

Navigating Transgender Inclusion Issues in the Workplace

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June 15, 2023 marked the three-year anniversary of the United States Supreme Court's landmark decision in *Bostock v. Clayton County*, holding that discrimination on the basis of gender identity or sexual orientation is sex discrimination that violates Title VII of the Civil Rights Act of 1964. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020). To acknowledge the occasion, on June 15, 2023, EEOC Chair Charlotte Burrows released the following message, appropriately signed with reference to "her" preferred pronouns:

[E]ven as we celebrate the many accomplishments of the LGBTQ+ community, many of our friends, neighbors, colleagues, and family members continue to face discrimination at work and in other areas of life because of who they are or who they love. Their strength, resilience, and courage provide an example for all of us as we do our part to prevent unlawful discrimination from occurring and take appropriate action when it does. I look forward to the day when Bostock's promise is truly a reality in fact as well as in law.

Charlotte A. Burrows (she/her/hers)
Chair, U.S. Equal Employment Opportunity Commission

While the EEOC has often said the *Bostock* opinion reflects its "longstanding position" on the topic, more than three years later many employers are still grappling with how to ensure a discrimination-free and inclusive workplace for LGBTQ+ employees. Adding to the uncertainty, in a more recent opinion, the Fourth Circuit extended the protections of the Americans with Disabilities Act ("ADA") to include individuals with gender dysphoria, creating an affirmative duty on

employers to make reasonable accommodations for individuals who experience distress based on “an incongruence between their gender identity and their assigned sex.” *Williams v. Kincaid*, 45 F.4th 759, 767 (4th Cir. 2022) (internal quotations omitted).

In the article below, we explore some of the common questions employers ask related to transgender issues in the workplace and discuss proactive steps employers can take to foster an inclusive work environment and insulate themselves from potential liability for transgender discrimination.

Preferred Names & Pronouns

Based on the EEOC’s latest guidance, harassment can include any manner of offensive or derogatory remarks about an individual’s sexual orientation or gender identity, which could include misgendering someone or failing to use their preferred name or pronoun. According to the EEOC, “[a]lthough 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 to refer to a transgender employee could contribute to an unlawful hostile work environment.”^[1]

Employers should encourage open dialogue among *all* employees about preferred names and pronouns. This is one area where a little bit goes a long way in establishing an inclusive environment and preventing scenarios that could give rise to discrimination or harassment claims. Employers should embrace policies that encourage the use of an employee’s preferred name or pronouns. For example, employers should consider allowing employees to include pronouns in email signatures or on company-issued nametags and providing training to all employees on pronoun vocabulary and similar guidance.

Dress Code Requirements

While employers still have the right to enforce an appropriate dress code, employers should be mindful of potential discrimination in this context. Employers cannot require a transgender employee to dress in a manner that aligns with their assigned sex at birth because that would constitute sex discrimination. For example, an employer cannot prohibit a transgender female employee from wearing a dress to work if a dress would be appropriate work attire for a cisgender female.^[2] Likewise, a policy allowing only cisgender males to grow facial hair likely is discriminatory.

In reviewing dress code policies, employers should consider replacing gender-specific requirements with gender-neutral requirements and ensure that any dress or grooming policies are enforced in a manner that does not discriminate against or adversely impact LGBTQ+ employees.

Bathroom Policy

Bathroom policies are a hot-button issue in many state legislatures around the country, but the obligation for employers is clear. The EEOC has stated unequivocally and repeatedly that employers may not require employees to use the bathroom that aligns with the employee’s gender assigned at birth. While employers have a right to maintain separate bathrooms, showers, and locker rooms for men and women, any workplace policy

that prohibits a transgender individual from using the facility corresponding to the individual's gender identity is discriminatory. In other words, employers cannot prohibit a transgender woman from using the women's restroom or a transgender man from using the men's restroom.

Designating gender-neutral or single-stall bathroom facilities is a good option for avoiding or minimizing issues that arise among employees related to bathroom sharing. Keep in mind the fact that a heterosexual or non-transgender employee feels uncomfortable sharing a bathroom with a transgender employee does *not* permit an employer to require the transgender employee use a different bathroom.

Job Positions

We sometimes hear concerns from employers about the impact of transgender inclusion efforts on clients or customers. EEOC guidance provides that employers cannot segregate members of the LGBTQ+ community "based on actual or perceived customer preference."^[3] Said differently, employers cannot keep LGBTQ+ employees out of public-facing positions or send LGBTQ+ employees to different work locations simply based on a customer's preference to interact only with cisgender or heterosexual employees. However, the reverse is not necessarily true. Employers *should* consider approving a transgender employee's request for assignment away from public or client-facing activities if necessary to avoid potential discrimination, particularly if the employee has been experiencing harassing conduct, is in a gender identity transition, or is recovering from a gender affirming procedure.

A word of caution to employers in the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina:

As discussed further below, based on the current law in the Fourth Circuit, an employer facing the above fact scenario, subject to demonstrating undue hardship, likely would be *required* to temporarily reassign an employee who is experiencing distress due to a conflict between the employee's assigned sex at birth and gender identity.

HR Policies

Responsive HR policies can underscore an employer's commitment to an inclusive work environment and may help avoid discrimination claims and/or minimize an employer's liability if charged with discrimination. In the event an employee undergoes gender identity transition during his or her employment, the HR infrastructure should provide a straightforward avenue for the employee to update personnel records, especially with regard to name and sex changes. Additionally, employers should be prepared to facilitate new identification or staff directory photos in the event of an employee's transition and have a plan for communicating and educating coworkers.

More Changes on the Horizon

As mentioned above, in *Williams v. Kincaid*, the Fourth Circuit held that gender dysphoria can be a disability under the ADA. Gender dysphoria is defined as the "clinically significant distress felt by some of those who experience an incongruence between their gender identity and their assigned sex." *Williams*, 45 F.4th at 767

(internal quotations omitted; emphasis removed).

The *Williams* ruling is a game-changing opinion that has far-reaching implications for employers in the Fourth Circuit and potentially beyond. Following *Williams*, employers in the Fourth Circuit now not only have to protect LGBTQ+ employees from discrimination but also have an affirmative duty to consider reasonable accommodations for an individual experiencing gender dysphoria that impairs the individual's ability to perform certain job functions. Much like other disability-related accommodations, this could include medical leave, modified dress or grooming requirements, task reassignment, and various other forms of job-related accommodations.

While the Fourth Circuit, at least so far, is the only federal circuit to extend the protections of the ADA to individuals experiencing gender dysphoria, this is an issue worth watching. On June 30, 2023, the Supreme Court denied the petitioners' writ of certiorari and declined to rule on the *Kincaid* case. *Kincaid v. Williams*, 143 S. Ct. 2414 (2023). Notably, however, in a compelling dissent by Justice Alito that was joined by Justice Thomas, they disagreed with the majority of their colleagues and urged that the Fourth Circuit's ruling "presents a question of great national importance that calls out for prompt review." *Id.* at 2414 (Alito, J., dissenting). As their dissenting opinion explains, "if the Fourth Circuit's decision is wrong – and there is certainly a reasonable argument to that effect – then the 32 million residents of the Fourth Circuit should not have to bear the consequences while other courts wrestle with the same legal issue." *Id.* at 2415.

It is almost a certainty that *Kincaid* will not be the last time the issue of gender dysphoria as a disability reaches the Supreme Court. For now, though, *Kincaid* is the law of the land in the Fourth Circuit states, and time will tell if other circuits follow or reject *Kincaid*.

[1] Sexual Orientation and Gender Identity (SOGI) Discrimination (June 15, 2021), <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination>

[2] As used herein, "cisgender" refers to the person's gender assigned at birth; "transgender female" refers to a person assigned as male at birth who identifies as female; and "transgender male" refers to a person assigned as female at birth who identifies as male.

[3] *Supra*, at n.1. see also <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.