



HUMAN
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WorkNet

TRANSGENDERISM AND TRANSITION IN THE WORKPLACE

A Note About Terminology and Scope

Terminology. “Transgendered” is a broad term that encompasses cross-dressers, intersexed people, transsexuals and people who live substantial portions of their lives as other than their birth gender. Generally speaking, a transgendered person manifests a sense of self, the physical characteristics and/or personal expression commonly associated with a sex other than the one he or she was assigned at birth. A transitioning transgendered person is one who is modifying his or her physical characteristics and manner of expression to -- in effect -- satisfy the standards for membership in another gender.

Scope. Although transgenderism can be understood as a form of gender nonconformity, transitioning employees present workplace challenges that may significantly exceed those presented by certain more common manifestations of gender nonconformity. For instance, in some workplaces, a woman's decision to forgo skirts, blouses, jewelry and cosmetics and to begin dressing in a masculine style might result in little more than raised eyebrows or a few arch comments. Yet in almost any workplace today, deeply held beliefs about gender roles likely would be challenged by a woman's decision to modify her sex characteristics by taking male sex hormones and undergoing a double mastectomy, and to begin identifying, dressing and behaving as a man. Transitioning employees, as they move outside the legal standards for membership in one gender and begin to satisfy the legal standards for membership in another, often cannot avoid challenging community standards about what is gender-appropriate self-identification, appearance or expression. Consequently, transitioning employees may face a broad range of challenges in the workplace. Employers trying to deal with such employees and the reactions of their coworkers may have no idea how to respond to these challenges.

If you are contemplating transitioning in the workplace, this document is intended to help you assess what might happen, and to help you understand how to best promote a positive response from management and coworkers. If you are an employer seeking to understand these issues, this document offers some practical suggestions for handling workplace transitions. Although some legal issues are discussed below, this document should not be construed as legal advice from the Human Rights Campaign.

Thinking About “Coming Out”

Before deciding to transition, consider the following.

Legal Factors.

Generally speaking, if you are an “at-will” (i.e., non-contract, non-union) employee, working in a jurisdiction that lacks strong legal protection, factors other than the law probably would influence whether you are able to keep your job. Little legal protection exists for workplace gender

nonconformity -- particularly transgenderism. An overview of the law is provided below. Consult competent legal counsel to understand the law in your jurisdiction.

Employment Factors

How much do you value your job? Do you have the world's best job, that you want to keep at all costs? Or is your job simply an income stream that you want to maintain while you come out? The more you value your job, the more you should plan, consult with those who can influence whether you stay or go, and seek compromise that enables you to preserve your job.

How much does your job value you? If your job exists within a hierarchical organization, what is your place in the hierarchy? The more you are considered a valuable or irreplaceable asset, the more management and your colleagues could be motivated to surmount the challenges raised by transitioning in order to continue working with you. In addition, the higher you are on the organization chart, the greater could be your ability to influence decisions made about your transition.

In what field do you work, and in what economic sector? Do you work for a marketing agency? A software developer? If conformity with gender norms is part of what is being promoted by the employer (e.g., in a parochial school), you should expect trouble. If you work for an employer that places a premium on regimentation and conformity (e.g., a police department), you should expect opposition -- although you might find yourself happily surprised, even at a more conservative workplace.

Finally, consider industry stereotypes. Would it be considered unusual for a person of the gender to which you plan to transition to work in your job? If so, you should expect resistance during and after transition.

How tolerant is your workplace? Does the organization have a written non-discrimination policy? If so, does it expressly cover what you plan to do, or would it support coverage by analogy? Moreover, is there an employee GLB or GLBT group that might be supportive? The lone individual is more susceptible to attack than a group.

How often does your job require you to interact with members of the public, with coworkers and with management? The degree of visibility you have could affect the extent to which you are perceived as challenging community standards.

How would benefits and entitlements be affected? How would coming out affect your insurance and medical coverage? Would your coming out increase your employer's insurance premiums, or your insurance premiums or copayments? What would your insurance company do with medical information it would obtain? You'll need to think through all of this. The amount of cooperation management may extend could depend in part upon its perception of whether your transition would increase the firm's health care costs.

Personal Factors

What is the nature and extent of the gender nonconformity you have in mind? Do you want to modify how you behave or dress? Change your body using hormones and/or surgery? The greater the nonconformity, the greater could be the need to negotiate with others (e.g., medical professionals, family, workplace management and coworkers) whose cooperation could influence the ease or difficulty of accomplishing your plans.

How conducive to your plans are the physical resources you would have to work with? How compatible is your body (e.g., in height, weight, shoulder-to-hip ratio, waist-to-hip ratio, etc.) with

the physical changes you contemplate during transition? The degree of compatibility could influence the extent to which you encounter resistance. How conducive are the emotional resources you would have to work with? Transitioning could expose the most intimate aspects of your life to scrutiny from strangers. Coming out could create enormous emotional stress for you and your coworkers. If you project shame, it will be reflected back at you. Evaluate your ability to negotiate and compromise. The more challenging your plans, the more compromise could be necessary.

How conducive are the financial resources you would have to work with? Do you understand what expenses are involved? (Many insurance policies and health plans try to exclude coverage for modifications to functioning bodily organs, systems and structures.) Failure to adequately plan for the financial costs of transition could leave you stranded in mid-process, prolonging a state that is stressful for you, your coworkers and management.

What is happening in your life outside the workplace that could affect your ability to continue doing your job while under the stress of transitioning? Do you have the emotional support of friends, loved ones and family? Ideally, it would be preferable to transition in the least stressful manner possible, so if other events in your life are a source of extreme stress, you may wish to alter your transition timing.

Transitioning

Suppose that, after considering the factors noted above, you decide to transition on the job.

Prepare Management and Coworkers. Your chances of keeping your job could be enhanced by working with management and coworkers beforehand, rather than by shocking them with a sudden change in your appearance, demeanor and/or self-identification.

First, Inform and Educate Management. The first step typically would be to contact the appropriate management representative(s), give notice of your plans and explain how you propose to implement them. This could lead to a period of negotiations with management. Suggested talking points for discussions with management are provided below. Ideally, discussions with management would resolve issues of timing, responding to harassment, job responsibilities, restroom use, pronouns, etc., before problems arise. The restroom issue often is a great source of tension. A willingness to seek compromise here (e.g., by agreeing to use a unisex or handicapped restroom, or by developing a system whereby other employees with sensitivities about the issue can avoid using the restroom contemporaneously) could pay dividends in other areas.

In order to influence management discussions held in your absence, prepare and give to management a brief document that can be circulated among decisionmakers. The document should be targeted toward the specific audience, focused on resolving management concerns and answering questions, and cooperative in tone. Search the World Wide Web for "transsexual transition letter" and you will find many examples of such documents.

Next, Inform and Educate Coworkers. Typically, this step would involve giving coworkers notice and explanatory information, displacing gossip and misinformation. Management may wish to do this without your involvement, or with your indirect assistance (such as by circulating an explanatory document prepared by you, similar to the document you prepared for management, but targeted to your coworkers and designed to address their questions and fears). The manner in which this step is accomplished may reveal to coworkers whether or not management supports you, consequently it is important to work closely with management so that you understand what management plans to say. It could be beneficial to involve the workplace GLB(T) support group, if any, at this stage.

Be Mindful of Dress and Demeanor. Your attire should remain professionally appropriate to the office in which you work, and the job you hold. Your demeanor should be that of a cooperative team player

who is focused on getting your job done. Suppose you are transitioning to a female gender role, and recently began working as a woman. Calibrating your appearance and demeanor probably will take some time. Moreover, gender nonconformity tends to be interpreted by others in sexual terms. Cultivating a somewhat androgynous appearance in the short term, while management and coworkers become accustomed to you, and while you learn the ropes, might minimize friction.

How to Respond to Harassment. Odds are that someone will find something cruel to say. Don't lose your cool because you will be the one who is portrayed as unstable. Instead, stay focused on getting your job done. If the harassment comes from peers, seek management's help. Emphasize your shared interest in getting the work done without friction. If necessary, continue up through the hierarchy to resolve the problem. Since you may be put in the position of having to prove that you were continuing to do your job, keep records of personnel memoranda, non-discrimination policies, and management's interpretations of these policies. In addition, keep a journal (work on it at home, on your time, not on the office computer). Note in detail the tasks you work on and accomplish each day. If anyone says (or writes) anything pro or con about your coming out, note in your journal the date and time, speaker/writer, recipient(s) and the gist of what was said. At least one human resources professional recommends separating the positive signs and supportive comments into their own journal and using that record as a tool to keep your balance and humor during a difficult time.

Prepare a Fallback Plan. Be prepared for the possibility that despite your best efforts, you may be forced to leave your job. Evaluate and articulate your skill set. Revise and update your resume and related documents, including recommendations. If management is uncooperative and you are forced to leave your job, attempt to negotiate a letter of recommendation as part of the severance package. Moreover, assess whether or not your appearance and demeanor currently would create an obstacle to your being hired in the gender to which you want to transition. (This assessment often is surprisingly difficult for transitioning people to do realistically; you may wish to ask people close to you for their candid opinions.) Consider whether that assessment, if negative, should influence the timing of coming out. The risk of unemployment could be reduced by coming out when you no longer pass as a member of your pretransition gender, because then you could most easily find another job if fired from your current job.

An Overview of the Law

“At-Will” Employment Status. In most jurisdictions in the United States, non-union, non-contract employees work as “at-will” employees. This means the employee is free to terminate the employment relationship at any time, for any reason. Conversely, the employer is free to terminate the employment relationship at any time, for any reason (except a reason that would violate public policy, including unlawful discrimination).

Reasonable vs. Stereotypical Regulation of Employee Appearance and Behavior at Work. Generally speaking, employers have a right to regulate employee appearance and behavior in the workplace for reasonable business purposes. Requiring conformity to accepted community standards of dress and behavior arguably serves the business purpose of promoting an orderly workplace and making employees and customers comfortable.¹ In contrast, some cases recognize that discrimination in this area based on gender stereotypes can be a form of unlawful sex discrimination.² Tension exists in the law between what constitutes reasonable regulation on the one hand, and what constitutes stereotyping, on the other hand.

Although few communities today are ready to acknowledge as reasonable an anatomically female person's choice to live as a man, the direction of the law's development suggests an eventual acknowledgment that the notion that all anatomically female people possess a “female” self-identity and a “feminine” sense of dress, manner and style, is a stereotype. Were such a stereotype to be widely acknowledged, it would follow that the courts could recognize as unlawful the act of

discriminating against an employee for nonconformity with that stereotype. The latter acknowledgment, however, has not yet occurred.

Sexual Orientation and Gender Nonconformity. For many gays, lesbians, bisexuals and transgendered people, sexual orientation and gender expression are interwoven. For instance, for some lesbians, being “lesbian” not only is about having a sexual preference for other women, but also is about a certain dress, manner or style -- a way of expressing gender that is different from a woman who is not a lesbian. Yet from a legal standpoint, sexual orientation has not been considered the same thing as gender identity or expression. Consequently, it is conceivable that an employee working in a job that is protected against sexual orientation discrimination could be discriminated against for gender nonconformity. In short, do not assume gender nonconformity (including transgenderism) is protected merely because you work in a jurisdiction or for a firm that prohibits sexual orientation bias.

The Significance of a "Gender Identity Disorder" (GID) Diagnosis. Unlike homosexuality, transgenderism still is deemed a mental illness by the American Psychiatric Association. The GID diagnosis can be a dual-edged sword for transitioning employees. The downside is that in order to obtain the medical services they desire, transgendered people are pathologized and stigmatized, perhaps providing a pretext for discrimination against them. The benefit is that in several states (but not under federal law), a GID diagnosis could qualify as a disability, for which medical coverage could be available, and as to which disability discrimination provisions could apply.

The Extent of Legal Protection for Workplace Gender Nonconformity. Legal protection for gender nonconformity exists today only in a handful of jurisdictions, and based on several different approaches:

Protection Currently Is Not Recognized Under Federal Law. Although Title VII of the Civil Rights Act of 1964 prohibits workplace sex discrimination, federal courts of appeal have uniformly held that Congress did not intend that the term “sex” include transsexuals or homosexuals.³ More recently, the federal courts have recognized that sex discrimination can involve gender stereotypes about traits,⁴ and that Congress' 1964 understanding of “sex” should not necessarily control how the law is construed today.⁵

The Employment Non-Discrimination Act is a bill that would, if enacted, prohibit job discrimination based on sexual orientation. As currently written, ENDA would not expressly protect gender identity, physical characteristics, and/or expression. HRC believes that additional educational work needs to be done before Congress would enact legislation explicitly protecting transgenderism in the workplace. But if ENDA were enacted, it would cover 'perceived' sexual orientation, and therefore would protect gender nonconforming applicants and employees who are perceived as 'gay' -- even erroneously.

Some States Offer Protection. States offering some protection for workplace gender nonconformity include Florida (administrative ruling protects GID as disability); Minnesota (anti-discrimination provision's definition of "sexual orientation" includes “self image or identity”); New York (*Rentos v. OCE-Office Systems Inc.*, 72 Fair Employment Practice Cases (BNA) 1717 (1996), (S.D.N.Y.1996) (provision barring "sex" discrimination construed to cover postoperative transsexual); Oregon (protects GID diagnosis as disability); and Washington (*Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (GID protected as disability, but termination for dress code violations allowed)).

Some Local Jurisdictions Offer Protection. Local jurisdictions offering some protection include Cambridge, Mass. (definition of “gender” includes “actual or perceived appearance, expression, or identity”); Cedar Rapids, Iowa; Evanston, Ill. (“transgender”); Iowa City, Iowa (“gender identity”);

New Orleans (“transgender” with a diagnosis of “gender identification disorder”); New York, New York (Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (provision barring “gender” discrimination construed to protect postoperative transsexual)); Louisville, Ky.; Olympia, Washington; Pittsburgh (“gender identity” and definition of “sex” includes gender expression); Portland, Ore. (“gender identity”); San Francisco; Santa Cruz, Calif.; Seattle (inclusive definition of “sexual orientation”); Toledo, Ohio (“gender identity”); Washington, D.C. (“personal appearance”); and York, Pa. (“gender identity,” and definition of “sex” includes gender expression).⁶ Other local jurisdictions are considering similar measures.

Talking Points for Seeking Management's Understanding and Cooperation

- Gender nonconformity is an expression of natural human diversity, which has occurred throughout history -- although it has often been suppressed and continues to be misunderstood. Today, modern medicine has expanded personal choice in this area, so this aspect of human diversity is becoming more visible.
- Employers should not casually discard the investment they have made in a transgendered employee. Consider the employee's experience, history and overall record.
- Workers who are valued and treated with respect are more loyal and committed to their jobs. By treating the transgendered employee with respect and understanding, you build that trust and commitment. Moreover, other employees watch how management treats particular workers, and make decisions about loyalty to the team and the employer based on what they see. Fairness matters.
- Bear in mind that this employee likely has thought long and hard about coming out as transgendered. This is not a decision people reach without much soul-searching.
- Initial appearance and demeanor issues tend to resolve themselves with time. Management concerns about adverse customer and coworker reactions should be evaluated in light of this fact.
- There is no evidence that allowing an employee to transition will open the floodgates to nonconformity. Developing an appropriate management process, however, will make it easier next time, if there is a next time.

Overview of the Transition Process.

Transition is done with the help of medical professionals, in accordance with recognized standards of care that have been in use since the 1960s. In general, the process involves the following phases (the duration of which can vary):

- _ initial psychological testing to rule out other diagnoses
- _ psychiatric monitoring and counseling over several months to assess extent of condition and understanding of consequences, obstacles, etc.;
- _ health evaluation for hormone therapy;
- _ administration of hormones;
- _ continued monitoring to assess reaction to hormone-induced physical changes;
- _ trial living period of at least one year to ascertain level of comfort in reassigned gender (it is usually at this stage that the employer is given notice of the employee's diagnosis and intentions);
- _ and if the transitioning person so decides, continued hormone administration and life in the reassigned gender, sometimes, but not always, accompanied by surgical reconstruction of primary and secondary sex characteristics, facial structure, etc.

The therapeutic process makes a frivolous or hasty decision impossible. Moreover, in the overwhelming majority of cases, the therapy is successful, and the person goes on to live a well-adjusted life in the reassigned gender. The degree of success, however, can be influenced by (i) whether or not the person is able to maintain a stable job and income during transition, and (ii) whether or not a supportive work environment exists. Management's cooperation matters.

The Restroom Issue. Restroom access issues need to be handled with sensitivity not only to the employer's obligation to provide the transitioning employee with the same level of restroom access available to non-transgendered employees, but also to the emotional responses of coworkers to the idea of sharing facilities with a transgendered coworker. Problems sometimes can be resolved through use of a unisex/handicapped restroom if one is available, or use of a signage or notice system through which non-transgendered employees can choose not to use facilities when a transitioning employee is inside. Of course, once transition is complete, a transgendered employee has the right to the same access as a non-transgendered employee of the same gender.

Coworker Acceptance and Hostility. These matters are best handled by decisive action from management. Harassment often can be prevented before it starts if management communicates to employees its interest in a fair workplace in which employers are judged on their work, not on their personal characteristics.

Several major firms, including Lucent Technologies Inc., Apple Computer and American Airlines, have concluded that transgendered employees raise no insurmountable problems, and find that a supportive environment makes good business sense.

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1. See, e.g., *Fagan v. National Cash Register Company*, 481 F.2d 1115 (D.C. Cir. 1973).

2. See, e.g., *Carroll v. Talman Federal Savings & Loan Association*, 604 F.2d 1028 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980).

3. See *Holloway v. Arthur Anderson & Company*, 566 F.2d 659 (9th Cir. 1977) (pre-operative transsexual not within Title VII); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1071 (1985) (post-operative transsexual not within Title VII); *DeSantis v. Pacific Telephone & Telegraph Company*, 608 F.2d 327 (9th Cir. 1979) (sexual preference not within Title VII).

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

5. See *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75 (1998). Although a federal appellate court has held that gender stereotype-based sex harassment against a gender nonconforming

employee may violate Title VII -- see *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), vacated and remanded in light of *Oncale* -- and the Supreme Court has acknowledged that gender stereotype-based termination of a gender nonconforming employee violated Title VII where job success required the nonconformity -- see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) -- no federal court yet has held that demoting, transferring or firing an employee for gender nonconformity itself violates Title VII. Moreover, a GID diagnosis is of no benefit under federal law, for the Americans with Disabilities Act specifically excludes transsexualism.

6. News accounts are the source for most of these cites.