

TRANSGENDER LAW AND EMPLOYMENT POLICY

I. Legal Issues

A. Federal non-discrimination laws.

Courts have uniformly held that federal non-discrimination laws do not apply to transsexuals, transgenderists or crossdressers.

1. To date no court has found Title VII of the 1964 Civil Rights Act applicable to discrimination cases brought by transsexuals. See, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081(7th Cir. 1984); Holloway v. Arthur Anderson and Company, 566 F.2d 659(9th Cir. 1977). Both courts concluded that there was no legislative history to support broadening the definition of "sex" to include transsexuals. In other words, you cannot discriminate against men because they are men or women because they are women but you can legally discriminate against transsexuals because they are transsexuals.

Some courts have indicated that transsexuals may state a cause of action under Title VII if they can prove their status as "women" and allege discrimination as a "woman." Would this require medical affidavits supporting a transsexual's claim to status as a "woman"? [Ask for input]

2. Consider Sommers v. Budget Marketing, Inc., 667 F.2d (8th Cir. 1982) wherein the Court of Appeals held that the word "sex" in Title VII ban on sex discrimination in employment is to be given its "plain meaning" and does not encompass transsexuals. In this case the employer dismissed Sommers because she misrepresented herself as an anatomical female on her job application. Budget further alleged that the misrepresentation led to a disruption of the company's work routine in that a number of female employees said they would quit if Sommers were allowed to use female rest room facilities. Sommers' attorney alleged that she had been discriminated against because of her status as a female with the anatomical body of a male and the fact that she had not yet had sexual conversion surgery should not prevent her from being classified as female.

The court agreed that Title VII did not have sufficient legislative history to indicate that Congress intended for the term "sex" to have anything more than its plain meaning. ("Sex" is not defined anywhere in the Act, nor did the court attempt to define it). The legislative history clearly indicates that the major thrust of Title VII was toward providing equal opportunities for women. However, it is interesting to note that the court was troubled by Sommers' dilemma:

We are not unmindful of the problems Sommers faces. On the other hand, Budget faces a problem in protecting the privacy interests of its female employees. According to affidavits submitted to the district court, even medical experts disagree as to whether Sommers is properly classified as male or female. The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female rest room, the male rest room, or one for Sommers' own use?

Perhaps some reasonable accommodation could be worked out between the parties.

Unfortunately, the issue of whether or not such an accommodation could be reached was not before the court, and the court held that Title VII did not protect transsexuals from discrimination.

3. Some cases have been brought under the Civil Rights Act of 1870, 42 U.S.C. Sec. 1981. Again, courts that have considered this statute have uniformly held it to be inapplicable to transsexuals. See Grossman v. Bernards Township Board of Education, 538 F.2d 319 (3rd Cir. 1976).
4. In 1979, a prospective transsexual, employed in a beauty salon, was terminated for not dressing and acting as a man while at work. Suit was filed claiming a denial of equal protection, equal privileges, and equal immunities under 42 U.S.C. Sec. 1985(3). The court held that her complaint failed to state a cause of action under this statute because

there was no allegation that other employees that were biologically men were protected, privileged or immune so as to have the right to work while dressed and acting as a woman, or visa versa. The court further stated that transsexuals were not a suspect class for purposes of equal protection analysis and that there was a rational basis for the employer requiring its employees who dealt with the public to dress and act as persons of their biological sex since (in the court's opinion) allowing employees to do otherwise would disturb customers and cause them to take their business elsewhere. Kirkpatrick v. Seligman & Latz, Inc., 475 F.Supp. 145 (M.D. FL 1979), aff'd 636 F.2d 1047 (5th Cir. 1980).

5. Observation: It should be clear that up to now courts have gone out of their way to find that existing federal non-discrimination laws do not apply to transgendered individuals.

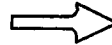
Query: What if the Third Circuit and other courts that have considered this issue were fully educated with respect to who we are, had the knowledge that is available today, and were aware of our ability and our potential to make meaningful contributions to society. [Ask for input and discussion. How do we educate policy makers? the public? What do we tell them? How do we "prove" our worth to society?]

6. The Rehabilitation Act of 1973. In Doe v. USPS 37 FEP Cases 1867 (D.C. DC 1985) the court denied a discrimination claim under Title VII, but held that a cause of action was stated under the Rehabilitation Act where a transsexual claimed that the USPS denied her a promised job when it learned of her intention to undergo gender reassignment. Furthermore, this court held that the applicant had stated a claim for denial of equal protection.

I was unable to find any follow-up case or disposition of this matter.

In Blackwell v. Treasury Dept. 41 FEP Cases 1586 (D.C. DC 1986), plaintiff alleged that the Treasury Department eliminated his position because of the fact that he is a

rev 830 F2d 1183 (1987) on
homophobic grounds -- court
skirted the real issue



transvestite. The court held that plaintiff stated a cause of action under the Rehabilitation Act and concluded that while homosexuals are not handicapped under the Rehabilitation Act, transvestites are because many experience strong social rejection in the work place as a result of their "mental ailment" made blatantly apparent by their cross-dressing lifestyle. I was unable to find a further report on this case.

B. State non-discrimination laws.

1. The only reported case I could find dealing with state non-discrimination laws was Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (8th Cir. 1983). This is the same plaintiff involved in Sommers v. Budget Marketing, Inc. The Iowa Supreme Court held that an Iowa statute prohibiting discharge of an employee because of that employee's sex or disability did not prevent discrimination against transsexuals.
2. Seven states (CA, CT, HI, MA, NJ, VT, WI) and the District of Columbia have passed laws protecting persons from discrimination based on sexual orientation in employment, housing, and public accommodations. Most of these statutes include "gender" as a protected class, and some of them include both "gender" and "sex" as protected classes. There is usually a preamble to the statute indicating that it is the intent of the statute to apply to all persons, in order to ensure equal opportunity for every citizen.

Governors of nine states (CA, CO, MN, NM, NY, OH, PA, RI, and WA) have issued executive orders prohibiting discrimination in state employment based on sexual orientation.

C. Local non-discrimination ordinances.

1. There may be protection on a local level for transgendered individuals. Approximately 110 cities and counties in twenty-five states have passed legislation protecting persons from discrimination in employment, housing, and public accommodations. Most are very comprehensive; for example, Denver recently adopted a non-discrimination ordinance that

includes "gender" as a protected class. The clear intent of the ordinance is to apply to "every individual." Caveat: there is a minimum employee threshold of 20 before the ordinance applies.

As an aside, members of the Gender Identity Center of Colorado, Inc. worked with the Colorado Equal Protection Ordinance Committee and the gay and lesbian community in drafting the final ordinance. It was through GIC's efforts that the word gender is included. The first draft contained both sex and gender, but several council members argued that they were one and the same. Rather than draw attention to what we were trying to accomplish at that time, we opted for the word gender as being broader than sex.

2. Santa Cruz, CA recently voted on a new non-discrimination ordinance that specifically applies to transgendered individuals and the definition section contains a definition of gender specifically stating that it is to be interpreted broadly to apply to transgendered individuals.
3. I am sure there are many more examples of local non-discrimination ordinances that would protect, or could be construed to protect, transgendered individuals. Unfortunately, time constraints prevented an exhaustive research. It is recommended that you check with your local municipality to determine the content of their non-discrimination ordinance.
4. Nationally, approximately 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

II. The Americans With Disabilities Act (ADA)

- A. Thanks to former Senator William Armstrong (R-CO) transsexuals and transvestites, as well as homosexuals, are specifically excluded from protected class status under the ADA.

- B. While it would be nice to have legal protection, I don't mind being excluded from the application of the ADA because I do not consider my transgenderism to be a disability.
- C. This same, wonderful William Armstrong is now the leading force behind an attempt to amend the Colorado Constitution by initiative petition (Amendment 2) to prohibit counties, cities and other local jurisdictions, as well as the state of Colorado, from passing laws that prohibit discrimination against homosexuals, gays, lesbians or based on sexual orientation. Hopefully, voters will understand that this is nothing more than an attempt to write hate into the constitution and that these bigots are a throw-back to Nazi Germany. GIC adopted a resolution opposing Amendment 2, made a substantial donation to the Equal Protection Ordinance Committee, and many of our members are actively working to defeat Amendment 2.
- D. A similar, but perhaps more heinous amendment is on the ballot in Oregon. Known as Proposition 9, this proposed amendment would declare homosexuality to be abnormal and abhorrent and not entitled to any protection of law. The Northwest Gender Alliance has joined with the gay and lesbian community to lead the fight against Proposition 9.
- E. Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital, or family status, does no more than protect persons from discrimination and guarantee their basic human rights. The proposed amendments in Colorado and Oregon may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears.

III. Is There Hope?

- A. While there are a few, well reasoned dissenting opinions in some of the cases, (see, e.g., Judge Goodwin's dissenting opinion in Holloway v. Arthur Anderson and Company, cited above) the important thing to learn from an analysis of the cases is that the best solution to the dilemma of the transgendered employee is not court battles for legal protection, rather awareness, education and the development of a mutually beneficial, common sense policy. One that enables an employer to maximize the return of their investment in an employee and allows

a perfectly good, productive employee to remain employed.

Through education, policy makers will become aware of the important contributions transgendered persons have made and will make. Through education we alleviate the fear of the unknown, which is the single greatest stumbling block transgendered individuals have.

IV. Development of an Employer's Policy Manual and Guidebook for Handling Transgendered Individuals Transitioning on the Job.

IFGE will soon be publishing an employer's guidebook for dealing with an employee involved in an on-the-job gender transition. The first part of this manual explains gender dysphoria, the transgender community, and attempts to give the employer some basic knowledge as to what is going on with the transgendered individual and why.

The second part of the manual deals with a practical approach to handling such issues as which rest room to use, what types of work disruption to anticipate, the effect on co-workers, and the possible effect on the performance of work teams.

The manual is based on the proposition that the transgendered employee is a valuable employee, that the employer has invested a lot of time, money and training in this employee, and it is in the best interest of all concerned to keep the employee employed and productive.

Establishing your value as a productive, loyal, and hard working employee before you approach your employer seeking to transition on the job is perhaps the single most important thing you can do. If you are not considered to be a valuable employee, your chances for a successful transition are greatly reduced.

A companion manual for co-workers is currently in the drafting stage and after review and editing will also be published by IFGE.

Translaw.emp



BY AUTHORITY

ORDINANCE NO. 623

SERIES OF 1990

*AS AMENDED OCTOBER 15, 1990

COUNCIL BILL NO. 441

COMMITTEE OF REFERENCE:

A B I L L

FOR AN ORDINANCE TO PROHIBIT DISCRIMINATION IN EMPLOYMENT, HOUSING AND COMMERCIAL SPACE, PUBLIC ACCOMMODATIONS, EDUCATIONAL INSTITUTIONS AND HEALTH AND WELFARE SERVICES.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. That Chapter 28, Article II, Sec. 28-17 shall be amended by adding a new paragraph 16 reading and to read as follows:

(16) To investigate incidents or patterns of discrimination as provided by Article III.

Section 2. That Chapter 28 of the Revised Municipal Code shall be and the same is hereby amended by adding a new Article IV reading and to read as follows:

ARTICLE IV

PROHIBITION OF DISCRIMINATION IN EMPLOYMENT, HOUSING AND COMMERCIAL SPACE, PUBLIC ACCOMMODATIONS, EDUCATIONAL INSTITUTIONS AND HEALTH AND WELFARE SERVICES.

SUBCHAPTER I

GENERAL PROVISIONS

Section 28-91. Intent of Council.

a) It is the intent of the Council that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the City and to have an equal opportunity to participate in all aspects of life, including, but not limited to, employment, housing and commercial space, public accommodations, and health and welfare services.

b) It is the intent of the Council in enacting this ordinance to eliminate within the City discrimination by reason of race, color, religion, national origin, gender, age, sexual orientation, marital status, military status, or physical or mental disability.

gender ≠ gender identification

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SANTA CRUZ
ADDING CHAPTER 9.83 TO THE SANTA CRUZ
MUNICIPAL CODE PERTAINING TO THE PROHIBITION OF DISCRIMINATION

BE IT ORDAINED by the City of Santa Cruz as follows:

SECTION 1. Chapter 9.83 is hereby added to the Santa Cruz
Municipal Code to read as follows:

"Chapter 9.83 Prohibition Against Discrimination."

Sections:

- 9.83.01 Purpose and Intent
- 9.83.02 Definitions
- 9.83.03 Prohibited Acts of Discrimination -
Employment
- 9.83.04 Prohibited Acts or Discrimination -
Housing and Real Estate Transactions
- 9.83.05 Prohibited Acts of Discrimination -
Business Establishments or Public
Accomodations
- 9.83.06 Prohibited Acts of Discrimination -
Educational Institutions.
- 9.83.07 City Services, Facilities and
Transactions
- 9.83.08 General Exceptions
- 9.83.09 Posting of Notices
- 9.83.10 Coercion or Retaliation
- 9.83.11 Preservation of Business Records
- 9.83.12 Resolution and Enforcement.

SECTION 9.83.01 Purpose and Intent. It is the intent of
the City Council, in enacting this chapter, to protect and
safeguard the right and opportunity of all persons to be free
from all forms of arbitrary discrimination, including
discrimination based on age, race, color, creed, religion,
national origin, ancestry, disability, marital status, sex,
gender, sexual orientation, height, weight or personal

ORDINANCE NO.

(9). "Gender" - shall have the same meaning as "sex" as
that term is defined herein and shall be broadly interpreted to
include transgendered individuals.

(10). "Labor Organization" - shall mean any organization
which exists and is constituted for the purpose, in whole or in
part, of collective bargaining or of dealing with employers
concerning grievances, terms or conditions of employment, or of
other mutual aid or protection on behalf of employees.

(11). "Person" - any natural person, firm, corporation,
partnership or other organization, association or group of
persons however arranged;

(12). "Personal appearance" - shall mean the outward
appearance of any person, irrespective of sex, with regard to:
bodily condition or characteristic; manner or style of dress;
manner or style of personal grooming, including, but not limited
to, hair styles and beards. "Personal appearance" shall not
relate to the requirement of cleanliness or prescribed
standards, when uniformly applied, for admittance to a public
accommodation. "Personal appearance" shall not relate to
prescribed standards for manner or style of dress or personal
grooming when those standards are uniformly applied to a class
of employees by an employer in furtherance of a reasonable
business purpose. "Personal appearance" shall not relate to
those situations where a bodily condition or characteristic, or