



## **Association of Corporate Counsel**

# **LGBTQ and Gender Identity in the Workplace— the Times They are a Changin’**

**Presented by: Randall J. Snapp**



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- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Randall J. Snapp, or another licensed attorney.





# What is Sexual Harassment?

# HARASSMENT Dictionary Definition

- Aggressive pressure or intimidation
- The act or an instance of harassing, or disturbing, pestering, or troubling repeatedly; persecution
- A wide range of behaviors of an offensive nature. It is commonly understood as behavior intended to disturb or upset, and it is characteristically repetitive
- Unwelcome verbal or physical conduct





# Harassment can Take Many Forms

- Bullying
- Mobile
- Online
- Power
- Psychological
- Stalking



# Good News and Bad News

- There is no black letter law on “bullying” or “harassment” by itself
  - This technically means that employers aren’t liable **unless** harassment is based on a protected category
  - In reality, it means there is a **lot** of grey area on what is illegal harassment and what is not illegal harassment
- Protected categories which can lead to legal liability are:
  - Race
  - Color
  - Religion
  - Sex
  - Nationality
  - Age (40 and over)
  - Disability
  - Genetic Information
  - Retaliation

# What is Sexual Harassment?

- Sexual harassment includes, but is not limited to:
  - Verbal harassment, epithets, derogatory comments or slurs
  - Physical harassment; assault, impeding or blocking movement, or physical interference with normal work or movement when directed at an individual
  - Visual forms of harassment; posters, cartoons, or drawings that are sexual in nature; and,
  - Requests for sexual favors; unwanted sexual advances that condition an employment benefit or work condition upon an exchange of favors



# Types of Sexual Harassment

- Quid pro quo = this for that
  - Expressed or implied condition of employment
  - Tangible job detriment for failure to submit
  - Based on sex
  - Harasser has authority



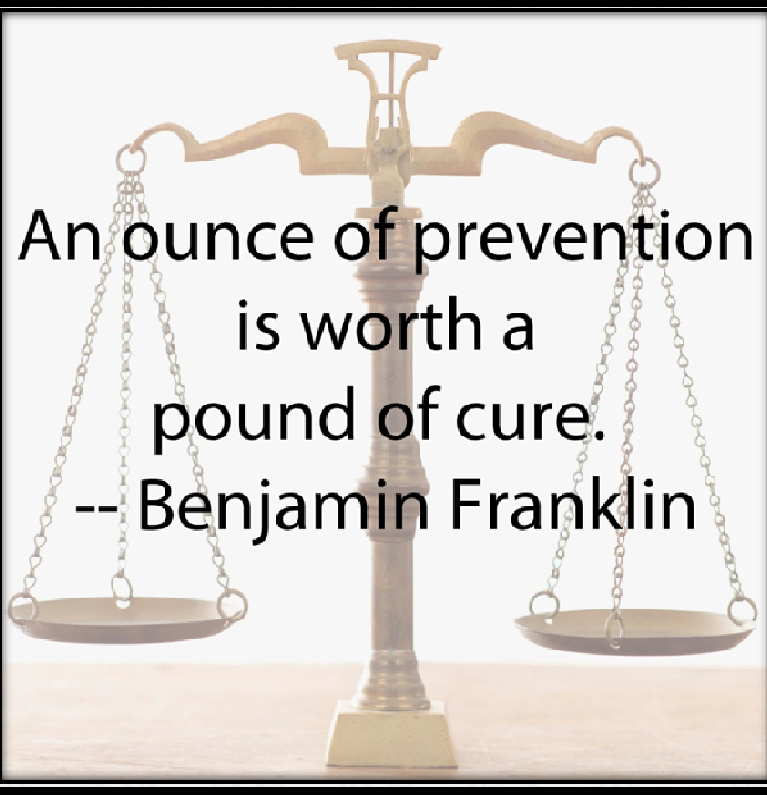


# Types of Sexual Harassment

- Hostile work environment
- Conduct which interferes with work performance or creates an intimidating, hostile or offensive working environment
- It is so severe and pervasive that it alters the conditions of the victim's employment and creates an abusive working environment
- The standard is both objective and subjective



# Prevention



An ounce of prevention  
is worth a  
pound of cure.  
-- Benjamin Franklin



# Prevention

- Create a culture
- Widely disseminate the harassment policy
- Zero tolerance
- Provide a reasonable complaint protocol



# Defenses

Once a complaint or incident occurs:

- Investigate promptly and thoroughly
- Take immediate action and appropriate corrective action
- Consider disciplinary action against the harasser
- Follow up





# Defenses – Quid Pro Quo Cases

Legitimate reasons for the adverse action, including:

- Excessive absenteeism or tardiness
- Poor performance
- Various other actions by employee



## Defenses – Quid Pro Quo Cases



# Defenses – Hostile Environment Cases

Providing by a preponderance that:

1. The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and,
2. The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.





**Understanding  
the Evolving  
Rights of LGBTQ  
Employees -  
Where Are We  
Now?**



# Where Are We Now?

- Generally, circuit court precedent falls into three categories:
  - Title VII does not prohibit discrimination based on sexual orientation
  - Sexual orientation by itself is not a protected class under Title VII, but individuals can attempt to bring Title VII *Price Waterhouse* claims that they were discriminated against for failure to adhere to conventional gender stereotypes, specifically looks or mannerisms, i.e., sex stereotyping.
  - Title VII prohibits discrimination based on sexual orientation.

# Where Are We Now?

- The majority of circuit courts follow the sex stereotyping analysis.
- These claims and the court opinions addressing them are somewhat convoluted.



# Terminology and Concepts

- Gender Identity
  - One's deeply felt internal sense of being male, female, both or neither. It is the primary determinant of sex. Also called "brain sex"
- Gender expression
  - Refers to the way a person expresses gender through dress, grooming habits, mannerisms and other characteristics
- Transgender
  - An umbrella term that refers to people who have a gender identity different than the sex they were assigned at birth. It can also apply broadly to people who transgress gender norms. Transgender people may or may not undergo a medical transition
- Retaliation



# Title VII In Perspective

- Prohibits discrimination in employment “because of... race, color, religion, sex or national origin.”
- The meaning of “because of sex” has evolved:
  - 1965 – EEOC (Equal Employment Opportunity Commission): “No man should be required to have a male secretary.”
  - 1971 – Refusal to hire men as flight attendants is sex discrimination.
  - 1976 – Discrimination based on pregnancy is permissible.
  - 1986 – Sexual harassment is sex discrimination (*Meritor Sav. Bank v. Vinson*).



# Supreme Court Weighs In

Three cases currently pending before U.S. Supreme Court

Joined Cases:

1. *Altitude Express v. Zarda* arising from E.D.N.Y.
  - Second Circuit (en banc) found sexual orientation to be a subset of “sex” and protected by Title VII
2. *Bostock v. Clayton County, Georgia*
  - 11<sup>th</sup> Circuit found sexual orientation not protected by Title VII

# Supreme Court Weighs In

## 3. *R.G. & G.R. Harris Funeral Homes v. EEOC*

- Sixth Circuit overturned district court in Michigan and found that transgender employee was protected by Title VII and also used sexual stereotyping analysis

# Supreme Court Weighs In

## Amicus Briefs:

- A. In favor of employees/protection of sexual orientation:
  - American Civil Liberties Union
  - American Bar Association
  - Amazon, Google and other employers
- B. In favor of employers/no protection of sexual orientation
  - 16 states, led by Texas, Nebraska, Tennessee and Oklahoma
  - Department of Justice
  - Certain congressional lawmakers, including Senator Jim Inhofe
  - Brigham Young University and Liberty University

Oral Argument: October 8, 2019

## The EEOC's Position

- In 2012, the EEOC employed a Strategic Enforcement Plan
  - One priority: “Addressing emerging and developing issues,” including “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”
- In 2013, the EEOC’s decision in *Jameson v. U.S. Postal Service*, addressed proper name usage
  - Repeated and/or intentional uses of the incorrect male pronouns subjected the complainant to a hostile work environment and constituted sex discrimination.



## The EEOC's Position

- In 2015, the EEOC decided in *Lusardi v. McHugh* that discrimination against transgender employees is sex discrimination prohibited by Title VII of the Civil Rights Act
  - Denying the complainant's use of "a restroom that other persons of her gender were freely permitted to use...constitutes a harm or loss with respect to the terms and conditions of complainant's employment."
  - The EEOC further stated that confining the employee to "single shot" restrooms isolated her and perpetuated a "sense that she was not worthy of equal treatment and respect."
  - The EEOC also held that discriminatory terms and conditions of employment cannot be justified by supervisory or co-worker confusion or anxiety.

# The EEOC's Position

- Transgender
  - Discrimination based on transgender status is, by definition, discrimination based on sex and is in violation of Title VII. The EEOC supports this position for the following reasons:
    - Transgender discrimination is discrimination based on sex because it involves non-conformance with gender norms and stereotypes;
    - A plain interpretation of the statutory language prohibits discrimination because of sex. See *Macy v. Dep't of Justice*, 2012 WL 1435995 (April 20, 2012).

# The EEOC's Position

- Sexual Orientation
  - Discrimination based on sexual orientation necessarily states a claim of sex discrimination under Title VII. The EEOC supports this position for the following reasons:
    - Sexual orientation discrimination involves treating employees differently based on sex
    - It takes sex into account by treating the individual differently for associating with a person of the same sex
    - It involves discrimination based on gender stereotypes. See *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015)

# The Department of Justice's Position

- DOJ does not take the same position as the EEOC
- The Office of the Attorney General of the United States' memorandum states:
  - "Title VII does not prohibit discrimination based on gender identity per se." Sessions, J. (October 4, 2017).
- EEOC's disclaimer:
  - "Note that the U.S. Department of Justice's position regarding Title VII's coverage of LGBT-related discrimination differs from that of the EEOC."

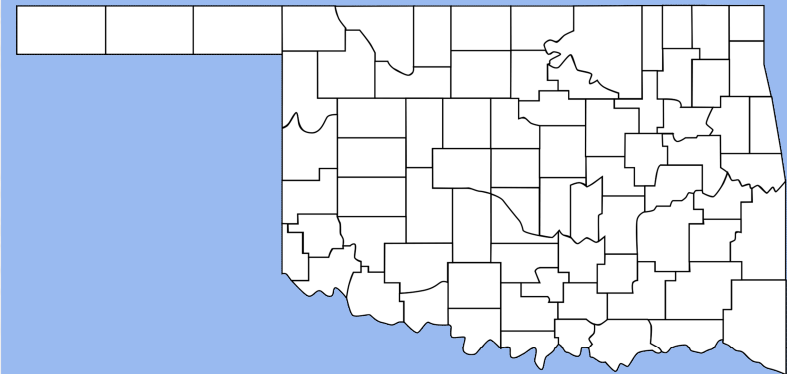


# State Laws

- Currently, 22 states and the District of Columbia prohibit discrimination based sexual orientation
- Currently, 20 states and the District of Columbia prohibit discrimination based on gender identify

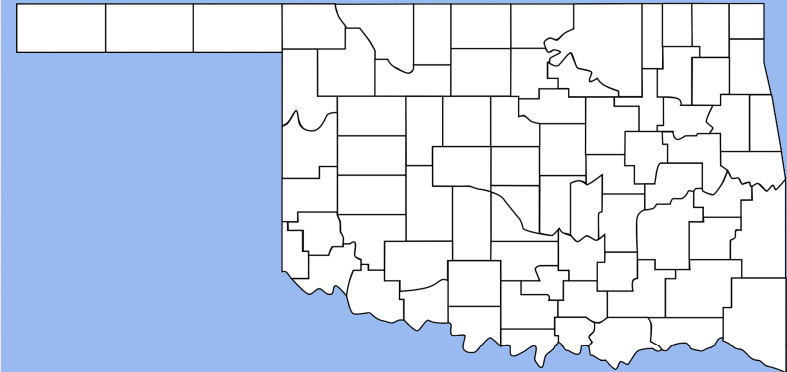
# Oklahoma Law

- No state level laws
- Seven localities prohibit discrimination based on sexual orientation for employees in local government:
  - Oklahoma City
  - Tulsa
  - Del City
  - Altus
  - McAlester
  - Vinita
  - Miami



# Oklahoma Law

- Private Sector
  - No localities in Oklahoma have ordinances that prohibit gender identity discrimination in either local government or in the private sector.



# The Trend

- Progressive employers
- Fortune 500 companies
  - 91% have sexual orientation non-discrimination policies
  - 83% have gender identity non-discrimination policies



# Employer Best Practices

## Discrimination Policies/Forms DOs

- DO update policies to specifically state that discrimination and harassment based on a person's actual or perceived sexual orientation, gender identity and/or transgender status violates company policy.
- DO consider eliminating check boxes on company forms delineating M or F only.
- DO train on best practices to avoid workplace discrimination and harassment.
- DO provide comprehensive complaint and investigation policies and procedures.

# Employer Best Practices

## Discrimination Policies/Forms DON'Ts

- DON'T prohibit a transgender or gender non-conforming employee from using a single-sex facility consistent with their gender identity.
- DON'T force a transgender or gender non-conforming employee to use the single-occupancy restroom.
- DON'T impose different uniform, dress codes, grooming or appearance standards based on sex or gender; instead have a gender-neutral dress code and grooming standards.

# Employer Best Practices

## Communication DOs

- DO use pronouns consistent with the employee's preference or gender presentation.
- DO allow the transgender employee to set timetable for disclosure to colleagues.
- DO respect employee's privacy, (i.e., medical or surgical history).
- DO delegate a point person to listen and assist employee during transition process, including benefits issues; maintain confidentiality.



# Employer Best Practices

## Communication DON'Ts

- DON'T make assumptions about a transgender employee's sexual orientation.
- DON'T make evaluative comments on how successfully the transgender person conforms to traditional gender standards.
- DON'T use the phrase "sex change."
- DON'T give unsolicited advice on grooming and dress.



# Concepts and Terminology

## Sexual Orientation:

- One's romantic, physical and/or sexual attraction to same-sex and/or different-sex people. Sexual orientations include: gay, lesbian, bisexual and others.

## Questioning:

- A process of exploration for people who may be unsure of their sexual orientation or gender identity. Most often used when discussing youth.

# Concepts and Terminology

## Sex Assigned at Birth:

- The sex designation given to someone at birth, usually by a medical professional and generally based on appearance of external genitalia.

## Cisgender:

- Refers to people who have a gender identity that is the same as the sex they were assigned at birth.

# Concepts and Terminology

## Lesbian:

- Refers to a woman who is primarily attracted romantically and/or sexually to other women.

## Gay:

- A term that can be used to describe either a male whose primary sexual and romantic attraction is to other males or to reference anyone whose primary sexual and romantic attraction is to a person who is the same sex as themselves.

## Bisexual:

- A sexual orientation or identity describing one's sexual, romantic and/or affectional attraction to people of the same sex and people of different sexes. Many bisexual-identified people are attracted to a spectrum of gender identities or expressions and recognize a non-binary gender paradigm.

# Concepts and Terminology

## Queer:

- An umbrella term used by people who reject conventional categories such as LGBT or embrace a political identity as “queer” in addition to being LGB and/or T. It also may include straight or cisgender people who embrace a non-normative or counter-normative sexual identity. Offensive when used as an epithet.

## Intersex:

- An umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated “male” or “female.” In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some intersex variations may not be visibly apparent at all. Some people who are intersex identify as binary; others do not.



# Concepts and Terminology

## Asexual:

- Describes people who do not experience sexual attraction. Unlike celibacy, which denotes the purposeful abstention from sex that one would otherwise enjoy, asexuality is an intrinsic lack of interest in sexual activity. Many asexual people experience romantic and affectional feelings towards others but do not desire to express those feelings in a sexual way. Other asexual people are uninterested in romantic relationships and focus instead on forming platonic bonds. Like any community, asexual people are diverse.

## Two-Spirit:

- A term that refers to historical and current First Nations or Native American people whose individual spirits blend male and female. This term has been reclaimed by some in Native American LGBT communities to honor their heritage and provide an alternative to the labels gay, lesbian, bisexual or transgender.

# Concepts and Terminology

## Crossdresser:

- A person who wears clothing traditionally worn by members of a different sex. Crossdressers are often comfortable with the sex they were assigned at birth and do not wish to transition. While crossdressing is a form of gender expression, it is not necessarily tied to sexual orientation or erotic activity. Many crossdressers are heterosexual and/or cisgender.

## Agender:

- Literally “without gender.” Some agender people identify as having no gender and others with a non-binary identity.

## Third Gender:

- Or “Third Sex” is a concept in which individuals are categorized, either by themselves or by society, as neither man nor woman. It also describes societies that recognize three or more genders.

# Concepts and Terminology

## Genderqueer:

- A term used by some people who identify their gender as being somewhere on the continuum between, or outside of, the binary gender system. Genderqueer people may or may not also identify as transgender. This should only be used if the individual identifies as genderqueer.

## Gender-fluid:

- A term used by people who identify their gender as fluid within a spectrum of gender identities and expressions.

## Gender-nonconforming:

- A term used to describe people who do not meet society's expectations of gender roles. Not all gender-nonconforming people are transgender and not all transgender people are gender-nonconforming.

# Concepts and Terminology

## Non-binary:

- Describes gender identities that do not fit within the binary of male or female. Refers to a spectrum of gender.

## They, Them, Ze, Hir, Xe, Xem:

- Pronouns some individuals use if they have gender identities that do not fit in with the binary male or female.

## She, Her, He, Him:

- Binary Pronouns used by many people who are female or male, respectively.



# Concepts and Terminology

## **MTF – Male to Female:**

- Initials or phrase no longer considered appropriate to describe someone who is transgender, as it focuses on the sex assigned at birth and insinuates that a transgender person was a male who became a female, instead of a woman who was assigned the incorrect sex at birth. Some people still do use this term to describe themselves.

## **FTM – Female to Male:**

- Initials or phrase no longer considered appropriate to describe someone who is transgender, as it focuses on the sex assigned at birth and insinuates that a transgender person was a female who became a male, instead of a man who was assigned the incorrect sex at birth. Some people still do use this term to describe themselves.

## **MAAB or FAAB:**

- Male Assigned at Birth or Female Assigned at Birth.

# Concepts and Terminology

## Transition:

- 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 can include 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 possible (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person.

## Sex Reassignment Surgery (SRS):

- Also called Gender Confirmation Surgery (GCS). Refers to doctor-supervised surgical interventions, and is only one small part of transition (see transition above). Avoid the phrase "sex change operation." Do not refer to someone as being "pre-op" or "post-op." Not all transgender people choose to, or can afford to, undergo medical surgeries.

# Concepts and Terminology

## NOTE:

- There is not universal agreement on identity terminology and that some of these terms can still be used as slurs, but that is important to recognize that even if you may be unfamiliar or uncomfortable with an identity, if someone tells you they identify as such and asks to be referred to as such, you should respect the person's right to self-determination and self-identification.

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