

TRANSGENDER AND CONSCIENTIOUS OBJECTOR ISSUES IN THE WORKPLACE

Answers to Common Questions

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Transgender Issues in the Workplace

What is Transgender?

- Transgender is an “umbrella” term that refers to many types of individuals, including transsexuals, cross-dressers, and other gender non-conforming individuals perceived to be gender atypical.
- In broadest sense, “transgender” encompasses anyone whose identity or behavior falls outside stereotypical gender expectations.

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Gender Transition

- Gender transition is the process by which transgender people move towards living in the gender with which they identify.
- Some have medical treatment, most do not.
- Identification documents are not always changed.

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Gender Transition

- Gender transition at work happens in different ways.
- Some begin by telling one's supervisor first and develop a timeline.
- Others start presenting in a more masculine or feminine way and coworkers notice.

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Gender Transition

- Until transgender person begins working in his/her new gender role, person should be considered a member of his/her original sex.
- Once employee begins to present himself/herself in new gender role, employee should be considered a member of new gender.

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Gender Transition Versus Sexual Orientation

- Sexual orientation refers to relative genders of an individual's partners (i.e., heterosexual, gay, lesbian or bisexual).
- Transgender people can have any sexual orientation.
- Transgender is not a sexual orientation, it is a gender identity.

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Relevant Discrimination Laws

- 18 states and the District of Columbia have laws that prohibit discrimination against transgender people.
- At least 200 cities and towns have banned gender identity discrimination, including Indianapolis and Bloomington, Indiana.

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Relevant Discrimination Laws

- Although there are no federal laws protecting transgender individuals, EEOC takes position that discrimination because a person is transgender is gender discrimination.
- Therefore, EEOC will accept and investigate claims of discrimination based upon transgender status (or because of gender identity or a gender transition).

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Non-Discrimination Policy

- It is imperative that employers create a transgender non-discrimination policy.
 - Comply with current law.
 - Recruitment/retention of trained workers.
 - An environment of fairness equals good morale.
 - Improves productivity of employees.

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Key Transgender Issues

1. Restrooms
2. Harassment and Hostile Environment
3. Male/Female Boxes, Identification Cards, Background/Credit Checks, and Security Checks
4. Dress Standards

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Guiding Principles

- Recognize self-identity, regardless of surgery and documentation.
- Understand and apply the concept of reasonable accommodation.
- Biases of customers or coworkers are not a valid reason for discrimination.

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Restrooms

- Some states and municipalities have specific laws regarding restroom usage (e.g., New York City requires an employer to permit a transgender employee to use the restroom in accordance with his or her gender identity.)
- EEOC has found that transgender employees must be allowed to use restroom in accordance with his or her gender identity.

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Restrooms

- OSHA prohibits employers from placing “unreasonable restrictions” on access to restrooms.
- As last resort, possible “middle ground” may be for transgender employee to use single-occupancy unisex restroom.

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Restrooms

- An employer may make a reasonable inquiry into an employee's gender only to determine the appropriate restroom rather than an invasive and overbroad investigation.
- EEOC recently issued guidance that it is unlawful for employer to inquire into surgeries or medical procedures as a pre-condition to restroom usage.

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Discrimination/Harassment

- 90% of transgender workers report some form of harassment or mistreatment.
- 15 to 43% of gay/transgender workers have experienced some form of discrimination.
- 8 to 17% of gay/transgender workers report being passed over or fired because of their sexual orientation or gender identity.
- 7 to 41% of gay/transgender workers report being verbally or physically abused.

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Discrimination/Harassment

- Factors contributing to a hostile environment for a transgender person:
 - Refusal to use correct pronouns.
 - Refusal to use person’s preferred name.
 - Asking inappropriate personal questions.
 - Discussing personal business regarding transgender employees behind their backs, including intentionally “outing” a person.

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Discrimination/Harassment

- Integrating transgender workers into the workplace is good for business.
 - Attracts and retains people most qualified for particular jobs.
 - Inclusiveness means an employer can draw from a broad range of talented people.

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Male/Female ID Boxes

- This can come up in many different ways:
 - Check-off box for male or female on a job application form.
 - Filling out an I-9 form.
 - Entering a secure building, a person is asked for identification.
 - A background check reveals the person's old name or gender.

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Male/Female ID Boxes

- Solutions:
 - Do not discriminate when transgender status is discovered.
 - Make allowances for people who earnestly fill out forms or give information that matches their gender identity.

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Dress Standards

- Employers have a right to establish employee dress and grooming guidelines during work hours if they are reasonable and serve a legitimate business purpose.
- Such purposes include:
 - Maintaining a certain image with customers and competitors.
 - Safety (e.g., safety shoes, goggles or gloves).

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Dress Standards

- Dress codes should avoid gender stereotypes.
- Employers can legally implement gender-specific dress codes as long as they are not arbitrarily enforced and do not favor or affect one gender over another.

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Conscientious Objectors in the Workplace

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Overview

- Steps an employer should take to address an employee who refuses to perform general work-related duties due to personal beliefs.
- Discussion will include:
 - Title VII protection and accommodating religious beliefs;
 - Supreme Court opinions; and
 - Examples of “reasonable accommodations”

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Types of Conscientious Objectors

- Kim Davis refusing to issue marriage licenses.
- Pharmacists refusing to prescribe birth control pills.
- Doctors refusing to provide medical treatment to same-sex couples.

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Title VII: What is Protected?

- Employees have right to request a reasonable accommodation for religious beliefs.
- Political beliefs are not protected pursuant to Title VII.

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Definition of Religious Belief

- Title VII definition of religion:
“The term “religion” includes **all aspects** of religious **observance** and **practice**, as well as **belief**, unless an employer demonstrates that he is unable to **reasonably accommodate** an employee’s or prospective employee’s religious observance or practice without **undue hardship** on the conduct of the employer’s business.”

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Reasonable Accommodation

- An employer must provide reasonable accommodation for an employee’s religious beliefs.
- Accommodation does not necessarily have to be the accommodation employee requests.
- If multiple accommodations exist, employer should offer alternative which least disadvantages employee with respect to his/her employment opportunities.

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Examples of Reasonable Accommodations

- Flexible scheduling and leave policies
- Lateral transfers and voluntary demotions
- Modifying dress code or grooming standards

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Examples that *MAY* Require Reasonable Accommodations

- Wearing religious head coverings
- Refusing to wear certain clothes
- Wearing certain hairstyles or facial hair
- Taking prayer breaks
- Refusing to work on the Sabbath
- Requiring time off to observe religious holidays
- Refusing to participate in office celebrations

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Undue Hardship

- Would employer incur more than minor costs?
- Would accommodation violate terms of collective bargaining agreement?
- Would accommodation jeopardize customer relations, disrupt business operations, or require work to be shifted to other employees?
- Would accommodation require employer to violate state law or the rights of employees?

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Noteworthy Cases

- *EEOC v. Abercrombie & Fitch*
- *Vandersand v. Wal-Mart*
- *Miller v. Davis*

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Abercrombie & Fitch
Reasonable Accommodation

- Prior to *Abercrombie*, elements of religious discrimination case:
 - Observance or practice conflicting with an employment requirement is religious in nature,
 - Employer is aware of employee’s religious observance or practice, and
 - Religious observance or practice was basis for adverse employment action.

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Abercrombie & Fitch
Reasonable Accommodation

- Abercrombie & Fitch has a “Look Policy” prohibiting caps.
- Applicant is a practicing Muslim who, consistent with her understanding of her religion’s requirements, wears a headscarf.
- Applicant is denied position because her headscarf violated Abercrombie’s Look Policy.

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Abercrombie & Fitch
Reasonable Accommodation

- Court held applicant need show only that need for an accommodation was a **motivating factor** in the employer's decision, **not that the employer had knowledge of need**.
- Employer may not make applicant's religious practice a factor in employment decisions.
- Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

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Vandersand v. Wal-Mart

- Pharmacist at Wal-Mart refused to dispense "the morning-after pill."
- Pharmacist alleged religious discrimination when placed on unpaid leave.
- Wal-Mart argued that it was an undue hardship because allowing employee not to dispense would violate state law and would require other employees to perform duties.

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Miller v. Davis



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Miller v. Davis: Background

- Davis is an elected official, not an employee.
- Two same-sex couples sought a marriage license in Rowan County Kentucky.
- Davis claimed that issuing marriage license ran contrary to her Apostolic Christian faith.

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Miller v. Davis: Background

- Four deputy clerks shared her religious objection to same-sex marriage.
- One clerk was undecided.
- One deputy clerk was willing to issue the licenses, but Davis would not allow it because her name and title appeared twice on the licenses.

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Miller v. Davis: Governor

- Kentucky Governor issued directive announcing that Kentucky would recognize all same-sex marriages as valid.
- In addressing religious beliefs expressed by some clerks, Governor stated that:
 - They could continue to have their own personal beliefs; and
 - Resign if they were unable to fulfill their duties prescribed by law.

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Miller v. Davis: Ruling

- Court found as follows:
 - “No marriage licenses” policy discouraged Rowan County residents from exercising their right to marry.
 - Davis had potentially violated the protection clause by openly adopting a religious convictions at the expense of others.
 - Davis infringed upon plaintiffs’ rights without serving a compelling state interest.

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Questions?

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