

UPDATE ON GENDER IDENTITY AND TRANSGENDER ISSUES IN THE WORKPLACE

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GENDER IDENTITY

- Gender v. Sex
- Gender Identity
- Gender Expression
- Transitioning Genders
 - Social
 - Surgical
 - “Passing”

COMMON TERMS

- Transgender/cisgender – relationship of gender identity to gender assigned at birth
- Transexual – disfavored (focuses on physical)
- Gender dysphoria – diagnosis (controversial)
- Transvestite – refers to clothing
- Drag – assume gender, usually for entertainment
- Bigender/trigender/pangender – not binary
- LGB“T”Q
- If you don’t know, ask.

INCLUSIVITY LEVELS

- Tolerance
- Acceptance
- Fully Inclusive

PROVIDING AN INCLUSIVE, SAFE ENVIRONMENT

- Pronouns
 - Transgender woman = him to her
 - Transgender man = her to him
 - Unsure? Ask them (preferably in a private setting)
- Personal Safety When Traveling
- Do's and Don'ts
 - Do not “out” a trans person
 - Do not ask about hormones, surgery, sexual anatomy

THE GREAT BATHROOM DEBATE

- **Occupational Safety and Health Administration**
 - Sanitation Standards – 29 C.F.R. 1910.141(c)
 - “Best Practices” – allow use of restroom that “corresponds to their gender identity”
- **Equal Employment Opportunity Commission**
 - Transitioning employees are not required to provide proof of medical transition to use facility of their choice

HYPOTHETICAL: EMPLOYEE IS CONSIDERING TRANSITIONING

- **Balancing privacy with safety and acceptance**
- **Conversation tips...**

SOCIAL SCIENCE RESEARCH

- **41% attempt suicide**
- **Higher rates of drug abuse, addiction, and domestic violence**
- **20% experience workplace harassment or discrimination**
- **1,412 EEOC complaints of transgender discrimination in 2015**

EMPLOYMENT DISCRIMINATION

- Cannot discriminate based on gender identity
 - Iowa Civil Rights Act – 2007 Amendment
 - Title VII – not explicit but interpreted to cover
- Two prongs – gender identity and sex
- How to handle in interviews:
 - Don't (unless applicant does)
- Intersection with disability discrimination
 - Transition issues; “perceived as”

FORMS OF DISCRIMINATION

- Failure to hire
- Discrimination based on intent to transition
- Denial of access to restrooms/facilities
- Harassment/hostile work environment
 - Includes failure to refer to as gender of identity
- Be careful not to single out with good intentions
 - Restrooms, travel accommodations
- Pregnancy/child care/leave policies

DEAR COLLEAGUE LETTER

- **May 13, 2016**
- **From DOJ and Dept. of Ed. – Title IX**
 - **Title IX prohibits sex discrimination in education**
- **Safe environment**
- **No documentation of gender**
- **Sex-segregated activities**
 - **Bathrooms**
 - **Travel**

DEAR COLLEAGUE LETTER

- Departments treat students as the gender with which they identify
- Cannot discriminate on the basis of sex
- “The desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students”
 - Client or coworker discomfort not a defense

CASE LAW

- ***Etsitty v. Utah Transit Auth.* – 502 F.3d 1215 (10th Cir. 2007)**
 - Concern of liability with public restroom use by transgender woman was legitimate reason to fire
 - *Price Waterhouse* theory does not protect
 - “an employer’s requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes”

CASE LAW

- ***Lewis v. Heartland*, 591 F.3d 1033 (8th Cir. 2010)**
 - Female terminated for not looking feminine
 - Reiterates validity of *Price Waterhouse*
- ***Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)**
 - Transgender discrimination is gender non-conforming discrimination under the Equal Protection Clause
- ***Macy v. Holder*, EEOC App. 0120120821 (2012)**
 - Title VII supports *Price Waterhouse* theory in transgender cases – shift in thinking about gender

CASE LAW

- ***Grimm v. Gloucester Co. Sch. Bd.*, 2016 WL 1567467 (4th Cir. 2016)**
 - Transgender male student – restroom access
 - District Court said schools could use sex to sort and student was female by birth
 - Reversed on appeal – did not defer to regulations
 - Regulations treat students as gender of identity

CASE LAW

- ***Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002)**
 - Female employee complained of religious and sex discrimination due to transgender woman in restroom
 - No reverse discrimination/hostile environment

RESOURCES

- **EEOC**
 - https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
- **Human Rights Campaign**
 - <http://www.hrc.org/explore/topic/workplace>
- **She's Not There**
 - Memoir by Colby College Professor Jennifer Finney Boylan
- **Getting to Ellen**
 - Memoir by Ellen Krug

QUESTIONS?

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