



Gender Identity, and Sexual Orientation Discrimination in the Workplace – Part I – Know the Terminology

LexVid CLE 2022

PRESENTED BY:

COLLEEN M. QUINN, ESQ.

QUINN LAW CENTERS

PERSONAL INJURY, EMPLOYMENT & FAMILY LAW ATTORNEYS

1802 BAYBERRY COURT, SUITE 103, RICHMOND, VA 23226

COLLEEN@QUINNLAWCENTERS.COM

804-545-9406

PART I – LGBTQI CULTURAL COMPETENCY
- BE EDUCATED AND EDUCATE YOUR TEAM
PART II – ADDRESSING THE CASE LAW ON GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION

1 Respect Your Clients, Customers & Employees & Prospective Clients, Customer & Employees

By knowing and using proper and respectful terminology


WE
ARE
ALL
THE
SAME
INSIDE


I'm gay
I'm lesbian
I am bisexual
I am transgender
I am like you
I'm human

Know the Letters:

L	**Lesbian**
G	**Gay**
B	**Bisexual**
T	**Transgender**
Q	**Queer/Questioning**
I	**Intersex**
GNC	**Gender Non-Conforming**
A	**Asexual**

SEXUAL ORIENTATION

AND

GENDER IDENTITY

ARE TWO DIFFERENT CONCEPTS…

SEXUAL ORIENTATION
is who you go home to

GENDER IDENTITY
is who you go home as.



GENDER IDENTITY

Gender Non-Conforming: A term for individuals whose gender expression/behavior is different from societal expectations and/or stereotypes related to gender.

Gender Queer: A term which generally refers to a person who does not accept a gender binary world and refuses to conform their behavior to any gender stereotypical behavior.

Gender Identity: A person's innate, deeply-felt psychological identification as a man, a woman, or some other status, which may or may not correspond with their external body or sex assigned at birth (i.e. listed on their birth certificate).

Gender Expression: The external manifestation of a person's gender identity, which may or may not conform to the socially-defined behaviors and external characteristics that are commonly referred to as either masculine or feminine. These behaviors and characteristics are expressed through movement, dress, grooming, hairstyles, jewelry, mannerisms, physical characteristics, social interactions, and speech patterns (voice).

Gender is a spectrum.

Cross-Dresser: A term for people who dress in clothing not typically worn by their assigned birth sex, but who generally do not desire to live full-time as the other gender.

Intersex: Biologically, a person who was born with both female and male or indescript sexual genitalia or chromosomal differences that create secondary sexual characteristics .

Definitions: Transgender People

Transgender: An umbrella term for people whose gender identity and/or gender expression differ from their assigned sex at birth (i.e., the sex listed on their birth certificates). **Not all transgender people want to live as the sex opposite of the one they were assigned at birth.** Individuals who cross dress, live androgynously or do not live their life in a gender binary manner (gender queer) are all within the umbrella term "transgender." The preferred use of the word transgender is as an adjective and not a noun or a verb. (*Tony is a transgender man* - NOT *Tony is a transgender*. OR *Tony is transgendered.)*

Transgender Man: A term for a transgender individual who, assigned female at birth, currently identifies as a man. This is sometimes shortened to transman.

Transgender Woman: A term for a transgender individual who, assigned male at birth, currently identifies as a woman. This is sometimes shortened to transwoman.

Transsexual: People whose gender identity differs from their assigned sex at birth (i.e., the sex listed on their birth certificates). People who, often on a full-time basis, live their lives as a member of the sex opposite of their birth-designated sex. They may or may not take hormones or have surgery. **This term is hotly debated within the transgender community and should be utilized only if the individual is comfortable with the term.**

Definitions: Transgender People

Gender Affirmation or Transition: When an individual begins to live as the sex opposite of the one assigned at birth that process is referred to as transitioning or going through the gender affirmation process.

Process of Self-Authorization

Three phases of transition: social, legal and medical

Definitions: Transgender People
Medical/Psychological

Gender Dysphoria: is a DSM V diagnosis – not a term of general usage that describes a strong and persistent cross-gender identification and persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex which causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Some, but not all, transgender individuals have gender dysphoria. This has been, and in some literature, still is referred to as “gender identity disorder,” however, many in the community consider the use of disorder to be offensive and gender dysphoria is now the preferred technical term.

Definitions: Transgender People
Medical/Psychological

Gender Reassignment Surgery (Also referred to as Gender Confirming Surgery or Gender Affirming Surgery): Terms that refers to various surgical procedures that change one's body to align gender identity and presentation. Contrary to popular belief, there is not one surgery; in fact there are many different surgeries.

Hormone Therapy: The administration of hormones to facilitate the development of secondary sex characteristics as part of a medical transition process. Those medically transitioning from female to male may take testosterone while those transitioning from male to female may take estrogen and androgen blockers.

Definitions: Transgender People
Medical/Psychological

Children: Lupron used to suppress puberty and the development of secondary sex characteristics that can exacerbate gender dysphoria symptoms and make transitions at adulthood less successful. Reversible effect upon termination of therapy.

WPATH: World Professional Association for Transgender Health (www.WPATH.org) debate on hormone therapy and surgery for minors.

RESPECT

Words not to use because they are out dated or considered offensive – “trannie,” “tranny,” “she-male,” “he-she,” ‘it,” “transvestite,” “sex change,” “sex change operation.”

Whenever possible, use a transgender person's chosen name even if it is not their legal name. Often transgender people cannot afford a legal name change or are not yet old enough to change their name legally. They should be afforded the same respect for their chosen name as anyone else who lives by a name other than their birth name (e.g., celebrities).

RESPECT

If it is not possible to ask a transgender person which pronoun he or she prefers, use the pronoun that is consistent with the person's appearance and gender expression. For example, if a person wears a dress and uses the name Susan, feminine pronouns are appropriate. If it is not obvious – try to avoid any use of gender terms until you can ask the person's preference.

When describing transgender people, please use the correct term or terms to describe their gender identity. For example, a person who was assigned male at birth and transitions to female is a *transgender woman*, whereas a person who was assigned female at birth and transitions to male is a *transgender man*.

Transgender People
"They"
Times Insider Excerpt April 2017

Grammar conventions are shifting just as quickly. Efforts to introduce nonstandard pronouns, some of which date to as early as the 1850s, have generated a vast array of alternatives, none of which have taken off, including "xe," "ze," "phe," "er," "ou." In 1884, several newspapers tried to make "thon" happen. And increasingly, courtesy titles like "Mr." and "Ms." are having to make room for novel varieties like "Mx." — pronounced "mix." Today, many transgender people prefer the conventional "he" or "she," but those who have adopted "they," "them" and "theirs" as personal pronouns have become much more visible. Both The Washington Post and The Associated Press recently began permitting the singular "they" in their reporting on a case-by-case basis.

In some cases, a reporter finds a write-around, like avoiding pronouns altogether. Other times the reporter confronts the terminology head-on in the introduction or body of the article. But readers will never find an unheralded "thon" in the paper.

CASE EXAMPLE – BETSY & BO

And How Does An English Major – or Any Good Writer Handle?

Tip: Watch the TV show "Billions" on Showtime

Definitions: SEXUAL ORIENTATION

Sexual Orientation: A term describing a person's attraction to members of the same gender and/or different gender. Sexual orientation and gender identity are different concepts.

Gay: A terms used to describe a male who is sexually and emotionally attracted to other males. Also a generally descriptive term for gay men or lesbians. Many lesbians prefer to be called "lesbian" however.

Lesbian: A term used to describe a female who is sexually and emotionally attracted to other females.

Bisexual: A term used to describe a male or female who is sexually and emotionally attracted to both sexes.

Questioning: A term used to describe a person who is unsure and is questioning their sexual orientation.

Heterosexual/Straight: A terms used to describe a person who is sexually and emotionally attracted to persons of the opposite sex.

Gender Queer: People who do not ascribe to a binary notion of sex/gender.

Asexual: Person with no desire for a sexual relationship with anyone

Definitions: SEXUAL ORIENTATION

Words not to use:

Offensive: "homosexual" (n. or adj.)

Preferred: "gay" (adj.); "gay man" or "lesbian" (n.); "gay person/people;"
“bi/bisexual” (n) (adj.)

Please use gay or lesbian to describe people attracted to members of the same sex. Because of the clinical history of the word "homosexual," it is aggressively used by anti-gay extremists to suggest that gay people are somehow diseased or psychologically/emotionally disordered – notions discredited by the American Psychological Association and the American Psychiatric Association in the 1970s. Please avoid using "homosexual.”

Definitions: SEXUAL ORIENTATION

Words not to use:

Offensive: "sexual preference"

Preferred: "sexual orientation" or "orientation" The term "sexual preference" is typically used to suggest that being lesbian, gay or bisexual is a choice and therefore can and should be "cured." *Sexual orientation* is the accurate description of an individual's enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex and is inclusive of lesbians, gay men, bisexuals, as well as straight men and women.

SEXUAL ORIENTATION

Words not to use:

Offensive: "homosexual relations/relationship," "homosexual couple," "homosexual sex," etc.

Preferred: "relationship," "couple" (or, if necessary, "gay couple" or "same-sex couple"), "sex," etc. Identifying a same-sex couple as "a homosexual couple," characterizing their relationship as "a homosexual relationship," or identifying their intimacy as "homosexual sex" is extremely offensive and should be avoided. These constructions are frequently used by anti-gay extremists to denigrate gay people, couples and relationships.

As a rule, try to avoid labeling an activity, emotion or relationship gay, lesbian, or bisexual unless you would call the same activity, emotion or relationship "straight" if engaged in by someone of another orientation. In most cases, your listeners will be able to discern people's sexes and/or orientations through the names of the parties involved, your depictions of their relationships, and your use of pronouns.

Definitions: SEXUAL ORIENTATION

Words not to use:

Offensive: "gay lifestyle" or "homosexual lifestyle”

Preferred: "gay lives," "gay and lesbian lives" There is no single lesbian, gay or bisexual lifestyle. Lesbians, gay men and bisexuals are diverse in the ways they lead their lives. The phrase "gay lifestyle" is used to denigrate lesbians, gay men, and bisexuals suggesting that their orientation is a choice and therefore can and should be "cured."

Definitions: SEXUAL ORIENTATION

Words not to use:

Offensive: "admitted homosexual" or "avowed homosexual"

Preferred: "openly lesbian," "openly gay," "openly bisexual," or simply "out"
Dated term used to describe those who self-identify as gay, lesbian or bisexual in their personal, public, and/or professional lives. The words "admitted" or "avowed" suggest that being gay is somehow shameful or inherently secretive. You may also simply describe the person as being out, for example: "Ricky Martin is an out pop star from Puerto Rico."

Definitions: SEXUAL ORIENTATION

Derogatory Language – don't use and don't allow anyone else to use.

"fag," "faggot," "dyke," "homo," "sodomite," and similar epithets

These derogatory terms should be treated in the same manner as vulgar epithets used to target other groups. They should not be used except in a direct quote that reveals the bias of the person quoted. So that such words are not given credibility in the media, it is preferred that reporters say, "The person used a derogatory word for a lesbian, gay, bisexual or transgender person."

Definitions: SEXUAL ORIENTATION

Derogatory Language – don't use and don't allow anyone else to use.

"deviant," "disordered," "dysfunctional," "diseased," "perverted," "destructive" and similar descriptions

The notion that being gay, lesbian or bisexual is a psychological disorder was discredited by the American Psychological Association and the American Psychiatric Association in the 1970s. Today, words such as "deviant," "diseased" and "disordered" often are used to portray LGBT people as less than human, mentally ill, or as a danger to society.

SEXUAL ORIENTATION

Derogatory Language – don't use and don't allow anyone else to use.

Associating gay, lesbian, bisexual and transgender people with pedophilia, child abuse, sexual abuse, bestiality, bigamy, adultery and/or incest or any "deviant" or anti-social behavior

Being gay, lesbian, bisexual or transgender is neither synonymous with, nor indicative of, any tendency toward pedophilia, child abuse, sexual abuse, bestiality, bigamy, adultery and/or incest. Such claims, innuendoes and associations often are used to insinuate that LGBT people pose a threat to society, to families, and to children in particular.

Per Urban Dictionary:

Polyamory:

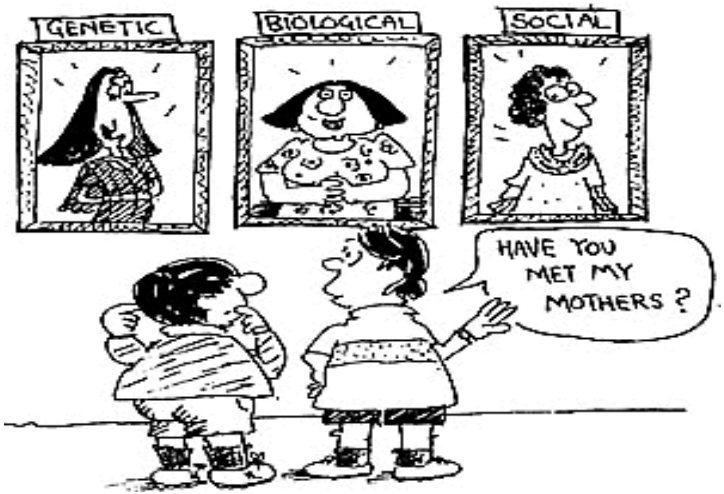
- A form of relationship involving more than two people. The relationships may be symmetrical (like a triangle), or something more complex. The relationships may also be open or closed, straight or gay, or a mixture.
  A purely heterosexual form of polyamorous marriage was once practiced among the Tibetans: each man had many wives, and each woman had many husbands. This raises the possible of your brother also being your husband-in-law-in-law.

What is Polyamory?

From Wickipedia:

- **Polyamory** (from Greek πολύ *poly*, "many, several", and Latin *amor*, "love") is the practice of or desire for intimate relationships with more than one partner, with the knowledge of all partners. It has been described as "consensual, ethical, and responsible non-monogamy"
- People who identify as polyamorous reject the view that sexual and relational exclusivity are necessary for deep, committed, long-term loving relationships. Those who are open to or emotionally suited for polyamory may embark on a polyamorous relationship when single or already in a monogamous or open relationship.
- Polyamorous arrangements are varied, reflecting the choices and philosophies of the individuals involved, but with recurring themes or values, such as love, intimacy, honesty, integrity, equality, communication, and commitment.
- Confusion arises when *polyamory* is misapplied in a broader sense, as an umbrella term for various forms of consensual non-monogamous, multi-partner relationships (including **polyamory**), or consensual non-exclusive sexual or romantic relationships.

SEXUAL ORIENTATION - POLYAMORY



State of the law since *Obergefell v. Hodges* (2015)

- ALL married couples are entitled to have their marriage recognized.
- However LGBTQ couples still are encountering issues in being recognized as legitimate parents– especially with the marital presumption NOT applying to whether their legal parentage is valid – by way of example:
  - *Stankevich v. Milliron* (Mich. App. 2015) (where married and had child with each other by agreement – yet upon split - bio mom tried to say non-bio mom not a parent)
  - *Ex parte E.L. (In re: E.L. v V.L.)* (Supreme Court of Alabama 2015) (bio mom tried to invalidate Georgia step-parent adoption by non-bio mom in Alabama), on appeal US Supreme Court held ALL adoption orders must be given full faith & credit by other states. See *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). Does NOT apply to birth certificates. Same-sex couples still need an Order.


YOU MAY NOW KISS THE SUPREME COURT.
©FLORIDA TODAY and FORT MYERS NEWS-PRESS
JEFF PARKER
CAGLECARTOONS.COM

2 Relationship Building

Ensuring an LGBTQI Friendly Work Environment

Company Employee, Customer or Client Intake

- Intake Forms – Do they ask for the person's sex or marital status?
- If yes, is that necessary to the intake?
- If yes and necessary to the intake – is the wording appropriate?
- Upon presentation of an individual whose sexual identity is not clear, but whose sexual identity is not germane to the attorney-client relationship, simply ask for the name and call the client or customer by name.

Intake (cont)

- Upon presentation of an individual whose sexual identity must be known as part of the representation (and it is not clear from appearance and name), simply ask “how do you identify in terms of your gender?” and if the info must be known (for example, in a legal proceeding) – “is that the same gender that is on your identification documents?”

Intake (cont)

- Do not hesitate to explain why proper gender identification is necessary.
- In some cases – proof of gender identification may be necessary to legal processes, insurance forms or to statutory requirements.

Making Your Company or Office LGBTQI Friendly:



Make Your Company or Office LGBTQI Friendly:



Making your Company LGBT Friendly

- Add your LGBT friendly commitment to your website – e.g. “All are welcome here”
- Have employees add their preferred pronouns to email signature blocks – e.g. she/her/hers
- Ensure LGBTQI friendly materials in the lobby
- Stay Educated, Seek Out & Support LGBT Resources – Join:
  - The LGBT Bar Association
  - The Virginia Equality Bar Association or the equivalent in your state
  - Gay RVA or your state equivalent

PART II: GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE

BY COLLEEN M. QUINN, QUINN LAW CENTERS,
COLLEEN@QUINNLAWCENTERS.COM

LEXVID CLE 2022

WHAT IS GENDER IDENTITY?

- Gender identity – One's innermost concept of self as male, female, blend of both, or neither. It's how individuals perceive themselves and refer to themselves.
- Gender identity can be the same or different from someone's assigned sex at birth

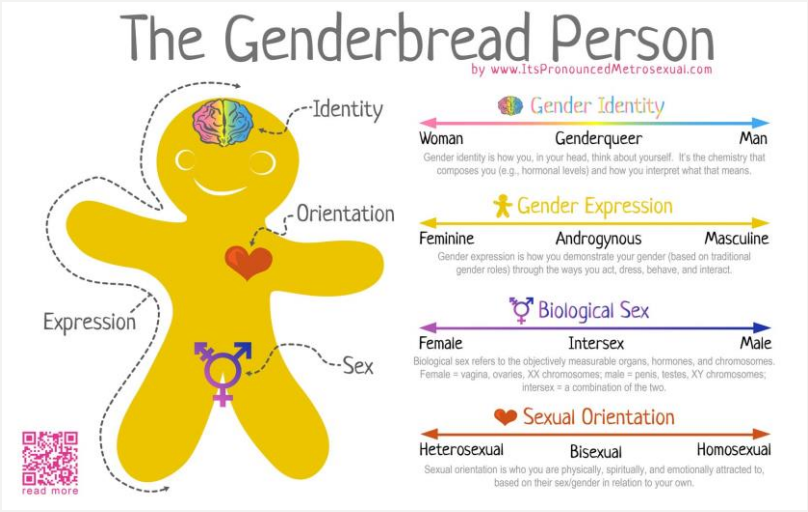
Citation: https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions



WHAT'S THE DIFFERENCE BETWEEN GENDER IDENTITY AND SEXUAL ORIENTATION?

- Gender identity = which gender you identify (or don't identify) with
- Sexual orientation = who you are romantically, physically, emotionally, sexually attracted to
- Sam Killermann (pronouns: he/him) says "gender is who you go to bed as, sex is who you got to bed with"

Citation: https://www.samuelkillermann.com/,


The Genderbread Person
by www.ItsPronouncedMetrosexual.com
Identity
Orientation
Expression
Sex
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.

SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ARE NOW PROTECTED

- Gender identity and sexual orientation are protected classes under Title VII
- How did that Happen?
- US Supreme Court ruling BOSTOCK v. CLAYTON COUNTY, GEORGIA, cert from THE ELEVENTH CIRCUIT
- No. 17–1618. Argued October 8, 2019; Decided June 15, 2020
- Actually was a combination of three cases on appeal
- So what were they and what was the ruling and what led up to that? Let's look.

SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ARE NOW PROTECTED – THE 2 OTHER CASES:

- ALTITUDE EXPRESS, INC., ET AL., PETITIONERS v. MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA; ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
- R.G. & G.R. HARRIS FUNERAL HOMES, INC., v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.; ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SCOTUS DECISION:

- The Supreme Court accepted three cases that ask whether federal anti-discrimination laws should apply to sexual orientation and gender identity in the workplace, putting the court on track to consider high-profile LGBTQ issues after its next term begins this fall.
- Two of the cases — *Bostock v. Clayton County, Georgia*, and *Altitude Express, Inc. v. Zarda* — were consolidated because both include claims that employers discriminated on the basis of sexual orientation. A third — *R.G. & G.R. Harris Funeral Homes v. EEOC* — involves the question of whether existing discrimination laws apply to transgender workers.

SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ARE NOW PROTECTED

- In a historic decision, the U.S. Supreme Court ruled that the 1964 Civil Rights Act protects gay, lesbian, and transgender employees from discrimination based on sex. The ruling was 6-3, with Justice Neil Gorsuch, President Trump's first appointee to the court, writing the majority opinion. The opinion was joined by Chief Justice John Roberts and the court's four liberal justices.

- Gorsuch found such discrimination is barred by the language in the 1964 law that bans discrimination in employment based on race, religion, national origin or sex.

QUOTE FROM BOSTOCK V CLAYTON COUNTY BY SCOTUS

"In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

SEXUAL ORIENTATION - BOSTOCK

- 11th Circuit - Bostock v Clayton County, Georgia
- Gerald Bostock, a gay man, began working for Clayton County, Georgia, as a child welfare services coordinator in 2003.
- During his ten-year career with Clayton County, Bostock received positive performance evaluations and numerous accolades.
- In 2013, Bostock began participating in a gay recreational softball league. Shortly thereafter, Bostock received criticism for his participation in the league and for his sexual orientation and identity generally. During a meeting in which Bostock's supervisor was present, at least one individual openly made disparaging remarks about Bostock's sexual orientation and his participation in the gay softball league.

GERALD BOSTOCK





SEXUAL ORIENTATION - BOSTOCK

- 11th Circuit - Bostock v Clayton County, Georgia
- Around the same time, Clayton County informed Bostock that it would be conducting an internal audit of the program funds he managed. Shortly afterwards, Clayton County terminated Bostock allegedly for "conduct unbecoming of its employees."
- Within months of his termination, Bostock filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).
- Three years later, in 2016, he filed a pro se lawsuit against the county alleging discrimination based on sexual orientation, in violation of Title VII of the Civil Rights Act of 1964.

SEXUAL ORIENTATION - BOSTIC

- 11th Circuit - Bostic v Clayton County, Georgia
- The district court dismissed his lawsuit for failure to state a claim, finding that Bostock's claim relied on an interpretation of Title VII as prohibiting discrimination on the basis of sexual orientation, contrary to a 1979 decision holding otherwise, the continued which was recently affirmed in Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017).
- Bostock appealed, and the US Court of Appeals for the Eleventh Circuit affirmed the lower court. In addition to noting procedural deficiencies in Bostock's appeal, the Eleventh Circuit panel pointed out that it cannot overrule a prior panel's holding in the absence of an intervening Supreme Court or Eleventh Circuit en banc decision.

SEXUAL ORIENTATION – ALTITUDE EXPRESS

- 2nd Circuit – Zarda v. Altitude Express
- En banc holding involving a gay sky diving instructor who was fired because of his sexual orientation
- Sexual orientation discrimination claims actionable under Title VII
- "Sexual orientation discrimination – which is motivated by an employer's opposition to romantic association between particular sexes – is discrimination based on the employee's own sex"
- This case was significant because it overruled two cases that expressly stated sexual orientation was not cognizable under Title VII

DON ZARDA







GENDER IDENTITY- FUNERAL HOME CASE

EEOC v. RG & GR Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

- Holding: Held termination of an employee on the basis of transitioning or transgender status violates Title VII
- Aimee Stephens (right, she/her/hers) worked at RG & GR Harris Funeral Homes for six years and was terminated two weeks after she told her employers she planned to transition to become a woman
- Her employer specifically stated he fired Aimee because she would no longer dress or represent herself as a man



GENDER IDENTITY CASE

EEOC v. RG & GR Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

- EEOC investigated and brought charges for terminating Stephen's on basis of transgender/transitioning status and discriminatory clothing allowance policy
- District Court granted summary judgment for funeral home on both counts using the Religious Freedom Restoration Act as their reasoning
- Sixth Circuit reversed citing that discrimination based on Stephens gender expression and transitioning status was sex-based discrimination

GENDER IDENTITY CASE

EEOC v. RG & GR Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

- The Sixth Circuit stated Stephens' employer fired her because she wanted to dress/identify as a woman, which falls under sex discrimination + discrimination against trans individuals is based on sex
- Sixth Circuit stated Title VII was intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" – which includes any discrimination based on gender or perceived gender
- "Discrimination based on a failure to conform to stereotypical gender norms" was no different under Title VII than discrimination based on "the biological differences between men and women"
- "It is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

OTHER PRIOR CASES LEADING UP TO THIS SCOTUS RULING

Other cases previously showed a split in the federal circuit courts on the issue of whether gender identity and sexual orientation were protected under Title VII. This was a decision that needed to be made by SCOTUS to resolve the conflicting decisions, the split in rulings and the uncertainty.



GENDER IDENTITY CASE LAW

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

- Holding: Held that termination of an employee based on their gender transition, transgender status, or "bathroom concerns" constitutes sex-based discrimination in violation of the Equal Protection Clause of the US Constitution
- Vandy Beth Glenn (right, she/her/hers) worked as an editor for the Georgia General Assembly when she notified her bosses she was going to transition to become a woman
- She was terminated because her boss thought it was "inappropriate" and "would be disruptive" to the workplace
- Glenn sued for discrimination under the Equal Protection Clause stating she was discriminated against because of her sex, female gender identity, and failure to conform to sex stereotypes



GENDER IDENTITY CASE LAW

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

- District Court granted summary judgment in favor of Glenn on her sex discrimination claim
- 11th Circuit affirmed
- Using *Price Waterhouse* and *US v. Virginia*, 11th Circuit linked discrimination based on transitioning/being transgender to discrimination on the basis of gender-based behavioral norms
- "An individual cannot be punished because of his or her perceived gender non-conformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual."

GENDER IDENTITY CASE LAW

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

- Holding: Held that termination of an employee based on her gender transition was sex-based discrimination under Title VII
- Philecia (right, she/her/hers) began to transition from male to female while working for the Cincinnati Police Dept
- She lived as a man on-duty and a woman while off-duty
- Barnes was told she did not appear "masculine" enough at work and "lacked command presence"



GENDER IDENTITY CASE LAW

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

- Barnes passed a promotional test to become a sergeant and began a probationary period (standard policy)
- Was demoted at the end of the probationary period
- She challenged the demotion under Title VII and the Equal Protection Clause
- Jury ruled in favor of Barnes awarding her $320,511 in damages
- Sixth Circuit upheld the ruling stating that sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination under Title VII

GENDER IDENTITY CASE LAW

Smith v. City of Salem, 378 F. 3d 566 (6th. Cir. 2004).

- Holding: Held that termination of an employee based on her gender transition constitutes sex-based discrimination under Title VII
- Smith was a firefighter who was born male but started to identify and express herself as a female
- Smith's coworkers and supervisors stated her actions/mannerisms weren't masculine enough and she was suspended for an alleged infraction of policy
- District Court dismissed Smith's claims stating transgender discrimination was not available under Title VII

GENDER IDENTITY CASE LAW

Smith v. City of Salem, 378 F. 3d 566 (6th. Cir. 2004).

- Sixth Circuit found that Smith had a prima facie case for sex discrimination under Title VII
- This was the FIRST time that the 6th Circuit (or any circuit) hinted that gender identity discrimination could be claimed as sex discrimination
- Court relied heavily on *Price Waterhouse* saying sex stereotypes are considered discrimination under Title VII
- "Employers who discriminate against men because they wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."

MEET OUR CLIENT: DINA PERSICO





SEXUAL ORIENTATION CASE LAW

EEOC Opinion – Baldwin v. Foxx (2013)

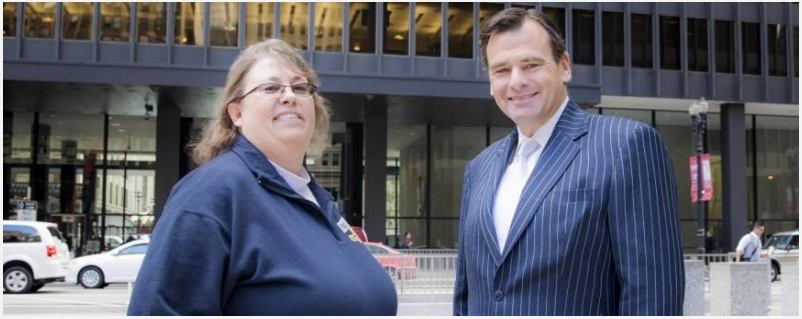
- First time EEOC held that sexual orientation discrimination could be seen as sex discrimination (Citation: https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2018/sexual-orientation-discrimination-claim-actionable-under-title-vii/)
- 2015 decision involving an air traffic controller who was not promoted to a permanent position because he was gay
- EEOC held that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII"
- Title VII prohibits employers from using gender or "sex based considerations" in employment actions for sex discrimination

SEXUAL ORIENTATION CASE LAW

7th Circuit – Hively v. Ivy Tech Community College of Indiana, 853 F. 3d 339 (2017)

- Case involving lesbian part-time adjunct professor who was repeatedly denied promotions, which she believed was related to her sexual orientation
- Held that sexual orientation discrimination was a subset of sex discrimination
- Used Oncale (a case involving male on male sexual harassment) to prove that sex can be interpreted to mean sexual orientation

KIMBERLY HIVELY



SEXUAL ORIENTATION CASE LAW

- 9th Circuit – Franks v. Santa Ana, 735 Fed.Appx. 305 (2018)
- Case involving a lesbian police officer who was forced out of her job based on her sexual orientation
- Didn't rule on the merits of the case, but stated the lower court was wrong to not allow the case to be presented to a jury and remanded
- This indicates they are open to the idea that sexual orientation discrimination is cognizable under Title VII

TAMMY FRANKS – FORMER SANTA ANA POLICE CHIEF



EMPLOYEE HANDBOOKS AND POLICIES



- In light of the SCOTUS ruling – all employers should be revising their employee handbooks and EEO policies to ensure that "sex" is more broadly defined to prohibit discrimination on the basis of sexual orientation and gender identity. AND employers also should be mindful of training supervisors and employees to understand the distinction as well as to how to be culturally competent in LGBTQI terminology.

EMPLOYEE POSTINGS

- Ensure that any required EEO postings in break rooms or similar areas are the most up to date and include gender identity and sexual orientation as subsets of sex discrimination.
- Send a message from the top on down of acceptance of persons from all walks of life and have a zero tolerance policy for any acts or words of discrimination or harassment or hostility.

QUESTIONS?