



Webinar Series: Sex Discrimination against LGBTQI+ Individuals

Part II: Working on Sex Discrimination Cases With LGBTQI+ Individuals: Litigation Guidance and Legal Updates



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Pronouns: she/her/hers



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Presenter: Ria Tabacco Mar
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Presenter: Elizabeth Kristen
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M. Dru Levasseur

- Director, Transgender Rights Project, Lambda Legal
- Pronouns: he/him/his

Terms and Concepts

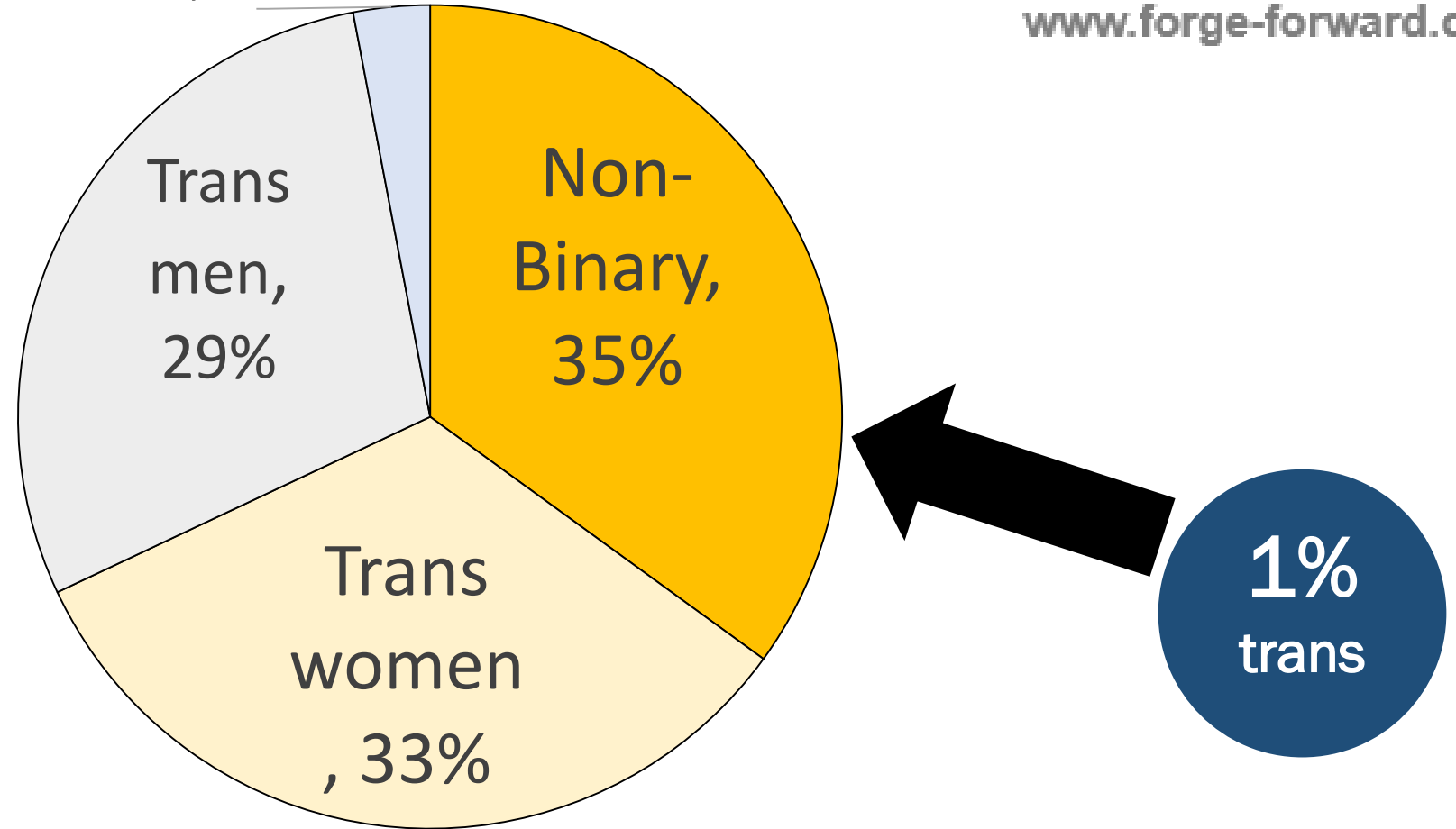
- **Sex assigned at birth:** the sex designation given to a person at birth. Avoid use of term “biological sex.”
- **Gender identity:** an individual’s innate sense of being male, female, or another gender. Not necessarily the same as sex assigned at birth. Primary determinant of a person’s sex.
- **Gender expression:** refers to the way a person expresses gender through dress, grooming habits, mannerisms, and other characteristics.
- **Transgender:** refers to people whose innate sense of being male, female, or something else, differs from their assigned sex at birth.
- **Cisgender:** refers to people whose gender identity is the same as their assigned sex at birth.
- **Transgender woman:** a woman who was assigned the sex of male at birth.
- **Transgender man:** a man who was assigned the sex of female at birth.
- **Gender Dysphoria:** clinically significant distress that some transgender people experience due to the fact that their gender identity is different from the sex they were assigned at birth.

Terms and Concepts

- **Non-binary:** refers to a person whose gender identity is not exclusively male or female. For example, some people have a gender identity that blends elements of being a man or a woman or a gender identity that is neither male nor female.
- **Gender-nonconforming:** a term used to describe people who do not meet society's expectations of gender roles.

Breaking it down

Crossdressers, 3%



Source: USTS, 2016 (n=27,715)

Terms and Concepts

“Transition” or “gender transition” is the period during which a transgender person begins to live more fully as their true gender, which may include any combination of the following: alterations to dress and other aspects of outward appearance; use of a different pronoun or name; changes to legal documents; hormone therapy; or gender **affirming** surgeries.

Terms and Concepts

Regarding Surgery:

- Not the end goal for all trans people
- Inappropriate to ask
- Unless the case is about this type of medical care or treatment, no one needs to know

Terms and Concepts

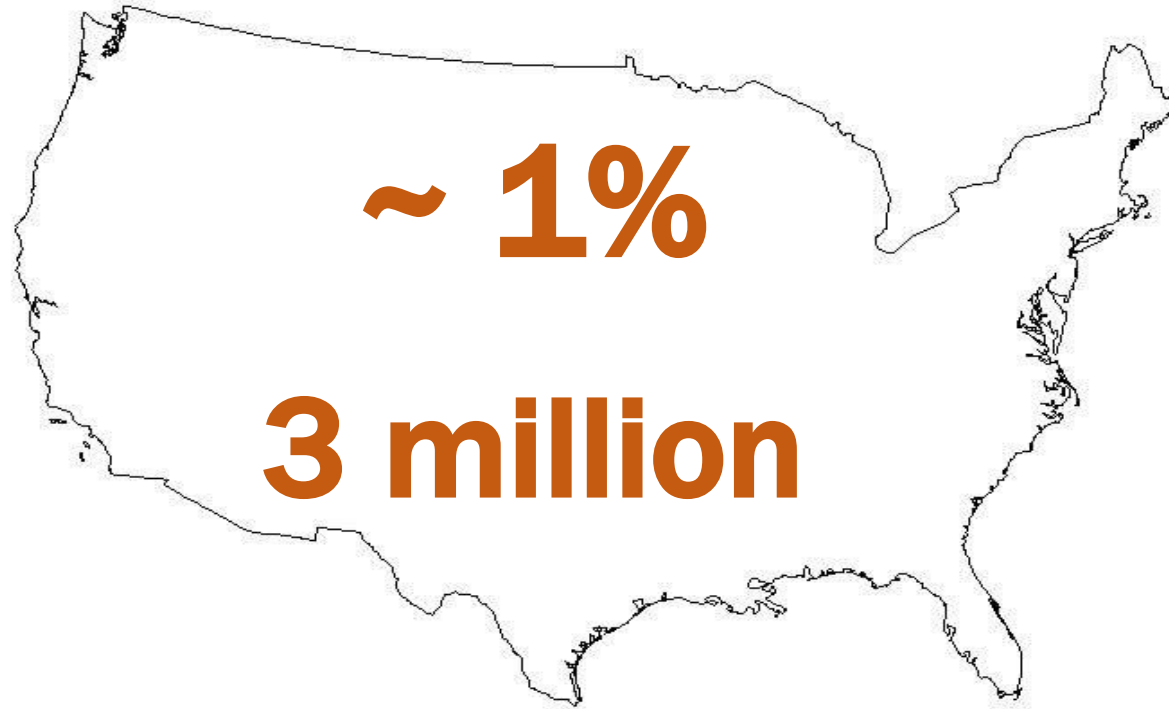
- **Intersex:** An umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated “male” or “female.” Experts estimate that between 0.05% and 1.7% of people are born with intersex traits.

Terms and Concepts

- **Sexual Orientation:** Separate from gender identity, gender expression, etc. This has to do with who a given person finds romantically or sexually attractive.
- **Lesbian** - Refers to a woman who is primarily romantically or sexually attracted to other women. Lesbian refers exclusively to women, while gay can refer to either women or men.
- **Gay**- A term that can be used to describe either a male whose primary sexual or romantic attraction is to other males or to reference anyone whose primary sexual or romantic attraction is to a person who is the same sex as themselves.
- **Bisexual**- A sexual orientation or identity describing one's sexual or romantic, or affectional attraction to more than one sex/gender, or as attraction to same and different sexes/genders from your own. This is a community identity label, and individuals may use a variety of personal identity labels for themselves, including **pansexual**, which is attraction to people regardless of gender, or attraction to all genders.
- **Queer**- originally a slur, it is an umbrella term used by people who reject conventional categories such as LGBT or embrace a political identity as 'queer' in addition to being LGB or T. While many people identify with this term, others still do not. It can also still be used as a slur. It should be used only when the person self-identifies as queer.
- **Straight**- a sexual orientation describing a person whose sexual or romantic attraction is to people of a different sex. Also known as heterosexual.

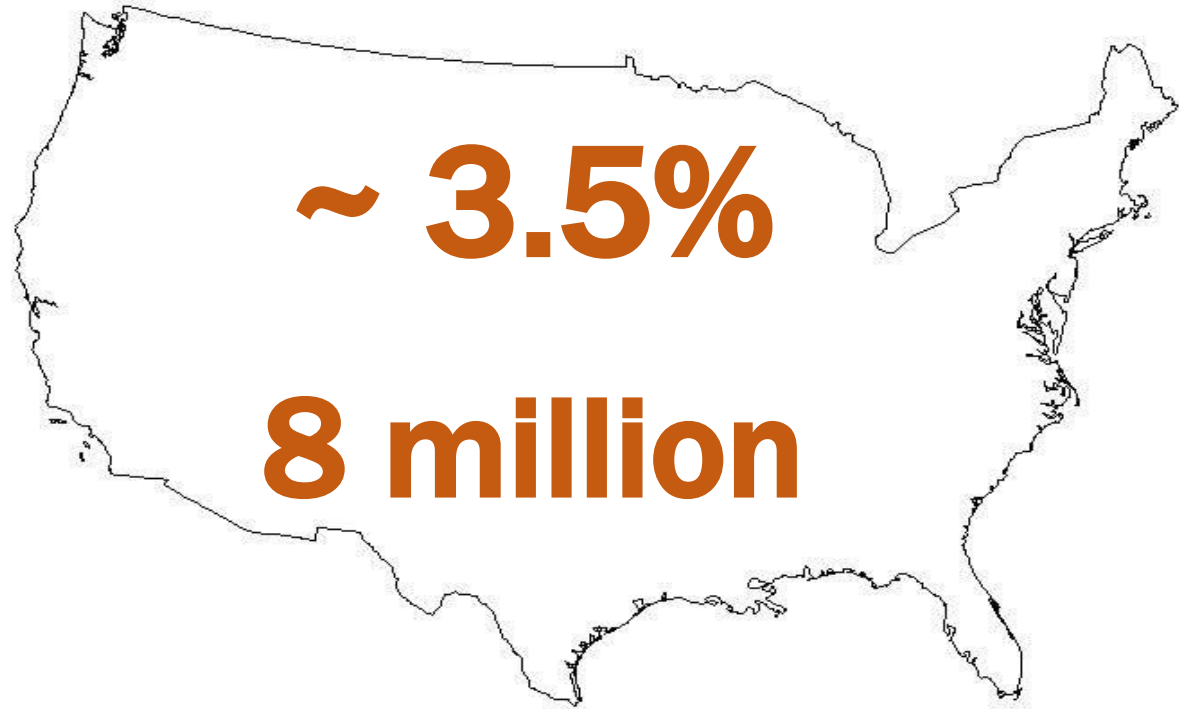
How many people are trans?

US population = 318,857,056



How many people are LGB?

US population = 318,857,056



LGBT people face discrimination in
many contexts

Common Ways LGBTQI+ Individuals Experience Discrimination in the Workplace

- Forms of discrimination include:
 - Failure to hire, other barriers to accessing employment
 - Firing, denials of promotion, pay disparities
 - Harassment or mistreatment on the job
 - Verbal harassment (slurs, misgendering, deadnaming)
 - Physical/sexual assault
 - Sharing of confidential/personal information
 - Access to sex-separated facilities, sex-specific uniforms/dress codes
 - Discrimination in employee benefits (family leave policies, health benefits)
- Examples of ways LGBTQI+ people experience these forms of discrimination

Statistics from 2015 U.S. Transgender Survey

- **High poverty and unemployment**

- 29% of transgender people live in poverty, compared to 12% of the overall population
- 15% of transgender people are unemployed, compared to the overall 5% employment rate at time of survey

- **Barriers to housing**

- 16% of respondents owned a home, compared to 63% of U.S. population
- 30% of transgender people have been homeless at some point in their lives, including 12% in just the previous year

Statistics from 2015 U.S. Transgender Survey (continued)

- **Access to Health Care**

- 33% of survey respondents experienced discrimination or harassment from a health care provider in the previous year
- 23% did not seek needed health care out of fear of discriminatory treatment, and 33% because they could not afford it
- 55% of transgender people who sought insurance coverage for transition-related surgery in the previous year, and 25% who sought coverage for transition-related hormone treatments in the previous year, were been denied insurance for those services

Best Practices

Ways to create respectful environment

- Think of the big picture

What will the experience be for a client from the first interaction with staff, security, or you through to the completion of the case?

Best Practices

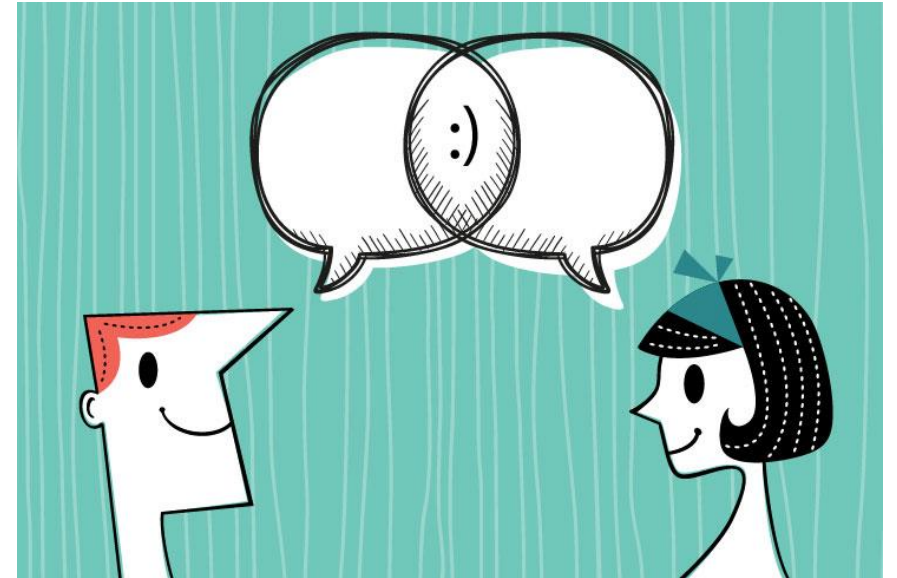
- Front line staff should be trained.
- Security staff should be prepared for your client.
- Providing identity to security can be very intimidating.
- Change intake forms to include the pronouns and the name a person wants used.

Best Practices

- Don't make assumptions
- Refer to someone by their affirmed name, not their legal name (if there is a difference)
- Ask what pronouns they want to be referred by **AND** offer yours as well
- Apologize and acknowledge when you've made a mistake on someone's pronouns. Do not make excuses or act like it didn't happen
- Keep educating yourself

3a. Person-centered approach

- Client-driven language
- Acknowledge the centrality of their identity (which might not be trans!)
- Mirror client's language
 - Creates resonance and trust



Best Practices

- Avoid using gendered language such as “Ms.” or “Mr.”, “ladies” or “gentlemen” until you are sure of the gender identity of the parties
- Dress codes should not be enforced by gender. Transgender and gender non-conforming people must be allowed to dress consistently with their gender identity or gender expression.

Best Practices

- Avoid making heterocentric statements or asking heterocentric questions about clients and colleagues.
- Do not assume your client is struggling with identifying as LGBT. But, be mindful of the high risk for feelings of isolation, depression, anxiety, shame, guilt, loneliness, fear, and stigma in the LGBT population due to lack of support.

Best Practices

- Always use the pronouns and titles that align with a client's gender identity in court and court documents.
- Take the lead on informing the court of a client's pronoun or honorific.
- Ask for a sidebar or bench conference to address the issue instead of addressing it publicly, if necessary.

Best Practices

- Use the clients preferred name in the courtroom, EVEN if it is not their legal name.
- Especially when talking about your client to the court or in making a name known to the other people in the courtroom.
- Challenge the assertion that using legal name is necessary or required.

Best Practices

Address Explicit Bias and Disrespect

- Immediately respond to jokes or disrespectful comments.
- If during a court hearing, judges and attorneys should respond promptly.
- If on the record, the response and any reference to the response should also be on the record.



Ria Tabacco Mar

- Senior Staff Attorney, American Civil Liberties Union (ACLU)
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Current Status of Court Decisions Addressing Federal Discrimination Protections for LGBTQ People

Gender Identity: Circuit Court Decisions

- Five circuits now agree that anti-transgender discrimination is a form of sex discrimination
 - Rosa v. Park West Bank & Trust Co. (1st Cir. 2000)
 - Smith v. City of Salem (6th Cir. 2004)
 - Whitaker by Whitaker v. Kenosha Unified School District (7th Cir. 2017)
 - Schwenk v. Hartford (9th Cir. 2000)
 - Glenn v. Brumby (11th Cir. 2011)
- Three additional circuits have assumed that transgender people may bring sex stereotyping claims

EEOC v. R.G. & G.R. Harris Funeral Homes (6th Cir. 2018)

- Employer fired employee who announced her intent to transition, saying he was “just old-fashioned” and believed that “a male should look like a . . . man, and a woman should look like a woman.”
- Petition for certiorari filed July 20, 2018



Photo of Donna and Aimee Stephens: ACLU

Sexual Orientation: Circuit Court Decisions



Photo of Kimberly Hively: Lambda Legal

- Two circuits have revisited the question en banc and ruled in favor of coverage for sexual orientation discrimination
 - Hively v. Ivy Tech Community College of Indiana (7th Cir. 2017) (en banc)
 - Zarda v. Altitude Express, Inc. (2d Cir. 2018) (en banc)
- One circuit recently declined to revisit the question over dissent
 - Evans v. Georgia Regional Hospital (11th Cir. 2017)

Sexual Orientation: Supreme Court Decision?

- Two petitions for certiorari currently pending
 - Employer seeking review of pro-coverage decision in Zarda v. Altitude Express, Inc. (2d Cir. 2018) (en banc)
 - Employee seeking review of anti-coverage decision in Bostock v. Clayton County Board of Commissioners (11th Cir. 2018) (per curiam)

No. 17-1623

IN THE
Supreme Court of the United States

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,
Petitioners,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

District Court Decisions

- Courts within circuits that have explicitly recognized sexual orientation or gender identity discrimination claims
- Courts outside circuits that have explicitly recognized sexual orientation or gender identity discrimination claims

Use of Single-Sex Facilities: G.G. v. Gloucester County School Board

“I didn’t ask to be this way. All I want to do is be a normal child and use the restroom in peace.” –Gavin Grimm (then 16 years old)



Objections to Facilities Use

- Doe v. Boyertown Area School District (3d Cir. 2018)
 - “Adopting the appellants’ position would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school.”
 - Petition for certiorari filed Nov. 19, 2018
- Cruzan v. Special School District No. 1 (8th Cir. 2002)



Barriers to Coverage for Medical Care

- Categorical exclusion for transition-related care (sometimes called “sex change procedures”)
- Denial of coverage as not “medically necessary” or “cosmetic”
- Denial of coverage as not appropriate for the insured’s gender

Boyden v. University of Wisconsin (D. Wis. 2018)

- District court finds that challenged exclusion is sex discrimination under Title VII, ACA, and Equal Protection Clause
- Jury awards \$780,000 to two state employees denied insurance coverage for hormone therapy and surgery relating to gender transition





Elizabeth Kristen

- Director, Gender Equity & LGBT Rights Program, Legal Aid at Work
- Pronouns: she/her/hers

Workplace Best Practices

Best Practices

- A commitment to diversity and anti-discrimination that includes LGBTQI+ communities.
- Good policies that are distributed in languages spoken by workforce
- Training for employees, supervisors and managers

Workplace Practices for LGBTQI+ Employers

- A commitment to diversity and anti-discrimination that includes LGBTQI+ communities and also recognizes the diversity of the LGBTQI+ communities.
- Recognition of important milestones for LGBTQI+ community (e.g., Pride month, Transgender Day of Remembrance).

Inclusive Policies

- Policies should pro-actively address the needs and questions of the LGBTQI+ community.
 - E.g., explicit statements that employees with same-sex partners will have their relationships equally recognized.
 - E.g., clear policies regarding transition-related health care for employees who may transition or have family members who transition.
 - E.g., discussion of pronoun usage protocols for organization
 - E.g. anti-harassment and anti-discrimination policies that are explicit in covering members of LGBTQI+ communities.
- Policies also should recognize that members of the LGBTQI+ community also are affected by other workplace matters (not just those that seem LGBTQI+ specific)

Address Facilities & Dress Code

- Consider gender-neutral facilities
- If you have sex-segregated facilities, ensure it is clear that people can use if they identify with the sex/gender of the facility
- Ensure dress codes are similarly clear and that you have uniforms available in different sizes

Organizational Affinity Groups

- Encourage an organizational affinity/resource group like an internal Pride Committee and solicit and implement feedback.

Resources for Best Practices

- https://www.greatplacetowork.ca/images/storage/2017_white_papers/pri_deatwork_greatplacetowork_final_digital.pdf
- <https://www.osha.gov/Publications/OSHA3795.pdf>
- <http://outandequal.org/app/uploads/2016/09/Transition-Guidelines-Full-Edition.pdf>
- <https://www.hrc.org/resources/employer-resources>

SETTLEMENT REMEDIES

Client-Centered Strategies

- The best remedies are client focused.
- Remedies in settlement contexts can be creative and personal.
- Also important to consider lasting change at the organizational level.

Examples of Client-Centered Remedies

- A letter of apology to the client;
- Suspension or termination of the person who was the bad actor;
- Continuation of health insurance;
- Agreement to not contest unemployment;
- Letter of reference (written by client);
- Don't forget traditional remedies like back pay, emotional distress damages and attorneys' fees and costs.

Examples of Organizational Change Remedies

- New policies and postings
- Agreement to conduct trainings
- Monitoring and reporting (by plaintiff's counsel or an outside monitor)

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- Pronouns: he/him/his or they/them/theirs

NYC Commission on Human Rights



NYC
HUMAN RIGHTS

The NYC Commission on Human Rights fights discrimination on behalf of people living in, working in, or visiting New York City. The Commission investigates and prosecutes claims of discrimination and provides training and public education.

To report discrimination, request a training, or to learn more about the Commission's services, dial **311** or visit nyc.gov/humanrights

BILL DE BLASIO, Mayor
CARMELYN P. MALALIS, Commissioner/Chair

WORKPLACE

In New York City, it is illegal to discriminate against employees, interns, and job seekers on the basis of:

- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- SEXUAL ORIENTATION
- SEXUAL IDENTITY
- SEXUAL ACTIVITY
- PREPREGNANCY
- DISABILITY
- PARTNERSHIP
- MARRITAL OR DOMESTIC PARTNERSHIP STATUS
- CITIZENSHIP STATUS
- ALLEGED OR CONVICTION RECORD
- STATUS AS VICTIM OF DOMESTIC VIOLENCE, SEXUAL VIOLENCE, OR STALKING
- UNEMPLOYMENT HISTORY
- GENETIC STATUS

HOUSING

In New York City, it is illegal to discriminate against tenants, apartment seekers, and mortgage applicants on the basis of:

- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- SEXUAL ORIENTATION
- SEXUAL IDENTITY
- SEXUAL ACTIVITY
- PREPREGNANCY
- DISABILITY
- PARTNERSHIP
- MARRITAL OR DOMESTIC PARTNERSHIP STATUS
- CITIZENSHIP STATUS
- ALLEGED OR CONVICTION RECORD
- STATUS AS VICTIM OF DOMESTIC VIOLENCE, SEXUAL VIOLENCE, OR STALKING
- UNEMPLOYMENT HISTORY
- GENETIC STATUS

PUBLIC ACCOMMODATIONS

In New York City, it is illegal to discriminate in public spaces like stores, restaurants, parks, libraries, or taxis on the basis of:

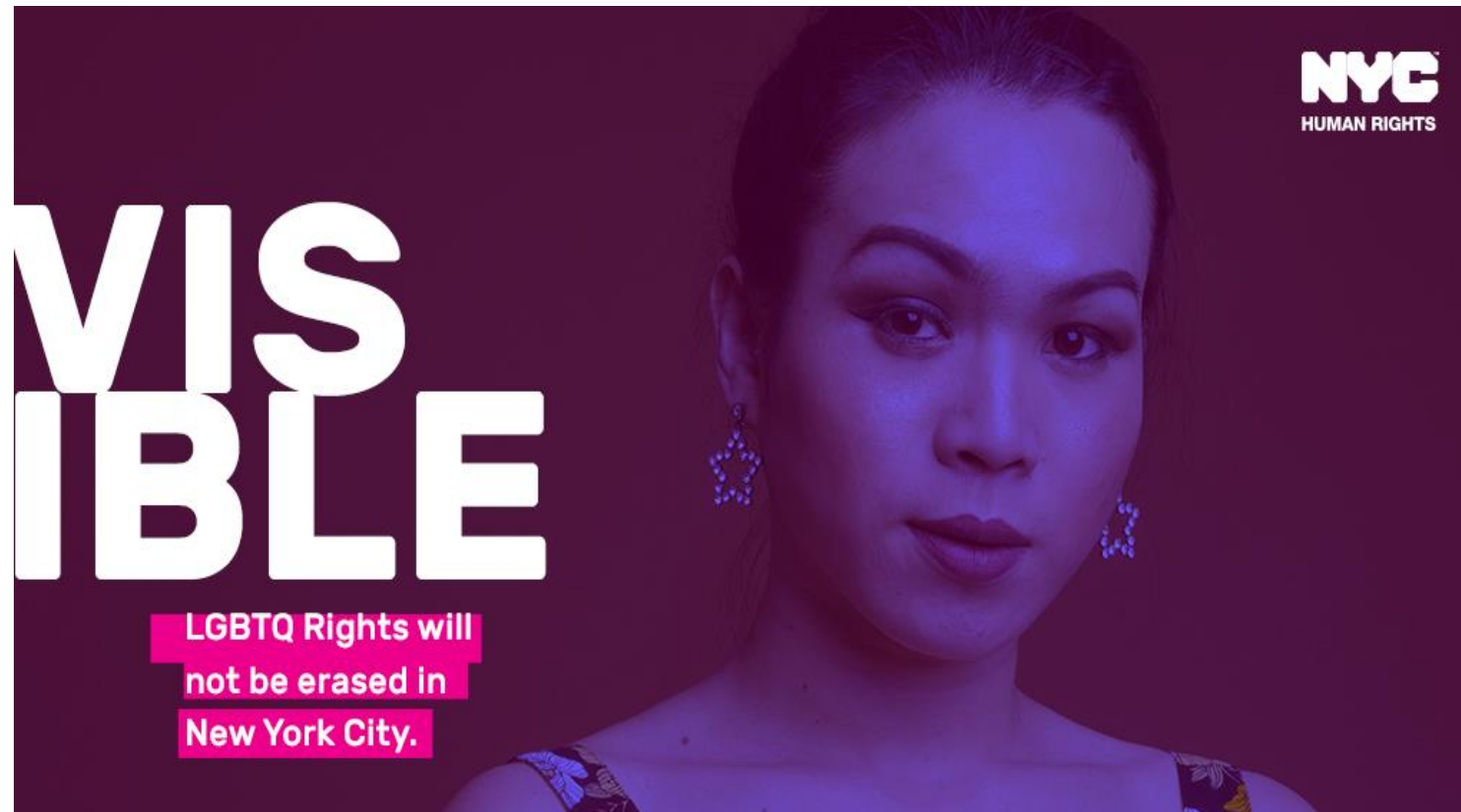
- AGE
- RACE
- COLOR
- RELIGION/CREED
- NATIONAL ORIGIN
- SEXUAL ORIENTATION
- SEXUAL IDENTITY
- SEXUAL ACTIVITY
- PREPREGNANCY
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- ALLEGED OR CONVICTION RECORD
- STATUS AS VICTIM OF DOMESTIC VIOLENCE, SEXUAL VIOLENCE, OR STALKING
- UNEMPLOYMENT HISTORY
- GENETIC STATUS

The law also prohibits retaliation, bias-related harassment (including cyberbullying), and bias-based profiling.

f t i YouTube @NYCCHR

- **Community Relations Bureau:**
 - Hosts trainings and presentations about the law;
 - Works with schools, community groups, and faith communities;
 - Encourages understanding and respect among NYC's many communities.
- **Law Enforcement Bureau:**
 - Accepts complaints from the public and initiates its own investigations;
 - Brings cases before the City's Office of Administrative Trials and Hearings; and
 - Negotiates settlements and mediates disputes.

The NYCHRL & LGBTQI People



The NYCHRL & LGBTQI People

- The NYCHRL has expressly prohibited discrimination based on sexual orientation since 1986.
- 2002 amendments to the NYCHRL strengthened protections for transgender, gender non-conforming, & intersex people.

The NYCHRL § 8-102

- **Sexual Orientation:** “an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, **on the basis of gender**. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality and pansexuality.”
- **Gender:** actual or perceived **sex, gender identity and gender expression**, including a person's actual or perceived **gender-related self-image, appearance, behavior, expression** or other gender-related characteristic, regardless of the sex assigned to that person at birth.”

Additional Features of the NYCHRL

1. Employers must provide a notice of rights and annual sexual harassment prevention [training](#).
2. NYC Commission on Human Rights [rules](#) & [legal enforcement guidance](#) further clarify the law's prohibition on gender discrimination.
3. [Executive Order 16 \(2016\)](#) requires City Agencies to allow employees and members of the public to access single-sex facilities consistent with their gender.

Challenges & Things to Keep In Mind in Advocacy for LGBTQI Clients

1. Harassment (sexual harassment, misgendering, & other gender-based harassment);
2. Denial of access to bathrooms or other single-sex facilities;
3. Denial of health care;
4. Termination, refusal to hire or promote.

**“IT’S ~~JUST~~
~~A JOKE.~~”**

SEXUAL HARASSMENT

YOU REPORT IT. WE GET IT. LET’S END IT.

At the NYC Commission on Human Rights, we investigate claims of sexual harassment in the workplace and are ready to fight for you.

Call **718-722-3131** today.

NYC Commission on Human Rights
Bill de Blasio, Mayor
Carmelyn P. Malalis, Commissioner/Chair
NYC.gov/HumanRights

“ES SOLO ~~UNA BROMA.~~”

ACOSO SEXUAL


**DENÚNCIALO. TE ENTENDEREMOS.
JUNTOS PODEMOS ACABARLO.**

En la Comisión de Derechos Humanos de la Ciudad de Nueva York investigamos denuncias de acoso sexual en el lugar de trabajo y estamos listos para luchar por ti.

Llama hoy al **718-722-3131**.

NYC Comisión de Derechos Humanos
Bill de Blasio, Alcalde
Carmelyn P. Malalis, Presidenta y Comisionada
NYC.gov/DerechosHumanos

Bathrooms & Other Single Gender Spaces



You have the right to use the restroom, locker room, or other single-sex facility consistent with your gender identity or gender expression.

Individuals cannot be asked to show identification, medical documentation, or any other form of proof or verification of gender.

Any person who abuses this policy in order to assault, harass, intimidate, or otherwise interfere with an individual's rights under this policy will be prosecuted to the full extent of the law.

This policy does not provide a right to a member of the public to use a facility that is reserved for the exclusive use of employees.

NYC Commission on Human Rights | Citywide Administrative Services

Visit nyc.gov/humanrights or call 311 and ask for the Commission on Human Rights. City employees may also learn more by speaking with their EEO Officer.



M. Dru Levasseur

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Barriers to Trans-Inclusion in Movement(s)

HuffPost article – “The #MeToo Conversation Erases Trans People” by Tris Mamone

- When trans women do report sexual harassment or abuse, they are often met with comments like, ‘Welcome to womanhood.’
- The general discourse surrounding sexual violence still centers around cis women.

https://www.huffpost.com/entry/opinion-mamone-trans-metoo_n_5a8c5c61e4b0273053a539d1

Making Space for Trans People in the #MeToo Movement

Article by [Gabriel Arkles](#), Senior Staff Attorney, ACLU LGBT & HIV Project:

- Although you wouldn't know it from mainstream advocacy campaigns, trans people have long been involved in efforts to stop gender-based violence.
- We are also among the most vulnerable to this violence.
- Based on a [recent survey](#), more than one in three trans women and one in two trans men have been sexually assaulted — and the rates of sexual assault against non-binary people are even higher.
- Trans people of color are disproportionately affected by sexual violence. So are trans people who have done sex work, who have been homeless, and who have disabilities.
- Many trans survivors face painful barriers when they seek visibility or support.

<https://www.aclu.org/blog/womens-rights/violence-against-women/making-space-trans-people-metoo-movement>

Barriers to Trans-Inclusion in the Courts

- Historically, courts have not treated trans people as “persons” under the eyes of the law.
 - *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 at 1222 (2007) (holding that *Oncale* does allow a trans plaintiff to bring a claim based on their sex, but that this only holds if they can show discrimination “because they are male” or “because they are female” – not because they are trans).

Dehumanized and Dissected

- When seeking legal recognition in the courts, transgender people have been dehumanized, have had their core, intimate aspect of their selves legally erased and their bodies publicly dissected for purported function and appearance.
- Transgender people have been judged defiant and worthy of punishment, immoral, fraudulent, mentally ill, delusional, medically wrong, or imaginary/nonexistent.
- Progress that has been made for coverage on the basis of sex has been built from this place, so there are gaps to fill in terms of human dignity, privacy, and bodily autonomy in the way we litigate trans cases.

Patterns for Framing Trans Cases

- Trans 101 section of brief often discusses medical history and detailed description of bodies.
 - Is that necessary to introduce your client to the Court?
- Tendency to use claims of harassment “based on trans status” as sex discrimination for:
 - Misgendering
 - Denial of restroom access
 - Insults related to plaintiff’s gender expression and identity
 - Disclosure of a person’s trans status to coworkers

Harassment v. Because of Sex

- Rescission of Title IX trans student guidance
 - Letter makes clear that the current Department does not see Title IX as requiring “access to sex-segregated facilities based on gender identity,” but it *does* view Title IX as giving “protections from discrimination, bullying, or harassment” so that “LGBT students [] are able to learn and thrive in a safe environment.”
 - This would necessarily imply that the Trump Department does not see access to the correct bathroom as a necessary component of a safe, harassment-free school environment.
 - All of this leaves Title IX arguments in a state of some ambiguity, as the rescission of the guidance does not necessarily prohibit a court from adopting the Obama administration’s interpretation. Indeed, the 7th Circuit, relying on a sex-stereotyping theory, held that Title IX requires bathroom access some months after the guidance was rescinded. See *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017)
 - This is further complicated by the looming threat of an oppressively narrow interpretation of “sex” foreshadowed in the draft memo which leaked last October. See <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>

Harassment in Trans Student Restroom Cases

- Harassment can sometimes arise as a sideline issue in Title IX cases simply because they are often about access to sex-segregated facilities, and so it is sometimes strategically important to emphasize that the plaintiff has been using the correct bathroom or locker room *without incident* for a period of time.
 - See, e.g., Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293, 1315 (M.D. Fla. 2018) (“The School Board also cites student safety as a basis to uphold its bathroom policy, expressing concern for transgender students who may be bullied or harassed in the bathroom matching their gender identity and for cisgender students who may not feel safe if a person with genitalia of the opposite sex is in the restroom with them. There was no evidence that Adams encountered any safety concerns during the six weeks he used the boys' restroom”)

Sexual Harassment Cases Involving Trans Clients

- Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744 (S.D. Ohio 2018)
 - In one very recent, pending case based on both Title VII as well as Ohio state law, the trans plaintiff alleged both harassment based on trans status *and* outright sexual harassment. Plaintiff alleged that she was “picked on” and written up because she was transgender (she was told to present as male and repeatedly insulted by coworkers), but also that she was sexually assaulted by a coworker, solicited for sexual favors by a supervisor, and then finally terminated.
- Tronetti v. Healthnet Lakeshore Hosp., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003)
 - Trans plaintiff brought a sexual harassment claim that could be considered both harassment based on trans status and traditional sexual harassment: coworkers questioned her mental health, started an interdepartmental “game” designed to mock her, and also started rumors about her sexuality, and left a penis-shaped toy on her desk.
- EEOC v. Apple Metro (<https://www.eeoc.gov/eeoc/newsroom/release/6-9-17.cfm>)
 - Coworkers made offensive comments about plaintiff’s genitals; when she complained, she was fired.
- **Health Care:** Rumble v. Fairview Health Servs., 2015 WL 1197415 (D. Minn. Mar. 16, 2015)
 - in recent Minnesota case, plaintiff brought medical discrimination claims based on both the ACA and state law, alleging both discrimination based on trans status and outright sexual harassment: doctor asked him (aggressively) who he was “having sex with...men, women or both” and asked if he was “engaging in penetration” and whether he’d “had sex with objects”

Sex Discrimination Cases, but no Sexual Harassment Claims

- Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011)
 - Supervisor said she was “inappropriately dressed” in a red turtleneck sweater and knee-length skirt.
 - Said it was “unsettling” to think about “male sexual organs” inside her clothing and that it was “unnatural”
- Etsitty v. Utah Transit Authority, 502 F.3d 1215
 - Supervisor asked whether she still had male genitalia (and where she was “in the sex change process”)
- Brandon v. Sage Corp., 808 F.3d 266
 - Supervisor pointed to an (apparently) trans employee (not plaintiff) and said “what is that and who hired that?”
- Harris Funeral Homes
 - Employer said to EEOC investigator, in rationalizing his dress code: “you women are a strange breed”
- Dawson v. H&H Elec., Inc, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015)
 - After receiving report that plaintiff had worn a blouse to work, supervisor told her “I’m sorry...you do excellent work, but you’re **too much of a distraction**. I’m going to have to let you go.”

Bodily and Informational Privacy for Trans Plaintiffs: Can We Do Better?

- Many are familiar with the theories under which discrimination against transgender people, particularly in the employment and education contexts, is litigated as sex discrimination or sexual harassment. But virtually every step of making such a claim – from coming out in the workplace or at school, to drafting the complaint, presumes as a matter of course that trans people are not entitled to the same level of bodily privacy as others in U.S. society or in its legal system. Whether it is to complain to H.R. or to state a claim in federal court, the trans victim of discrimination must offer up granular, private details about their body, their transition, their personal lives, their mental health treatment, their medications – all of which are simply assumed by all of us to be proper matters for public discussion and scrutiny.
- Sometimes this disregard for bodily privacy is subtle or benign; at other times – particularly when intimate details about one's body become a topic of public discussion highlighted and sensationalized in the media – it is extreme.

Bodily and Informational Privacy for Trans Plaintiffs: Can We Do Better?

- How can we protect the bodily and personal privacy of trans litigants without sacrificing the ability to effectively vindicate their rights to be free from discrimination at work or in school?
- For example, how can we work toward establishing a norm against asking trans people about their genitals when they come out at work, similar to the norm that already exists for cisgender people?
- How can we change litigation and advocacy strategies to make it just as unacceptable for a supervisor to ask a trans employee if they've "had the surgery" as it would be for the same supervisor to ask a cisgender employee if they've ever had a hysterectomy?

“Transgender woman with breasts, no male genitalia forced to live with, shower with male inmates”

- Would a journalist use the same framing for a cis inmate?
- This leaves trans people in a difficult situation – do I seek justice and accommodation, knowing that it might put my body and my transition in the public spotlight?

<https://www.wyff4.com/article/transgender-woman-with-breasts-no-male-genitalia-forced-to-live-with-shower-with-male-inmates/26450183>

Apply the “Cis” Lens

- Consider what you would do if this was not a trans person? How can you afford the same respect, human dignity, and bodily autonomy to your trans client?
 - For example, could we use employment litigation to establish a (stronger) norm against asking trans employees about their genitals?
 - What if all men were asked the size of their penis to use a restroom?
- Are there opportunities to bring sexual harassment claims in addition of “because of sex” with the goal of expanding the respect and dignity of your trans client?



Moderator: Sunu Chandy
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Pronouns: she/her/hers



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Presenter: Ria Tabacco Mar
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Presenter: Elizabeth Kristen
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THANK YOU

Merci beaucoup *Thank You*
Danke *Gracias* お疲れ様
Grazie *Danke u*
Thanks 谢谢你 *Obrigado*