



# Transgender Law Center

*Making Authentic Lives Possible*

1

## **EMPLOYMENT LAW AND TRANSGENDER CLIENTS**

AIDS Legal Referral Panel (ALRP) MCLE  
December 7, 2016

### AGENDA

- Welcome
- Commonly Used Terms
- Review of Relevant State and Federal Law
- Working with Transgender Clients & Coworkers
- Questions & Answers

# Commonly Used Terms

2

## **Sex Assigned At Birth**

The classification of people as male, female, intersex at birth, usually based on physical anatomy.

## **Gender Identity**

A person's internal, deeply-felt sense of being male, female, something other or in-between.

## **Gender Expression**

An individual's characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine.

# Commonly Used Terms

3

## **Transgender / Trans**

An umbrella term that can be used to describe people whose gender expression is nonconforming and/or whose gender identity is different from their sex assigned at birth.

- Male to Female – MTF – Transgender Woman
- Female to Male – FTM – Transgender Man
- Nonbinary – Genderqueer – Gender Nonconforming

## **Cisgender / Cis**

A term for people whose gender identity matches their sex assigned at birth.

# Commonly Used Terms

4

## **Sexual Orientation**

A person's emotional and sexual attraction to other people based on the gender of the other person. Examples include lesbian, gay, heterosexual, bisexual.

# Commonly Used Terms

5

## Gender Transition

The process of changing gender roles from one's birth assigned gender to one's gender identity. For some people, it involves social, legal, and medical aspects. For some, transition is complex process that takes place over a long period of time, while for others it happens more quickly.

**“Social Transition”** may include coming out; telling family, friends, and/or co-workers; changing one's name and/or sex on legal documents.

# Commonly Used Terms

6

## **“Medical Transition”**

- Transition related health care can include a variety of treatments such as:
  - ✦ Hormone therapy
  - ✦ Gender identity-related mental health services
  - ✦ Electrolysis and laser hair removal
  - ✦ Surgeries
- Contrary to popular belief, there is no one “surgery” for transgender people.
  - Many if not most transgender people never have any kind of gender reassignment surgery

# Employment Challenges

7

## **From the National Transgender Discrimination Survey:**

- 90% experienced employment discrimination
- 16% moved to underground economy
- Unemployment 2X national average - up to 4X for people of color

# State of the Law

8

## **Survey of Federal and State Law**



# Federal Law

9

A variety of federal laws and policies protect transgender people:

- Hate Crimes
- Violence Against Women Act
- Title VII
- Title IX
- Affordable Care Act
- HUD Regulations
- Identity documents: Passport, Social Security

# Federal Employment Law

10

## **Title VII of the Civil Rights Act of 1964**

- 42 U.S.C. § 2000e-2(a)
- prohibits job discrimination based on race, sex, color, religion, and national origin
- applies to all federal employers and federal contractors and to private employers with 15 or more employees

# Early Cases

11

- Cases in the 1970s and 80s:
  - Sex discrimination laws don't protect transgender people:
    - ✦ "Plain meaning" of sex is "biological sex"
    - ✦ Presumed congressional intent
    - ✦ Legislative history re adding sexual orientation to Title VII
  - E.g., *Ulane v. E. Airlines, Inc.* (7th Cir. 1984)

"It is clear from the evidence that if Eastern did discriminate...it was not because she is female, but because Ulane is a transsexual – a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."

# The Turning Point

12

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

- Female employee told she needed to “walk more femininely, talk more femininely, wear make-up have her hair styled, and wear jewelry” and “go to charm school.”
- **Holding: Sex stereotyping = sex discrimination.**
- “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

# The Turning Point

13

*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)

- Holding: Same-sex harassment = sex discrimination.
- “Statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”
  - *I.e.*, **congressional intent does not control.**

# Post-*Price Waterhouse*

14

From 2000 on:

- Discrimination against trans people = sex stereotyping = sex discrimination
- Logic of earlier trans cases overruled by *Price Waterhouse*
- *E.g., Smith v. Salem* (6th Cir. 2004)
  - Trans employee penalized for dressing femininely can bring sex-stereotyping claim – reverse *Price Waterhouse* situation

# Post-Price Waterhouse

15

- *E.g., Glenn v. Brumby* (11th Cir. 2011)
  - Intermediate scrutiny under Equal Protection Clause
  - Discrimination against trans people is always based on sex stereotypes
- *E.g., Schroer v. Billington* (D.D.C. 2008)
  - Analogy to discrimination against religious converts
  - Discrimination against trans people is literally sex discrimination

# Workplace Protections

16

## ***Macy v. Holder*** **(EEOC 2012)**

- Firing or not hiring someone just because they are trans is sex discrimination.
- *Macy* is particularly important in the 32 states without explicit gender identity protections.
- Confirmed the trend in court decisions and gives the EEOC's stamp of approval.





# Legal Protections

17



## ***Lusardi v. McHugh*** **(EEOC 2015)**

- “Misgendering” a trans employee with the wrong name and pronoun can create a hostile work environment
- Denying a trans employee use of the restroom consistent with their gender identity is sex discrimination

# Recent Employment Decisions

18

- *Bradley v. Roberts v. Clark Cty. Sch. Dist.*, No. 2016 WL 5843046 (D. Nev. Oct. 4, 2016)
  - Discrimination against a trans person is sex discrimination under Title VII.
  - Excluding a transgender person from the restroom used by others of the same gender identity violates Title VII.
- *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509 (D. Conn. 2016)
  - Discrimination against a trans person is sex discrimination under Title VII.

## *"But see"*

19

- *Texas v. United States*, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016)
  - Notice of appeal filed by the DOJ on 10/14/2016.
- *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 WL 4396083 (E.D. Mich. Aug. 18, 2016)
  - Notice of appeal filed by the EEOC on 10/13/2016.
- *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016)
  - Briefing at SCOTUS underway

# California Law

20

California prohibits discrimination based upon gender identity and expression in virtually every area of public life:

- Employment
- Public Accommodations
- Education
- Housing
- Insurance
- Hate Crimes
- Marriage & Child Custody

\* Many cities and counties have additional nondiscrimination laws including Los Angeles, Oakland, San Diego, San Francisco, Santa Cruz, West Hollywood

# California Employment Law

21

## Fair Employment and Housing Act (FEHA)

- “It is unlawful for an employer to refuse to hire or employ a person or to discharge a person from employment or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of the person’s...gender identity or gender expression”  
Cal. Gov’t Code § 12940(a)
- **Discrimination** prohibition applies to government & private employers with 5 or more employees
- **Harassment** prohibition applies to all employers
- EEOC **filing deadline** extended from 180 days to 300.

# California Employment Law

22

## Dress Codes

Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards . . . **provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity.** Cal. Gov't. Code §12949.

# California Employment Law

23



# Common Examples of Discrimination

24

- Terminating or failing to hire someone because they are transgender (E.g., Mia Macy)
- Limiting a transgender employee's interaction with customers because they might not be "comfortable"
- Prohibiting a transgender employee from dressing or appearing in accordance with their gender identity (E.g., Victoria)



# Common Examples of Discrimination

25

- Denying a transgender woman access to the women's restroom, or denying a transgender man access to the men's restroom (E.g., Tamara Lusardi, Andy)
- For sex-segregated jobs or tasks, requiring a transgender man to work as a woman, or a transgender woman to work as a man (E.g., Andy)
- Repeatedly calling a transgender person by the wrong pronouns or name (E.g., Tamara, Gabe)

# Common Examples of Discrimination

26

- Asking inappropriate personal questions about a transgender person's medical treatment or their body parts
- "Outing" a transgender person to others without permission. A person's transgender status is private medical information that is protected under laws like HIPAA.

# Common Examples of Discrimination

27

- Requiring a transgender person to present a birth certificate or a court-ordered name or gender change before the employer will agree to respect their gender identity
- Having discriminatory exclusions for treatment related to gender transition in an employee health plan

# Identity Documents

28

- **Federal Documents** (removed surgery requirement)
  - Passport Agency (2011)
  - Social Security Administration (2013)
- **California**
  - Removed surgery requirement for gender change (2011)
  - AB 1121 (2013)
    - ✦ Created administrative option for birth certificate gender marker changes
    - ✦ Removed publication & hearing requirement for name changes

# Health Care Access

29

- Insurance regulations:
  - California
    - ✦ Department of Managed Health Care (DMHC)
    - ✦ Department of Insurance
  - 14 other states + D.C.
- Affordable Care Act: § 1557
- Employment discrimination laws

# Transgender Law Center

30

## **Best Practices for Working with Transgender Clients and Co-Workers**

# Tips for Working with Transgender Clients

31

1. Use correct pronouns and name on all intakes, narratives, timelines, letters to clients, pleadings, and court documents, even if the client has not had a legal name/gender change.

See: Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)\*

\*FN 1: "In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun. See, e.g., Murray v. United States Bureau of Prisons, 106 F.3d 401, 401 n.1 (6th Cir.1997) (unpublished disposition); Meriwether v. Faulkner, 821 F.2d 408, 408 n. 1 (7th Cir.1987)."

# Tips for Working with Transgender Clients

32

2. Always refer to transgender persons by the name and pronoun that corresponds with their gender identity

- Use “she” for transgender women and “he” for transgender men, even if you are not in the client’s presence.
- If you are unsure about a person’s gender identity or how they wish to be addressed, ask politely and privately for clarification.
- If you are not sure which pronoun to use, and you cannot ask the person privately, avoid using pronouns all together.
- A growing number of transgender and gender nonconforming people use gender neutral pronouns like “they/them/their” or “ze/zem/zir”



# Tips for Working with Transgender Clients

33

3. It generally is inappropriate to ask a transgender person about whether they have had medical treatments in furtherance of their gender transition.
  - Whether or not a person has accessed medical treatment in furtherance of their gender transition does not affect their legal rights.
4. Educate colleagues and opposing counsel
  - Use correct name and pronouns in pleadings
  - Object & educate
  - Ask to approach the bench if counsel (or the judge) insists on misgendering your client
  - Report harassment to State Bar or Commission on Judicial Performance

# Tips for Working with Transgender Coworkers

34

## Transition Your Workplace:

- Add gender identity and expression to non-discrimination policies
- Create policies and procedures addressing common issues faced by transgender people in the workplace
- Train all levels of organizations on policies and procedures
- Transition intake forms to include “preferred name” and pronouns
- Ensure health insurance policies are transgender-inclusive

# Tips for Working with Transgender Coworkers

35

## Create Policies and Procedures to Address Gender Change and Nondiscrimination in the Workplace:

Policies & procedures should cover...

- Name changes and identification (emails, system logins, etc.)
- Employee privacy
- Restroom access
- Dress codes
- Sex-segregated job assignments
- Guidelines for employees transitioning on the job
- Health insurance access
- Identify and remove barriers in hiring

# Working with Transgender Clients & Coworkers

36

## Use Common Sense:

- Be polite: It's easy to show respect
- Don't gossip: Respect transgender people's confidentiality and privacy
- Be an ally:
  - Help colleagues who are having trouble with another employee's transition
  - Become knowledgeable about transgender issues
  - Don't assume your transgender colleagues know everything about transgender issues

# Questions?

37

- Questions? (There are no dumb questions!)
- Join TLC's Cooperating Attorney Network:

**[www.transgenderlawcenter.org/cooperate](http://www.transgenderlawcenter.org/cooperate)**

# Contact Info

38



# Transgender Law Center

*Making Authentic Lives Possible*

[www.transgenderlawcenter.org](http://www.transgenderlawcenter.org)

Shawn Thomas Meerkamper, Staff Attorney

[shawn@transgenderlawcenter.org](mailto:shawn@transgenderlawcenter.org)

(415) 865-0176 x303