WORKPLACE RIGHTS & WRONGS

Getting and keeping a regular job is out of reach for many transgender and gender-nonconforming (TGNC) people, and the experiences endured when they do have a job can be just as traumatic. Whether accused of using the "wrong" bathroom, harassed for not matching one gender stereotype or another or being the only one in the office turned down for medically necessarily health care, TGNC employees often face humiliating treatment and unfair policies every day of the week.

Employment is one of the most legally challenging and personally difficult areas for TGNC people. And work is essential: Many people define themselves by it, spend lots of time doing it and can't make a living or afford health care coverage without it. In a 2011 transgender survey,[1] 90% of respondents reported workplace mistreatment or discrimination, and 26% said they lost work because of their gender identity or expression.

Being fired is especially harmful for someone already struggling with workplace tensions or outright abuse. Transgender survey respondents who had lost a job were four times as likely to be homeless as those who didn't lose a job; 70% more likely to have drinking or drug problems; and 50% more likely to be incarcerated.

Recently, there's been some success using federal sex discrimination law and state disability law to protect TGNC rights. Some states and cities are moving ahead with ordinances as well.

Private industry's record is a mixed bag. Eighty-two percent of Fortune 100 companies have transgender-inclusive non-discrimination policies. But many are just beginning to address discrimination in their health insurance policies, thanks in part to a revised Human Rights Campaign Corporate Equality Index. In our successful effort in *Esquivel v. Oregon*, Lambda Legal maintained that a transgender state employee's denial of medically necessary health care was employment discrimination (see Lambda Legal's "Transition-Related Health Care," another fact sheet in this Transgender Rights Toolkit, at lambdalegal.org/publications/trans-toolkit).

What's especially important at this point is for public and private employers to be explicit about protecting transgender workers, whether by clarifying existing protections under sex as encompassing "gender identity" or by adding a separate category.

Otherwise, even very extreme and obvious discrimination—such as that faced by Vandy Beth Glenn, fired after years of service when she attempted to transition on the job (she is featured below)—will continue to require considerable sweat, tears, time and money to challenge. And many well-meaning employers will remain confused about how their transgender employees are protected by the law.

1 "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey," by the National Center for Transgender Equality and the National Gay and Lesbian Task Force.

MY STORY DESPAIR EVERY DAY, THEN A GROUNDBREAKING VICTORY

—Vandy Beth Glenn

"I lost my job as an editor for the Georgia General Assembly when I told my boss I planned to transition. He told me that that would be seen as 'immoral' and couldn't 'happen appropriately' in the workplace. Not a day went by that I didn't think about that moment. Every day I revisited the anger, humiliation and despair I felt.

"In August 2010 a lower court ordered me reinstated. While the case was appealed to the Eleventh Circuit, I received my full salary and benefits. My appeal was heard in December 2011 and we had a positive decision just five days later. The Eleventh Circuit upheld the lower court ruling that the Georgia General Assembly had discriminated against me. [See "Victory" on the next page.]

"I hope all similar cases will have a similar outcome. But even more, I hope they put a federal law in place that will make clear such discrimination is illegal, and then people won't have to go through what I went through."

FAQ

Answers to Common Questions About Transgender Workplace Rights

Q: What exactly is ENDA and what happened to it?

A: The Employment Non-Discrimination Act (ENDA) is a law proposed in Congress that would explicitly forbid gender identity discrimination in both private-sector (nongovernment) and public employment. Lambda Legal and other LGBT advocacy groups have withdrawn support from the current version of ENDA because it permits too much discrimination by religiously affiliated organizations. We are working with congressional leadership and our allies on better language to provide LGBT workers the protections they need.

Q: What kind of employment protections do transgender employees have without ENDA in place?

A: In the past 15 years, federal appellate courts have increasingly recognized that discrimination against a transgender person is a form of sex discrimination prohibited by federal law. Lambda Legal has successfully handled some of that important litigation.

These court decisions paved the way for a historic 2012 decision from the federal Equal Employment Opportunity Commission (EEOC) in the case *Macy v. Holder*, which held that such discrimination violates Title VII of the 1964 Civil Rights Act. The EEOC's *Macy* ruling is binding on the federal government and establishes definitively that federal transgender workers have protections under Title VII. It also supports transgender employees, public and private, anywhere in the country who feel they have experienced employment discrimination, because they can now file complaints with the EEOC, which will investigate complaints and, if they are found valid, pursue settlements and sometimes file lawsuits. (See "Federal Employees" sidebar on page 3).

In 2014, 18 states and the District of Columbia expressly ban discrimination based on gender identity, as do over 130 cities and counties across the United States. Also, a growing number of private companies have antidiscrimination policies on their books that cover bias against transgender people.

Although the federal Americans with Disabilities Act has language that explicitly excludes trans people from its protections, some advocates have been successful in bringing state disability claims on behalf of trans people.

Q: How are transgender people covered by existing sex discrimination laws?

A: It is now widely considered sex discrimination when someone is treated differently for failing to conform to sex stereotypes or for changing their sex—or in some cases because gender identity is part of one's sex.

In 1989, the Supreme Court accepted the idea that treating someone differently on the basis of stereotypes could be sex discrimination—in a case that did not involve a transgender employee. The Court ruled in the case of *Price Waterhouse v. Hopkins* that Title VII did indeed protect a female accountant who didn't make partner at her firm solely because her demeanor didn't match her employer's idea of what a woman should look and act like. A supervisor wrote in a job evaluation that Hopkins could do with a "course in charm school."

DEFINITIONS

Transgender refers to people whose gender identity, one's inner sense of being male, female or something else, differs from their assigned or presumed sex at birth; ***cisgender*** refers to people whose gender identity is the same as their assigned or presumed sex at birth. ***Gender-nonconforming*** people don't meet society's expectations of gender roles.

VICTORY!

EQUAL PROTECTION FOR TRANS EMPLOYEES

On December 6, 2011, a longstanding workplace discrimination case ended in a groundbreaking ruling that firing someone based on gender-nonconformity violates the Constitution's prohibition on sex discrimination.

The Eleventh Circuit Court of Appeals upheld a lower-court ruling in the Lambda Legal case, finding that the Georgia General Assembly had discriminated against Vandy Beth Glenn, a transgender woman who was fired from her job as legislative editor after telling her supervisor that she planned to transition from male to female. (See what Glenn had to say on page 1.)

The ruling got at the core of how the Constitution protects transgender people from workplace discrimination. Judge Rosemary Barkett, writing for the unanimous three-judge panel, said, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." She went on, "[A] government agent violates the Equal Protection Clause's prohibition on sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."

> **The more people assert their identities, the better it will be for all of us. — VANDY BETH GLENN**

2008's *Schroer v. Billington* moved things ahead a little further. A transgender woman who was offered a job at the Library of Congress when she was "David" was told she didn't have the job after all when she shared her intention to transition to "Diane." The court analogized that just as discrimination "because of religion" easily encompasses discrimination based on a change from one religion to another, discrimination based on a person's change of sex is discrimination because of sex.

Some laws define sex or gender as inclusive of gender identity. New York City's Human Rights Law, for instance, has since 2002 redefined "gender" as referring not just to someone's sex but also to "a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."

Q: How do you know which bathroom a TGNC person should use?

A: A TGNC person should use the bathroom that corresponds to his or her gender identity. But employers and coworkers don't always welcome that idea. Trans people often endure extreme discomfort or inconvenience just to keep a job—traveling some distance to use a gas station restroom, for instance, or simply "holding it."

The difficulties some TGNC people have accessing bathrooms in the workplace is a key rights violation because it's pretty much impossible to work without having a bathroom to use. The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) prohibits employers from placing "unreasonable restrictions" on employees' access to restrooms. (For more about this issue, see Lambda Legal's "Equal Access to Public Restrooms," another fact sheet in this Transgender Rights Toolkit, available at lambdalegal.org/publications/trans-toolkit.)

Q: What name and gender pronouns do you use if a transgender person's ID still has their pre-transition name and gender?

A: It's important for transgender people to have their preferred names and pronouns respected regardless of what it says on an ID card. Trans employees are also entitled to full privacy in such matters; employers should refrain not just from treating an employee differently if his or her gender transition comes to light but also from sharing that information. It's also within every human resources department's responsibilities, however, to counsel members of the workforce and discusses an approach with which the employee is comfortable.

Q: Are employers allowed to institute dress codes according to gender?

A: Courts have allowed employers to set gender-based dress codes as long as they don't make the requirements more difficult for women than men, or vice versa. Such rules can pose a problem for transgender people when employers force them to present according to their birth sex, rather than in accordance with their gender identity. The medical community now recognizes that it is essential to the health and well-being of transgender people to live in accordance with their gender identity in all aspects of life, including gender expression via clothing. And employers increasingly see the wisdom in making that policy. If your employer is not respecting your gender identity within your workplace dress code policy, contact Lambda Legal at 866-542-8336 or go to www.lambdalegal.org/help.

FEDERAL EMPLOYEES

NEW CLARIFICATIONS THAT "SEX" INCLUDES GENDER IDENTITY

Several federal agencies have updated their employee antidiscrimination policies to include transgender workers, defining "gender identity" as part of a person's sex. Here are two excerpts:

- Office of Personnel Management (manages the federal government's civil service): "It is the policy of the Government to treat all of its employees with dignity and respect and to provide a workplace that is free from discrimination whether that discrimination is based on race, color, religion, sex (including gender identity or pregnancy), national origin, disability, political affiliation, marital status, membership in an employee organization, age, sexual orientation, or other non-merit factors."
- Equal Employment Opportunity Commission: "EEOC employees are protected by federal laws prohibiting discrimination on the basis of race, religion, color, sex (including pregnancy and gender identity), national origin, age, disability, family medical history, or genetic information.

TIPS

A GOOD PLACE TO WORK

Here's what employers can do to make their workplaces fairer and more trans-friendly:

1. Adopt a non-discrimination policy that explicitly bars treating transgender people differently from other workers.
2. Ensure that your employees have access to restrooms in accordance with their gender identity. Add an all-gender restroom option. (See Lambda Legal's "Equal Access to Public Restrooms," another fact sheet in this Transgender Rights Toolkit, also available at www.lambdalegal.org/publications/trt_equal-access-to-public-restrooms).
3. Use a health insurance company (such as Aetna, Cigna or Blue Cross/Blue Shield) that offers coverages for transition-related health care—and make sure you select for your employees plans that include that coverage. (Also see Lambda Legal's "Transition-Related Health Care," another fact sheet in this Transgender Rights Toolkit, also available at www.lambdalegal.org/publications/trt_transition-related-health-care).
4. Make your workplace culture welcoming to trans people by providing mandatory trainings on trans issues. Don't wait until your first employee transitions; do it now in order to create a welcoming environment.

FOR MORE INFORMATION: Contact Lambda Legal at 212-809-8585, 120 Wall Street, 19th Floor, New York, NY 10005-3904. If you feel you have experienced discrimination, call our Legal Help Desk toll-free at 866-542-8336 or go to ***www.lambdalegal.org/help***.

HIRING

"SORRY, THAT JOB HAS BEEN FILLED"

TGNC people often have trouble landing jobs. The classic story is being called in to interview for a job that you're highly qualified for only to watch your interviewer's face fall—and hearing the opening has already been filled. When prospective employers overlook your job application in the first place because they happen to know you're transgender, that's discrimination too. But experiencing someone's change of mind in person is especially upsetting, not least because it's so hard to prove such bias case by case.

A 2010 study by Make the Road New York set out to measure this problem by sending out "matched pairs"—job candidates equal to each other in every way except that one was TGNC and the other was not—to do interviews in the Manhattan retail industry. In one round, 49% of TGNC employees experienced discrimination (i.e. they weren't offered a job but their cisgender equivalent was offered a job). The rate was 59% in a second round. After the New York Attorney General's office became involved, a favorable settlement was reached with one retailer, which included a revision to the employee handbook's requirements for gender-specific appearance and a mandatory training for employees on transgender issues.

So what can you do about this anti-transgender bias and the way it so often hinges on "gender expression"? The TGNC community is increasingly fighting back not just in courts, legislatures and boardrooms, but also through networking and mentoring efforts. Transgender job fairs are more and more common at local LGBT centers around the country. And the Transgender Economic Empowerment Initiative (TEEI) in San Francisco is behind a new push to specifically target workshops and mentoring to TGNC job-seekers. (See "How can I find work?" in Lambda Legal's fact sheet on transgender youth, also available at www.lambdalegal.org/know-your-rights/transgender/trans-youth-faq.)

UNIONS

DON'T MOURN, ORGANIZE!

These unions—some of the largest in the country—have transgender non-discrimination clauses in some of their contracts:

- American Federation of State, County and Municipal Employees
- American Federation of Teachers
- Office and Professional Employees International Union
- Service Employees International Union
- United Auto Workers
- UNITE HERE
- United Food and Commercial Workers International Union

Photo of Vandy Beth Glenn © Joey Ivansco