

PUBLICATION

5 Things to Know About Transgender Rights in the Workplace

Authors: Emma Janine Redden

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1. **Persistent failure to use a transgender employee's preferred name, or update the employee's records to reflect the preferred name, may constitute harassment.**

The EEOC in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015), held that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment. In *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (E.E.O.C.) (Apr. 16, 2014), the EEOC held that an employer's year-long failure to revise its records pursuant to changes in gender identity was severe or pervasive enough to constitute a claim of sex-based harassment.

Employers understandably are concerned with the extent to which they must recognize a transgender employee's preferred name. Per the EEOC's opinions, an employee should be verbally referred to with their preferred name and with the employee's preferred gender pronouns. While the EEOC has not explicitly stated that an employer must change its records immediately upon being notified its employee intends to undergo a gender transition, it is advisable to update records to the extent possible and at least in conformity with the employer's practice of updating records for other life events, such as a name change pursuant to marriage.

Note that there may be state law and legal implications involved in name changes with regard to public records. The advice of counsel should be used for these specific questions.

2. **Gender reassignment surgery cannot be required to trigger a transgender employee's rights.**

In *Lusardi*, the EEOC held that the transgender employee was subject to disparate treatment because she was denied use of the female restroom until after her sex reassignment surgery had taken place. The EEOC concluded that an employer cannot condition a transgender employee's right to use the restroom of his or her gender identity upon receiving gender reassignment surgery. It stated, "An agency may not condition access to facilities – or to other terms, conditions, or privileges of employment – on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity."

3. **Requiring a transgender employee to use a single-stall restroom may not suffice under Title VII.**

Recognizing that employees may be uncomfortable with a transitioning employee's use of the restroom that corresponds with his or her gender identity, the EEOC maintains that an employer cannot require a transgender employee to use a single-stall restroom. In *Lusardi*, the employer refused to allow the transitioning employee to use the multiple-occupancy restroom that other persons of her gender were freely permitted to use. The EEOC concluded that this "constitutes a harm or loss with respect to the terms and conditions of [the transgender employee's] employment."

The EEOC did provide that “[f]or a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one.” Key to this statement, however, is the transitioning employee's agreement to use the single-stall facility.

4. The law is not settled.

Federal agencies, such as the EEOC and the Department of Education, have consistently stated that transgender individuals are protected under Title VII and Title IX's prohibition of discrimination on the basis of “sex.” However, neither the Supreme Court of the United States nor Congress has explicitly stated that Title VII, or other similar federal statutory schemes such as Title IX, protects transgender individuals from discrimination. Currently pending before the Supreme Court is a case concerning transgender rights under Title IX, the statutory scheme that governs educational institutions, called *G.G. v. Gloucester County*. If the Supreme Court decides this case on the merits, it will likely set a precedent as to the Supreme Court's opinion as to whether federal agencies' interpretations of federal law are entitled to deference. If the Supreme Court gives the Department of Education deference in its interpretation of Title IX, it is to be expected that it would similarly give deference to the EEOC's interpretations of Title VII, discussed above.

5. Gender transitions are not all the same.

According to GLAAD (Gay and Lesbian Alliance Against Defamation), “Altering one's birth sex is not a one-step procedure; it is a complex process that occurs over a long period of time. Transition includes some or all of the following personal, medical, and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person.”

For that reason, the EEOC encourages individualized treatment of transitioning employees. In *Lusardi*, it stated, employers “are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions.” Therefore, while the EEOC has provided guidance as to certain practices, it recommends formulating an individualized plan that takes into account the transitioning employee's preferences.