

THE DIFFERENCES BETWEEN SEX, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

Nikki Nesbitt

Goodell DeVries Leech & Dann (Baltimore, MD)
410.783.4026 | knn@gdldlaw.com

Equal Access to Goods and Services – The Differences Between Sex, Sexual Orientation, and Gender Identity Discrimination

K. Nichole Nesbitt

Anti-discrimination laws prohibit businesses from discriminating against employees and denying access to their goods and services on the basis of sex. Under certain current federal anti-discrimination laws, the term “sex” includes gender identity, although a new proposed rule could change that. Many state anti-discrimination laws also include sexual orientation as a separate protected status. The distinction between these concepts is significant, and protecting one’s business against discrimination claims requires more than just a superficial understanding of the rights and features of these groups. This paper discusses the differences of each group and the rights granted under the anti-discrimination laws.

Overview of laws forbidding discrimination on the bases of sex

A host of federal and state laws prohibit discrimination on the basis of “sex” in various contexts – public accommodations, employment, education, and health care among them. But controversy exists over whether the term “sex” is or should be broad enough to include sex-related traits like gender identity or sexual orientation. Within the area of public accommodations, all but five states¹ have laws prohibiting purveyors of any public services (hotels, restaurants, stores, and the like) from discriminating on the basis of sex. As of today, 21 of

them explicitly forbid discrimination on the basis of gender identity² and 24 of them prohibit discrimination on the basis of sexual orientation.³

In the employment context, Title VII forbids an employer from discriminating against any employee “with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e. The U.S. Equal Employment Opportunity Commission interprets and enforces Title VII’s prohibition of sex discrimination as forbidding discrimination based on gender identity or sexual orientation. See https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

In the education context, Title IX prohibits discrimination on the basis of sex throughout all areas of education, including recruitment, admissions, housing, athletics, and financial assistance, among other things. 20 U.S.C. § 1681.

Section 1557 of the Affordable Care Act incorporates the existing federal civil rights laws of Titles VI, VII, and IX into the provision of health care by federally funded health programs. Thus, to the extent one of those longstanding federal anti-discrimination laws would forbid sex-based discrimination in employment or education, the same prohibition applies to health care. 42 U.S.C. § 18116. In 2016, regulations implementing Section 1557 made clear that the term “on the basis of sex” included discrimination based on gender identity (although not

² California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia all prohibit discrimination on the basis of gender identity in the public accommodations context. See <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>

³ All of the above, plus Michigan, New Hampshire, and Wisconsin, have public accommodations laws prohibiting discrimination on the basis of sexual orientation. See *id.*

¹ Alabama, Georgia, Mississippi, North Carolina, and Texas have public accommodation laws prohibiting discrimination against disabled individuals, but these laws do not extend to race, ethnicity, religion, or sex.

sexual orientation). But the Northern District of Texas found that gender identity should be excluded from the definition of “sex” in this context and issued an injunction against the Department of Health and Human Services (“DHHS”) from enforcing Section 1557 as to the health care provider plaintiffs in that case. *Baker v. Aetna Life Ins. Co.* 228 F. Supp. 3d 764, 768-69 (N.D. Tex. 2017).

In recent months, DHHS promulgated a new rule that would revise the existing Section 1557 regulation so that the term “sex” does not include the concept of “gender identity.” The validity of this new rule has not been established as of the writing of this article. But it does pose a practical question that many employers and providers of services must consider: If an employee or customer or patient is protected against discrimination on the basis of sex, gender identity, and/or sexual orientation, what must that employer or company do to ensure discrimination does not occur?

The distinction between sex, gender identity and sexual orientation

In order to answer that question, the employer or company or provider must understand what gender identity and sexual orientation are.

The Human Rights Campaign, “the largest national lesbian, gay, bisexual, transgender and queer civil rights organization,” has developed materials designed to educate people on these concepts, which to the uninitiated may seem unclear. <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>.

“Sex” and “gender identity” are often thought of as the same characteristic, but they can be different. The conception of gender identity is that a person’s assigned sex at birth – male or female – sometimes does not comport with the person’s “innermost concept of self as male, female, a blend of both or neither.” *Id.* Those whose gender identity is the same as the sex they were assigned at birth are referred to as “cisgender.” Those whose gender identity is different from the sex they were assigned at birth are usually referred to as “transgender.” Those who identify with neither, both, or a combination of male and female genders are “genderqueer” or “non-binary.” *Id.*

These concepts have practical implications, inasmuch as our interactions with a person often follow customs or conventions that are based on our own perception of the person’s gender rather than that person’s gender identity. The use of titles and pronouns is one example. If you see a person you perceive to be female, your custom likely is

to address that person with a female title (Mrs./Ms./Miss) and a female pronoun (she/her/hers). If that person does not identify as female, though, the person may find such pronouns unfitting. (More on the legal implications of this below.) Another example is the controversy around the use of public bathrooms. A person who is born male but identifies as female may feel more comfortable using a women’s restroom, while cisgender women using those restrooms may feel uncomfortable with this.

Regardless of your personal or moral views on gender identity, it is useful to understand that gender identity is connected with the concept of gender and not a person’s emotional, romantic, or sexual attraction to other people. The latter concept is sexual orientation.

Sexual orientation exists apart from a person’s gender identity. A cisgender person can be gay. A transgender person can be straight.⁴ But the concepts are different, and so are their legal consequences.

Avoiding discrimination - even the inadvertent kind

The anti-discrimination laws in general seek to ensure that people in protected groups have equal access to services or employment opportunities as those in majority groups. In conventional sex discrimination scenarios, an employer or company or healthcare provider cannot refuse employment, accommodations, or services solely on the basis of a person’s sex. Put another way, if the employer, company, or health care provider would offer the employment, accommodation, or service to one sex, it must offer it to the other.

In some ways, gender identity discrimination is not that different from conventional notions of sex discrimination. Harassment, hostile environments, compensation and cost discrepancies, and the imposition of extra burdens or obligations, for example, are prohibited in either case, and the steps taken to prevent or address these wrongful practices will look similar whether the issue is sex or gender identity - or sexual orientation, for that matter.

But in other ways, gender identity introduces new variations of what constitutes equality. An employer or company may need to take extra steps to ensure that a person with a non-conforming gender identity has equal access to employment opportunities or services. For instance, the continual use of the wrong pronoun for a transgender or non-binary person can rise to the level of harassment. 4 DCMR § 808 (D.C. Municipal Regulations). Staff may need to be trained to ask questions about

⁴ It is true that there are associations between gender identity and sexual orientation – a survey of transgender people conducted by the National LGBTQ Task Force found that about three quarters of transgender respondents were also either homosexual, bisexual, or queer. <https://www.thetaskforce.org/wonky-wednesday-trans-people-sexual-orientation/>.

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customers' or patients' preferred pronouns. Indeed, the failure to ensure that transgender employees or patrons are addressed with the proper pronoun could lead to an allegation that they transgender person did not have equal access to the employment opportunity or service.

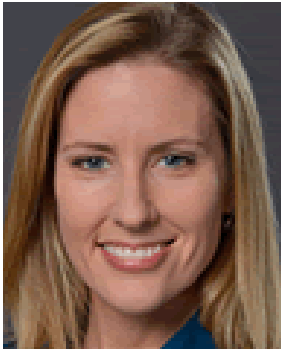
Similarly, requiring a transgender or non-binary person to use a restroom or dressing room matching their assigned sex at birth can be considered discriminatory, which leaves a company in the position of potentially offending cisgender employees or patrons versus creating gender neutral bathrooms or dressing rooms. *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016); *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Carcao v. McCrory*, 203 F.

Supp. 3d 615 (M.D.N.C. 2016).

Knowing about these concepts is important for the prevention of inadvertent discrimination.

Conclusion

Our anti-discrimination laws are in flux with regard to protections afforded to gender identity and sexual orientation. But these two categories are not treated the same in the law, and all employers, companies, and health care providers charged with the responsibility of avoiding discrimination need to appreciate the distinctions and take steps to ensure that discrimination is avoided.



K. NICHOLE NESBITT

Partner

GOODELL DEVRIES LEECH & DANN (Baltimore, MD)

410.783.4026 | knn@gdldlaw.com

Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

For the entirety of her 18 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JD RF.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

- *Wilds v. MedStar Washington Hospital Center* (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- *Wood v. MedStar Harbor Hospital* (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.

Honors and Awards

- Best Lawyers in America- Commercial Litigation (2016, 2018)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland - (B.A., cum laude, 1996)
- University of Maryland, School of Law - (J.D., 1999); Order of the Coif