



THE MANY FACES OF TRANSGENDER DISCRIMINATION

Trial®

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Even as the LGBT community has seen social and legal progress, transgender people still face pervasive discrimination in many areas of life, including work, school, housing, and public accommodations. You can help these clients fight for the equal treatment they deserve.

The news is full of stories about state laws limiting legal protections for the lesbian, gay, bisexual, and transgender (LGBT) community. On the heels of last year's victory for marriage equality, bills were introduced in nearly two dozen states that would have abridged LGBT people's basic rights—and unfortunately, many of these efforts specifically targeted the transgender community, which already faces significant discrimination.¹

The largest completed survey of transgender people found that almost half of all respondents—47 percent—had faced discrimination in hiring, promotion, or job retention, and 78 percent experienced at least one form of harassment or mistreatment at work because of their gender identity.² Many courts have acknowledged the challenges transgender individuals face. For example, the Ninth Circuit wrote that “significant evidence suggests that transgender persons are often especially visible, and vulnerable, to harassment and persecution due to their often public nonconformance with normative gender roles.”³

Transgender people are individuals whose genders differ from the genders they were assigned at birth.⁴ A person transcending gender may have two aspects to the variation: the person's gender identity—a feeling of being “born in the wrong body”—and the person's gender expression—dress or behavior not typically associated with the genetic gender. Some transgender people undergo gender reassignment surgery, while others don't seek surgery or don't have that option. People should be protected based on both the gender they identify with and the way they express their gender.

Legislative Efforts

The movement for LGBT equality has won some recent battles, such as marriage equality, but others have flared up. Some of the LGBT community's most vulnerable members include transgender people—specifically transgender people of color and those living in more rural and conservative areas—and they have been the targets of backlash.

Twenty states, the District of Columbia,⁵ and 255 municipalities⁶ have enacted or extended employment, housing, or public accommodations statutes or ordinances that prohibit discrimination on the basis of gender identity or expression. But other states, such as Mississippi and North Carolina, have moved in the opposite direction.

In March, North Carolina enacted the Public Facilities Privacy & Security Act, which requires everyone to use the public bathrooms of their gender as assigned at birth.⁷ Mississippi passed the Protecting Freedom of Conscience from Government Discrimination Act, which specifically allows anti-LGBT discrimination in the name of religious belief.⁸

These so-called “bathroom bills” are not about safety—rather, they are about policing gender and dehumanizing transgender people by attempting to erase them from public life. There is no documented case of a transgender person committing such a bathroom crime, and in school districts and jurisdictions that protect transgender people's rights to use facilities consistent with their affirmed genders, no public safety issues have been reported since those policies or protections were implemented.

In fact, “bathroom bills” put transgender people in more danger: A bearded, burly transgender man would be forced to use the women's restroom, and a made-up, busty transgender woman would be sent to the men's restroom.

Six weeks after North Carolina enacted its bathroom bill, the U.S. Department of Justice (DOJ) sued state officials for violating the Constitution and federal laws that prohibit discrimination against transgender people. The DOJ and the U.S. Department of Education have both issued guidance, stating

that any school that receives federal funding must allow students to use the bathroom and locker room that matches their affirmed gender—otherwise, the school risks losing those funds pursuant to Title IX.⁹

The Equal Employment Opportunity Commission (EEOC) also has stated that transgender discrimination is sex discrimination, and EEOC Commissioner Chai Feldblum has affirmed that federal law supersedes local and state laws.¹⁰ The Fourth Circuit has also ruled that banning restroom use is sex discrimination.¹¹ Much more litigation on this issue is very likely.

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Myriad Discrimination

Unfortunately, transgender people experience discrimination in many areas of life: employment, housing, public accommodations, and even incarceration.¹² Here are some of the most common situations in which your clients might encounter bias and what you need to know.

Employment. This takes many forms and can include termination, failure to hire, demotion, and hostile work environment, among others. No comprehensive federal equality act exists yet, so you will have to make a substantial argument based on the law in your jurisdiction. For example, multiple federal circuits have held that discrimination against transgender people is sex discrimination and is therefore a clear violation of the Fourteenth Amendment's Equal Protection Clause.¹³

Get to know Title VII of the Civil Rights Act as well.¹⁴ You may be able to argue that discrimination against an LGBT or gender nonconforming person is considered sex discrimination under that statute, as the EEOC decision in *Baldwin v. Foxx* demonstrates.¹⁵

Perhaps the most significant federal case is *Price Waterhouse v. Hopkins*.¹⁶ This case involved a heterosexual woman who was denied a promotion because she did not wear sufficiently feminine clothing, makeup, and jewelry and because her mannerisms did not conform to female gender stereotypes. The U.S. Supreme Court held that her employer's behavior was impermissible sex discrimination that violated Title VII.¹⁷

Local law also can provide strong remedies, but it may have specific requirements or restrictions. Many have different statutes of limitations or apply only to workplaces with a certain number of employees. Be aware of these particularities.¹⁸

Housing. The Fair Housing Act—also called Title VIII—covers all residential dwellings, from apartment buildings to assisted living facilities.¹⁹ Although it does not specifically enumerate sexual orientation or gender identity as protected classes, any housing unit that receives federal funding from the U.S. Department of Housing and Urban Development—and most housing does—is bound by the Federal Housing Administration's basic fairness provisions, which state that LGBT people must have equal access.²⁰

Public accommodations. This is another area where transgender people commonly encounter discrimination. Public accommodations include everything from restaurants to shops to banks—and people can experience humiliating treatment in these environments.²¹ There is no federal law prohibiting sex discrimination in public accommodations, but 45 states and the District of Columbia have such laws.²²

Unlike the higher burden in employment cases—which requires showing your client was denied an employment benefit or suffered egregious treatment such as severe bullying—public accommodations discrimination can be easier to prove. You only have to show that your client was denied entry, service, or a product.

For example, a federal court applied the Minnesota Human Rights Act²³ to a case in which a transgender woman was rejected as a plasma donor.²⁴ In Colorado, a same-sex couple successfully argued that a cake shop violated the Colorado Anti-Discrimination Act²⁵ by refusing to provide a cake for a same-sex wedding celebration. The court also held that the shop's refusal was not protected by the First Amendment.²⁶

Prison accommodations. Incarceration presents a serious safety issue for transgender prisoners if their housing placement is based on their gender assigned at birth rather than their lived gender. Also, a client might ask you to fight for the right to medically necessary transition-related care, such as hormone replacement therapy or surgery. The DSM-V provides that the correct diagnosis for a transgender client is "gender dysphoria."²⁷ Obtaining a name or gender-marker change may be part of your client's medically necessary treatment for gender dysphoria. If such changes are necessary, your client generally has the same legal right to obtain those protections as others.

When representing an incarcerated client, it is critical to frame these treatments as addressing a medically necessary regimen and not as a mere choice. Consider bringing an action under 42 U.S.C. §1983 for failure to house your client based on the person's lived gender,²⁸ or for failure to provide your client's medically necessary treatment in violation of the Eighth Amendment or other constitutional provisions.²⁹

Always keep in mind that you may need to get creative to redress the different types of discrimination your clients face. Investigate whether your state's hate crimes act authorizes civil as well as criminal penalties.³⁰ Your state or local law may include statutes, codes, ordinances, or cases with helpful protections, explicit or implicit. Be sure to expansively research your jurisdiction's remedies and consult with your state or local LGBT rights organization.³¹

Fostering Good Client Relations

There are a few key things to keep in mind when a transgender client comes into your office. Most important, use the client's chosen name and pronoun. This gives clients the dignity they don't always enjoy elsewhere. A clear lack of experience with or exposure to the LGBT community may make a client uncomfortable. Like your other clients, transgender clients are aggrieved when they come to you—don't let ignorance create a barrier.

Don't make assumptions, and try to ask open-ended questions. If your client has just transitioned, understand that this is a major moment for that person: Your client is vulnerable, in treatment, and finally stepping into their true self—an act that takes courage.

You don't have to build these cases alone. Many organizations can assist in many ways, from providing client support to helping you find trial experts. If you aren't sure whether you should take on a case, several organizations can offer help.³² They can provide drafted briefs and other resources—and, just as important, they can help ensure you don't make an argument that unintentionally harms LGBT rights in future jurisprudence. Don't risk making bad law, and try not to advance a problematic argument.

Also, take the time to find local resources for your transgender clients, such as support groups. If you know therapists who specialize in helping gender nonconforming youth and adults, refer your clients to them.

This area of the law is moving quickly. Unfortunately, it doesn't always move in the direction of greater fairness. By helping transgender people secure fair treatment under the law, you can keep justice moving forward for all.

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Notes

1. Some states—including North Carolina, Michigan, and Mississippi—have enacted such laws, while many others have been defeated for now. For a comprehensive list of various kinds of anti-LGBT bills and their current status, see Am. Civil Liberties Union, *LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country#harmfulbills.
2. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Gay and Lesbian Taskforce 51 (2011), www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf; Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, The Williams Inst. 2 (2011), williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf.
3. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015).
4. The correct term is transgender, not transgendered. And although the LGBT community identifies as a united group, there is a distinction between sexual orientation and gender identity: Whom a person loves has nothing to do with the gender they identify as. See GLAAD, *Debunking the "Bathroom Bill Myth": Accurate Reporting on Nondiscrimination: A Guide for Journalists* 12 (Feb. 2016), www.glaad.org/sites/default/files/Debunking_the_Bathroom_Bill_Myth_2016.pdf.
5. Movement Advancement Project, *Equality Maps: Non-Discrimination Laws*, www.lgbtmap.org/equality-maps/non_discrimination_laws.
6. Human Rights Campaign, *Cities and Counties With Non-Discrimination Ordinances That Include Gender Identity*, www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender.
7. See 2016 N.C. Sess. Laws 2016-3.
8. See 2016 Miss. Laws ch. 334. ("Sincerely held religious beliefs or moral convictions protected" are: "marriage is or should be recognized as the union of one man and one woman," "sexual relations are properly reserved to such a marriage," and sex is an immutable biological characteristic that is determined by anatomy and genetics at the time of birth).
9. Title IX of the Education Amendments of 1972 provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. §§1681–1688. This interpretation of Title IX is consistent with decades of federal court precedent, and at least one court has held it is entitled to *Auer* deference. See *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016). The Obama administration issued a similar guidance in 2014 relating to education environments such as single-sex classes and stated that Title IX's provisions extend to transgender

- students. U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014).
10. *Lusardi v. McHugh*, No. 0120133395 (E.E.O.C. Apr. 1, 2015); *Macy v. Holder*, No. 0120120821, (E.E.O.C. Apr. 20, 2012).
 11. See *G.G.*, 822 F.3d at 714.
 12. Nat'l Ctr. for Transgender Equality, *Know Your Rights*, www.transequality.org/know-your-rights/.
 13. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); see also *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).
 14. Title VII of the Civil Rights Act, as amended, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a).
 15. *Baldwin v. Foxx*, No. 0120133080 (E.E.O.C. July 15, 2015); see also *Fabian v. Hosp. of Cent. Conn.*, 2016 WL 1089178 (D. Conn. Mar. 18, 2016).
 16. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), superseded by statute as stated in *Burrage v. United States*, 134 S. Ct. 881 (2014).
 17. *Id.* at 250–251, 258–261.
 18. See, e.g., California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§12900-12996 (West 2016) (incorporating Cal. Civ. Code §51 (2016) in §12921); *Dep't of Fair Emp't and Hous. v. Marion's Place*, F.E.H.C. No. 06-01, 2006 WL 1130912 (Cal. F.E.H.C. Feb. 1, 2006).
 19. 42 U.S.C. §§3601-3619 (2012).
 20. The agency's LGBT portal contains many resources about local housing discrimination protections that cover sexual orientation and gender identity. See U.S. Dep't of Hous. & Urban Dev., *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_op/LGBT_Housing_Discrimination. The site also provides case examples like this: "A property manager refuses to rent an apartment to a prospective tenant who is transgender. If the housing denial is because of the prospective tenant's non-conformity with gender stereotypes, it may constitute illegal discrimination on the basis of sex under the Fair Housing Act."
 21. See, e.g., *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).
 22. See Nat'l Conference of State Legislatures, *State Public Accommodation Laws*, www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (listing public accommodation laws by state, including sexual orientation and gender identity protections).
 23. Minn. Stat. Ann. §363A.17 (2016).
 24. *Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961 (D. Minn. 2015).
 25. Colo. Rev. Stat. §§24-34-301-308 (2016).
 26. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015), *petition for cert. filed*, July 22, 2016.
 27. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Health Disorders: DSM-5*, 451-59 (5th ed. 2013).
 28. See, e.g., *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015).
 29. See *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015).
 30. A comprehensive list of hate crime laws can be found on the Movement Advancement Project (MAP) website at www.lgbtmap.org/equality-maps/hate-crime-laws.
 31. The Equality Federation's homepage at www.equalityfederation.org is a great place to start, with member groups in almost every state.
 32. For more information, contact these national advocacy organizations or view their websites: the Transgender Legal Defense and Education Fund, the Transgender Law Center, the National Center for Lesbian Rights, and the National Center for Transgender Equality.

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