

SEX, GENDER IDENTITY, AND THE LAW:
A VIEW FROM
THE BENCH AND THE BAR

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Terminology concerning Sex, Gender, and Identity

Sex: The biologically-based presumption of reproductive capability to determine a person's label as female or male. This label is usually based on a doctor's visual assessment of a baby's genitalia at birth.

Gender: Gender refers to the biological attributes that classify one as male or female. Gender (masculine or feminine) is generally associated with features that include physical sex and other features such as height, weight and body hair.

Gender Characteristics: Gender characteristics include dress, mannerisms, physical characteristics, speech patterns or other external characteristics and behaviors that are socially defined as either masculine or feminine. Social or cultural norms can vary widely and some characteristics which may be accepted as masculine, feminine in one culture may not be assed the same in another.

Gender Identity: Gender identity is a person's innate, deeply felt psychological identification as male or female. This may or may not correspond to that person's body or sex as assigned at birth.

Gender Identity Disorder (GID)/Gender Dysphoria: GID is a psychological diagnosis, recognized by the American Psychiatric Association, of severe distress and discomfort caused by the conflict between one's gender identity and one's sex at birth. Some people who experience this condition are transsexual, but not all transsexual people experience gender dysphoria or are diagnosed with GID. Additionally, not all people with GID are transsexuals.

Presentation: Presentation refers to how a person expresses their gender to the world. A person may be biologically one gender, but "present" as that of their gender identity. This is an important milestone in the transition process.

Transgender: Transgender is a broad term that applies to people who live all or substantial portions of their lives expressing an innate sense of gender other than their birth sex. This includes transsexuals, cross-dressers and people who simply fee like their biological sex fails to reflect their true gender.

Transitioning: This is the process through which a person modifies his/her physical characteristics and/or manner of expression to satisfy the standards for membership in a gender other than the one he/she was assigned at birth. Some people transition simply by living as a member of the other gender, which others undergo medical treatment to alter their physical characteristics. This may or may not include hormone therapy and eventual sex reassignment surgery.

Transsexual: A person who identifies with the roles, expectations and expressions more commonly associated with a sex different from one he/she was assigned at birth. A transsexual often seeks to change his/her physical characteristics and manner of expression to transition to the other gender. After transitioning, transsexuals may identify themselves as male-to-female (MTF) or female-to-male (FTM) to acknowledge their transition.

Gender Identity & Sexual Orientation

Whether a person is transsexual has no direct or predictable connection to his/her sexual orientation.

What is sexual orientation?

Sexual Orientation is the direction of thought, inclination, or interest expressed with regards to emotional, physical or romantic attraction. Orientations include gay, lesbian, bisexual and heterosexual.

If you are gay or lesbian, this means that you have innate strong physical, emotional and romantic feelings for people of the same gender. Being bisexual means you are attracted to both men and women. Being heterosexual means you are attracted to the opposite gender.

What is gender identity?

Gender identity is a person's innate, deeply felt psychological identification as male or female. This may or may not correspond to that person's body or sex as assigned at birth. Transgender people often say that they are trapped in the wrong body – they were born one sex but feel more like another. This can be described as “gender dysphoria” or confusion about one’s gender.

Everyone has both a sexual orientation and a gender identity.

When someone is characterized as a straight man, that person has just been identified by both orientation (heterosexual) and gender (male).

Legal and Practical Issues

EMPLOYMENT

Title VII, SEC. 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations. Despite Title VII's passage half a century ago, gender and race discrimination in the workplace is still a serious problem.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination — whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action. The EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

This case was an important decision by the United States Supreme Court on the issues of prescriptive sex discrimination and employer liability for sex discrimination. Anne Hopkins sued her former employer, Price Waterhouse. Price argued that the firm denied her partnership because she didn't fit the partners' idea of what a female employee should look like and act like. The Court ruled that discrimination based on a person's non-conformity with gender stereotypes constitutes sex discrimination under Title VII.

The court also elaborated on the meaning of "gender play[ing] a motivating part in an employment decision", saying that it meant that if, at the moment the decision was made, one of the reasons for making the decision was that the applicant or employee was a woman, then that decision was motivated by gender discrimination. This definition includes stereotypes based on sex, which previous definitions had not.

Baldwin v. Foxx, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015)

David Baldwin, an employee with the Department of Transportation, Federal Aviation Administration, filed a formal EEO complaint alleging that the FAA subjected him to discrimination on the basis of sex (male, sexual orientation) and reprisal for prior protected EEO activity when Baldwin learned that he was not selected for a permanent position as a Front Line Manager (FLM)). The EEOC asserted in a federal sector case that sexual orientation discrimination violates Title VII’s prohibition of sex discrimination. The EEOC argued that gay male employees were subject to hostile work environment based on sexual orientation. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account. Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be denied or understood without reference to sex.

Hively v. Ivy Tech

The Seventh Circuit became the first circuit since the EEOC's *Baldwin* decision to reject the argument that sexual orientation discrimination is sex discrimination. The Seventh Circuit based its decision on precedent.

Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love or marry. The agency tasked with enforcing Title VII does not condone it [see *Baldwin*], many of the federal courts to consider the matter have stated that they do not condone it; and this court undoubtedly does not condone it. But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to our prior precedent.

Hively has since been taken up by the full 7th Circuit who reversed its prior ruling and found sexual orientation discrimination **IS** sexual discrimination under Title VII.

United States Federal Government

Executive Order 13672, signed by U.S. President Barack Obama on July 21, 2014, banned companies that do federal work from discriminating against gay, lesbian, bisexual and transgender employees. It was the first time the government explicitly protected federal workers from discrimination based on gender identity. In January 2017, the Trump Administration stated it would leave in place a 2014 Obama administration order that created new workplace protections for gay, lesbian, bisexual and transgender people.

In a statement issued in response to growing questions about whether Mr. Trump would reverse the Obama order, the White House said the president was proud to embrace gay rights.

Louisiana State Government – Equal Opportunity and Non-Discrimination, Executive Order No. JBE 2016-11

Louisiana enacted an Executive Order on April 13, 2016 where it stated no state agency or department of the State shall discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, political affiliation, disability, or age against any individual in the provision of any service and/or benefit by such agencies or departments. The Order further stated all contracts by any state agency or department of the State shall be awarded without discrimination and the contracts shall include the language concerning non-discrimination.

On December 14, 2016, a Baton Rouge judge has thrown out Gov. John Bel Edwards' executive order protecting lesbian, gay, bisexual and transgender people in state government at the request of Attorney General Jeff Landry.

The court sided with Landry and decided the governor was essentially trying to create a new law with the order, after the Louisiana Legislature repeatedly voted down bills that would have provided LGBT protections. The court declared that [the executive order] is in violation of the Louisiana Constitution's separation of powers doctrine and an unlawful usurp of the constitutional authority vested only in the legislative branch of government.

MARRIAGE

The Defense of Marriage Act (DOMA) was a United States federal law that defined marriage for federal purposes as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. DOMA, in conjunction with other statutes, had barred same-sex married couples from being recognized as "spouses" for purposes of federal laws, effectively barring them from receiving federal marriage benefits. DOMA's passage did not prevent individual states from recognizing same-sex marriage, but it imposed constraints on the benefits received by all legally married same-sex couples.

In United States v. Windsor (2013), the U.S. Supreme Court in a 5-4 decision declared Section 3 of DOMA unconstitutional under the Due Process Clause of the Fifth Amendment. Windsor is a landmark civil rights case in which the United States Supreme Court held that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to opposite-sex unions, by Section 3 of the Defense of Marriage Act (DOMA), is unconstitutional under the Due Process Clause of the Fifth Amendment. Justice Kennedy wrote: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."

As a result of the Windsor decision, married same-sex couples have tax benefits, military benefits, federal employment benefits for employees of the U.S. Government and immigration benefits. In February 2014, the Justice Department expanded recognition of same-sex marriages in federal legal matters, including bankruptcies, prison visits, survivor benefits and the legal right to refuse to testify to incriminate a spouse. Family medical leave benefits under the Family and Medical Leave Act of 1993 were extended to married same-sex couples in all of the U.S. in June 2014. Social security and veterans benefits to same-sex married couples who live in states where same-sex marriage is recognized are eligible for full benefits from the Veterans Affairs (VA) and the Social Security Administration (SSA).

Obergefell v. Hodges, is a landmark 2015 United States Supreme Court case in which the Court held in a 5–4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On June 26, 2015, the U.S. Supreme Court held that the Fourteenth Amendment requires all states to grant same-sex marriages and recognize same-sex marriages granted in other states. The Court overruled its prior decision in Baker v. Nelson, which the Sixth Circuit had invoked as precedent.

ADOPTION

Alabama

On September 18, 2015, the Supreme Court of Alabama reversed lower courts that recognized an adoption judgment granted to a same-sex couple over their three children in 2007 by the Superior Court of Fulton County, Georgia. The court ruled that the Georgia state court misapplied Georgia state law in granting the adoption. The case of *V.L. v. E.L.*, the biological mother of the three children, sought to reverse an order recognizing the adoption decree and argued the Georgia decree was void based upon that court lacking subject matter jurisdiction. The Supreme Court of Alabama agreed, voiding the decree's recognition in-state and nullifying the parental rights of V.L.

V.L. petitioned the United States Supreme Court to stay the order stripping her of her parental rights and to allow her to see her children during the appeals process. The Supreme Court granted her request for a stay of the ruling pending their disposition of V.L.'s petition for a writ of certiorari.

On March 7, 2016, the United States Supreme Court unanimously reversed the Supreme Court of Alabama. The court ruled that the Alabama Supreme Court was incorrect, ruling that the Full Faith and Credit Clause had been violated. The court's decision required the adoption decree from Georgia being recognized in Alabama, and V.L.'s parental rights be restored.

Arkansas

On November 4, 2008, Arkansas voters approved Act 1, a measure to ban anyone "cohabitating outside of a valid marriage" from being foster parents or adopting children. Although the law could apply to heterosexual couples, it was believed to have been written to target gay couples due to the fact that same-sex marriage is prohibited in that state, thereby making an adoption impossible. Single gay men and lesbians were still allowed to adopt in Arkansas. The law was overturned on April 16, 2010 by state judge Chris Piazza. The Arkansas Supreme Court in *Arkansas Department of Human Services v. Cole* upheld the lower court's decision on April 7, 2011.

In Arkansas, state Circuit Judge ruled on December 1, 2015, that a state law restricting parental identification on birth certificates to heterosexual couples was unconstitutional. His ruling initially applied only to the three couples who originally sued in this case, *Pavan v. Smith*. Two days later, he broadened the ruling to apply statewide. On December 10, 2015, the Supreme Court of Arkansas stayed the statewide applicability, but allowed the three plaintiff couples to receive their amended certificates. On December 9, 2016, the Supreme Court of Arkansas reversed the trial court's order.

Florida

A 1977 Florida law prohibited adoption by homosexuals. In November 2008, a state circuit court struck down the law in *In re: Gill*, a case involving a gay male couple raising two foster children placed with them in 2004 by state child welfare workers. On appeal, on September 22, 2010, Florida's Third District Court of Appeals unanimously upheld the decision of the lower court. The state did not appeal. The 1977 law was repealed on July 1, 2015.

Idaho

In 2013, a lesbian couple, married in California, but now living in Idaho, petitioned for second-parent adoption. A state magistrate denied the petition on the grounds that Idaho did not recognize their marriage. On appeal, the Idaho Supreme Court unanimously reversed the magistrate's ruling because Idaho has no specific statutory ban on unmarried second-parent adoption.

Indiana

In Indiana, there are two cases pending in the United States District Court for the Southern District of Indiana, one filed in February 2015, and one in December 2015, against a policy identical to Florida's. The February case deals with issues more specific to the ruling by the Seventh Circuit Court of Appeals in the case *Wolf v. Walker* due to the fact *Obergefell* had

not yet been decided. The December case cites *Obergefell* as reason for ordering the state to list both parents in a same-sex relationship on birth certificates. No action has been made in either case.

Kansas

In November 2012, the Kansas Court of Appeals ruled in the case *In the Matter of the Adoption of I. M.* that a single person who is not a biological parent of a child cannot petition to adopt that child without terminating the other parent's parental rights. Since Kansas does not recognize same-sex marriages, this ruling effectively prevents same-sex couples from second-parent adoption in Kansas. However, the Kansas Supreme Court ruled on February 22, 2013, in *Frazier v. Goudschaal* that a partner of a biological parent is entitled to parental rights.

Mississippi

33% of Mississippi's households headed by same-sex couples include a child, the highest such percentage in the nation. Nevertheless, Mississippi's Domestic Relations Code states, "Adoption by couples of the same gender is prohibited." A lawsuit, *Campaign for Southern Equality v. Mississippi Department of Human Services*, was filed in August 2015 by four Mississippi same-sex couples seeking to overturn this law. The plaintiffs in that case are represented by Roberta Kaplan, who successfully argued *United States v. Windsor* before the US Supreme Court. Mississippi is the only U.S. state to not have legal joint adoption rights for LGBT couples; the only other jurisdictions under US sovereignty where this is the case are American Samoa and some Native American¹ tribal nations.

In Mississippi, a state law passed in 2000 explicitly prohibits same-sex couples from joint adoption. After *Obergefell*, Mississippi has specifically stated the ban is still in effect. On August 12, 2015, the Southern Poverty Law Center joined by four same-sex couples raising children filed suit in the United States District Court for the Southern District of Mississippi seeking to declare the statute unconstitutional.

On March 31, 2016, Judge Daniel P. Jordan III issued a preliminary injunction striking down Mississippi's ban on same-sex couples from adoption, ruling the ban violates the Equal Protection Clause. There were no immediate plans by the state of Mississippi to appeal the ruling to the U.S. Court of Appeals for the Fifth Circuit.

Nebraska

Three same-sex couples filed a lawsuit against the state on August 27, 2013, seeking the right to serve as foster and adoptive parents. It claimed that the state's policy against allowing two unrelated adults to adopt has been consistently enforced only against same-sex couples.

New York

An October 2012 court ruling in a custody dispute between two women in a same-sex relationship awarded custody to the adoptive parent rather than the biological mother.

Wisconsin

In Wisconsin, the state has allowed both parents to be on the birth certificate, but refuses to change the wordage from "father and mother" to a gender-neutral "parent 1 and parent 2."

Torres v. Rhoades, challenged the birth certificate wordage. The court dismissed *Torres* because the couple initiated the case as an adoption proceeding, plaintiffs didn't properly attack the constitutionality of the statutes that used the term "father and mother" or "husband and wife.". The couple could now appeal the case to the Supreme Court of Wisconsin or they could go back to the trial court with a case challenging the constitutionality of the statutes that require the terms "father and mother."

CUSTODY

In re: CAC (2017 Louisiana case)

This case involves a non-parent's claim for joint custody of a minor who was born through artificial insemination during the course of a same-sex relationship. The issue is whether the non-parent has sustained her burden of showing an award of sole custody to the parent would cause substantial harm to the minor child. If there is substantial harm, then the issue becomes whether joint custody between the non-parent and parent would serve the best interest of the child. The Court found the non-parent sustained her burden and joint custody was ordered in the best interest of the minor child.

The parties are a former lesbian couple who were in an 18 year relationship and decided to have a child together in 2007. After the birth of the child, the parties executed a Domestic Partnership Contract that would provide shared joint custody of the minor in the event of the parties' separation. The non-parent never formally adopted the minor. However, the parent of the minor appointed the non-parent as legal guardian and tutor of the minor. The parent executed a power of attorney wherein she named the non-parent her "life partner" and "co-parent." The Court found the legal documents and the decision of the parties to start and raise a family together demonstrate the commitment to raise the minor as co-parents.

The non-parent and the minor shared a strong emotional connection in a way a child has with her parent. After the separation of the couple, the minor was restricted from the non-parent. The Court found if the parent was given exclusive control over the minor, then the parent would probably continue to reduce the minor's access to the non-parent, causing the minor to suffer emotional damage. The Court determined substantial harm would occur if the minor was not raised by her "two mommies" and granted joint custody.

BATHROOM ACCESS RIGHTS FOR TRANSGENDER PERSONS

Macy v. Department of Justice, 2012 WL 1435995, (April 12, 2012), is the landmark case concerning transgender rights in the workplace. The EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII.

In Lusardi v. Department of the Army (May 27, 2015), the EEOC held that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination; an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead.

In G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit deferred to the Department of Education's position that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity. Title IX forbids sex discrimination in schools receiving federal funding.

This matter was set to be heard before the United States Supreme Court in March 2017. However, the Trump Administration rescinded federal guidelines advising schools to let students use the bathroom of their chosen gender, not the one assigned at birth. The Supreme Court has sent the matter back to the appellate court to determine the application of Title IX and its application to transgender students. There are pending lawsuits involving transgender students in at least five other states, including Illinois, North Carolina, Ohio, Pennsylvania and Wisconsin. North Carolina's "bathroom bill" became a widespread topic after North Carolina lost various business opportunities, including the NBA Allstar game in 2017. The State of North Carolina has since reversed its stance, but not to the full protections as would be sought by the LGBTQ community.

Colorado, Iowa, and Vermont require that employers permit their employees to use restrooms appropriate to their gender identity rather than their assigned gender at birth. Delaware provides state employees with access to restrooms that correspond to their gender identity. District of Columbia prohibits discriminatory practices in regard to restroom access. Washington requires employers maintain gender-specific restrooms to permit transgender employees to use the restroom that is consistent with their gender identity. Where single occupancy restrooms are available, Washington recommends that they be designated as "gender neutral."