

TITLE VII IN A NEW ERA

GENDER ODYSSEY
AUGUST 10, 2018



Introduction

Topics Covered

- Introduction
- Federal Law
 - ▣ Title VII Basics
 - ▣ Cases to Watch For
 - ▣ What Happens at the EEOC?
- Questions

Employment Discrimination

- 37% of lesbian and gay people experienced workplace harassment in the last five years.
- 12% lost a job because of their sexual orientation.

-Brad Sears, et al., The Williams Institute, Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment 1-1 (2009). See also Jennifer C. Pizer, Brad Sears, Christy Mallory, and Nan D. Hunter, Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits, 45 Loy. L.A. L. Rev. 715 (2012).

Employment Discrimination

In a national survey of transgender people:

- ▣ Respondents experienced unemployment at twice the rate of the general population.
- ▣ 50% of respondents were harassed at work.
- ▣ 26% reported losing a job due to being transgender or gender non-conforming.

– *National Gay and Lesbian Task Force and National Center for Transgender Equality, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey” (2011)*

Fairness is good for the workplace

Of respondents who had lost a job due to being gender nonconforming or transgender, 58% were currently employed.

Of respondents living full-time in accordance with their gender identity, 78% said they felt more comfortable and their job performance improved.

Title VII

What the heck is it?

- Federal law
- Prohibits discrimination on the basis of sex, race, religion, color, or national origin
- Part of the Civil Rights Act of 1964
 - ▣ Title I – Voting Rights
 - ▣ Title II and III – Public Accommodations
 - ▣ Title IV – Schools
 - ▣ Title VI – Programs getting federal funds

Who is covered by it?

- 15+ employees
- Individual targets of discrimination
- Targets of discrimination based on association
- Targets of retaliation
- BFOQ does not apply

Who is not covered by it?

- Some federal employees (they have a separate EEO law)
- Federally recognized tribes
- Religious groups discriminating on the basis of religion or employing ministers
- Nonprofit membership organizations (e.g. Elks, Boy Scouts)

Discrimination/Harassment

What is Unlawful Discrimination?

- An adverse action (firing, demotion, failure to hire, failure to promote, severe or pervasive harassment)
- Taken **because of** protected characteristic
- With notice to the employer
- Without prompt or effective remedial action by the employer to stop it

Harassment/Hostile Work Environment

- Sufficiently severe or pervasive
- Subjectively and objectively offensive
- Negatively alters the terms and conditions of employment
- Employer on notice
- Employer must promptly take remedial action reasonably expected to end harassment

Examples

- Joe, a trans man, begins hormone therapy and grows a small beard. His boss tells him that while she supports him, customers might be offended, and reassigns him to work in the back office. Workers in that area are not entitled to shift differential pay, so Joe now earns about \$2.00 less per hour.

Examples

- Alexa, a trans woman, works in a shipping warehouse doing packaging and admin work. Sometimes, when reaching for a box or leaning over the counter, Alexa's shirt hikes up and shows a few inches of her back. Alexa's coworkers always point it out and say she's being flamboyant. They don't treat the other women this way. She told HR, but then she got written up for violating the dress code.

Sex Discrimination

Title VII

- Does it protect LGBT employees from discrimination *because of* being LGBT?
- Used to be no, but increasingly Title VII (and Title IX and Equal Protection Clause) has been interpreting GI/SO under “sex discrimination” and specifically failure to conform to sex stereotypes.

Title VII – sex stereotyping

- *Price Waterhouse v. Hopkins*
 - Coworkers described her as aggressive, demanding, needed a “course in charm school.” Her supervisor encouraged her to “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry” in order to improve her chances of promotion.
 - Result: *all* employees protected from discrimination based on being “too feminine/masculine,” “not masculine/feminine enough” (i.e. discrimination based on an employee’s failure to conform to sex stereotypes is unlawful under Title VII prohibitions against sex discrimination)

Title VII – same sex harassment

- *Oncale v. Sundowner Offshore Services*
 - ▣ Another expansion of the definitions/interpretation
- Result: same-sex sexual harassment is sex discrimination under Title VII.
- Justice Scalia noted in the majority opinion that, while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils"

The Big Picture

- Title VII does *not* explicitly list sexual orientation or gender identity among protected classes
- Through its sex discrimination protections, it protects employees who do not conform to sex stereotypes
- That has been interpreted to include transitioning employees and gnc LGB employees (and, once, a lesbian employee based solely on her same-sex relationship)
- *BUT* SCOTUS has not yet heard this question.

Case Studies – Aimee Stephens

- *EEOC v. R.G. & G.R Funeral Home*
 - ▣ Aimee Stephens, 57, funeral home director
 - ▣ Informed employer she was transgender, and would be following the employer’s dress code for women in the future
 - ▣ Employer objected and terminated Ms. Stephens
 - ▣ Ms. Stephens went to the EEOC, and with the EEOC and her own attorney, filed a claim of sex discrimination under Title VII

Case Studies – Aimee Stephens

□ Employer Defense

- Anti-discrimination law does not require employer to allow employee to adhere to female dress code
- Employing a trans worker interferes with employer's religious belief that “a person's sex (whether male or female) is an immutable God-given gift and that people should not deny or attempt to change their sex.”

Case Studies – Aimee Stephens

- 6th Circuit:
 - ▣ “Gender must be irrelevant to employment decisions.”
 - ▣ Employees may not be discriminated against because they fail to conform to “stereotypical gender norms”, e.g. “how biologically male persons should dress, appear, behave, and identify”
 - ▣ “An employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex.”

Case Studies – Aimee Stephens

What's next?

- Employer appealed to SCOTUS
- Worst-case SCOTUS scenario:
 - ▣ Congress was not thinking about transgender people when it passed the Civil Rights Act in 1964
 - ▣ RFRA protects the religious freedom of employers to enforce gender norms or to discriminate.
- What will happen? Hard to say.

Title VII and Health Care

Statute Language

- Title VII protects against discrimination in the “compensation, terms, conditions, or privileges” of employment.

42 U.S. Code § 2000e-2(a)

Other Laws to Look Out For

- ERISA – federal law which supercedes state law, governs most self-funded employer health plans
- ACA § 1557 – federal law prohibiting discrimination in ANY “health program or activity” that gets HHS money or participates in Health Insurance Marketplaces
 - ▣ BUT *Franciscan Alliance v. Burwell* case resulted in injunction against rules interpreting “sex discrimination” to include transgender people
- State anti-discrimination laws

Case Studies – Alina Boyden and Shannon Andrews

- *Boyden v. Conlin*, U.S. District Court for the Western District of Wisconsin (May 11, 2018)
 - ▣ Ms. Boyden and Ms. Andrews are trans women who sought gender transition care from their employer, the State of Wisconsin
 - ▣ WI and its third party administrator denied claims due to exclusion for gender transition treatment
 - ▣ Title VII, § 1557, and § 1983 claims

Case Studies – Alina Boyden and Shannon Andrews

- Employer argued that there was no evidence either State or plan administrator intended to discriminate
- Court said “disparate treatment is demonstrated by the terms of the policy itself.”
- So, no need to show any person or entity had bad feelings about transgender people – the benefits treated transgender people differently *because of* their gender, and that was enough.

Case Studies – Alina Boyden and Shannon Andrews

What's next?

- No appeal filed
- Plaintiffs moved for partial summary judgment (asking court to rule in their favor on one or more claims)
- No decision issued yet.
 - ▣ If yes, Plaintiffs win and WI can appeal
 - ▣ If no, the parties exchange evidence and have a trial, or settle

Case Studies – Brittany Tovar

- Tovar V. Essentia Health, 8th Cir. 2017
 - Brittany Tovar is mom to a son diagnosed with gender dysphoria, who she covered in her health insurance
 - Essentia’s health plan excluded “services and/or surgery for gender reassignment”
 - Because of the exclusion, Tovar paid out of pocket for some meds, and her son had to forego another med and was unable to obtain gender confirmation surgery
 - Title VII, §1557, and state law claims

Case Studies – Brittany Tovar

- Court held:
 - ▣ Title VII *does* protect transgender employees
 - ▣ Title VII prohibits discrimination because of *the employee's* sex
 - ▣ Brittany Tovar is cisgender, and her son is not an employee – thus, she is not the person harmed. Her son is, but he is not an employee.
 - Different from benefits for married couples because coverage for spouses is coexistent with coverage for the employee
 - Failure to cover son does not amount to discrimination against Brittany because of *her own* sex

Case Studies – Brittany Tovar

What's next?

- No appeal filed

- _(ツ)_/

Title VII and Intersectionality

“Sex Plus” Discrimination

- Policies or practices where employer classifies employees on the basis of sex plus another characteristic (e.g., race or age)
- Employers must consider protected traits as an “intersectional” whole, rather than separate or individual aspects

Case Studies – Marilyn Shazor

- *Shazor v. Prof'l Transit Mgmt., Ltd.*, 6th Cir., 2014
 - ▣ Marilyn Shazor is African American and a woman, accused by colleagues of being disloyal, disrespectful, and “one helluva bitch.”
 - ▣ Court said “African American women are subjected to unique stereotypes that neither African American men nor white women must endure.”
- *See also Franchina v. City of Providence*, 1st Cir., 2018

What is the EEOC?

EEOC Agency Power

- Interprets Title VII
- Enforces Title VII rights for federal employees through EEO process
- Issues decisions with persuasive power
- Receives complaints from private/public employees re: Title VII violations
 - ▣ Investigates
 - ▣ Mediates
 - ▣ Litigates (in cooperation with private counsel) or files statements of interest.

EEOC Cases

- April 2012, *Mia Macy v. Holder* explicitly held that when Title VII says it prevents discrimination on the basis of “sex,” that includes being transgender
- April 2015, *Tamara Lusardi v. John McHugh* (Secretary of the Army) says employees must be allowed access to the restroom facilities consistent with their gender identity, and cannot be prohibited in the name of accommodating others’ prejudices or discomfort

Why Do We Care About the EEOC?

- An employee **MUST** complete a charge of discrimination
 - ▣ Questionnaire
 - ▣ Interview
 - ▣ Sign Charge
 - ▣ Employer Response/Rebuttal
- **AND** receive a Right to Sue Letter
 - ▣ 90 days to file a lawsuit under Title VII

EEOC Deadlines

- 180 days (6 months) from date of last discriminatory incident
- 300 days IF state or local agency also enforces an anti-discrimination law on the same basis
- Ongoing discrimination: incidents must be related to each other (e.g. same type of discrimination, same discriminator or decision-maker)

State Law

Washington Law Against Discrimination

RCW 49.60

- **Freedom from discrimination – Declaration of civil rights.**
- The right to be free from discrimination because of race, creed, color, national origin, **sex**, honorably discharged veteran or military status, **sexual orientation**, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
 - (a) The right to obtain and hold employment without discrimination.
- 8+ employees, and employment agencies/recruiters

WLAD Definitions

- **"Sexual orientation"** means heterosexuality, homosexuality, bisexuality, and gender expression or identity.
 - "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

New WACs – November 2015

- WAC 162-32 added covering sexual orientation and gender identity; apply to employment
 - ▣ Medical or health care needs related to gender are covered in the same manner as requests for all other medical conditions
 - ▣ Employment benefits must be consistent between all employees

WAC 162-32

- “Harassment” includes:
 - ▣ Unwelcome questions about sexual orientation, gender identity/expression, transgender status
 - ▣ Intentionally causing distress by disclosing sexual orientation or gender identity/expression
 - ▣ Offensive terms or jokes re: sexual orientation, gender expression/identity
 - ▣ Deliberate misuse of an individual’s preferred name or gender pronoun

WAC 162-32

- Dress codes are permissible but cannot require an individual to dress/groom inconsistent with gender identity
- Gender segregated facilities shall be used according to an individual's gender identity
- Any removal of an individual from a gender segregated facility must be taken due to actions/behavior
- Options for private facilities for any individual are encouraged

WAC 162-12-140 - Pre-employment Inquiries

- Can ask whether employee has worked under another name
- Cannot ask inquire into original name where a legal name change exists, and cannot ask questions that would divulge trans status.
- Cannot ask about marital status
- Any inquiry concerning sexual orientation, gender identity, gender expression, or transgender status is prohibited.

Bona Fide Occupational Qualification

- Can sex-segregate where BFOQ applies
- Should be applied narrowly
 - When necessary for the purpose of authenticity (e.g., model, actor/actress)
 - When necessary to maintain conventional standards of sexual privacy (e.g., locker room attendant)



Best Practices – Transitioning at Work

Transitioning at Work – Employees

- Transgender employees have the right to:
 - Talk confidentially to HR or supervisor about intent to transition
 - Use their chosen name/pronoun, regardless of their legal name or gender designation
 - Use the restroom or locker room that is best for them, regardless of their legal gender designation
 - Access medical leave for transition-related medical needs
 - The same privacy and respect afforded cis employees

Transitioning at Work - Management

- Management/HR can:
 - ▣ Announce the employee's name and pronoun to relevant colleagues
 - ▣ Express support for the transitioning employee
 - ▣ Explain company policies regarding anti-discrimination
 - ▣ Communicate restroom/locker room use
 - ▣ Encourage uncomfortable employees to talk with HR and NOT the transitioning employee
 - ▣ Come up with a script for employees to use when customers, etc. have questions (“Sue is a valued member of our team. We are proud of her and we don’t discriminate.”)
 - ▣ Make a checklist for updates to email, nametag, org charts, other HR paperwork, and implement on the day of transition
 - ▣ Change documents when possible, keep confidential when not possible

Thank you!



J. Denise Diskin
Teller & Associates, PLLC
206-324-8969
denise@stellerlaw.com