LGBTQ+ Protections Under Federal EEO Law

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Understanding Concepts-

“THROUGH EDUCATION COMES UNDERSTANDING. THROUGH UNDERSTANDING COMES APPRECIATION. “
Sexual orientation:
Describes who you are attracted to.

Gender identity:
Describes who you are.
It is a person’s internal, deeply held sense of their gender.

Transgender:
Refers to people whose gender identity and/or expression is different from the sex assigned to them at birth.
Additional Terminology

**Cisgender (“Cis”):** Someone whose gender identity matches the sex assigned at birth.

**Dead Name:** The name of an individual given at birth, that is no longer used after transition.

**Misgendering:** The act of referring to someone in a way that does not conform to his/her/their gender identity.

**Non-binary:** A general term meaning someone who does not identify as male or female. Includes agender (having no gender), bigender (identifying as both male and female), genderfluid (alternating between male and female identities), and others.
Transition

The process that people go through to change their gender presentation.

Could include:
- Social changes (e.g., clothing, pronouns)
- Legal (e.g., name change)
- Medical (e.g., hormones, surgery)

*Some transgender people do not want medical intervention—do not assume that transition will include surgery/hormones.
Title VII: Case Review

DISCRIMINATION ON THE BASIS OF SEX
Title VII does not *explicitly* include the terms “gender identity” or “sexual orientation” as a basis for protection under the law.

EEOC’s perspective: the law’s broad prohibition of discrimination “on the basis of . . . sex” prohibits discrimination on the basis of sexual orientation and gender identity.
EEOC Cases
Leading Up to Bostock:  *Macy*

Macy v. Dept of Justice (April 20, 2012)
- Ms. Macy applied and was offered a position, pending a background check.
- When Macy, who identified as male during the initial interview, informed the agency she was transitioning gender, she was told the position was no longer available.
- Holding:

  *The Commission finds that discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on sex,” and such discrimination violates title VII.”*
EEOC Cases

Leading Up to Bostock: *Baldwin*

*Baldwin v Dept of Transportation*, July 15, 2015

- Agency failed to select Mr. Baldwin for a position.
- Complainant’s supervisor stated, “we don’t need to hear about that gay stuff,” and also told complainant that he was “a distraction in the radar room” when his participation in conversations included mention of his male partner.

Holding:

**Discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII.**
The *Bostock Cases: Harris Funeral Homes*

- R.G. & G.R. Harris Funeral Homes v. EEOC
  - Ms. Stephens is fired after announcing her upcoming transition.
  - District court held that Title VII does not cover transgender individuals; and
  - Sixth Circuit Reversed
The *Bostock* Cases: *Zarda*

**Zarda v. Altitude Express**
- Mr. Zarda fired after telling a client that he is gay.
- District Court: held that Title VII does not cover sexual orientation.
- Second Circuit granted *en banc* review.
- Second Circuit held that sexual orientation is covered by Title VII.
The *Bostock* Cases: *Bostock*

**Bostock v. Clayton County**
- Mr. Bostock was fired after joining a gay softball league and promoting it at work.
- District Court found Title VII did not cover sexual orientation.
- 11th Circuit affirmed
- Mr. Bostock petitioned for a writ of certiorari, which the Court certified in April 2019.
Three cases were consolidated

Held:
Title VII protects employees against discrimination because of their sexual orientation or transgender status.

“It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

Majority opinion (6 to 3) drafted by Justice Neil Gorsuch.
The “But-For” Test

The causation standard under Title VII is still “motivating factor”—disparate treatment is prohibited if sex is a motivating factor (absent a defense)

But the “but-for” analysis can show discrimination

1. Aimee Stephens was assigned the sex “male” at birth.
2. Aimee Stephens identifies as female.
3. Aimee Stephens was fired.
4. If Aimee Stephens had been assigned “female” at birth, she would have been a natal female who identifies as female.
5. Under these circumstances, Aimee Stephens would not have been fired.
6. Therefore Aimee Stephens’ sex made a difference as to whether she was fired.
Doesn’t matter if an employer says decision was due to homosexuality or gender identity (and not sex)

Doesn’t matter if the employer says it would discriminate against LGBTQ+ individuals regardless of sex assigned at birth

When employer fires someone based on sexual orientation or gender identity, it necessarily and intentionally discriminates against that individual in part because of sex
Title VII: Implications of Bostock
Title VII: Disparate Treatment

It is illegal to take a negative employment action against someone on the basis of their sexual orientation or gender identity

- Termination
- Refusal to hire
- Demotion
- Undesirable assignments
- Lesser pay
- Unequal benefits
Title VII prohibits limiting, segregating, or classifying a job applicant or employee in a way that adversely affects opportunities or status on the basis of a protected characteristic.

- segregated or unequal facilities
- “Channeling" individuals in the protected class into particular jobs or career paths
Title VII: Harassment Based on Sexual Orientation or Gender Identity

Unwelcome conduct based on sexual orientation or gender identity.

Offensive conduct may include offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Becomes unlawful where the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
Bostock did not address pronouns or “dead names.”

However, use of pronouns that are inconsistent with an individual’s gender identity or dead names could be “unwelcome conduct.”

Whether or not such conduct is illegal harassment will depend on whether it, when considered with all other unwelcome conduct, is severe or pervasive enough to create a work environment.

Lusardi clarified that, although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns may contribute to a hostile work environment.
### Other Practices

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<th>Include gender identity in harassment and discrimination policies</th>
<th>Trainings</th>
<th>Review health insurance policies to make sure there are no discriminatory terms</th>
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<td>Develop resources</td>
<td>Affinity groups</td>
<td>Names in official records</td>
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THE TIME IS ALWAYS RIGHT TO DO WHAT IS RIGHT.
- MARTIN LUTHER KING
Further Information

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