



REPRESENTING TRANSGENDER CLIENTS IN THE DC METRO AREA
Metropolitan Washington Employment Lawyers Association
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I. STATUTORY PROTECTIONS

District of Columbia

DC Code § 2-1401.11. Prohibitions.

(a) General. It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual:

- (1) By an employer - To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

Maryland

Md. STATE GOVERNMENT Code Ann. § 20-606. Unlawful employment practices

- (a) Employers. -- An employer may not:
- (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of:

- (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment;

Md. LABOR AND EMPLOYMENT Code Ann. § 3-304 Equal pay for equal work

(a) "Providing less favorable employment opportunities" defined. -- In this section, "providing less favorable employment opportunities" means:

- (1) assigning or directing the employee into a less favorable career track, if career tracks are offered, or position;
- (2) failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or
- (3) limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but for the employee's sex or gender identity.

(b) In general. --

(1) An employer may not discriminate between employees in any occupation by:

- (i) paying a wage to employees of one sex or gender identity at a rate less than the rate paid to employees of another sex or gender identity if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type; or
- (ii) providing less favorable employment opportunities based on sex or gender identity.

Montgomery County Code § 27-19. Discriminatory employment practices

(a) A person must not because of the race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, or genetic status of any individual or disability of a qualified individual, or because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, gender identity, family responsibilities, or genetic status:

(1) For an employer:

- (A) fail or refuse to hire, fail to accept the services of, discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment; or
- (B) limit, segregate, or classify employees in any way that would deprive or tend to affect adversely any individual's employment opportunities or status as an employee;

Howard County Code § 12.208 Unlawful employment practices.

I. Definitions. (a) Discrimination/discriminatory means acting or failing to act, or unduly delaying any action regarding any person because of:

- Race, Creed, Religion, Disability, Color, Sex, National origin, Age, Occupation, Marital status, Political opinion, Sexual orientation, Personal appearance, Familial status, or Gender identity or expression

in such a way that such person(s) are adversely affected in the area of employment. Discrimination does not include providing services or accommodations to employees that are distinctly personal or private in nature.

Baltimore City Code SUBTITLE 3 UNLAWFUL PRACTICES

§ 3-1. Employment.

Except where a particular occupation or position reasonably requires, as an essential qualification, the employment of a person or persons of a particular race, color, religion, national origin, ancestry, sex, age, marital status, physical or mental capability, sexual orientation, or gender identity or expression and that qualification is not adopted as a means of circumventing the purpose of this article, it is an unlawful employment practice:

- (1) for any employer to discriminate against an individual with respect to hire, tenure, promotion, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment;
- (2) for any employer, employment agency, or labor organization to practice discrimination by denying or limiting through a quota system or otherwise, employment or membership opportunities to any group or individual;
- (3) for any employer, employment agency, or labor organization, before employing an individual or admitting an individual to membership, to:
 - (i) make any inquiry about or record of an applicant's race, color, religion, national origin, ancestry, marital status, sexual

- orientation, or gender identity or expression, except as authorized or ordered by the Commission;
- (ii) use any form of application for employment or membership that contains questions or entries about race, color, religion, national origin, ancestry, marital status, sexual orientation, or gender identity or expression, except as authorized or ordered by the Commission; or
 - (iii) cause to be printed, published, or circulated any notice or advertisement relating to employment or membership that indicates any preference, limitation, specification, or discrimination based on race, color, religion, national origin, ancestry, sex, age, marital status, sexual orientation, or gender identity or expression;

Baltimore County Code, Article 29

§ 29-1-101. - DEFINITIONS.

(d) Discrimination. "Discrimination" means acting or failing to act or unduly delaying an action regarding a person because of the person's race, creed, religion, color, sex, age, national origin, marital status, sexual orientation, gender identity or expression, status as a veteran, or physical or mental disability, in a way that the person is adversely affected in the areas of: (1) Housing; (2) Employment; (3) Education; (4) Public accommodation; or (5) Financing.

Virginia

In May 2016 the Virginia Attorney General issued an opinion that state law (the VHRA, among others) should interpret "sex" discrimination to include discrimination based on sexual orientation or gender identity when the conduct is based on sex-stereotyping or treating them less favorably on account of their gender.

https://www.oag.state.va.us/files/Opinions/2016/15-070Messrs_GarrettPlumLaRock.pdf

II. COVERAGE FOR TRANS CLIENTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT

Equal Employment Opportunity Commission

Discrimination on the basis of gender identity is unlawful employment discrimination on the basis of sex.

https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Case Law

District of Columbia

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.

Maryland

Finkle v. Howard Cty., 12 F. Supp. 3d 780, 789 (D. Md. 2014) Here, the Court finds that Plaintiff has alleged sufficient facts to state a claim of sex discrimination in employment that is plausible on its face. Although Plaintiff's complaint represents something of a close call, it sets forth sufficient allegations to allow the Court to "draw the reasonable inference" that her application to join the VMP was denied "because of her obvious transgendered status" and her failure to conform with gender norms.

Cooper v. Micros Sys., No. CCB-14-1373, 2015 U.S. Dist. LEXIS 145390, at *8 n.6 (D. Md. Oct. 27, 2015) (In this district, Judge Bredar has held that discrimination against transgender individuals is a cognizable claim of sex discrimination under Title VII. *Finkle v. Howard Cnty.*, Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014). A number of other courts agree. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004). Because neither party argues that discrimination on the basis of gender identity is not protected under Title VII, the court need not address the issue.

Hart v. Lew, 973 F. Supp. 2d 561, 579 (D. Md. 2013) As the statutory language makes clear, Title VII only provides a civil remedy to individuals who were discriminated against on the basis of certain enumerated characteristics, one of which is "sex." See *id.* Plaintiff seems to allege that she was discriminated against based on her sex, because she is a transsexual, and because she failed to conform to gender norms. Defendant does not contend that plaintiff, as a transsexual, is not protected by Title VII's prohibition on sex discrimination, and so I will assume for purposes of this motion that plaintiff is within Title VII's aegis.

Virginia

Garland v. Fairfield Malvern Lakes LLC, 1:15-cv-0721-GBA-JFA (E.D. Va. August 2, 2016), denying motion to dismiss claims of Title VII gender discrimination for transgender male subjected to hostility and disparate discipline. "Similar to the female employee subjected to sex stereotyping in *Price Waterhouse*, Plaintiff was allegedly subjected to comments on Plaintiff's masculinity, gender appearance and gender. . . . Therefore, since in this case, Plaintiff is alleging being treated negatively by a female supervisor because Plaintiff does not adhere to traditionally female sex stereotypes, the claims of discrimination on the basis of Plaintiff's transgender identity are squarely within the scope of *Price Waterhouse*. Furthermore, the Supreme Court has made clear that Title VII protection is not limited to traditionally protected activity, such as male-on-female sexual harassment, but 'reasonably comparable evils' such as male-on-male sexual harassment. *Oncale*, 523 U.S. 75, at 79. . . . The situation in Plaintiff's case is similar. In Plaintiff's case, as a transgender man, Plaintiff was allegedly harassed and subjected to 'misgendering,' a sex-specific form of harassment, by another woman."

Federal Sector

Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (decision by Commission holding that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and therefore violates Title VII).

Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment).

Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) (a sex discrimination allegation involving the failure to

revise agency records pursuant to changes in gender identity stated a valid Title VII claim).

Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015) (decision by Commission holding that Agency restrictions on transgender female's ability to use a common female restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions combined with hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex).

III. Note: recent case law coverage under the Americans with Disabilities Act (E.D. Pa.)

Blatt v. Cabela's Retail, Inc., 2017 U.S. Dist. LEXIS 75665, 33 Am. Disabilities Cas. (BNA) 776, 2017 WL 2178123 (E.D. Pa. May 18, 2017). Finding coverage for gender dysphoria under the ADA notwithstanding exemption for “transsexualism”

[I]t is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have —such as Blatt's gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning. Because this interpretation allows the Court to avoid the constitutional questions raised in this case, it is the Court's duty to adopt it. Accordingly, Blatt's condition is not excluded by § 12211 of the ADA, and Cabela's motion to dismiss Blatt's ADA claims on this basis is denied.