I. Introduction

The existence of individuals who live as members of the other gender and whom we would now likely identify as “transsexual” has been documented throughout human history.1 In contrast, the contemporary medical treatments that comprise sex-reassignment have only been available for about forty years. As a medical condition, transsexualism is defined as “the desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.”2 Transsexualism is listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), where it is technically classified as a specific form of a broader psychiatric disorder termed “gender identity disorder,” also known as “gender dysphoria.” It is also listed in the International Classification of Disease (ICD).3

Based on current medical knowledge and practice, the medically prescribed treatment for transsexualism is sex-reassignment, which typically consists of three components: (1) hormone therapy; (2) living as a member of the other sex (known as the “real life experience”); and (3) sex-reassignment surgeries.4 Increasingly, however, there is also a recognition that the treatment prescribed for a transsexual person must be based on an individualized assessment. For some transsexual people, for example, hormone therapy alone may be sufficient to alleviate the distress caused by gender dysphoria; for others, simply being able to live as a man or a woman may be sufficient, without undergoing any medical treatment.

As medical treatments for transsexualism have developed, transsexual people have sought—and, increasingly, received—legal protection in the areas of employment

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1 See, e.g., Leslie Feinberg, Transgender Warriors: Making History From Joan of Arc to RuPaul (1997).
2 Stedman’s Medical Dictionary 1841 (26th ed. 1995).
II. Employment Discrimination: Case Law & Statutes

[1] Disability Laws

[a] Federal Disability Laws

Transsexual people have no established protection under federal laws that prohibit discrimination on the basis of handicap or disability. Transsexualism has been recognized as a medical condition for many years and is included as a psychiatric disorder in the DSM under the rubric of "gender identity disorder." Nonetheless, both the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disabilities Act ("ADA") explicitly exclude "transsexualism" and "gender identity disorders not resulting from physical impairments" from protection.

[b] State Disability Laws

Most states and the District of Columbia have statutes prohibiting employment discrimination on the basis of disability. Some of these state laws include explicit exemptions for transsexual people, similar or identical to the exemptions in the Rehabilitation Act and the ADA. These include Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, and Virginia. Even in the absence of a specific exclusion, a few courts have held that transsexualism is not a protected disability.

More often, however, state courts and administrative agencies have found that transsexualism is a protected disability under state laws. For example, an appellate court in New Jersey recently held that transsexualism is a protected handicap under the New Jersey non-discrimination law. Similarly, courts in Massachusetts have held that transsexualism is a protected disability under state law.

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5 The Transgender Law & Policy Institute provides regular updates on legislation and litigation affecting transsexual people. See www.transgenderlaw.org.


At the administrative level, state agencies responsible for enforcing state disability protection laws have issued favorable rulings for transsexual plaintiffs in at least five states. In 1996, the Oregon Bureau of Labor and Industry ruled that a transsexual woman who was fired from her job as a result of her transition was protected from employment discrimination under Oregon disability law. Unfortunately, the Oregon Legislature responded to this decision in 1997 by amending the state law to state that "an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism." While this provision excludes transsexual people from the right to obtain reasonable accommodation, it does not exclude them from the right not to be fired or otherwise discriminated against because of their transsexual status. The Florida Division of Administrative Hearings has also ruled that transsexual people are protected under the Florida state law prohibiting discrimination on the basis of disability. Similar administrative rulings have been issued in Illinois, Massachusetts, and New Hampshire.


[a] Title VII

Until very recently, federal courts uniformly held that transsexual people are not protected under Title VII's prohibition of sex discrimination, on the ground that the term “sex” must be narrowly construed to mean a person’s biological sex at birth, and that Congress did not intend Title VII to protect transsexual people. See Ulane v. Eastern Airlines, Inc., 742 F. 2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., . . . a person born with a female body who believes herself to be a male"). See also James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478 (D. Kan. 1995) (same); Somers v. Budget Marketing, 667 F.2d 748 (8th Cir. 1982) (same); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (same); Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md...
Over the past decade, however, the rationales in these decisions have been undercut by the Supreme Court’s increasingly expansive interpretation of Title VII in other contexts. As a result, both the Ninth Circuit and the First Circuit have issued favorable decisions holding that transsexual or, more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes. In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.

[b] Title IX

In 1997, a federal district court in New York held that a transsexual woman could proceed with a sexual harassment suit against New York University under Title IX of the Education Amendments Act, which prohibits sex discrimination in public education. The university moved for summary judgment on the ground that the plaintiff "is in fact a male-to-female transsexual who, at the time of the professor's alleged conduct, was in the process of becoming a female." The court rejected this argument: "The simple facts are . . . that Professor Eisen was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the

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14 See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); see also Oncale v. Sundowner Offshore Oil Services, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the “principal evil” Congress intended to combat when it enacted Title VII).

15 Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse"). See also Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire").

16 See, e.g., Doe v. United Consumer Financial Services, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, “at least in part, on the fact that her appearance and behavior did not meet United Consumer’s gender expectations (particularly in light of United Consumer’s alleged inability to categorize her as male or female ‘just from looking’)”). For a complete list of federal cases holding that discrimination on the basis of gender non-conformity and/or transgender status is a form of sex discrimination, see http://www.transgenderlaw.org/cases/federalcases.htm. For an exception to this trend, see Oiler v. Winn-Dixie, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job).


18 Id.
university, plaintiff was not a biological female." The court distinguished Title VII case law addressing employment discrimination, stating that "all of [the cases on this issue] stand for the entirely different proposition that Title VII, and hence Title IX, does not prohibit expressing disapproval of conduct involved in the transformation from one gender to another."

In addition, at least one federal district court has recognized that harassment based on failure to conform to gender stereotypes is also prohibited under Title IX.


In the past, employment discrimination cases brought under state laws prohibiting sex discrimination have been unsuccessful. More recently, however, courts and

19 Id. at 249.

20 Id. (also citing dicta in Holloway, 566 F.2d at 644, that "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII").

21 Snelling v. Fall Mountain Regional Sch. Dist., 2001 WL 276975 (D.N.H. 2001) (holding that harassment based on "sex-typed stereotypes of masculinity" is actionable under Title IX).


administrative agencies\textsuperscript{24} have uniformly interpreted state and local sex discrimination laws to include transsexual people. Based on this strong trend, state sex discrimination claims are currently the most viable avenue of protection for transgender and transsexual employees.

\textbf{[4] State Laws Prohibiting Sexual Orientation Discrimination}

Fourteen states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation.\textsuperscript{25} Of these, only Minnesota, New Mexico, and Rhode Island also explicitly protect transgender and transsexual people.\textsuperscript{26} Where transgender people are not expressly included in state laws, courts have generally rejected attempts by transgender plaintiffs to seek protection under the rubric of sexual orientation.\textsuperscript{27}

In practice, however, transsexual people are often mistakenly perceived to be lesbian, gay, or bisexual. If a transsexual person is discriminated against based on this mistaken belief, then the transsexual person may have a viable claim of sexual orientation discrimination in states in which there is protection against such conduct.\textsuperscript{28}

\textbf{[5] State Laws Protecting Transgender People}

Three states expressly prohibit discrimination against transgender people. Minnesota passed the first such law in 1993. The Minnesota statute establishes protections for transgender people under the rubric of sexual orientation, which is defined to include

\textsuperscript{24} \textit{See In the Matters of HCRC No. 9951 et al}, D.R. No. 02-0015 (Hawaii Civil Rights Commission, June 28, 2002) (holding that the Hawaii Civil Rights Commission has jurisdiction to investigate all claims of sex discrimination filed by transgendered individuals and transsexuals); \textit{Millett v. Lutco, Inc.}, 2001 Mass. Comm. Discrim. LEXIS 52 (Oct. 10, 2001) (holding that transsexual people are protected by state law prohibitions against sex discrimination); \textit{Declaratory Ruling on Behalf of John/Jane Doe} (Conn. Human Rights Comm’n 2000) (relying on \textit{Price Waterhouse, Schwenk, Rosa}, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

\textsuperscript{25} These are California, Connecticut, Hawaii, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Vermont, and Wisconsin.

\textsuperscript{26} \textit{Maffei v. Kolaeton Industry, Inc.}, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that the definition of sexual orientation in New York City ordinance does not include transsexualism); \textit{Underwood v. Archer Management Services, Inc.}, 857 F. Supp. at 98 (holding that "a conclusory statement that [transsexual plaintiff] was discharged on the basis of transsexuality . . . does not constitute a claim for relief on the basis of . . . sexual orientation").

\textsuperscript{27} \textit{See, e.g., Conway v. City of Hartford}, 1997 Conn. Super. LEXIS 282 ("[h]ad the plaintiff failed to allege specifically discrimination based on sexual orientation, but rather merely referenced his transsexualism as a basis for discrimination based on sexual orientation, the . . . claim would have been legally insufficient")
"having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness."  

In 2001, the Minnesota Supreme Court held that this statutory language does not prohibit an employer from requiring employees to use the restroom facilities corresponding to their biological sex. The plaintiff in Goins was a transsexual woman who had undergone extensive medical treatments to alter her biological sex. Nonetheless, she did not argue that she should be considered biologically female. Rather, she argued that the statute should be interpreted to prohibit employers from inquiring into an employee’s biological sex and to require employers to accept the employee’s self-image as female or male. The Minnesota Supreme Court rejected this broad construction of the statute. Accordingly, to state a viable claim, future transsexual plaintiffs who are denied access to appropriate restrooms should argue (and be prepared to present evidence) that they have altered their biological sex by undergoing sex-reassignment.

In 2001, Rhode Island’s non-discrimination statute was amended to explicitly include “gender identity or expression” as a protected category. The statute defines “gender identity or expression” to include:

- a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

In 2003, New Mexico enacted a statewide law prohibiting both sexual orientation and gender identity discrimination in employment, public accommodations, and credit. Under the new law, gender identity “means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the


30 Goins v. West Group, 635 N.W.2d 717 (Minn. 2001).

31 Goins, 635 N.W.2d at 723 (Goins argues “that the [statute] prohibits West’s policy of designating restroom use according to biological gender, and requires instead that such designation be based on self-image of gender”).


person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth.” 34

[6] Local Ordinances Protecting Transgender People

Over fifty localities have adopted ordinances prohibiting discrimination against transgender people. Jurisdictions that have passed such laws include, among others: New York City, Boston, Chicago, San Francisco, Dallas, Philadelphia, Atlanta, and Seattle. They also include a number of smaller cities, such as Tucson, AZ; Santa Cruz, CA; Iowa City, IA; Louisville, KY; Ann Arbor, MI; Toledo, OH; and Tacoma, WA. 35

[7] Employer Policies

Increasingly, both public and private employers are broadening their non-discrimination policies to include transgender and transsexual employees. Employers who have taken this step include American Airlines, Intel, Lucent Technologies, Apple Computer, Box Office Tickets, Inc., the City of Dallas, Texas, the City of Lexington, Kentucky, and the City of Decatur, Georgia, among others. 36

34 2003 N.M. ALS 383, amending the New Mexico Human Rights Act to include sexual orientation and gender identity.


36 The Human Rights Campaign maintains a database of employers that include gender identity in their non-discrimination policies. See http://www.hrc.org/worknet/transgender/index.asp
CASES PROTECTING TRANSGENDER PEOPLE UNDER STATE LAWS PROHIBITING DISCRIMINATION ON THE BASIS OF SEX AND DISABILITY

STATE SEX DISCRIMINATION LAWS


*Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on Price Waterhouse, Schwenk, Rosa, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals)


*Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been discriminated against on the basis of sex in violation of the New York State and New York City Human Rights Law)


STATE DISABILITY DISCRIMINATION LAWS
Jean Doe v. Bell, New York Supreme Court, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that transsexual foster youth protected by state law prohibiting discrimination on the basis of disability in housing)


Jette v. Honey Farms Mini Market, 2001 WL 1602799 (Mass. Comm'n Against Discrimination 2001) (holding that transsexual people are protected by state law prohibitions against sex and disability discrimination)


Doe v. Boeing Co., 6 P.2d 531, 536 (Wash. 1993) (holding that gender dysphoria "is a medically cognizable condition with a prescribed course of treatment," but that the plaintiff (a male-to-female transsexual) had failed to prove that she was discriminated against because of her transsexualism)

Smith v. City of Jacksonville Correctional Institution, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (holding that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability)

Jane Doe v. Electro-Craft Corporation, No. 87-B-132 (N.H. Sup. Ct. 1988) (holding that transexualism is a disability within the meaning of the state employment discrimination statute)

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Avoid gender identity discrimination by adopting the following recommended policies.

Add "gender identity and expression" to the list of prohibited bases of discrimination in your company's Equal Opportunity/Non-Discrimination policy and statements.

Adopt a no-tolerance policy toward harassment of employees who are transgender or who have undergone, are undergoing, or intend to undergo sex-reassignment.

Include transgender awareness education in diversity training for managers and staff. This allows individual employees to be relieved of the burden to educate others around them and enables everyone to focus on their work.

Treat the transsexual status of any employee as a private, confidential matter. When an employee is undergoing a transition that involves the cooperation of others in referring to him or her with the appropriate pronoun, the transition itself becomes a matter of public knowledge, but personal or intimate details about an individual's transition are the employee's personal business and as such are entitled to confidentiality. Transgender or transsexual employees may elect to open themselves to questions or educational sessions at their option. No employee should be required to explain or justify her or his personal life or medical treatments in the workplace.

Assert that transgender employees are valued employees and treat them with respect. Management-modeled respectful behavior can eliminate many hours of unproductive behavior in the workplace.

Transgender employees should be allowed to use restroom facilities that correspond to their gender identity.

Upon an employee's request, change the employee's name and sex in all personnel and administrative records.

Remove exclusions for medically necessary treatments and procedures for transsexual employees from all healthcare coverage provided by the company. Insure that transsexual employees receive the same standard healthcare and other benefits as all other employees.
AFFIRMING GENDER IDENTITY IN THE WORKPLACE
By Jamison Green, for the National Center for Lesbian Rights

What does it mean when an employer agrees not to discriminate against workers or customers based on "gender identity"?

Gender identity is a fundamental aspect of human identity. In a psychological sense, gender identity refers to a person's internal, deeply felt sense of being either male or female, which may differ from the person's anatomical sex.

When an employer pledges or recognizes a responsibility not to discriminate based on gender identity, it means the employer will base hiring, promotion, compensation or dismissal decisions on work-related performance and skills, and not on irrelevant gender-based characteristics or the employer's own judgments about or comfort with an individual's gender. It means the employer respects her or his employees, including those who are or are perceived to be transgender, as workers and human beings.

Accordingly, if a woman is perceived to be "too masculine" or a man "too feminine," these characteristics must not be factors in any employment decision. Transgender people should be allowed to dress in accordance with their gender identity, just as any other employee does. If an employee reveals that his gender identity is different from that traditionally associated with the person’s sex at birth (or the employer knows or assumes such information to be true about an employee), employers must not discriminate against the employee based on that knowledge or belief. Further, if an employee presents evidence that she is undergoing medically-supervised treatment for sex-reassignment, the employer will not take any adverse action against the employee on that basis. The employer will also make any necessary accommodations, such as permitting the employee to work as a member of his or her new gender, and will refrain from instituting policies or practices that negatively affect the employee's work environment. The employer also indicates a willingness to become educated in matters pertaining to gender variance and diversity, and to ensure that the work environment is safe and free from prejudice or harassment based on gender identity for all employees and customers.

Nationwide, hundreds of employers have added gender identity to their non-discrimination policies. These include, among others: AMR/American Airlines, Apple Computer, Lucent Technologies, and Xerox Corporation. For an updated list of employers with such policies, see http://www.hrc.org/worknet/transgender/index.asp.
