LGBT Discrimination in the Federal Workplace

Presented by the Equal Employment Opportunity Commission’s Office of Federal Operations
History of LGBT Discrimination in the Federal Workplace: The “Lavender Scare”

- The Lavender Scare began in the 1950s
- April 27, 1953 – Executive Order 10450 was signed
- During the Lavender Scare more than 10,000 federal employees were fired for being gay
History of LGBT Discrimination in the Federal Workplace

• 1960’s D.C. Circuit Cases

  – **Dew v. Halaby** - upheld termination of an FAA Air Traffic Controller after it was discovered that he engaged in a sexual act with a male a decade earlier when he was a teenager

  – **Norton v. Macy** - gay employees may only be fired if their sexual orientation affected their service. The court noted that service may be affected if: 1) Potential for blackmail 2) Homosexuality is an indication of an unstable personality or 3) If other employees or the public have a negative reaction to employee’s sexuality
History of LGBT Discrimination in the Federal Workplace

- The Civil Service Reform Act of 1978 - defined 11 prohibited personnel practices, one of which was a prohibition on discrimination against federal employees for conduct not directly related to job duties.


- April 2012 EEOC decision Macy v. Dep’t of Justice – Transgender employees protected under Title VII.

- United States v. Windsor, 133 S.Ct. 2675 (2013) - S.Ct. found it was unconstitutional for the Federal government to interpret marriage as only opposite-sex unions where a couple is legally married.
Most States Do Not Protect LGBT Employees in the Workplace

- If you are not a federal employee, you can still be fired in 28 states for being gay
- If you are not a federal employee, you can still be fired in 32 states for being transgender
- EEOC is bringing claims in the private sector, but change takes time
Sexual Orientation and the Law
Sexual Orientation

• Sexual orientation is a person’s sexual identity in relation to the gender they are attracted to
  
  – Gay: a person who is attracted to people of the same gender
  
  – Lesbian: a woman who is attracted to another woman
  
  – Bisexual: a person who is attracted to both genders
  
  – Heterosexual or straight: a person who is attracted to people of the opposite gender
LGB employees report that they experience high percentages of discrimination and harassment in the workplace.

**Poll conducted by the Williams Institute, 2011**
Title VII of the Civil Rights Act Of 1964

- Race
- Color
- National Origin
- Religion
- Sex
- Retaliation
Sexual Orientation: The Law

• The Supreme Court has recognized that Title VII's prohibition of discrimination on the basis of sex includes discrimination on the basis of "gender"

• This includes discrimination because an individual fails to conform to gender-based expectations, stereotypical or otherwise

Ann Hopkins, pictured to the right, is the plaintiff in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), where the Supreme Court found that discrimination against someone because they fail to conform to sex stereotypes is discrimination based on sex.
Sexual Orientation: The Law

• Lesbian, gay, and bisexual individuals may experience sex discrimination, including sexual harassment or other kinds of sex discrimination

• In accordance with EEO Pre-Complaint Processing Procedures set forth in MD 110 Chapter 2, EEO Counselors should assist individuals in clearly defining their claims
  – Lesbian, gay and bisexual employees who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a complaint under the 1614 process, because they may have experienced sex discrimination

See EEOC’s Instructions on Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees (June 2012)
Recent OFO Sexual Orientation Decisions

• Discriminating against a man because he is going to marry a man states a claim of sex discrimination
  – Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873 (July 1, 2011)

• Discriminating against a woman because she is only attracted to other woman states a claim of sex discrimination

• Discriminating against a gay woman because you think it is improper to see her spending time with another woman states a claim of discrimination
  – Culp v. Dep’t of Homeland Security, EEOC Appeal No. 0720130012 (May 7, 2013)
Recent OFO Sexual Orientation Decisions

• An ongoing pattern of comments and rumors referring to someone as being gay can be severe and pervasive enough to rise to the level of sexual harassment
  – Brooker v. U.S. Postal Service, EEOC Request No. 0520110680 (May 20, 2013)

• Offensive jokes, mocking feminine mannerisms, and calling a gay man “Honey, sweety, baby” state a claim of sex discrimination. As long as the allegations state a viable claim of sex discrimination, the fact that a Complainant alleged sexual orientation discrimination does not defeat an otherwise valid sex discrimination claim.
Recent OFO Sexual Orientation Decisions

- Sex discrimination claims intersect with sexual orientation discrimination claims such that allegations of discrimination on the basis of sexual orientation can be construed as claims of discrimination on the basis of sex

Harassment Overview

Harassment is any unwelcome verbal or physical conduct based on one of the protected bases that is so objectively offensive as to alter the conditions of the victim's employment. This standard is met when:

• The conduct culminates in a tangible employment action, or

• The conduct was sufficiently severe or pervasive to create a hostile work environment
Offensive Slurs

- The Commission has found that the terms “fag” and “faggot” have been historically used in the United States as a highly offensive, insulting, and degrading sex-based epithet against gay men.

- Additionally, the words “fag” and “faggot” are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying their belief that a male is not as masculine or as manly as they are.

- Using this term in the workplace could create a hostile work environment.

- **Couch v. Dep’t of Energy, EEOC Appeal No. 0120131136 (August 14, 2013); Complainant v. U.S. Postal Service, EEOC Appeal No. 0120132452 (Nov. 18, 2014)**
Preventing Sexual Orientation Discrimination & Harassment in the Workplace: Terms that are Respectful

Gay People
Gay Men
Gay Women
Lesbian or Lesbians
Bisexual
Asexual
Sexual Orientation
LGBT or GLBT

A portion of this list is from Out & Equal, 2012
Preventing Sexual Orientation Discrimination & Harassment in the Workplace:

Offensive Terms

Homosexual
Homo
Fag
Faggot
Sexual Preference
Gay Lifestyle
That’s so gay
Queen

*Dyke
*Queer

*These terms are sometimes used by LGBT community members, so in some contexts it may be socially acceptable for them to use. However, in the workplace employees should avoid these terms because most people do not consider them respectful.

A portion of this list is from Out & Equal, 2012
Gender Identity and the Law
Question: What is the difference between sexual orientation and gender identity?

Answer: Everything

A person’s gender identity has nothing to do with their sexual orientation.
Transgender

**Transgender** is an umbrella term that can be used to describe people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on his or her birth certificate)

- The term **Transgender woman** typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female

- Likewise, the term **Transgender man** typically is used to refer to someone who was assigned the female sex at birth but who identifies as male

- **Gender non-binary** is a term for an individual who may not have the gender identity of either a male or female, or who may identify as both male and female. They may personally prefer the term genderqueer, gender neutral, agender, or non-binary
Understanding Gender Identity

• Sex – the *biological/physical* aspect of our body

• Gender Identity – the term for an individual’s *internal psychological sense* of their gender

• Gender Expression – demonstrates a person’s individual sense of their gender to others

• Below are examples of how celebrities’ have changed their gender expression to match their gender identity

Chaz Bono

Laverne Cox

Jenna Talackova – Ms. Canada
Transgender Employees Report An Extremely High Percentage of Discrimination in the Workplace

Poll conducted by the Williams Institute, 2009

Series 1

- Transgender Employees Who Have Experienced Discrimination or Harassment: 97%
- Transgender Employees who have been fired, not advanced, or not hired due to their gender identity: 67%
Transgender Employment: The Law

• The Commission found that discrimination against someone because they are transgender is discrimination “based on sex” and is prohibited under Title VII

• Below is Mia Macy, the Complainant in Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012)
Understanding the Transition Process

• Some transgender individuals will find it necessary to transition from living and working as one gender to another

• These individuals often seek some form of medical treatment, however some individuals, will not pursue some (or any) forms of medical treatment

• The transition process is different for every individual

• No medical treatment is required for an individual to be considered “transitioned” to the gender they identify with
Transgender Individuals & Restrooms

- **Complainant v. Dep’t of Army**, EEOC Appeal No. 0120133395 (April 1, 2015)

- This decision answers one of the most frequent questions that the Commission has heard since *Macy* was decided – the question of access to restrooms.

- This decision makes clear that when an individual has transitioned to the gender that reflects his or her gender identity, denial of equal access to the restroom that corresponds with the individual’s gender identity is discrimination under Title VII.

  - Once an individual has transitioned to being a woman, she *is* a woman, and Title VII therefore requires that she be provided equal access to the women’s restroom. Similarly, once an individual has transitioned to being a man, he *is* a man, and Title VII therefore requires that he be provided equal access to the men’s restroom.
Transgender Individuals & Restrooms

• This decision makes clear that transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure in order to have access to facilities designated for use by a particular gender.

  – Some individuals who transition from one gender to another may undergo genital surgery, but others do not. This decision makes clear that nothing in Title VII makes any particular medical procedure a prerequisite for equal opportunity.
Transgender Individuals & Restrooms

- This decision makes clear that supervisory or co-worker confusion or anxiety may not justify discriminatory terms and conditions of employment, including denial of access to particular restrooms.

  - Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort.

- The Commission’s decision is consistent with guidance issued by the Office of Personnel Management (OPM) in 2011 and a decision issued by the Office of Special Counsel (OSC) in 2014.
Transgender Individuals & Locker Rooms

• This decision also noted that if an employer provides locker rooms to its employees, Title VII requires that the employer afford a Transgender individual access to the locker room consistent with his or her gender identity.
Confidentiality & Dress Codes

• **Confidentiality**: An employee's transition should be treated confidentially, and medical information received about an individual employee is protected under the Privacy Act and the Rehab Act.

• **Dress and Appearance**: To the extent that some Agencies have dress codes, dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender.

See OPM's Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace.
Names and Pronouns

• Managers, supervisors, and coworkers should use the name and pronouns appropriate to the employee's new gender.

• Managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.

• Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992 (May 20, 2013); OPM’s Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace
Record Keeping

• In accordance with OPM guidelines, the records in the employee's Official Personnel Folder (OPF) and other employee records (pay accounts, training records, benefits documents, and so on) should be changed to show the employee's new name and gender, once the employee has begun working full-time in the gender role consistent with the employee's gender identity.

• Complainant v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120133123 (April 16, 2014)
Preventing Transgender Discrimination & Harassment in the Workplace: Terms that are Respectful

Transgender Woman
Transgender Man
Gender Transition
Gender Identity
Transgender People
LGBT or GLBT

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Preventing Transgender Discrimination & Harassment in the Workplace: Offensive Terms

Sex Change
Transvestite
She-Male or He-She
Shim
Tranny
It
A Transgender
Gender bender
Transgendered

*Transgenders
*Transsexual
*Pre-Operative/Post Operative
*Cross Dresser

*These terms are sometimes used by LGBT community members, so in some contexts it may be socially acceptable for them to use. However, in the workplace employees should avoid these terms because most people do not consider them respectful.

A portion of this list is from Out & Equal, 2012
Now that you know that discrimination in the workplace is a significant issue for LGBT employees, what can you do about it?
What You Can Do: Consider Coming Out as an Ally

• An ally is a person who supports equal civil rights and gender equality, and challenges homophobia and transphobia

• Make it clear that your office is a “safe space”
What You Can Do: Do Not Make Assumptions

• Do not make assumptions that all employees and coworkers are heterosexual/straight or identify with the gender they were born with

• An LGBT employee may overhear your conversation or receive one of your emails – be inclusive in everything you say
What You Can Do: Do Not Tolerate Discriminatory Comments or Jokes

• Communicate a zero-tolerance policy for discrimination

• Speak up if you hear a discriminatory comment, name, or joke about LGBTs

• Don’t engage in gossip or allow others to gossip about an employee’s sexual orientation or gender identity

• Know that LGBT employees CAN file EEO complaints of discrimination
What You Can Do: Encourage your Agency to Be Proactive

• Encourage your Agency to conduct LGBT cultural competency training

• Encourage your Agency to implement a transgender transition policy
What Happens in a LGBT Inclusive Work Environment?

• Increases effectiveness of resources
• Larger pool of employees
• Increases retention of valuable employees
• LGBTs are more engaged in work and with coworkers
• Improves LGBTs’ performance
• Improves public image
“Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights... In reality, gay people are born into and belong to every society in the world. They are all ages, all races, all faiths. They are doctors and teachers, farmers and bankers, soldiers and athletes. And whether we know it, or whether we acknowledge it, they are our family, our friends, and our neighbors.”

– Hillary Clinton, United Nations in Geneva, 2011

• They are your co-workers, too.