

CHAPTER IV

Equal Access to Public Restrooms

When you gotta go, you gotta go. Whether at work, in a restaurant or passing through a train station, pretty much everyone needs to stop into a restroom at some point while away from the comforts of home. But this simple routine is anything but that for many transgender and gender-nonconforming (TGNC) people.

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. For transgender and gender-nonconforming people, even just walking through the door of a public restroom can be a stressful, scary experience. The mere possibility of hostile remarks from other restroom goers, questions from store owners or mall security or arbitrary restrictions from employers can be so frightening that many just "hold it."

TGNC people get harassed in other situations too, but public restrooms tend to invite extra scrutiny based on comparisons to stereotypes about how men and women are *supposed* to look or act.

The solution is quite simple, in theory: Everyone should use the restroom that matches who they are, regardless of whether they are making a gender transition or appear gender-nonconforming. But the realities of anti-transgender bias and a widespread lack of understanding about transgender people's lives can complicate things.

Litigation in this area has been gaining traction in the past few years. A decade ago, some courts did not grasp the importance of this issue and saw restrooms as outside the realm of anti-discrimination laws. While a few of these states still have bad decisions on the books, states such as Maine and Colorado have been leading a new charge by recognizing the right of TGNC people to use the restrooms that match who they are both at school and at work.

This fact sheet is intended to help you advocate for what is right by using information about the medical and historical context of gender transition and practical ideas for improving access to public accommodations.

MY STORY A HIGHWAY REST STOP NIGHTMARE

DANICA ALI

"I was in Connecticut at a rest stop. I was coming back from New Haven with some friends of mine and we were on I-95. We stopped to get something to eat and use the restroom—just like everybody else.

"I went in, and this lady—the manager or something—pulled me aside and said she wanted to see my ID to see if I'm male or female. She had this guy with her—I don't know if he was security.

"I asked her, 'Who are you?' She said she didn't have to tell me. And I told her, 'I don't have to give you my driver's permit!' She said, 'If you don't show me your ID, I'm going to call the police and say that a man is using the female restroom.' I took out my ID and I showed her my ID and it said 'female.'

"I was so upset! I just walked right out and went to the car."



FAQ

Answers to Some Common Questions about Equal Access to Public Restrooms

GOOD GOVERNMENT

SAMPLE CITIES AND STATES THAT GOT IT RIGHT

Information from states and cities around the U.S. that are doing a good job of addressing the restroom issue:

WASHINGTON, D.C., ON GENDER-NEUTRAL RESTROOM SIGNS:

“All entities...with single-occupancy restroom facilities shall use gender-neutral signage for those facilities (for example, by replacing signs that indicate ‘Men’ and ‘Women’ with signs that say ‘Restroom’).”

IOWA LAYS OUT THE MATTER ESPECIALLY WELL:

“[J]ust as non-transgender individuals are entitled to use a restroom appropriate to their gender identity without having to provide documentation or respond to invasive requests, transgender individuals must also be allowed to use a gender-identity appropriate restroom without being harassed or questioned.”

WASHINGTON STATE PUTS THE ONUS ON THE BOSS:

“All employers need to find [restroom] solutions that are safe, convenient and respect the transgender employee’s dignity.”

Q: How do you know which restroom a transgender person should use?

A: A transgender person should use the restroom that matches who they are.

The medical community (and increasingly, employ-ers, schools and courts) now recognize that it is essential to the health and well-being of transgender people for them to be able to live in accordance with their internal gender identity in all aspects of life—restroom usage is a necessary part of that experience.

In *Doe v. Regional School Unit*, the Maine Supreme Court held that a transgender girl had a right to use the women’s restroom at school because her psychological well-being and educational success depended on her transition. The school, in denying her access, had “treated [her] differently from other students solely because of her status as a transgender girl.” The court determined that this was a form of discrimination.

The right to use restrooms that match who one is has also have also been recognized in the workplace and are actively being asserted in public accommodations. In Iowa, for example, discrimination in public accommodations on the basis of sexual orientation and gender identity has been prohibited by law since 2007 through the Iowa Civil Rights Act.

Q: What if someone doesn’t look masculine or feminine enough to use a particular restroom?

A: There is no rule that a person must look a certain way to use a certain restroom. This kind of “gender policing” is harmful to everyone, whether a transgender person, a butch woman, an effeminate man or anyone dressed or groomed in a way that doesn’t conform to someone else’s gender standards. Moreover, courts have increasingly found that discrimination against transgender people is sex discrimination. For instance, in *Mathis v. Fountain-Fort Carson School District 8*, Colorado’s Division of Civil Rights found that denying a transgender girl access to the women’s restroom at school

was discrimination. They reasoned, “By not permitting the [student] to use the restroom with which she identifies, as non-transgender students are permitted to do, the [school] treated the [student] less favorably than other students seeking the same service.” Furthermore, the court rejected the school’s defense—that the discriminatory policy was implemented to protect the transgender student from harassment—and observed that transgender students are in fact safest when a school does not single them out as different. Based on this finding, it is no longer acceptable to institute different kinds of restroom rules for transgender and cisgender people.¹

Q: Which restroom should a transgender person use if the person hasn’t had genital surgery?

A: The details about whether or not someone has had genital reconstructive surgery, also called gender-affirming surgery (SRS), don’t tell you anything about gender identity or someone’s right to use a certain restroom—and asking about it is a major invasion of privacy, as it involves personal medical information.

It could also be illegal. For instance, if employers were to impose such a “genital standard” for restroom use, they would need to inquire about the genitals of everyone in that workplace. Imagine the privacy concerns that would raise!

The fact is that very few transgender people seek gender-affirming surgery, whether because of cost, personal beliefs, concern about surgical risks or the limitations of available procedures. In a recent survey of 6,450 transgender people in the U.S. conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, fewer than 25% of transgender women had undergone genital surgery, and fewer than 5% of transgender men had.

The U.S. State Department and the Social Security Administration (SSA) recently recognized this by dropping surgical

1. *Mathis v. Fountain-Fort Carson School District 8*, No. P20130034X at 10–11 (Colo. Div. of Civil Rights June 17, 2013).

“ We stopped to get something to eat and use the restroom—just like everybody else. —DANICA ALI ”

requirements to change the gender listed on passports and SSA records.

Q: Don't unisex restrooms leave women more vulnerable to being harassed or attacked by men than gender-segregated restrooms do?

A: This argument is based on a myth: There is no evidence that gender-segregated restrooms are “safer” for cisgender women than unisex restrooms. And besides, there are laws protecting people from criminal conduct in public restrooms. If anything, a concern for safety weighs in favor of restroom accessibility. Transgender people face a uniquely high degree of harassment—53% of 6,450 transgender people reported being harassed or disrespected in a place of public accommodation in a recent survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force. In *Mathis v. Fountain-Fort Carson School District 8*, Colorado's Division of Civil Rights found that barring transgender students from gender-segregated restrooms may out an individual as transgender and invite the very harassment that a school or employer claims to want to prevent. Providing individual restrooms can be a solution for dealing with these concerns, as long as transgender people are not *required* to use them.

2. *Cruzan v. Special School District #1*, 294 F.3d 981 (8th Cir. 2002).

Q: Are individual or unisex restrooms better for transgender people than segregated restrooms?

A: Transgender people should not be singled out as the only people using any particular restroom. But providing individual and/or unisex restrooms is not a bad idea, because they do provide more options for TGNC people, as well as for people with young children and people with disabilities who need help from someone of a different gender.

Q: What should an employer do when a non-transgender employee complains about being uncomfortable sharing restrooms with a transgender employee?

A: In *Cruzan v. Special School District #1*, decided in 2002, a Minnesota federal appeals court ruled that it isn't the job of the transgender person to do the accommodating. Employers need to offer an alternative to the complaining employee in these situations, such as an individual restroom.²

Q: Are employers allowed to tell an employee to use a restroom that does not match the person's gender identity or presentation?

A: Employers should make the workplace fair for all employees. Currently, 18 states

HEALTH

TWO REASONS WHY RESTROOM ACCESS IS ALSO A HEALTH ISSUE

1. USING APPROPRIATE RESTROOMS IS AN ESSENTIAL PART OF TRANSITIONING

The most critical aspect of gender transition, according to the internationally-recognized medical protocol set by the World Professional Association for Transgender Health, is to ensure that a transgender person is able to live, be seen and be treated by others in a matter consistent with the person's gender identity. Getting used to using the appropriate restroom is an important part of this process. Moreover, transgender people must take this step well before proceeding—if at all—to medical interventions involving hormones or surgery.

2. “HOLDING IT” MAY BE HAZARDOUS TO YOUR HEALTH

According to the U.S. Occupational Safety and Hazards Administration (OSHA), delaying going to the restroom when you need to go is unhealthy, and so, workplace policy may not encourage it. This is not to mention the dehydrating effects of trying to avoid using restrooms by limiting intake of liquids, another common strategy for TGNC people navigating uncomfortable restroom situations in the workplace and at other public accommodations.

HISTORY

PUBLIC RESTROOMS HAVE ALWAYS BEEN A CIVIL RIGHTS BATTLEGROUND

Restrooms have played a role in virtually every civil rights movement in the United States. Controlling the way people use—or are not allowed to use—restrooms has been a tool for degrading people of color, excluding women from traditionally male jobs and keeping people with disabilities from accessing public accommodations and employment.

The public humiliation often involved makes it especially hard to confront restroom discrimination and educate the general public. But the same basic principle holds true for transgender people and those who have confronted this issue before: Everyone deserves to be treated with respect and dignity, including while involved in such basic human activities as using a public restroom.

(CA, CO, CT, DE, HI, IL, IO, ME, MA, MD, MN, NJ, NV, NM, OR, RI, VT, WA) and the District of Columbia have employment laws that explicitly protect employees on the basis of gender identity. Moreover, the U.S. Occupational Safety and Health Administration (OSHA) forbids employers from placing “unreasonable” restrictions on restroom access. By insisting that someone use the wrong restroom, an employer is both violating the employee’s privacy, exposing that employee to harassment by effectively outing him or her as transgender and potentially even compromising the employee’s health (see *Health* sidebar on the previous page of this fact sheet).

Q: Is it okay to propose that a company’s restrooms be more trans-friendly?

A: Yes! Advocacy is the most important part of the fight for transgender rights. And if employers adopt pro-trans policies proactively, instead of waiting for a transgender person to pave the way, there’s much less chance of having problems down the line. Need ideas for a comprehensive policy? Check out the sidebar on this page regarding the federal government’s Office of Personnel Management’s restroom policy.

WASHINGTON

SETTING AN EXAMPLE: A NEW POLICY FOR TRANSGENDER EMPLOYEES OF THE FEDERAL GOVERNMENT

“The Department of Labor’s Occupational Safety and Health Administration (DOL/OSHA) guidelines require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once the person has begun living and working full-time in the gender that reflects the employee’s gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with the person’s gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender-affirming surgery) in order to have access to facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee’s work station. Because every workplace is configured differently, agencies with questions regarding employee access to any facilities within an agency should contact OPM for further guidance.”

Tips

IF YOU’RE BEING HASSLED IN A RESTROOM ABOUT YOUR GENDER EXPRESSION...

- 1 Stay calm so that you can read the situation and figure out whether or not you’re safe. You can always leave the scene if you feel threatened and come back later with a friend to file a complaint.
- 2 Report the incident to a manager, owner or someone in charge. Explain to them that you are using the restroom that matches who you are.
- 3 Educate. Show them this toolkit! Explain that transgender people deserve to be treated with respect and dignity and are harmed by being denied access to appropriate restroom facilities.
- 4 If you are still denied access to the appropriate restroom, you can file a complaint with your local or state anti-discrimination agency. Denial of access to the appropriate restroom for transgender people could be considered sex discrimination under the law. You may also live in one of the dozen or so states or over 125 cities and counties where there are specific protections against discrimination on the basis of gender identity.
- 5 Let us know. Lambda Legal’s Help Desk (toll-free: 866-542-8336 or www.lambdalegal.org/help) takes calls from transgender and gender-nonconforming people who have experienced discrimination.

Photo of Danica Ali © Glenn Koerner

FOR MORE INFORMATION: Contact Lambda Legal at 212-809-8585, 120 Wall Street, 19th Floor, New York, NY 10005-3919. 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.