



EMPLOYMENT LAW ALERT

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YOU CAN'T CLOSE THE BATHROOM DOOR: The EEOC Issues Guidance on Bathroom Access Rights for Transgender Employees

Patricia Tsipras, Esq.

In March 2016, North Carolina enacted its Public Facilities Privacy & Security Act, requiring individuals to use restrooms that correspond to the sex listed on their original birth certificates. This law means that transgendered people cannot use the restroom of the gender with which they identify. The fate of this law is uncertain, as it is being challenged in court and by the U.S. Department of Justice. Whatever the outcome, gender identity issues are becoming more commonplace in the workforce.

North Carolina is not alone. On April 5, 2016, Mississippi enacted the Mississippi Protecting Freedom of Conscience from Government Discrimination Act, which prohibits the state government from taking action against a person who establishes sex-specific standards or policies regarding access to restrooms, baths, showers, dressing rooms, lockers, and other intimate facilities. In addition, the City Council of Oxford, Alabama has enacted an ordinance making it unlawful for a person to use a bathroom or changing facility within the jurisdiction of

the City that does not correspond to the person's biological sex – defined as the sex “stated on a person's birth certificate.” Unlike the laws in Mississippi and North Carolina, Oxford's ordinance criminalizes bathroom usage based on gender identity. A person violating the ordinance could be punished by a fine of up to \$500 or up to six months in prison.

The Equal Employment Opportunity Commission (EEOC) has staked out its position on the issue in a new fact sheet entitled **Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964**.

In addition to other federal laws, the EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964, which applies to all federal, state, and local government agencies in their capacity as employers, and to all private employers with 15 or more employees. Title VII makes it illegal to discriminate against a job applicant or an employee

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because of the person's race, color, religion, national origin, or sex.

The EEOC lists "gender identity" and "sexual orientation" as protected under the "sex" characteristic of Title VII, though the statute does not mention them. The EEOC further notes that a person does not have to undergo any medical procedure to be considered a transgender man (assigned the female sex at birth but who identifies as a male) or a transgender woman (assigned the male sex at birth but who identifies as a female).

Not surprisingly, the conclusions in the Fact Sheet are consistent with the EEOC's recent decisions in

- Macy v. Department of Justice (April 2012), where the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII; and
- Lusardi v. Department of the Army (March 2015), where the EEOC ruled 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). As the EEOC observed in that case, "supervisory 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 Fact Sheet also discusses an April 2016 decision from the United States Court of Appeals for the Fourth Circuit under Title IX, a statute that prohibits sex discrimination in any education program or activity receiving federal financial assistance. Specifically, in G.G. ex rel. Grimm v. Gloucester County School Board, the Fourth Circuit deferred 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.

The EEOC is aggressively litigating its position that Title VII's protections extend to gender identity and sexual orientation. See our article entitled *Got Title VII Straight?* Equally important, 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," the core principle of which is that "[a]ll employees, including transgender employees, should have access to restrooms that correspond to their gender identity."
- Likewise, the U.S. Office of Personnel Management issued

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“Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace,” which embraces the same principle.

Nor can employers in North Carolina, Mississippi, and Oxford, Alabama defend themselves before the EEOC by saying they were complying with state law because contrary state law is not a defense under Title VII.

So what is an employer to do? Stay apprised of developments on this issue and ensure that your anti-discrimination and anti-retaliation policies comply with the law.

Please contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinformunato.com for more information on this article or to discuss your policies or practices regarding transgender employees.

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