to another.

"the program did have a tremendous evangelical effect, proselytizing many"

synonyms: evangelize, convert, save, redeem, win over, preach (to), recruit, act as a missionary

"I'm not here to proselytize"





GLSEN

Rainbow Pride is a Great Place

BURT'S BEES



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BEST PLACES TO WORK
CORPORATE EQUALITY INDEX | 2014



BERTOLLI
EST. 1817

**EQUALITY IS
REFRESHING**

**BEST
PLACES TO WORK**

2014
HRC
CORPORATE EQUALITY INDEX

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ESPN



NEXT
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PICK IS IN
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MEL'S
WHEELS

5. A.C. Leonard TE - Tennessee St
6. Terrance Mitchell CB - Oregon

151 TENNESSEE - Avery Williamson IUB Kentucky
152 NY GIANTS - N.J.

By the Numbers

- **9 million LGBT adults in U.S.**
 - 700,000 transgender
- **2010 U.S. Census Data**
 - 594,000 same-sex couple households in U.S.
 - 25% reported they were “spouses”
 - 19% reported having children
 - 52% live in states banning same-sex marriage
- **More people know LGB individuals**
 - 87% report knowing someone lesbian/gay
 - 49% have a close lesbian/gay friend
 - 31% know a lesbian/gay person raising a child



Employment Discrimination Against Transgender Individuals

- **90%** harassed at work
- **47%** lost a job due to being transgender or gender non-conforming

Source: Rodríguez-Roldán, Victoria M., and Elliot Imse. *Valuing Transgender Applicants and Employees: A Best Practices Guide for Employers*. Washington: District of Columbia Office of Human Rights and National LGBTQ Task Force, 2016.

Transgender

AWARENESS WEEK 2014

65%

OF THE TRANSGENDER
POPULATION HAS
ATTEMPTED SUICIDE

19%

OF TRANSGENDER
INDIVIDUALS UNDER THE AGE
OF 18 HAVE ATTEMPTED
SUICIDE

70%

OF THE TRANS POPULATION
HAS BEEN SEXUALLY
ASSAULTED BY LAW
ENFORCEMENT

69%

OF HIGH SCHOOL
STUDENTS

AND

85%

OF COLLEGE
STUDENTS

THAT ARE
TRANSGENDER
HAVE BEEN SEXUALLY
ASSAULTED

77%

OF THE TRANSGENDER
POPULATION CURRENTLY
SUFFERS FROM ANXIETY
OR DEPRESSION

55%

OF TRANSGENDER
INDIVIDUALS HAVE
LOST THEIR JOB DUE
TO BEING TRANS

57%

OF FAMILIES TO TRANSGENDER
INDIVIDUALS CHOSE NOT TO
SPEAK/SPEND TIME WITH THEM
AFTER COMING OUT

50%

OF TRANSGENDER
INDIVIDUALS WILL BE
RAPED IN THEIR LIFETIME

54%

OF TRANSGENDER
INDIVIDUALS WERE
FORCED TO PRESENT IN
THE WRONG GENDER
TO KEEP THEIR JOB.



60%

OF THE TRANS* POPULATION HAS BEEN
DENIED TREATMENT FROM A DOCTOR /
HEALTHCARE PROVIDER BECAUSE OF THEIR
GENDER IDENTITY

W.F.A.D.

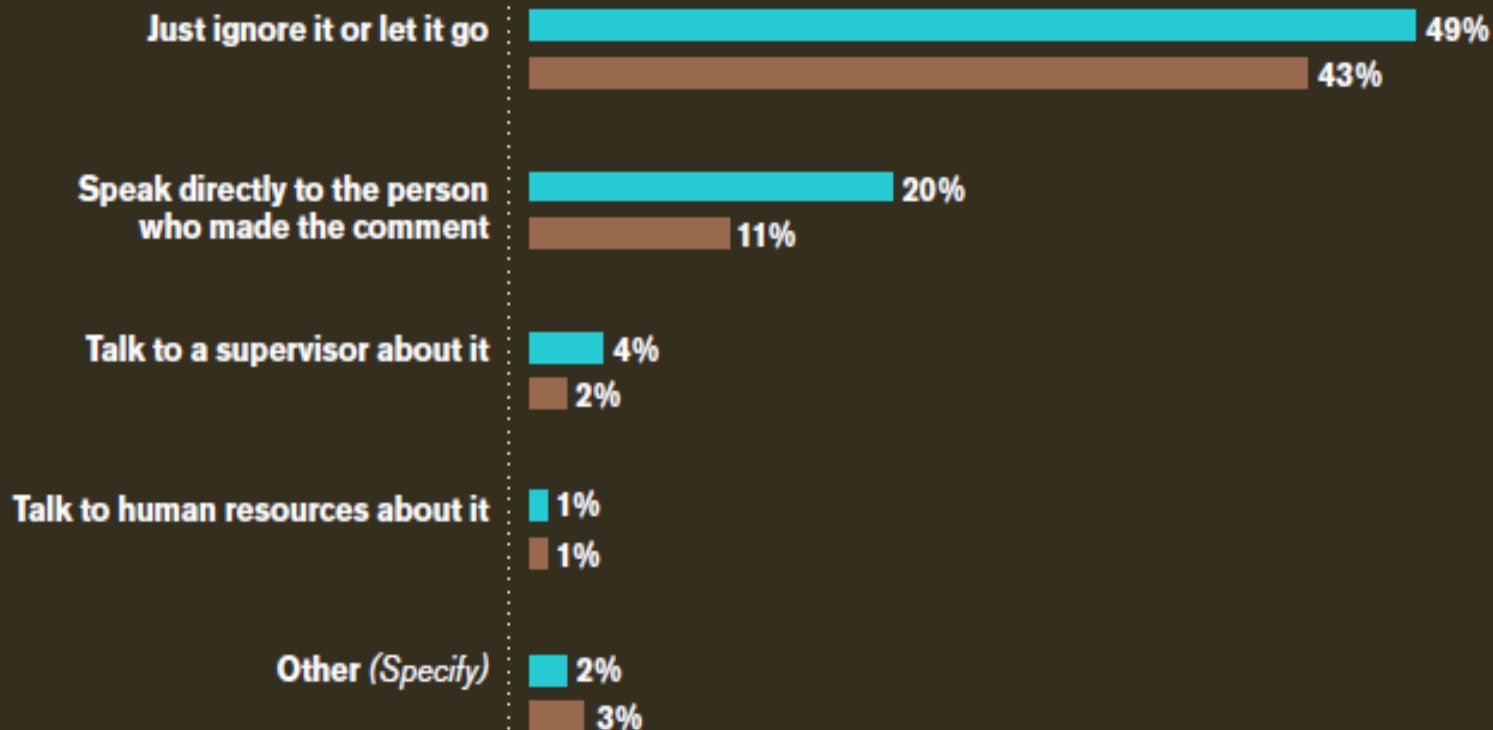


Reluctance to Speak Up About Questionable Comments and Behavior

Overall, both LGBT and non-LGBT workers do not report incidents of negative remarks or jokes about LGBT people to management or human resources.

When you hear someone at work make a joke or say something negative about LGBT people, how do you typically deal with it?

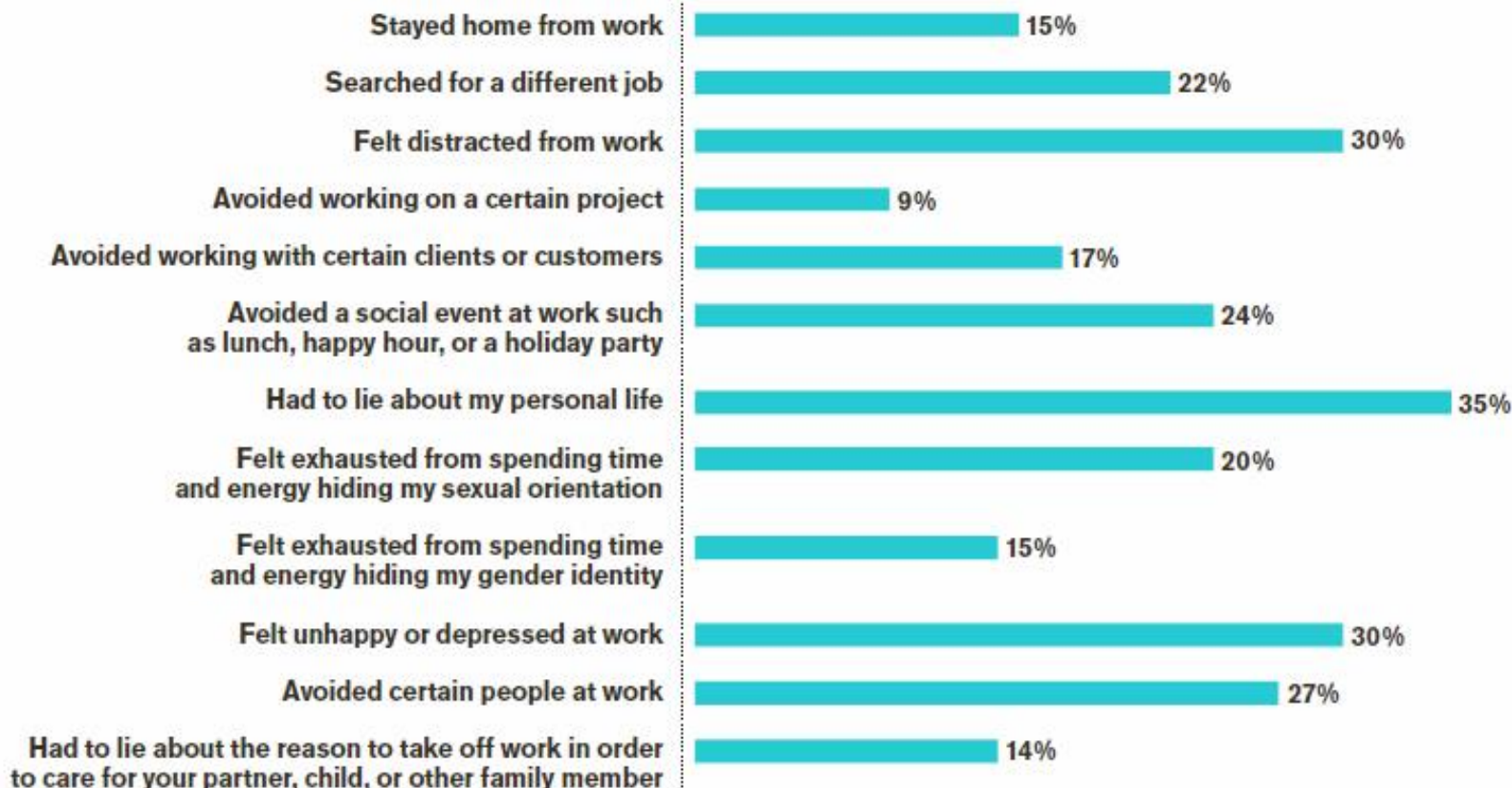
ALLOW MULTIPLE RESPONSE (2008 wording: When you hear someone make an anti-GLBT comment at work, how do you typically deal with it?)





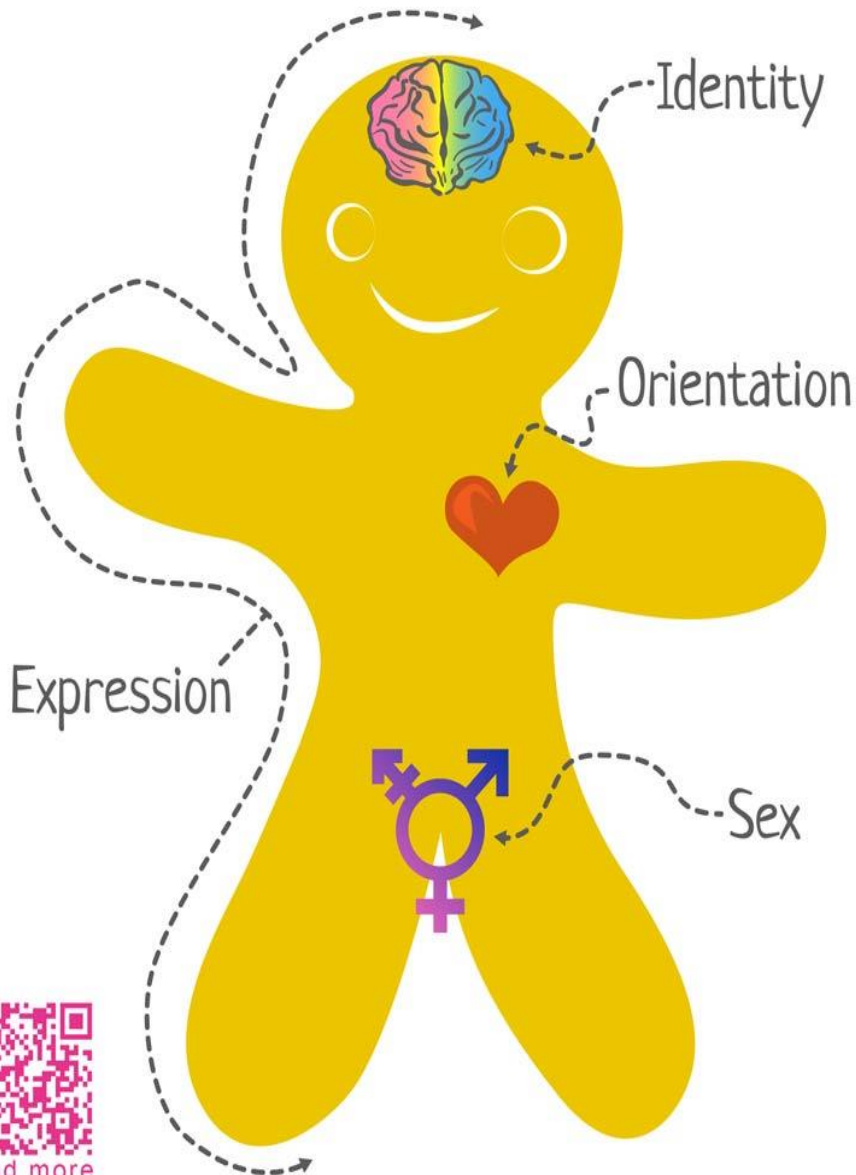
Overall Business Impact

Employee engagement suffers by up to 30 percent due to unwelcoming environments. When asked about the following results of experiencing a negative workplace environment and/or feeling compelled to be closeted, LGBT workers reported the following effects on their productivity, engagement with coworkers and overall sentiments about their job.



The Genderbread Person

by www.ItsPronouncedMetrosexual.com



read more



Gender Identity

Woman Genderqueer Man

Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.



Gender Expression

Feminine Androgynous Masculine

Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.



Biological Sex

Female Intersex Male

Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.



Sexual Orientation

Heterosexual Bisexual Homosexual

Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.

What Terms Are Not Appropriate

- “Homosexuality” or “homosexual” = outdated and offensive
- “Sexual preference” = outdated and offensive
- No longer a binary construct of gender
- Avoid heteronormative behaviors
- No “accommodation” language
 - This is not an ADA issue*

*There is a case challenging this premise.

What Terms Are Appropriate

- Cisgender
- Gender dysphoria (DSM-V)
- Genderqueer
- Asexual
- Intersex
- Pansexual
- Graysexual
- Gender non-conforming
- Non-binary
- Transgender female/transgender male
 - FTM and MTF may be outdated; “Realignment” or “gender conformance procedures”

Gender Transition

To more closely align one's internal knowledge of gender with its outward appearance.



- **Dressing, using names and pronouns and/or being socially recognized as another gender;**
- **Taking hormones or having surgery;**
- **Changing identity documents to reflect one's gender identity.**

What Pronoun Do I Use?

- What name is the person using?
- “Caitlyn” is “she”
- “Bruce” is “he”
- Neutral is “ze”



What is the EEOC telling its Investigators?



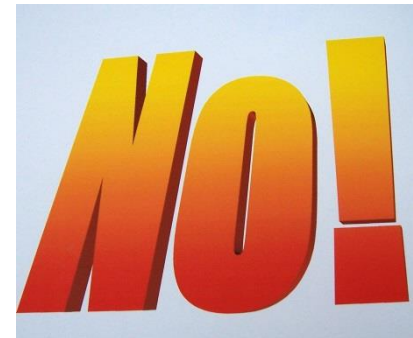
- Strategic enforcement priority
- Courts have already expanded Title VII to include more than biological sex, so sexual orientation and gender identity/expression are covered
- Pursue gender stereotyping theories
- Doors are open to all charges
- Investigate thoroughly and in depth
- **NO ADR**

Does Title VII Prohibit Sexual Orientation Discrimination?

YES!

- EEOC says yes
 - Aspirational
- DOJ conflicting with EEOC (October 5, 2017)*
 - Long history of case law saying otherwise
- OFCCP says yes
 - EO 13672/11246
- Courts generally say no. But . . .

*DOJ memo withdrew protections
Filed brief arguing sexual orientation
discrimination is not illegal – *Zarda v.
Altitude Express*



Title VII, Sexual Orientation and the Courts

- Most federal courts say sexual orientation is not protected.
- BUT – Zarda v. Altitude Express (2018)
 - “In the context of Title VII, the statutory prohibition extends to all discrimination ‘because of ... Sex’ and sexual orientation discrimination is an actionable subset of sex discrimination.”

EEOC's Stance Is Clear . . .

- “Sex discrimination law can protect lesbian, gay and bisexual employees. The parallels with race and interracial marriage show why.”
- “Assume a male employee is fired because he marries another man. The reason for that employee’s firing makes reference to the sex of the people involved, and the antipathy to marriage by a same-sex couple is deeply embedded in the history of gender roles and sex stereotypes.”
- **“This is a simple case of sex discrimination.”**

Federal Transgender Protections

- Title VII
- Amended Executive Order 11246
 - Federal contractors only
 - OFCCP
 - Notice of Proposed Rule Making – Sex Guidelines
- EEOC/DOJ stances and guidance
- No protections:
 - ADA*
 - ENDA



*Blatt v. Cabela's Retail

EEOC's Stance Is Clear...

■ *Macy v. Holder*, EEOC Decision (2012)

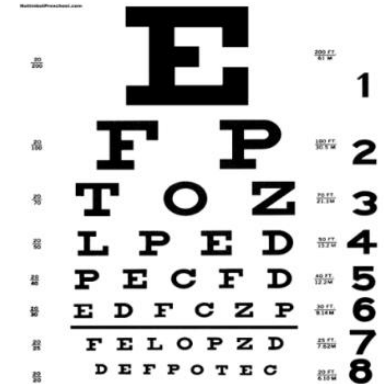


- Applied for ATF position as male and received conditional offer pending background check.
- Arrived to background check as female.
- 3 days later, is told there is no position due to budget cuts.
- Job not eliminated but filled with another.

“To that end, the Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition. . . .”

EEOC v. Lakeland Eye Clinic

- In 2010, Defendant interviewed and hired “Michael” who presented as male.
- In 2011, “Michael” began wearing make-up and women’s clothing.
- Co-workers snickered, rolled their eyes, and withdrew from social interactions with her in response to her changing appearance.



EEOC v. Lakeland Eye Clinic

- Defendant met with “Michael,” who stated then that she was undergoing a gender transition to female and that she would be changing her name legally to “Brandi.”
- Brandi’s job is “eliminated” in June – but a replacement is hired in August.



EEOC v. Lakeland Eye Clinic

- **Payment of \$150,000 / Neutral letter of reference**
- **Revised Policies**

Revise!

- No employee will be terminated (or harassed) “based on an employee’s status as transgender, because of an employee’s transition from one gender to another, and/or because the employee does not conform to the Defendant’s sex or gender-based preferences, expectations or stereotypes”.

Managerial and Employee Training

- Including “an explanation of the prohibition against transgender/gender stereotype discrimination under Title VII” and “guidance on handling transgender/gender-stereotype complaints made by applicants, employees and customers.”
- **Monthly reports to the EEOC every six months certifying compliance with the terms of the Consent Decree; and**
- **Two years of monitoring by the EEOC, including the right to conduct workplace inspections with 24 hours’ notice.**

Courts Are Accepting the Gender Stereo-type theory

- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (6TH Cir. 2018)*
 - *“We also hold that discrimination on the basis of transgender and transitioning status violates Title VII.”*
 - *“Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.”*

Other Federal Law Protections

***Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)**

§1983 - Equal Protection Clause of the Fourteenth Amendment

- “The question here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause. For the reasons discussed below, we hold that it does.”
- A person is considered transgender “precisely because of the perception that his or her behavior transgresses gender stereotypes.”
- As a result, there is “congruence” between discriminating against transgender individuals and discrimination **on the basis of “gender-based behavioral norms.”**
 - 11th Circuit does not recognize sexual orientation protection under Title VII but may allow gender non-conformity claims. *Evans v. Georgia Regional Hospital* (11th Cir. 2017)

Courts Have Permitted Claims

***Parker v. Strawser Construction* (S.D. OH. 2018)**

"That is, although claims of discrimination on the basis of transgender or transitioning status may often involve a failure to conform to sex stereotypes, allegations related to sex stereotypes are not necessary to state such a claim"

***Wittmer v. Phillips 66 Co.* (S.D. Tex. 2018)**

"Although the Fifth Circuit has not yet addressed the issue, these very recent circuit cases are persuasive. They consistently recognize transgender status and orientation as protected classes under Title VII, applying the long-recognized protections against gender- or sex-based stereotyping. Applying these recent cases, the court assumes that Wittmer's status as a transgender woman places her under the protections of Title VII."

EEOC is Actively Supporting

Transgender Status & Gender-Identity

- ***EEOC v. A&E Tire***
(CO lawsuit filed September 29, 2017)
- ***EEOC v. Rent-A-Center East, Inc.***
(C.D.Ill.) (lawsuit filed July 19, 2016)
- ***Dawson v. H & H Electric, Inc.***
(E.D. Ark.) (amicus brief filed June 26, 2015)
- ***Eure v. Sage Corp.***,
(5th Cir.) (amicus brief filed April 22, 2015)
- ***Jamal v. Saks & Co.***
(S.D. Tex.) (amicus brief submitted with motion for leave to file, Jan. 22, 2015)
- ***Lewis v. Highpoint Reg'l Health Sys.***
(E.D.N.C.) (amicus brief filed Oct. 30, 2014)
- ***Chavez v. Credit Nation Auto Sales, LLC***
(N.D. Ga.) (amicus brief filed June 5, 2014)



What About the Bathroom?



Do I look like I belong in women's facilities?
Republicans are trying to get legislation
passed that would put me there, based on
my gender at birth. Trans people aren't
going into the bathroom to spy on you, or
otherwise cause you harm,
#wejustneedtopee. Trans lives matter!
@_michaelhughes1

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EEOC's Stance Is Clear...



***Lusardi v. McHugh*, EEOC Decision (2013)**

Transgender woman, software engineer working at Redstone Arsenal (Army)

When transitioned gender presentation, limited to executive single person restroom

Continued to be referred to as former male name and called “sir”

EEOC's Stance Is Clear...



***Lusardi v. McHugh*, EEOC Decision (2013)**

(1) requiring a transgender to use a single-user restroom (*i.e.*, not allowing the employee to use the common women's restroom); and

(2)

tolerating a team leader's repeated, references to the employee by male pronouns, "sir," and the employee's former male name.

Bathrooms: EEOC

- Referencing *Lusardi* –
 - 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



Fact Sheet: *Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964*

EEOC's Stance Is Clear...

➤ ***EEOC v. Deluxe Financial Serv.***

- Refusing to allow use of the women's restroom after the transition to female.
- Refusing to change the employee's name or gender in its systems because the employee transitioned to female.
- Co-workers' derogatory comments.



EEOC v. Deluxe Financial Serv.

- **Consent Decree filed January 2016**
 - **For individual, \$115,000 and:**
 - Expunge poor evaluations and references to discrimination complaint from personnel file.
 - Neutral reference and letter of apology.
 - **For all of defendant's facilities:**
 - EEO policy revisions and training;
 - Change sex-designation in records and systems;
 - Unhindered bathroom access;
 - Coverage under benefits plans including gender dysphoria, etc.; and
 - Notice posted at all facilities.

Not Just the EEOC

Restrooms:

- Federal government and federal contractors must allow employees and applicants to use restrooms consistent with their gender identity.



Not Just the EEOC

Bathrooms, June 1, 2015

**“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.”



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Bathrooms

“A Guide to Restroom Access for Transgender Workers”, June 1, 2015

“[N]o employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status.”



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**Occupational
Safety and Health
Administration**

Bathrooms

- Separate but equal bathrooms?
- “We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

Brown v. Board of Education, 347 U.S. 483, 495 (1954)

The image shows the front page of the Danville Bee newspaper, dated Monday, May 17, 1954. The masthead includes the newspaper's name, "The Danville Bee," and the price, "FIVE CENTS." The main headline is "SEGREGATION IN PUBLIC SCHOOLS ENDED BY COURT." Below this, several sub-headlines are visible: "Ruled Unconstitutional By Supreme Court; Date To End Practice Not Set," "Danville School Board Will Meet At Once To Study Court Decision," "Officials Give Views On Matter; Call For Calm Study On All Sides," "Firm Entered, Haul Is Made; Boy Wounded Man Accidentally Shot In The Head," "Paroled Slayer Captured After Bizarre Deaths," "McCarthy-Army Hearings' Future Thrown In Doubt," and "Held For Four Brutal Killings." The page also features a "Late News" section on the left and a "FOR ALL DEPARTMENTS CALL 4500" box on the right.

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State & Local Transgender Protections

- **20 states plus D.C.**
 - Gender identity or expression = protected class
 - Covers 40% of LGBT population
- **225 cities and counties**
 - Repeal efforts afoot
- **60% of Fortune 500 companies**



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WHAT ABOUT COLORADO?



Etsitty v. Utah Transit Authority

10th Circuit Court of Appeals

- Alleged termination based on transsexual status
 - Title VII and 1983 (Equal Protection)
- District Court granted summary judgment to Employer
- “This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII. In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII.”





Colorado



- **C.R.S. § 24-34-402** - “because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry;”
 - 3 CCR 708-1: sexual orientation includes transgender status
- **Boulder City Ordinance, § 12-1-3**
 - “because of the race, creed, color, sex, sexual orientation, gender variance, genetic characteristics, marital status, religion, national origin, ancestry, age or mental or physical disability of such individual or such individual's friends or associates”
 - “Notwithstanding any other provision of this chapter, a workplace supervisor may require that a worker not change gender presentation in the workplace more than three times in any eighteen-month period.”



Colorado Bathrooms



- **Colorado Civil Rights Commission Rules and Regulations**
- In Colorado, a transgender person has the right to access the gender-segregated facility that matches their gender identity.
- CCRC Rule 81.9 (B)(C) provides: All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include but are not limited to, restrooms, lockers rooms, dressing rooms, and dormitories.

Colorado DORA Advisory (Feb. 24, 2017)



- “In Colorado, access to restrooms and other gender-segregated facilities in places of public accommodation and places of employment is a right protected by Colorado law,” said DORA Executive Director Joe Neguse.
- “In Colorado, a person cannot be denied access to the restroom that conforms to their gender identity, and we encourage any victims of such discrimination to contact our office,” added Colorado Civil Rights Division Director Aubrey Elenis.

Handbooks and Policies

- How broad is your language?
- **SHRM Sample Policy**
 - **Equal employment opportunity.** It is the policy of [Company Name] to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, marital status, citizenship, genetic information, or any other characteristic protected by law.

https://www.shrm.org/templatestools/samples/policies/pages/cms_000551.aspx#sthash.4ZK9KT K4.dpuf

How Should Employers Handle Gender Transitions and Related Issues?

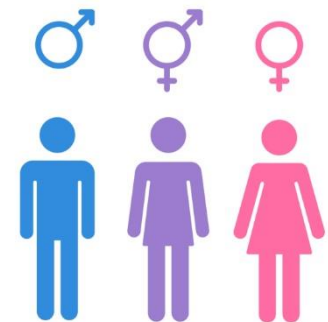
- Gender is not binary
- Transitions are not linear
- Pre-transition, transitioning and post-transition phases
- De-transitioning, special populations and special needs
- Revisit and update action plans



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How Should Employers Handle Gender Transitions and Related Issues?

- Provide assurance and affirm support/policy
- Collaboratively discuss key issues
 - Restroom/locker room
 - Name change/pronouns
 - Document changes
 - Dress code
 - Personnel file and benefit plan updates
- Develop action plan
 - When transition will occur
 - When and how to inform others
 - Employee's needs moving forward, such as leave
 - Identify support team/resources



Avoid Being the Next Test Case

- Know the federal/state/local laws with which you must comply
- Watch sex orientation test cases by EEOC/advocacy groups
- Get your employer on-board and prepared – your day will come
- Update policies, including affirmative action postings, to include sexual orientation/gender identity where applicable
- Update EEO/Title VII and other training
- Possible corporate initiatives (e.g., HRCI, affinity groups)
- Address issues as you would with any other protected class or hot social/religious topic
- Be sure you raise corporate culture with your client when making legal decisions, as appropriate

Best Practices

- Employer policies updated to reflect protections for LGBT employees
- Training for managers and employees
- Maintain confidentiality
- Use proper names and pronouns
- Access to restrooms and other facilities
- Gender neutral dress codes
- Promptly address complaints and document follow up
- Open communication between transitioning employees and manager and/or HR
- Address challenges with other employees



Acknowledge the Challenges (known and unknown)

- Employee Complainers
- Customer Complainers
- Consider impact of stereotypes and fears
- BFOQs
- Religion
- Observed drug testing
- Others???



QUESTIONS





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WORKING TOGETHER

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Presented by: David L. Zwisler
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