

EEOC Stresses Title VII Bars Discrimination against Transgender Workers, Including Regarding Bathroom Access

By Michelle E. Phillips

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The Equal Employment Opportunity Commission's new fact sheet focuses on bathroom access and reminds employers that discrimination based on transgender status is sex discrimination in violation of Title VII of the Civil Rights Act, and contrary state law (such as [North Carolina's HB-2](#), [Mississippi's HB 1523](#), and [Oxford, Alabama's Ordinance](#)) is not a defense to transgender claims filed under Title VII.

["Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964"](#) reviews the EEOC's 2012 (see our article, [Title VII Prohibits Discrimination against Transgender Workers, EEOC Decides](#)) and 2015 decisions in which it held that:

- denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
- an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and
- an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

The fact sheet explains that "transgender" refers to people whose gender identity or expression is different from the sex assigned to them at birth (*e.g.*, the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be recognized as a transgender man or a transgender woman; while not stated in the fact sheet, neither does a transgender employee need to provide proof of a legal name change, but rather, the EEOC and many other local and state jurisdictions recognize, an individual is recognized as transgender as long as "he, she, they, ze, hir (or other preferred personal pronouns)" consistently presents as the gender different from the individual's biological sex assigned at birth.

Further, the EEOC states that gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment. As the Commission observed in 2015, "[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."

The EEOC also notes that the federal appeals court in Richmond reached a similar conclusion by deferring to the Department of Education's position that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity. [G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.](#), No. 15-2056 (4th Cir. April 19, 2016). A similar decision was reached in November 2015 in a Chicago case in which the Department of Education Office of Civil Rights held that an Illinois school district violated anti-discrimination laws by not allowing a transgender student who identifies as female and is on her high school's girls' sports team to change and shower in the girls' locker room. (See our article, [School District Faces Government Sanctions under Title IX for Denying Transgender Female Student Access to Locker Rooms](#).)

Additionally, the EEOC states that, like all non-discrimination provisions, these protections address *conduct* in the workplace, *not personal beliefs*. Thus, these protections do not and should not require any employee to change their sincerely held religious or moral beliefs. Rather, the agency seeks to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination.

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Other federal government agencies also have issued guidance on transgender employees in the workplace. The Occupational Safety and Health Administration (OSHA) issued "[A Guide to Restroom Access for Transgender Workers](#)," and the U.S. Office of Personnel Management issued "[Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace](#)."

Not surprisingly, the fact sheet was issued now, as lawmakers in states and municipalities across the United States consider measures to proscribe or protect bathroom use by transgender people. (See our articles, [New York State and New York City Guidance Focus Transgender Discrimination](#) and [Oxford, Alabama, City Council Adopts Ordinance Restricting Access to Bathroom Facilities Based on Biological Sex](#).)

Employers should stay apprised of expanding employee protections and ensure that their anti-discrimination and anti-retaliation policies comply with new laws. For questions about this or other lesbian, gay, bisexual, and transgender (LGBT) legal issues, please contact the Jackson Lewis attorney with whom you regularly work.

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