



Transgender in the Workplace

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As the movement to bring the transgender community into the mainstream of American society continues to gain awareness and momentum, companies employing transgendered individuals are encountering a new set of legal issues related to discrimination in the workplace.

The rights and struggles of transgendered individuals are complicated, and a growing conversation today in settings ranging from the workplace to social and educational institutions. Often, transgendered people are stigmatized and ostracized, and face staggering levels of unemployment, discrimination and harassment. Consider these scenarios, which represent some of the complex issues employers are increasingly facing:

- Until recently, everyone at the large factory where Danielle has worked for years knew her as “Daniel.” Although biologically male, Danielle has always identified herself as female. Now she is ready to openly express herself as female in the workplace. She begins using the women’s restroom, making many of her female co-workers uncomfortable. The factory does not have any unisex restrooms and Danielle is afraid of sexual harassment if she were to use the men’s restroom.
- Sarah has been presenting as female for several months, but her co-worker Steve has never gotten “comfortable” with the idea. He insists on referring to Sarah as “him” or “it.” He makes lewd jokes when Sarah goes into the women’s restroom.
- Jordan, a cashier in a grocery store, is transitioning from female to male,

and has started dressing in masculine attire and taking hormones to grow facial hair. Several customers have complained about his appearance and clothing.

A meaningful discussion of these issues warrants an accurate understanding of the difference between the terms “transgender” and “sexual orientation.” The word “transgender” focuses on gender identity and/or expression rather than sexual orientation. The term transgender includes a broad category of people who transcend gender norms in many ways. Generally speaking, transgendered people identify with a gender other than the one assigned at birth. “Transitioning” is the term most often used to describe the process through which a person changes his or her outward gender to reflect the gender he or she identifies with.

Gender identity is used to describe a person’s instinctive, emotional identification as male or female. Some transgendered people transition by living as the opposite gender, while others take hormones or undergo sex reassignment surgery.

Sex reassignment surgery is extremely costly which means many transgendered individuals are unable to surgically change their biological sex. The transitioning process is extensive and lengthy and usually includes psychological testing and supervision. Every transgendered person has his or her own unique and individualized experience and path, and thus there is no precise definition or formula to define a transgendered person.

Legal Landscape

There is no federal law that textually prohibits discrimination against transgendered individuals and courts have examined the issue with mixed results. The Americans with Disabilities Act (ADA) specifically excludes transgender, transsexual or any gender identity disorder as a disability. The proposed Employment Non-Discrimination Act, which would prohibit discrimination on the basis of gender identity and sexual orientation, passed in the Senate, but has since stalled in the House of Representatives. President Barack Obama has proposed an executive order requiring federal contractors to establish policies against lesbian, gay, bisexual and transgender (LGBT) discrimination, and many states and municipalities currently have laws against LGBT discrimination. Currently, 18 states and the District of Columbia prohibit discrimination based on gender identity. New York City, Boston,

Chicago, Seattle and Dallas, to name a few cities, have passed legislation protecting transgendered individuals from discrimination. These numbers will only continue to grow, as Maryland's law prohibiting discrimination based on gender identity will go into effect in October 2014.

No court of law has recognized gender identity as a protected class under Title VII, but that is not to say that transgendered workers are without recourse when mistreated solely because of their gender identity or expression. Rather, the majority of courts have recognized that discrimination based on one's gender identity may present a viable Title VII discrimination claim under a "sex stereotyping" theory.

Sex stereotyping is a prohibited form of sex discrimination where the discrimination is based on an individual's failure to conform to stereotypical gender norms. The Supreme Court has ruled the term "sex" under Title VII includes both biological sex as well as gender. Courts have reasoned discrimination against a transgendered person is due to that person's failure to conform to society's perception of gender, thus falling under Title VII's definition of "sex."

In fact, the very definition of transgender is based on a person's refusal to conform to stereotypical gender-appropriate appearance and behavior. Consequently, under the sex stereotyping theory, all discrimination against a transgendered individual because of his or her gender identity or expression could potentially fall under the ambit of "sex" discrimination. Furthermore, the Equal Employment Opportunity Commission (EEOC) recently issued guidance that discrimination on the basis of gender identity falls within the realm of Title VII sex discrimination. As such, there is a growing trend in the legal system to increase protection against discrimination of transgendered individuals in the workplace.

Real-World Implications

The sensitive and unique issues surrounding a transgendered person's transition creates a multitude of potential legal landmines for employers. A first step in adapting the workplace to include transgendered individuals in a meaningful way is to implement a transgender anti-discrimination policy. This anti-discrimination policy should include awareness and educational

programs for all employees and supervisors. Due to the complicated and individualized nature of a person's transition process, supervisors and employees will need additional guidance beyond a general anti-discrimination policy.

As a general rule, once a transgendered individual has undergone sex reassignment surgery, that person is for all intents and purposes the transitioned gender. Therefore, an employer should treat the individual as the transitioned gender in all aspects of the employment relationship. This includes changing the employee's gender and name on all employment forms, allowing the employee to use the appropriate restroom, and referring to the employee by his or her proper pronoun.

However, physicians require that, prior to surgery, an individual live as one's gender identity full time, including during working hours. This is often referred to as the "real-life experience." Furthermore, due to the high cost of surgery, many transgendered individuals live by their gender identity without ever undergoing surgery. This pre-transition time period can lead to a number of questions for the employer, such as proper restroom usage and compliance with dress codes and grooming policies.

Perhaps the most hotly contested issue facing employers today is determining the proper restroom or locker room for a transgendered employee. Biological anatomy alone can no longer be the determinative factor in designating restroom usage.

Some states and municipalities have specific laws regarding restroom usage. For example, New York City requires an employer to permit a transgendered employee to use the restroom in accordance with his or her gender identity. Likewise, for those jurisdictions that provide no guidance, it is commonly recommended that a transgendered person should use the restroom that corresponds to his or her gender identity.

Yet this could result in workplace discomfort, as many co-workers may be initially uncomfortable with sharing a bathroom with a person they view as the opposite gender. In one case, an employee sued for religious discrimination due to sharing a restroom with a transgendered co-worker. The court quickly rejected the claim, ruling merely sharing a restroom with a transgendered employee does not constitute harassment or religious discrimination.

Conversely, many transgendered individuals fear that being forced to use the restroom of their biological sex could lead to physical or sexual harassment. The employer must accommodate all employees' fears and concerns—no easy task.

As a general rule of thumb, employers should make a strong good-faith effort to determine which facilities are appropriate and make reasonable accommodations. A reasonable accommodation could include permitted use of a single stall or unisex restroom, if available.

Relegating a transgendered employee to a unisex bathroom, however, could hinder a transgendered person's reintegration in the workplace as a new gender. An employer may only make a reasonable inquiry into an employee's gender to determine the appropriate restroom rather than an invasive and overbroad investigation, which could subject the employer to a lawsuit for invasion of privacy. For example, the EEOC just recently issued guidance that it is unlawful for an employer to inquire into surgeries or medical procedures as a pre-condition to restroom usage. Moreover, government identification may not always be an accurate indicator, as certain states do not even permit an individual to legally change their gender.

Another common issue is the enforcement of dress codes and grooming policies. Physicians and psychologists alike have stated that it is crucial to the health and well-being of transgendered people to live in accordance with their gender identity. Gender-specific dress codes and grooming policies are lawful as long as they serve a legitimate purpose, such as promoting corporate image or safety. There is one huge caveat. The employer does not have free reign to force a transgendered individual to conform to gender-specific appearance. To avoid liability under a sex stereotyping theory, all dress codes and grooming policies must be applied and enforced uniformly. Any discretionary enforcement of the dress code to the transgendered employee could lead to a Title VII claim of discrimination. Thus, removing gender-specific rules from a dress code or grooming policy is still the best way to avoid liability.

It is also vitally important for employers to address a transgendered employee by the proper pronoun. If employers or co-workers are unsure of how to refer to a transgendered employee, it is usually recommended to first ask the transgendered employee. Once the transgendered employee states a preference, the employer should adhere to that preference. An employee's preferred name, if different than written on their birth certificate, should be

used in staff directories, business cards, websites, and other internal and external communications and records. A co-worker's repeated failure to use the proper pronoun could be considered harassment. Therefore, monitor this issue carefully.

Additionally, a prospective employee has no duty to disclose that he or she is transgender, or his or her intentions to begin the transitioning process, during the hiring and interview process. Rescinding a job offer after learning an employee's transgender history or intentions has been repeatedly ruled as discrimination under Title VII. Concerns about co-workers' biases or discrimination is not a legitimate reason to rescind a job offer. Nor can failure to disclose be considered deceptive or a sign of untruthfulness for purposes of terminating an employee. Likewise, if an employee has already undergone sex reassignment surgery, the employee's transgender status should be kept confidential.

One method to help prevent liability and discrimination is to have a gender transition plan in place for supervisors and co-workers to follow. This plan should contain a timeline of the transitioning employee's milestones, as well as written agreements regarding appearance, dress code and use of gender-specific facilities. The plan should also include a main contact for the transgendered employee as well as co-workers to seek out for any questions or concerns. A gender transition plan may help reduce uncertainties and create a support team for all individuals involved. While it is certainly natural for supervisors and co-workers to have questions, it is imperative that these situations are handled with the utmost sensitivity and respect. Being prepared and open-minded is key.

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