

Informed Employer

Restricting Transgender Employees Access to Restrooms Constitutes Unlawful Discrimination

The Equal Employment Opportunity Commission recently issued a decision holding that the U.S. Army discriminated against a transgender (transition from male to female) civilian employee when they restricted her from the female bathroom.

Private employers who restrict transgender employees from using the restroom of their gender identity may be found liable for discriminatory practices under Title VII of the Civil Rights Act of 1964 (“Title VII”). In a recent landmark decision, the Equal Employment Opportunity Commission (“EEOC”) held that the Department of the Army’s actions limiting a civilian transgendered employee (transition from male to female) to the single occupancy restrooms and prohibiting her from using the common women’s restroom violated Title VII. *Tamara Lusardi, Complainant*, EEOC DOC 0120133395 (Apr. 1, 2015). The EEOC concluded that the Army’s segregating and isolating actions constituted disparate treatment on the basis of sex which violates the U.S. Supreme Court’s determination that “an employer may not take gender into account in making an employment decision.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

The *Lusardi* decision should not be seen as an outlier based on the EEOC’s actions during the past 12 months. On June 5, 2015, the EEOC filed a complaint in the U.S. District Court for the District of Minnesota against Deluxe Financial Services Corp. for subjecting a transgender employee to sex discrimination. The allegations of the complaint include attempts to bar the transgender employee from the common restroom that conformed to her gender identity. In April, 2015, the EEOC settled a transgender based discrimination lawsuit against a Florida eye clinic for the amount of \$150,000.00. Finally, in September, 2014, EEOC filed suit against a Detroit funeral home for firing an employee for transitioning from a male to a female. The case is ongoing and in April, 2015, the claim survived a motion to dismiss.

Perhaps in correlation with the EEOC’s recent actions, on June 1, 2015, the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) issued a best practices guide to restroom access for transgendered workers. (A copy can be found [here](#).) OSHA’s guide instructs employers that an employee should be able to use the restroom that corresponds to his or her gender identity. OSHA also cautions against requiring employees to provide medical or legal documentation in order to have access to gender appropriate facilities.

Although the law is by no means settled, it is clear that there is a recent trend affording Title VII rights to transgender employees. Best practices suggest that an employer allow an employee to use the restroom that conforms to the employee’s self-identifying gender. Some additional tips that can help an employer avoid transgender related discrimination claims and minimize complaints of non-transgender employees include:

- 1) Provide single-occupancy gender-neutral facilities which are available to all employees,

- 2) Provide multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls,
- 3) Update workplace policies and employee handbooks, and
- 4) Provide sensitivity training to all employees.

If you have any questions, please contact Kerry E. Saltzman (Saltzman@wbs-law.com) or Aaron W. Chaet (chaet@wbs-law.com) by email or by phone at 312.372.3311.

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