



SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION

Create an Inclusive and Welcoming Workplace for Your Employees

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Penelope (Penny) J. Phillips,
Felhaber Larson





Penelope (Penny) J. Phillips

Felhaber Larson

(612) 373-8428

pPhillips@felhaber.com



Presentation Overview

- Terminology
- Impact of *Bostock*
- State Laws Regarding Gender Identity
- Federal Laws Regarding Gender Identity
- Responsibility, Liability, and Policies



Terminology

- LGBTQIA+ Lesbian, Gay, Bisexual, Trans, Queer/Questioning, Intersex, Asexual and “+” is everything else.
- Transgender: People whose gender identity and/or expression differs from what is typically associated with their biological sex assigned at birth.
- Cisgender: Identifying with the same gender with which you were born (i.e., non-transgender).
- Gender Identity: One’s internal, deeply-held sense of their own gender.
- Gender Expression: External manifestations of gender.



Terminology

- Gender Transition: Process in which transgender persons begin to assert the sex that corresponds to their gender identity instead of the sex they were assigned at birth.
- Transsexual: Outdated term for “transgender.”
- Cross-Dresser: Formerly “transvestite.” Also outdated.
- Gender Non-conforming: People whose outward gender expression is different from traditional expectations.



Transgender Workers

- According to a 2023 report from the HRC Foundation, the proportion of Americans identifying as LGBTQIA+ will almost double by 2040.
 - Today, almost 1 in 10 adults worldwide identify their sexual orientation as something other than heterosexual (9%).
 - By 2030, one-in-seven (14.3%) adults age 18+ will be LGBTQ+ identifying.
 - By 2040, nearly one-in-five (17.8%) adults will identify as LGBTQ+.



Transgender Workers

- According to a 2021 survey by UCLA School of Law:
 - 50.4% of workers are not out to their current supervisor; 25.8% are not out to any of their co-workers.
 - 67.5% of workers reported that they have heard negative comments, slurs, or jokes about LGBTQIA+ people at work.
 - 45.5% of workers reported experiencing unfair treatment at work because of their sexual orientation or gender identity at some point in their lives.



Policy Changes

- According to the HRC Foundation, 91% of the Fortune 500 companies have implemented non-discrimination policies that include sexual orientation, and 83% have policies that include gender identity.



Protected Classes Under Federal Law

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of “sex.”
- In 2020, the United States Supreme Court expanded this definition to include protections for sexual orientation and gender identity in *Bostock v. Clayton County*.



Protected Classes Under State Law

- 22 states and the District of Columbia currently have explicit statutes prohibiting workplace discrimination on the basis of sexual orientation and gender identity or transgender status:
 - California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington.
- In addition, 9 states have extended existing sex discrimination laws to cover sexual orientation and gender identity.



The Federal Standard: *Bostock v. Clayton County, GA, Altitude, Express Inc. v. Zarda, and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*

- Decided June 15, 2020.
- Combined three cases for review.
- The cases involved gay men who alleged they were terminated because of their sexual orientation and a woman who alleged she was terminated after telling her employer she would embrace her gender identity at work.



Bostock v. Clayton County, GA

- Bostock worked for Clayton County, GA as a child welfare coordinator.
- County officials criticized his participation in a recreational softball league for gay men.
- Shortly thereafter, he was terminated for “conduct unbecoming of a County employee.”



Altitude, Express Inc. v. Zarda

- Zarda worked for Altitude Express, Inc. as a skydiving instructor in Long Island, NY.
- He disclosed his sexual orientation to women while he was skydiving with them.
- The women became concerned about being strapped closely to him.
- Zarda was then terminated for “sharing inappropriate information about his personal life” with clients.



R.G. & G.R. Harris Funeral Homes Inc. v. EEOC

- Stephens worked as an embalmer and funeral director at Harris Funeral Homes, Inc. in Livonia, Michigan.
- Stephens was assigned the male gender at birth.
- After working as a male for several years, Stephens told her employer that she would be coming to work wearing women's clothing to embrace her true gender identity.
- Shortly thereafter, Stephens was terminated because the funeral home believed her gender identity would upset customers and stated her gender identity was a violation of the owner's religious beliefs.



U.S. Supreme Court Decision

- Holding: Title VII's prohibition on employment discrimination "because of sex" applies to gay and transgender workers.
- "[I]t is impossible to discriminate against a person for being homosexual and transgender without discriminating against that individual based on sex."



Impact of the Decision

- Individuals who experience discrimination based on sexual orientation or gender identity in the workplace now have a right to file a complaint with the EEOC.
- *Bostock* expressly reserved several issues for the future, including religious implications and sex-segregated restrooms and locker rooms.
- Specifically, the Court majority noted that the only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual because of such individuals sex, and further noted that “we do not purport to address bathrooms, locker rooms, or anything else of the kind.”



President Biden's Executive Orders

- January 2021 – Executive Order 13988; Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- June 2021 – Executive Order 14035; Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce



Let's Take a Step Back

What are the most common legal issues faced by employers after *Bostock*?



Workplace Considerations

- Harassment and discrimination
 - Restrooms
 - Misgendering



What is Unlawful Sex Discrimination?

- Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.



What is Unlawful Harassment?

- Harassment is a form of discrimination which takes place at work and is unwelcome.
- Harassment becomes illegal when enduring the offensive conduct becomes a condition of continued employment or the conduct is sufficiently severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- Under the newly-expanded scope of Title VII as well as state law, unlawful harassment now includes harassment related to sexual orientation and transgender status.



Sexual Harassment

- **Quid pro quo:** Unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature where acceptance is made a term or condition of employment.
- **Hostile Environment:** The creation of an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct or communication of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's employment.



Gender Stereotyping

- Stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular class, including sex, should act or look.



What Type of Behavior Could Create a Hostile Working Environment Based on Sexual Orientation or Transgender Status?

- Talking about stereotypes associated with gender identity;
- Offensive nicknames;
- Making negative comments about an employee's sexual orientation or transgender status;
- Using discriminatory slang and phrases;
- Making remarks about an individual's lack of conformity to sex stereotypes;
- Displaying drawings, or posters, bumper stickers or signs that might be offensive;



What Type of Behavior Could Create a Hostile Working Environment Based on Sexual Orientation or Transgender Status?

- Making derogatory comments about failure to comply with sex stereotypes. For example, clothing and physical presentation;
- Sharing inappropriate images, videos, e-mails, letters, notes, social media, that make fun of a person's gender identity;
- Asking questions about someone's sexual history.
- Repeated and deliberate failure to use requested pronouns.



Example – Harassment and Misgendering

- Tracy worked as a truck driver for Strawser Construction
- After she was hired, Tracy began to transition her gender from male to female.
- Upon disclosing this to her immediate supervisor, she was told “you had better be ready to be picked on.”
- Tracy was assigned to share a hotel room with a male co-worker.
- A co-worker told the hotel staff member that Tracy was transitioning. The staff member called Tracy to the front desk “just to see what she looked like.”



Example – Harassment and Misgendering

- Tracy’s coworkers made comments that they believed Tracy was really a male attracted to males, they would purposely refer to Tracy using male pronouns, and one asked her “can’t you just dress like a man?” and said, “you make for an ugly woman.”
- When Tracy asked the superintendent if there was anything he could do to stop the harassment, he said: “if she wasn’t tough enough to handle the harassment, she wasn’t tough enough to work in construction.” He encouraged her to resign.
- Tracy’s eventual termination letter was addressed to “Mr.”



Example - Harassment

- Jennifer was a teacher, and upon informing her principal that she would begin socially transitioning from living as a man to living as a woman, and asking the principal to keep it quiet, started to receive frequent threats and insults.
- Over a 6-year period and throughout multiple transfers to various schools, Jennifer was frequently referred to by coworkers, students, and parents by her former name, as “he,” as “a he/she,” and as “tranny.”
- Parents and students asked inappropriate questions (“have you cut it off,” “do you bleed”?)
- This continued despite Jennifer’s attempts to correct the use of her former name and the use of incorrect pronouns



Example – Sexual Stereotyping and Harassment

- Christopher worked for a municipal utility provider as a water distributor operator
- Christopher was involved in an incident where a vacuum tube was not securely attached to a vacuum truck which caused the tube to come off the truck and shatter
- After this incident, Christopher started to receive comments from his coworkers about “not living up to the masculine stereotype,” and they started frequently calling him “cornhole” which Christopher understood to mean homosexual. They would also make comments when they saw him such as “oh look who decided to show up” and “my day is ruined”
- Christopher alleges one coworker intentionally filled a trench with rock in a manner that would cause the rock to fall on Christopher, and another would step in front of Christopher to block him and just smile or laugh
- Coworkers refused to bring Christopher the necessary tools when he was working in a trench



Harassment – Customers and Co-Workers

- Jane Doe is transgendered and worked as a cashier at a Dunkin' Donuts in Pennsylvania.
- Doe's managers would deliberately misgender Doe, calling Doe "him" in company meetings.
- This encouraged co-workers and customers to harass Doe. The harassment included:
 - Inappropriate questions from customers and co-workers.
 - Customers refused to be served by Doe ("I don't want him serving me at the counter;" "you're a man.")
 - Supervisors directed Doe to use the men's bathroom.
 - Supervisors changed the dress code for Doe.
 - Co-workers told Doe "We don't like f****s."



Hot Topic -Restrooms

- Courts that have looked at this issue prior to *Bostock* have held that not allowing a transgendered employee to use the restroom that corresponds to their gender identity violates Title VII.
- For example, in *Roberts v. Clark County School District*, 215 F.Supp.3d 1001 (D. Nev. Oct. 4, 2016), a Nevada Federal District Court held that not allowing a transitioning employee to use the bathroom which corresponded with their gender identity constituted discrimination because of sex under Title VII.



Restrooms

- Similarly, on the issue of bathroom choice, OSHA issued guidance regarding an employer's general duty to provide its employees with restroom facilities, stating that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.
- The EEOC reached a similar conclusion with respect to both bathroom and locker room access.



EEOC Guidance

- EEOC's June 2021 guidance followed the *Bostock* decision.
- In the guidance, the EEOC stated that employers could not bar employees from bathrooms or locker rooms that correspond to their gender identity.
- The guidance also stated that employers could not require employees to dress according to their sex assigned at birth.
- The guidance stated that intentional and repeated misuse of an individual's pronouns or preferred name could contribute to a hostile work environment.



Texas v. EEOC, 2:21-CV-194-Z (Oct. 1, 2022)

- In March 2022, Governor Greg Abbott directed the Texas Department of Family and Protective Services to investigate incidents of sex change procedures on minors.
- A fight ensued over the EEOC Guidelines and whether the Guidelines reflect the court's decision in *Bostock*.
- The court declared the EEOC Guidance to be unlawful and set aside the Guidance on a national basis.



***Texas v. EEOC*, 2:21-CV-194-Z (Oct. 1, 2022)**

- In his decision, the judge stated that the crux of the issue essentially boiled down to one thing: whether the non-discrimination holding in *Bostock* is tied to or confined to “homosexuality and transgender status or does it extend to correlated conduct — specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices...”.
- The judge held that the EEOC “misread *Bostock* by melding ‘status’ and ‘conduct’ into one catchall protected class covering all conduct correlating to ‘sexual orientation’ and ‘gender identity.’”
- Critically, however, the decision here does not decide with certainty that such conduct – e.g., using the bathroom that corresponds to a person’s gender identity – is not protected. The decision simply makes clear that *Bostock* did not decide that question.



Employer Liability for Sexual Harassment

- Coworkers or Third Parties (including customers)
 - An employer is liable for unlawful harassment if the employer knew – or should have known – of the harassment and failed to take timely and appropriate action.



Employer Liability

- There is a different liability standard for supervisor behavior:
 - The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.
 - If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.



Next Steps – What Should You Be Doing?

- Employers Must Have Harassment Policies to Avoid Liability
- Having an easy to understand, comprehensive, and enforced harassment policy is **non-negotiable**.
- Policies should be updated in light of the *Bostock* decision to state that discrimination and harassment based on transgender status or sexual orientation is prohibited.



Policy Basics and Responsibilities

- Employee Responsibilities
 - If an employee believes that he/she has been subject to inappropriate behavior, the employee must report the behavior so the employer can conduct an investigation and stop the behavior if it is occurring.
- Employer Responsibilities
 - If an employer receives a report of inappropriate behavior or the employer is aware or becomes aware of potentially inappropriate behavior, the employer must conduct an investigation and if the behavior is substantiated, it must take timely and appropriate action to stop the behavior.



What is Timely and Appropriate Action?

- As soon as employer knows or should reasonably know that harassment may have occurred, the employer is required to take timely and appropriate action, including:
 - A prompt, thorough, and fair investigation;
 - Effective protective steps; and
 - Monitoring.



EEOC Checklist – Harassment Policy

- Applies to employees at every level, applicants, clients, customers, etc.;
- Prohibits harassment based on any legally protected class;
- Describes prohibited conduct;
- Describes informal and formal complaint processes;
- Encourages reporting even if employee is not sure that the conduct violates the policy;
- Employer will do a prompt, impartial, and thorough investigation;



EEOC Checklist – Harassment Policy (cont.)

- States that confidentiality for individuals and information will be to the extent possible and permitted by law, consistent with a thorough and impartial investigation;
- Encourages employees to participate in investigations;
- Assures immediate and proportionate corrective action will be taken if employer determines that harassment has occurred; and
- Prohibits retaliation.



What Should You Do If Someone Complains To You About Harassment?

- Tell the employee you take his/her concerns seriously;
- Don't minimize the behavior or be dismissive;
- Don't ask if there were witnesses (yet); and
- Do something about the complaint.



What Employers Must Do

- **Train employees and supervisors** on what behaviors constitute harassment in the workplace and what to do about harassment;
 - Training should now include information related to recognizing discrimination and harassment based on transgender status and sexual orientation.
- **Know** what constitutes a report of harassment;
 - Broader types of behavior and statements will warrant investigation.



What Employers Must Do

- **Investigate** reports of harassment promptly and appropriately, and take appropriate corrective action;
 - Investigate reports related to sexual orientation and transgender status the same way you would investigate reports related to other types of protected classes.
- **Save** investigation report and documents collected; and
- **Continue** to monitor the workplace to ensure that the harassment has stopped.



What Employers Must Do

- Be a leader/role model
 - Don't engage in the conduct- your employees look to you to set the tone.
 - Don't tolerate the behavior if you see it.
- Create the type of working environment where employees will tell you what's going on (nearly 3 in 4 harassment claims go unreported).



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Dushaw Hockett
Executive Director
SPACES

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Founder and Executive Director of Safe Places for the
Advancement of Community & Equity (SPACES)





Agenda

1. Welcome and Purpose
2. Supporting Employees Who Identify As LGBTQ+ or Gender-Fluid
3. Q & A Part I
4. Other Strategies for Increasing Welcoming + Belonging
5. Q and A Part II and Closing



Strategies for Increasing Welcoming + Belonging in the Workplace

1. Practice micro-affirmations
1. Practice intergroup-Contact
1. Improve decision making



Micro-affirmations

Definition: The everyday comments, gestures and behaviors that affirm the humanity, dignity and worth of another human being.



Micro-affirmations

- 1) **Names** - remembering a person's name
- 2) **Life events** - remembering important events in the lives of others
- 3) **Feedback and Affirmation (one on one)** - giving genuine + specific feedback/affirmation to others
- 4) **Shout outs + public credit** - giving credit (that is genuine + specific) to other people
- 5) **Greeting** - pausing, every day, to simply say, "Good morning!" and ask, "How are you?"
- 6) **Receiving** - asking another person, "How are you doing today?" and taking the time to truly listen/hear how the other person is doing
- 7) **Inviting feedback** - inviting a person to give you honest feedback
- 8) **Life goals** - understanding + supporting another person's life/work/spiritual goals
- 9) **Technology** – cut phone off; remove it from view; don't touch the device until the meeting is over.
- 10) **Presence + attention** - giving another person your 100% non-rushed and undivided attention



“People who manage their own emotions and are empathetic with others ... receive more favorable reviews from their peers and supervisors.”

Richard Davidson, Professor of Psychology and Psychiatry at the University of Wisconsin-Madison; founder of Center for Healthy Minds



“Those who received acts of kindness did 300% more acts of kindness as a result. It seems that kindness is contagious.”

Richard Davidson, Professor of Psychology and Psychiatry at the University of Wisconsin-Madison; founder of Center for Healthy Minds



Practice Intergroup Contact

Definition: Stepping out of our comfort zone to engage people who are different (or those we perceive to be).

- a) Friendly versus hostile
- a) Intimate versus superficial
- a) Sustained versus one-shot deal



Practice Intergroup Contact

The result:

- a) Increased psychological investment
- a) Empathy
- a) Humanizes the other person





Team Check-Ins

Take the time to get to know everyone on the team on an individual level. Carve out time at the beginning of each meeting to conduct structured go-arounds - ask questions like:



Sample Questions for Team Meetings/Structured Go-Arounds

1. What brought you into this line of work? What keeps you here?
1. Where's home for you? Or where do you most feel at home?
1. Share the name of a person who is near and dear to you, and who shaped you into the person you are now and/or the person you are becoming.
1. What's a food that reminds you of home and/or your childhood (in a positive way)?
1. What did you want to do/be when you were growing up?



Improve decision-making

What - slowing down the pace of decision-making AND removing or reducing unhealthy amounts of ambiguity or discretion from decision-making

How - a) use “checklists;” b) use mental scripts/templates

Examples - the “bench card” or checklists used by NYC family court judges



Improve Decision-Making

Checklists

What other sectors/institutions do: Courts Catalyzing Change “bench card” or checklist for judges. See excerpt below:

- *What assumptions have I made about the cultural identity, genders, and background of this family?*
- *What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?*



Improve Decision-Making

Mental Scripts:

What if I'm wrong and it's not _____.

But it's _____.



Strategies for Reducing Bias + Increasing Belonging in the Workplace

1. Improve Decision-Making
1. Practice Micro-affirmations
1. Practice Intergroup Contact