It's About More Than Which Bathroom –
Gender Identity Issues
Changing Ideas, Changing the Workplace

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Justin Mulaire, Esq., Trial Attorney, U.S. EEOC
Whitney Ross, Claims Manager, Financial & Professional Lines, Starr Adjustment Services, Inc.
Heather A. Bailey, Esq., Partner, SmithAmundsen LLC
Christine Murray, Senior VP Chief Underwriting Officer – Professional Lines, USLI
Defining Terms

- **Sex** is more than the designation of a person at birth as either “male” or “female” based on their anatomy (i.e., pregnancy, sexual orientation).
- **Transgender** is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.
- **Gender Identity** refers to a person’s internal sense of being male, female or something else.
- **Gender Expression** refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.
- **“Trans”** is sometimes used as shorthand for “transgender.” While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person.
Less Common Terms

- **Genderqueer** is an umbrella term for gender identities other than man and woman. People who identify as genderqueer may see themselves as being both male and female, neither male nor female or as falling outside of both categories.

- **Gender Non-conforming** refers to people who do not behave in a way that conforms to the traditional expectations of their gender.

- **Gender Dysphoria** is a psychological diagnosis recognized by the American Psychiatric Association that is marked by clinically significant distress caused by a marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her.

- **Transition** is the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth.
Discrimination because of gender identity is sex discrimination

Discrimination because of sexual orientation is sex discrimination
EEOC Policy

If you didn’t like Venn diagrams in high school, look away!

Sex Discrimination

- Gender Identity discrimination
- Sexual orientation discrimination
- Use of sex stereotypes
- Pregnancy discrimination
EEOC Policy:

Discrimination because of gender identity = sex discrimination

For example…

- Failing to hire applicant because she is transgender
  - *Macy v. Dep’t of Justice* (EEOC Appeal, April 20, 2012)

- Firing employee because he is planning a gender transition and plans to start using a traditionally female name soon

- Repeatedly & intentionally calling transgender woman “he” or “him” or by her previous, traditionally male name (harassment)
  - *Lusardi v. Dep’t of the Army* (EEOC Appeal, April 1, 2015)

- Denying a woman access to the women’s restroom because she is transgender (terms & conditions of employment)
  - *Lusardi also covers this*
EEOC Policy:

Discrimination because of **sexual orientation** = **sex discrimination**

For example…

- Denying employee promotion because he is gay
  
  - *Baldwin v. Dep’t of Transportation* (EEOC Appeal, July 15, 2015)

- Firing bisexual employee because she dated women in the past

- Denying spousal health insurance benefits to a woman because her spouse is also a woman

- Harassing an employee because she is a lesbian
Caselaw in the 7th and 8th Circuits says sex discrimination does not include discrimination against “transsexuals.”

- *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984) (Title VII only prohibits discrimination “against women because they are women and against men because they are men”)

- *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982)

The 10th Circuit says “transsexuals” are not a “protected class,” but assumes without deciding that Title VII may extend to “transsexuals who act and appear as a member of the opposite sex.”

- *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215 (10th Cir. 2007) (transsexuals are not a protected class under Title VII)
Caselaw supporting coverage: gender identity

- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)
  - “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”

  - Along with *Glenn*, comes the closest to saying gender identity discrimination is sex discrimination *per se*.

- The 1st, 6th, and 9th Circuits and many district courts have also applied sex stereotyping analysis to sex discrimination claims by transgender plaintiffs.
Caselaw supporting coverage: gender identity (cont’d)

- **Fabian v. Hosp. of Central Connecticut**, 2016 WL 1089178, *12 (D. Conn. Mar. 18, 2016) (failure to hire applicant because she is transgender is sex discrimination under Title VII)

  - “[T]he notion that the word ‘sex’ simply and only means ‘male or female’ ... is mistaken.”

  - “‘Male or female’ is a relatively weak definition of ‘sex’ for the same reason that ‘A, B, AB, or O’ is a relatively weak definition of ‘blood type’: it is not a formulation of meaning, but a list of instances.”

  - “Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the ‘wrong’ way, is obviously discrimination ‘because of religion.’”
Same Sex Benefits: 

On June 26, 2015 the Supreme Court held that: The Constitution requires that same-sex couples be allowed to marry no matter where they live and that states may no longer reserve the right only for heterosexual couples.
North Carolina - First state to enact a law requiring people to use bathroom or locker rooms in schools and other public facilities that match the gender of their birth.

Georgia - Governor vetoed similar bill.

Alabama - The Supreme Court of Alabama ordered all the state's probate judges to stop issuing marriage licenses to same-sex couples, the latest saga in a growing legal battle in Alabama over whether the decisions of federal justices trump those made by state judges.

Mississippi - Passes Religious Liberty Law - Effective July 2016 - The first-of-its-kind law allow businesses, individuals, and religiously affiliated organizations to deny service to LGBT people, single mothers, and others who somehow offend an individual's "sincerely held religious belief." It also directly targets transgender residents, effectively claiming that one's sex assigned at birth is immutable, and will be the only gender recognized by the state.
Other States with LGBT Protections

- Colorado (2007)
- Delaware (2009, 2013)
- District of Columbia (1977, 2006)
- Iowa (2007)
- Massachusetts (1989, 2012)
- Maine (2005)
- Maryland (2014)
- Minnesota (1993)
- New Jersey (1992, 2007)
- New Mexico (2003)
- Nevada (1999, 2011)
- Oregon (2008)
- Rhode Island (1995, 2001)
- Utah (2014)
- Wisconsin (1982)
EEOC v. R.G. & G.R. Harris
Funeral Homes (Michigan)

• Fired after disclosed that he was transitioning to become a woman

• Allegedly told that this was unacceptable

• April 9, 2015: motion to dismiss denied as Title VII protects individuals who fail to act in accordance and/or identify with perceived sex or gender
EEOC v. Lakeland Eye Center

- Middle District of Florida

- EEOC alleges that eye center’s director of hearing services was terminated after beginning to present as a woman

- Settled for $150,000
Restroom Use Issues
Transgender Employees
Restroom Use - EEOC

• Considers transgender status protected

• In April 2015, the EEOC ruled that denying an employee use of a restroom used by gender he/she identifies with is direct evidence of sex discrimination under Title VII

• Unclear whether courts will follow EEOC approach
Use of Restrooms - OSHA

- Issued new guidance on June 1, 2015
- Recommend employers allow transgender employees to use restrooms corresponding to gender they identify with
- Focus is health and safety issues
- Employees should be allowed to work the way they live
- Should not be required to provide medical or legal documentation
- Cannot force employees to use unisex restroom
With the EEOC’s focus on LGBT, insurers should expect more employee claims against employers.

- Types of Claims
- Policy Coverage / Services
- Challenges to Resolution
Employment Practice Claims – Third Party

• Insurers should also expect to see more third party employment claims.
  • Types of Claims
  • Policy Coverage
  • Challenges to Resolution
Where Does Employment Practices Liability Insurance Come In?

Christine Murray, SVP and Chief Underwriting Office, USLI
Defense Costs and Indemnity for Basic Covered Perils

– Discrimination

– Harassment

– Retaliation

– Wrongful Termination

– Expanded Definitions of “Wrongful Employment Act” generally all revolve around these four perils …
Definition of “Wrongful Employment Act”

Employment-related:
• Misrepresentation
• Defamation
• Invasion of privacy
• Negligent supervision, training or evaluation
• Wrongful discipline
• Wrongful deprivation of opportunity
• Wrongful infliction of emotional distress

• Breach of employment contract
• Wrongful demotion
• Failure or refusal to hire or promote
• Negligent retention
• Failure to enforce written policies and procedures related to a Wrongful Employment Act
• Negligent violations of USERRA and FMLA
Definition of Discrimination

- termination of an employment relationship
- demotion or a failure to hire or promote any individual
- any other limitation or classification of an Employee or applicant for employment which would deprive any individual of employment opportunities or adversely affect any individual’s status as an Employee;

because of race, color, religion, age, sex, disability, pregnancy, national origin, marital status, sexual orientation or other protected class or characteristic established under applicable federal, state, or local statute, ordinance, regulation or order.
Definition of Harassment

• **sexual harassment** including unwelcomed sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature that are made a condition of employment, are used as a basis for employment decisions, or create a work environment that is hostile, intimidating or offensive or that interferes with performance; or

• **other harassment** which creates a work environment that is hostile, intimidating or offensive or that otherwise interferes with performance
Third Party Discrimination & Harassment

- **Third Party** means any person with whom an Insured interacts while performing duties related to the conduct of the insured’s business.

- Same definitions of discrimination and harassment apply to employees’ treatment of third parties.

- If a third party discriminates against or harasses an insured’s employee?
Duty to Defend

- The insurer has the right and duty to defend the insured
- 100% allocation of defense costs
  - Covered and uncovered matters/persons
- Carrier assigns panel counsel
- Reimbursement policies as alternative to Duty to Defend policies
In PLUS News…

• 8/9/16 --“Viability of Sexual Orientation Discrimination Claims: Venue Driven?

• 8/9/16 – “EEOC: Title VII Prohibits Employment Discrimination Based on Gender Identity, Sexual Orientation”

• 8/10/16 – “A Conflicted 7th Circuit Holds Title VII Does Not Cover Sexual Orientation Discrimination”
  – *Kimberly Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. July 28, 2016)
Employment Non-Discrimination Act (ENDA)

- Would prohibit employment discrimination based on sexual orientation and gender identity
  - Would apply to employers with 15 or more employees
- Exemption for organizations whose “primary purpose” is to worship or teach religious doctrine, non profit membership-only clubs and the US Armed Forces.
- Introduced in every Congress except one since 1994
  - 1996: Lost by one Senate vote & opposed by major corporations
  - 2007: Gender identity protection first included in the bill
  - 2011: Transgender protection included
  - 2013: Passed in the Senate but died in the House
  - 2014:
20 states, DC, Guam and Puerto Rico have statutes that protect against both sexual orientation and gender identity employment discrimination: CA, CO, CT, DE, HI, IL, IA, ME, MD, MA, MN, NV, NJ, NM, NY, OR, RI, UT, VT, WA

NH and WI have statutes that only protect sexual orientation discrimination

16 states no state-level protection for LGBT in either the public or private sector: SC, GA, FL, TN, AL, MS, AR, OK, TX, ND, SD, NE, KS, WY, ID
Of Fortune 500 companies:

- 91% have non-discrimination policies that include sexual orientation; 61% include gender identity
- 67% provide domestic partner health benefits
- 28% provide transgender-inclusive benefits
- 44% have organizational competency practices
- 49% assert a public commitment to the LGBT community
Consider this…

• “64% of respondents cited “because it’s nobody’s business” as one of the reasons for not being openly LGBT in the workplace
  – Statistical analysis reveals the highest correlation between this response and workplace experiences of harassment, anti-LGBT jokes and comments made on a frequent basis, along with other demeaning behavior from co-workers”

• “81% of non-LGBT people report that they feel LGBT people should not have to hide who they are at work
  – However, less than half would feel comfortable hearing an LGBT coworker talk about their social lives, dating or related subject”

The Cost of the Closet and the Rewards of Inclusion
Why the Workplace Environment for LGBT People Matters to Employers

## Overall Business Impact

Employee engagement suffers by up to 30 percent due to unwelcoming environments. When asked about the following results of experiencing a negative workplace environment and/or feeling compelled to be closeted, LGBT workers reported the following effects on their productivity, engagement with coworkers and overall sentiments about their job.

<table>
<thead>
<tr>
<th>Effect</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Stayed home from work</td>
<td>15%</td>
</tr>
<tr>
<td>Searched for a different job</td>
<td>22%</td>
</tr>
<tr>
<td>Felt distracted from work</td>
<td>30%</td>
</tr>
<tr>
<td>Avoided working on a certain project</td>
<td>9%</td>
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<tr>
<td>Avoided working with certain clients or customers</td>
<td>17%</td>
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<tr>
<td>Avoided a social event at work such as lunch, happy hour, or a holiday party</td>
<td>24%</td>
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<tr>
<td>Had to lie about my personal life</td>
<td>35%</td>
</tr>
<tr>
<td>Felt exhausted from spending time and energy hiding my sexual orientation</td>
<td>20%</td>
</tr>
<tr>
<td>Felt exhausted from spending time and energy hiding my gender identity</td>
<td>15%</td>
</tr>
<tr>
<td>Felt unhappy or depressed at work</td>
<td>30%</td>
</tr>
<tr>
<td>Avoided certain people at work</td>
<td>27%</td>
</tr>
<tr>
<td>Had to lie about the reason to take off work in order to care for your partner, child, or other family member</td>
<td>14%</td>
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</tbody>
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Other Workplace Statistics to Consider

- 78% of transgender individuals have been subjected to workplace discrimination
- 43% of LGBT workers have experienced workplace discrimination
- 8-17% report being fired or denied employment based on sexual orientation
- 10-28% report being denied a promotion or given negative employment evaluations
- 7-41% report being verbally/physically abused or had their workspace vandalized
- 10-19% report receiving unequal pay or benefits

Mitigating Risk in Employment/Gender Identity Claims

Heather A. Bailey, Esq., Partner, SmithAmundsen LLC
Mitigating Risks in Employment

• Practical Considerations – Transgender Employees
  – Name preference
  – Dress codes
  – Housing discrimination
  – Right to participate in sports
  – Restroom use
  – Ability to legally change one’s name on driver’s license, birth certificate, social security card, passport
  – Ability to legally change gender markers
  – Marriage
  – Airport frisks
  – Healthcare coverage
Mitigating Risks in Employment

• Best Practices to Avoid Liability
  – Workplace training, especially management
  – Inclusive policies/Update policies in Handbook (EEO, Non-Discrimination)
  – Evaluate and update, if applicable, dress code
  – Evaluate company correspondence to be inclusive
  – Adopt transition guidelines for transgender and gender-transitioning
  – Ensure all employees have access to a restroom in accordance with their gender identity and consider adding an all-gender restroom option

• Consider a health insurance company that offers coverage for transition-related health care – and choose a coverage for your employee plans that include that coverage.

• Establish relationship with nearby LGBT organizations and LGBT recruitment assistance
Questions?