



## Employer Hot Topic: Navigating LGBTQ Issues in the Workplace



**Monica A. Velazquez, Partner**  
**Strasburger & Price, LLP**  
**2600 Dallas Parkway, Suite 600**  
**Frisco, Texas 75034**  
**[monica.velazquez@strasburger.com](mailto:monica.velazquez@strasburger.com)**

AUSTIN  
COLLIN COUNTY  
DALLAS  
HOUSTON  
MEXICO CITY  
NEW YORK  
SAN ANTONIO  
WASHINGTON D.C.

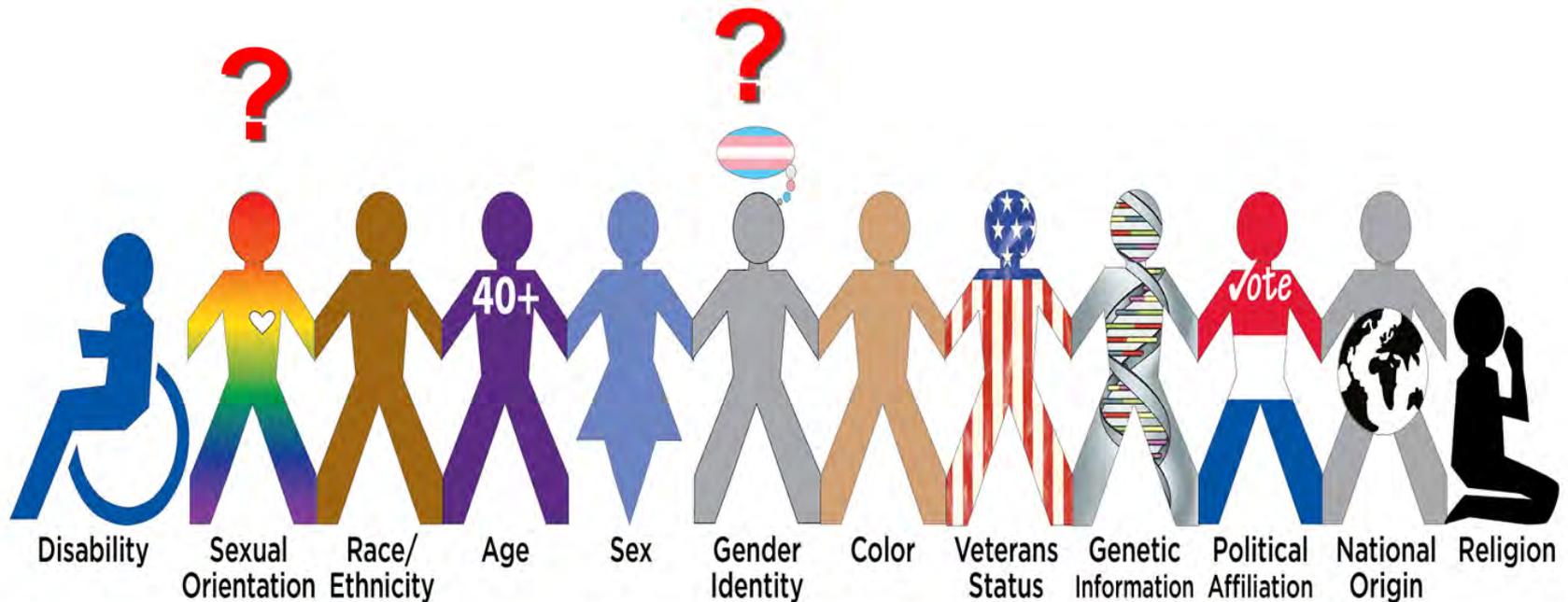
**Strasburger**  
ATTORNEYS AT LAW

# Overview

- Employment 101: A Brief History of Sex
- A New Frontier and Relevant Cases
- Practical Considerations

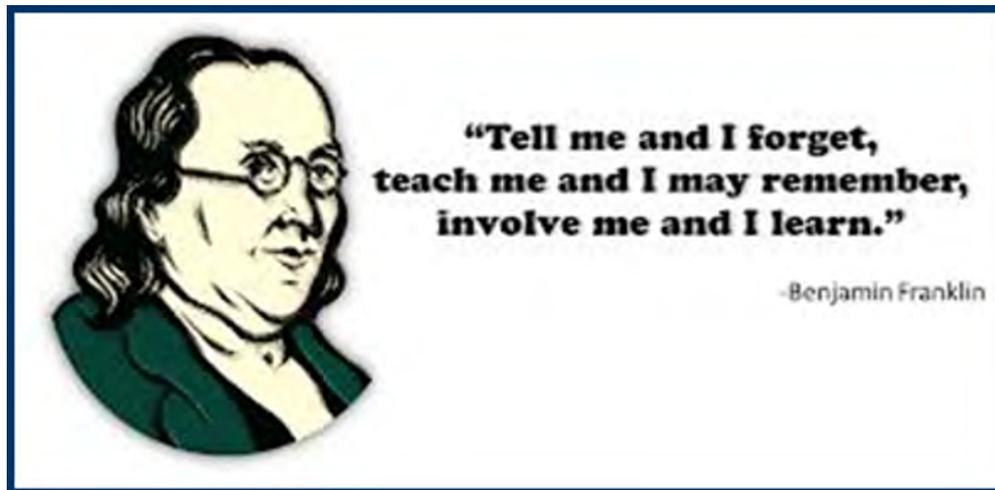


# Protected Classes - Expansion



- **May 2007 – Caregiver (EEOC)**
- **November 2009 - GINA**
- **March 2010 – Nursing Mothers (DOL)**
- **July 2014 – Expansion of Pregnancy Discrimination Protections**

# Employment 101 – A Brief History



# A Bit of Trivia



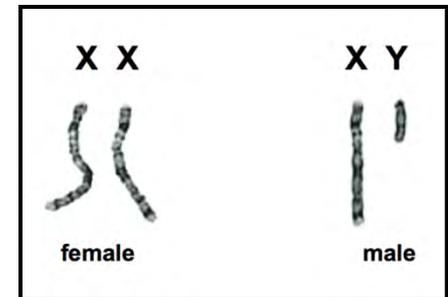
**Howard W. Smith**



# Title VII of the Civil Rights Act of 1964

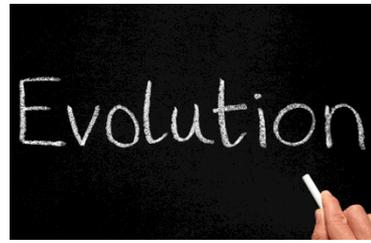
Title VII prohibits discrimination on the basis of various characteristics, including:

“It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual’s...**sex...**”



# Sex Discrimination

Evolution



- **Pregnancy Discrimination Act of 1978 - The term “sex” or “because of sex” in Title VII includes:**
  - pregnancy, childbirth, or related medical conditions;
  - women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of fringe benefits.
- **Sexual Harassment (1970s ...)**
  - EEOC Regulations on Sexual Harassment
    - Hostile work environment
    - *Quid pro quo*



# Sex Discrimination Evolution



- **Gender Stereotyping**



- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
- Under Title VII “sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.”
  - *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004).
- Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior, or (2) through appearance.
- Some courts have indicated that this should not be used to “bootstrap” protection for sexual orientation.

- **“Lookism” Discrimination**

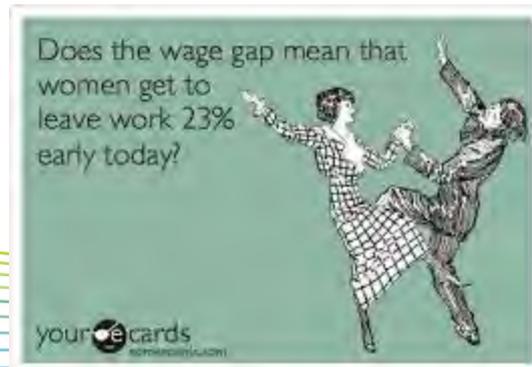
- Too attractive / Not attractive enough to work here.
- Some local jurisdictions prohibit discrimination based on “unattractiveness.”



# Sex Discrimination Evolution



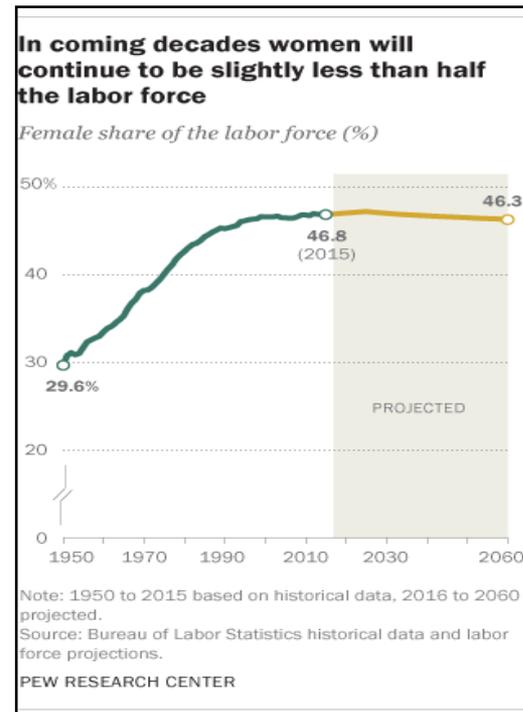
- **Equal Pay Act (EPA)**
  - 1963 amendment to Fair Labor Standards Act
  - Equal pay for jobs of equal skill, effort, and responsibility, and which are performed under similar working conditions.
  - Subject to four exceptions:
    - a seniority system;
    - a merit system;
    - a system which measures earnings by quantity or quality of production; or
    - a differential based on any other factor other than sex.
- **Lilly Ledbetter Fair Pay Act of 2009**
  - Each time compensation is paid, the limitations period re-starts for a claim challenging a discriminatory compensation decision.



**Strasburger**  
ATTORNEYS AT LAW

# Sex Discrimination Evolution

- **EEOC Guidance on Caregiver Discrimination (2007)**
  - In part, prohibits sex-based discrimination against caretakers and gender role stereotyping.



# Sex Discrimination Evolution

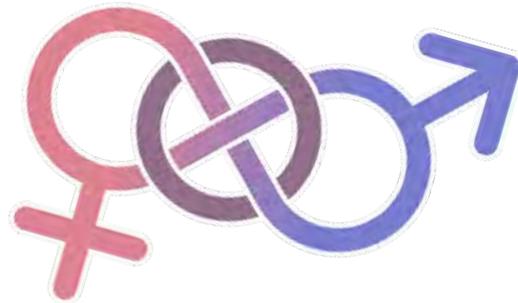


- **Employment Non-Discrimination Act (ENDA)** is proposed legislation that would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity.
- Introduced (almost) every year in U.S. Congress since 1994
- Gender identity protections added in 2007
- Nov. 2013 – Senate passed (Vote of 64-32)
- Last time considered in House was in July 2014
- July 21, 2014 – Executive Order 13672 (amends E.O. 11246)
  - Prohibiting discrimination on the basis of sexual orientation and gender identity by federal contractors and subcontractors.



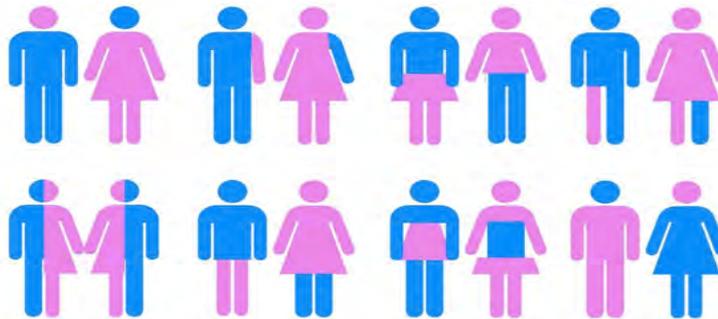
# Gender Identity – Core Terms

- **Transgender**
  - Individuals with a gender identity that is different from the biological sex assigned at birth.
  - Male at birth, but identifies as female = Transgender Woman.
  - Female at birth, but identifies as male = Transgender Man.
  - Some identify, simply, as men or women.



# Gender Identity – Core Terms

- **Gender Identity**
  - A person's internal sense of being male or female.
  - Determined early in life and may be different than physical gender.
- **Gender Expression**
  - The way an individual expresses his or her gender identity through behavior, clothing, hairstyles, voice or body characteristics.
  - May or may not conform to social stereotypes associated with a particular gender.



# Gender Identity – Core Terms

- **Transition**
  - The process of aligning the external and internal identities.
  - May include medical treatment such as counseling, hormone therapy, or surgery.
  - Some individuals, however, may not pursue transition.
  - Not all transgender individuals will follow the same pattern.



# Sexual Orientation Discrimination

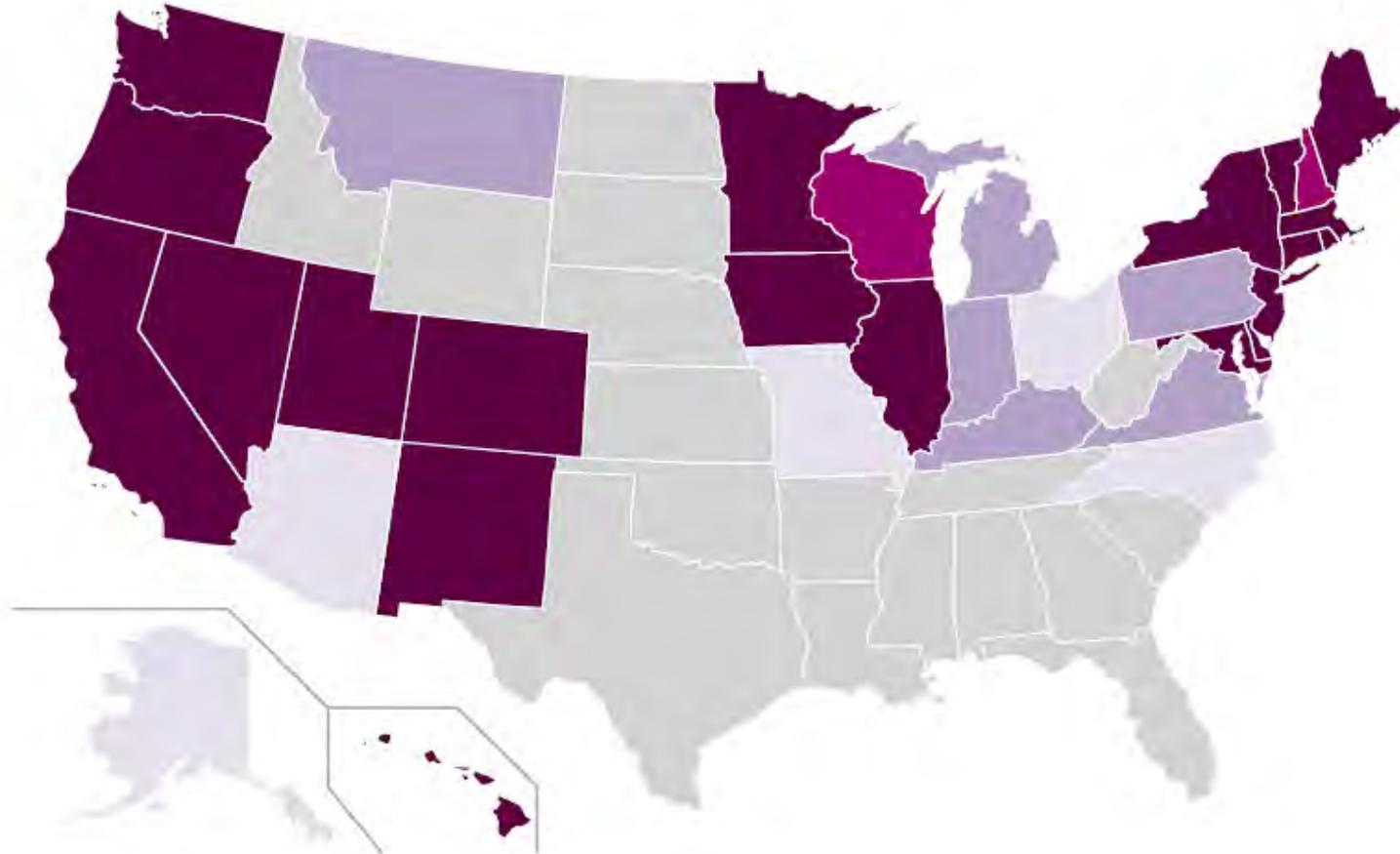


- **Not protected by Title VII or state law (TCHRA).**
  - Currently pending Texas H.B. 1534 / S.B. 165
- **23 states and the District of Columbia, have enacted laws that prohibit sexual orientation discrimination in both private and public workplaces.**
- **However, sexual orientation (and gender identity) may be protected by local law or city ordinance.**
  - Dallas, City Code Ch. 46 (Oct. 2002)
  - Plano Equal Rights Ordinance (2014-2015)
- **Business Coalition for Workplace Fairness**
  - 100+ large and small employers (AA, AT&T, Dell, TI)
  - “Having a corporate culture that embraces diversity improves the productivity of our associates, helps the company recruit the best talent, and makes us more productive.”
- **One federal court case making its way through Court of Appeals**
  - *Kimberly Hively v. Ivy Tech Community College* (N.D. Indiana, Seventh Circuit)



HUMAN  
RIGHTS  
CAMPAIGN®

# STATEWIDE EMPLOYMENT LAWS & POLICIES



Updated August 26, 2016

The Federal Equal Employment Opportunity Commission is currently accepting complaints of sexual orientation and gender identity discrimination in employment based on Title VII's prohibition against sex discrimination.

# *Macy v. Holder, Department of Justice*

(ATF-2011-00751, April 20, 2012)

- EEOC, in an administrative opinion held:
  - Under Title VII the term sex “encompasses both sex—that is, the biological differences between men and women—and gender.”
  - If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited conduct would be when an employer prefers a man over a woman, or vice versa.
  - Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a *prima facie* case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.
  - Similarly, the Justice Department issued a memorandum on December 15, 2014, stating that the Justice Department will now interpret Title VII as extending to protect discrimination claims based on gender identity, including those claims brought by transgender employees.



=

**GEND****R**

=

**PROTECTION**

Strasburger  
ATTORNEYS AT LAW

# EEOC Expansion

- Restrictions on using common female restroom were a form of sex discrimination against transgender woman.
  - *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)
- Intentional misuse of transgender employee's new name and pronoun could be considered sex discrimination and/or harassment.
  - *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013)
- Employer's failure to revise its records pursuant to changes in gender identity could state valid sex discrimination claim.
  - *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).

# Additional Federal Guidance

- The Occupational Safety & Health Administration (OSHA) published a guide to restroom access for transgender workers on June 1, 2015.
- “The core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.”
- The employee and not the employer should determine which facility will be used by the employee.



Please note: As of January 20, 2017, information in some news releases may be out of date or not reflect current policies.

June 1, 2015  
Contact: Office of Communications  
Phone: 202-693-1999

#### OSHA publishes guide to restroom access for transgender workers

**WASHINGTON** – The Occupational Safety and Health Administration today published a [Guide to Restroom Access for Transgender Workers](#)<sup>\*</sup>. The publication provides guidance to employ practices regarding restroom access for transgender workers. The guide was developed at the request of the National Center for Transgender Equality, an OSHA Alliance partner that works with the agency to develop products and materials to protect the safety and health of transgender workers.

**Strasburger**  
ATTORNEYS AT LAW



# A New Frontier



# Gender Identity Discrimination

- Typically, state laws that protect transgender individuals prohibit discrimination based on “gender identity or expression.”
  - Nevada defines it as gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth.
  - Hawaii defines it as a person’s *actual or perceived* gender, regardless of whether it is different from that traditionally associated with the person’s sex at birth.
- **Factors to consider:**
  - Medical history / medical treatments.
  - Sincerely held belief of gender identity.
  - Not limited to individuals who have gender reassignment surgery or have undergone a portion of the gender transition process.



# Generally, not a Disability



- **Disability discrimination laws do not include protection for transgender individuals.**
  - Americans with Disabilities Act of 1990
  - State laws in Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, Virginia
  - However, some states have recognized Gender Identity Disorder (GID) as a protected disability.
  - One PA case pending challenging that ADA exclusion.
    - *Blatt v. Cabela's Retail, Inc.*, Civil Action No. 14-4822-JFL (E.D. Penn)
- **Federal law also does not include protection against discrimination in public accommodations.**
  - Transgender individuals may be refused access to public accommodations.
  - Number of cases challenging that exclusion, as well.

# Gender Identity – Early Cases

- For nearly years, courts consistently held that transgender status is not within the definition of Title VII’s “sex” or “because of sex.”
  - Sex means anatomical sex, a biological difference.
  - No Congressional intent to specifically protect sexual orientation or gender identity.
    - *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904 (D.N.J. Sept. 10, 1975) (a teacher's sex-reassignment surgery was not protected under Title VII).
    - *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“sex” in Title VII means only anatomical sex rather than gender).
    - *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977) (refusing to extend Title VII to transsexuals because the discrimination is based on gender and not "based on sex").



# Glenn v. Brumby

663 F.3d 1312 (11th Cir. 2011)



- In October 2005, shortly after she was diagnosed with gender identity disorder, Vandy Elizabeth Glenn, then known as Glenn Morrison, was hired by the Georgia General Assembly's Office of Legislative Counsel.
- As part of her transition process, Glenn was required to live as a woman.
- Her supervisor, Sewell Brumby, sent her home after she dressed as a woman for a Halloween work event and made statements vocalizing his discomfort with her dress.
- After Brumby learned that Glenn intended to begin gender transition and report to work as a woman, Brumby terminated her employment.
- Brumby claimed the transition was “*inappropriate*,” “*immoral*,” “*disruptive*,” and would make co-workers uncomfortable.

# Glenn v. Brumby

- Glenn brought her claim under 42 U.S.C. § 1983 to address the violation of her civil rights to be free from discrimination on the basis of sex in public employment, a right protected by the Equal Protection Clause of the U.S. Constitution.
- **Holding:** A government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he/she fires a transgender or transsexual employee because of his or her gender non-conformity.
  - “All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. ... An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination...”



# Lopez v. River Oaks

542 F. Supp. 2d 653, 660 (S.D. Tex. 2008)



- In September 2005, Lopez, a 26-year-old transgender woman, accepted a job as a scheduler with River Oaks Imaging and Diagnostic in Houston.
- After resigning from her position with her then-current employer, Lopez received a call from River Oaks rescinding the job offer because of her “*misrepresentation*” of herself as a woman. Lopez was unable to get her previous job back and was without employment for several months and filed suit.
- Holding: Lopez’s “transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”

# *Kastl v. Maricopa Comm. College*

325 Fed. Appx. 492, 493 (9th Cir. 2009)

- A transgendered faculty member, began presenting herself as a female at work in January 2001.
- In October 2001, in response to student complaints, the school required Plaintiff to use the men's restroom, until she could prove she was a biologically female. The school rejected her female drivers' license as proof, and when Plaintiff refused to use the men's restroom, the school terminated Plaintiff's employment.
- ***Holding:*** School had a valid reason (safety) for its actions and Plaintiff failed to present sufficient evidence that the school terminated her "because of her gender."

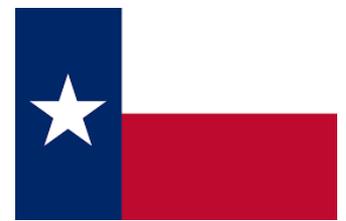


# ***Etsitty v. Utah Transit Auth.***

**502 F.3d 1215 (10th Cir. Utah 2007)**

- **Employee argued her transsexual gender identity was a protected class under Title VII. Alternatively, that she was discriminated for failing to conform to sex stereotypes.**
- **Holding: Transgender/transsexual is not a protected class under Title VII. Sex stereotyping is a form of sex discrimination under Title VII. However, employee, failed to overcome the employer’s reason for her termination.**
- **“Scientific research may someday cause a shift in the plain meaning of the term “sex” so that it extends beyond the two starkly defined categories of male and female.” ... But not at this point in time.**
- **9<sup>th</sup>, 6<sup>th</sup> , and 11<sup>th</sup> Circuit Courts – Recognize “gender identity” as a protected class.**

# Texas at the Forefront



- *State of Texas, et al. v. United States of America, et al.*, Case No. 7:16-cv-00054-O, pending in the Northern District of Texas (Fort Worth Division)
- Texas Attorney General filed suit on behalf of two school districts and 12 other states to challenge OCR guidelines requiring schools to honor a student's gender identity.
- On August 21, 2016, U.S. District Judge O'Connor issued a nationwide injunction preventing OCR from interpreting Title IX to include gender identity protections.
- Court also enjoined the defendants from relying on the guidelines in any litigation following the court's order, or "initiating, continuing, or concluding any investigation based on [the] interpretation that sex" in Title IX includes gender identity.
- February 2017 – Trump Administration withdrew the Title IX guidance. Issue should be decided at the state level.

# But Wait ...

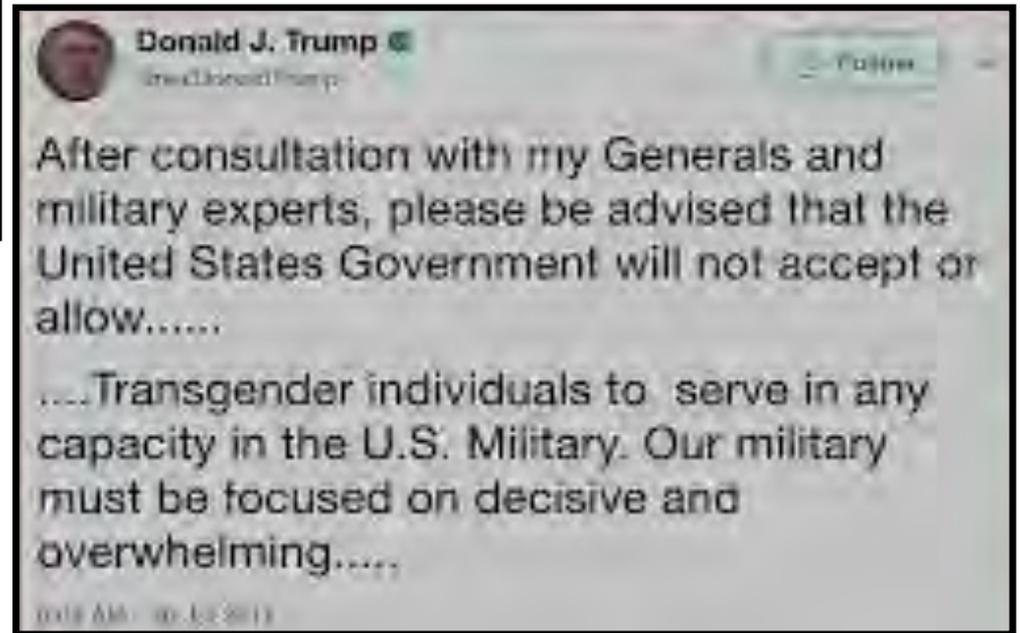
- April 2017 – The Seventh Circuit Court of Appeals held that Title VII protects discrimination on the basis of sexual orientation (and very likely gender identity).
  - “Any discomfort, disapproval, or job decision based on the fact that the complainant -- woman or man -- dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII’s prohibition against sex discrimination, if it affects employment in one of the specified ways.”
    - *Kimberly Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. Apr. 4, 2017)

# *Smith v. Avanti (FHA Case)*

- Same-sex couple, including trans-gender woman, with two children denied housing in Gold Hill, Colorado.
- Landlord e-mailed couple and allegedly informed them that she would not be renting to them because she thought their “unique relationship” would become the focus of discussion in town and would harm landlord’s position in the community.
- The lawsuit, in the U.S. District Court for the District of Colorado, asserts that landlord engaged in discrimination on the basis of sex and familial status, in violation of the federal Fair Housing Act and Colorado Anti-Discrimination Act. It also asserts that landlord discriminated against couple on the basis of sexual orientation and transgender status, in violation of the Colorado Anti-Discrimination Act.
- Court held in favor of the couple.



# What a Difference a Year Makes ...



# Practical Considerations



# Workplace Issues

- **Gender Identity/Expression Workplace Issues**
  - **Dress / Appearance**
  - **Public Facilities/Bathrooms**
  - **Confidentiality / Privacy**
  - **Names/ Pronouns/Recordkeeping/Other Issues**



# Guidance for Federal Employees



- In May 2011, the U.S. Office of Personnel Management issued a memo entitled *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*.
  - “It is the policy of the Federal Government to treat all of its employees with dignity and respect and to provide a workplace that is free from discrimination whether that discrimination is based on ... gender identity... sexual orientation, or other non-merit factors.”
- Recommends federal agencies review policies to ensure that they afford a non-discriminatory working environment to employees, irrespective of their gender identity or perceived gender non-conformity.
- Covers topics such as confidentiality, privacy, appearance, names/pronouns, public facilities, leave, recordkeeping, and others.
- Does not address legal rights or remedies, just common questions that may arise in the federal workplace.
  - <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>

# Federal Workplace - Policies



- **Confidentiality and Privacy:**

- An employee's transition should be treated with as much sensitivity and confidentiality as any other employee's significant life experiences, such as hospitalization or marital difficulties.
- May raise concerns about safety and other employment issues.
- Medical information received about individual employees is protected under the Privacy Act (5 U.S.C. 552a).

- **Tips for managers and supervisors:**

- Be sensitive of special gender identity concerns.
- Advise employees not to share information, gossip, or spread rumors.
- Personal information about the employee should be considered confidential and should not be released without the employee's prior consent.
- Questions regarding the employee should be referred to the employee himself/herself.
- If helpful, provide a qualified trainer to answer general questions regarding gender identity.



# Federal Workplace - Policies



- Dress and Appearance:

- Employees who begin the “real life experience” stage of their transition live and work full-time in the target gender in all aspects of their life, which includes dressing in the clothes of the target gender at all times.
- Once an employee informs management that he or she is transitioning, the employee may begin wearing the clothes associated with the gender to which the person is transitioning.
- Dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees.
- Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.



# Federal Workplace - Policies



- Names and Pronouns:

- Managers, supervisors, and co-workers should use the name and pronouns appropriate to the employee's new gender.
- Also use the correct name and pronouns in employee records and in communications with others regarding the employee.
- Continued intentional misuse of the employee's new name and pronouns (coupled with reference to the employee's former gender) may undermine the employee's therapeutic treatment, and is contrary to the goal of treating such employees with dignity and respect.
- Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.

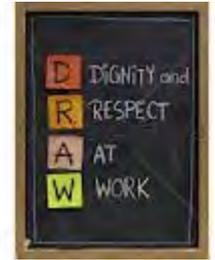


# Federal Workplace - Policies



- Restrooms and Related Facilities:

- Guidelines may require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences.
- For a transitioning employee, this means that, once he/she has begun working full-time in the gender that reflects his/her gender identity, agencies should allow access to restrooms and locker room facilities, if any, consistent with his/her gender identity.
- Reasonable temporary arrangements or a compromise may be appropriate in some circumstances.
- Employee need not provide proof of a medical procedure in order to have access to facilities designated for use by a particular gender.
- Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee's work station.



# Federal Workplace - Policies



- Recordkeeping:
  - Consistent with provisions of the Privacy Act (5 U.S.C. 552a(d)), the records in the employee's Official Personnel Folder (OPF) and other employee records (pay accounts, training records, benefits documents, and so on) should be changed to show the employee's new name and gender, once the employee has begun working full-time in the gender role consistent with the employee's gender identity.



# Federal Workplace - Policies

- Insurance Benefits:

- Employees in transition who already have Federal insurance benefits must be allowed to continue their participation (and new employees must be allowed to elect participation) under their new names and genders.
- If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a new name and gender.



# Federal Workplace – Policies

- Sick and Medical Leave
  - Employees receiving treatment as part of their transition may use sick leave under applicable regulations.
  - Employees who are qualified under the Family Medical Leave Act may also be entitled to take medical leave for transition-related needs of their families.



# Federal Workplace – Policies

- **Hiring and Background Checks**
  - Hiring managers and supervisors should be sensitive to the possibility that applicants have transitioned.
  - The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting.
  - In such cases, hiring managers should respectfully ask whether the applicant was previously known by a different name, and confirm with the applicant the name and gender that should be used throughout the hiring process.

# Lessons Learned

- Discrimination against LGBTQ individuals is *likely* protected.
  - Tentatively under existing law (Title VII or local ordinance); or
  - Pursuant to the passage of new laws and/or federal guidance.
- Recommend that you review your existing policies.
  - If you prohibit sex or sexual orientation discrimination, you may also be presented with gender identity claims.
- Recommend you treat such issues with heightened sensitivity.





**STRASBURGER & PRICE, LLP.**

**\*Materials contained within this presentation provide information on general legal issues and are not intended to provide advice on any specific legal matter. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Every matter is different.**

**Strasburger**  
ATTORNEYS AT LAW