

# Gender Identity and Sexual Orientation Discrimination in the Workplace

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A Practical Guide

**Chapter 13: Why I Support Transgender Rights:  
An Employer-Side Lawyer's Story**

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**Bloomberg  
BNA**

Arlington, VA

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### **Library of Congress Cataloging-in-Publication Data**

Gender identity and sexual orientation discrimination in the workplace : a practical guide / Editor-in-Chief Christine Michelle Duffy, Esq., Pro Bono Partnership, Parsippany, New Jersey ; State Laws Executive Editor Denise M. Visconti, Esq., Littler Mendelson, P.C., San Diego, California ; with the assistance of The National LGBT Bar Association and its Executive Director D'Arcy Kemnitz, Esq.

pages cm

Includes index.

ISBN 978-1-61746-300-6

1. Transgender people--Employment--Law and legislation--United States. 2. Gays--Employment--Law and legislation--United States. 3. Gender identity--Law and legislation--United States. 4. Transphobia--Law and legislation--United States. 5. Homophobia--Law and legislation--United States. I. Duffy, Christine Michelle, editor. II. Visconti, Denise M., editor. III. Kemnitz, D'Arcy. IV. National LGBT Bar Association

KF3467.5.G46 2014

344.7301'56--dc23

2014027148

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Published by Bloomberg BNA  
1801 S. Bell Street, Arlington, VA 22202  
[bna.com/bnabooks](http://bna.com/bnabooks)

ISBN 978-1-61746-300-6

*Printed in the United States of America*

WHY I SUPPORT TRANSGENDER RIGHTS:  
AN EMPLOYER-SIDE LAWYER'S STORY

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**Editor's Note:** To close the personal essay part of the treatise, I asked Catherine E. Reuben, a founding partner of the Boston law firm of Hirsch Roberts Weinstein LLP, to write about her experiences in learning about transgender-related legal and human resource issues and how those experiences affected her personally and professionally. Cathy has spent more than 20 years representing employers in labor and employment matters. As I have learned myself as a management-side lawyer for more than 30 years, the issues are not complex—unless we go out of our way to make them so. Employers that have fostered an ethical culture in the workplace face few challenges—all easily addressable—in providing an accepting environment for LGBT employees.

In her essay, Cathy explains why, notwithstanding her employer-side focus, she became and remains a supporter of transgender rights. Cathy's experience is similar to those of many people—be they advocates, managers, coworkers, or neighbors—who learn about “trans” issues by happenstance and quickly discover that all the fuss was much ado about nothing, except for the discrimination and other hardships faced by gender-affirmed and gender-diverse individuals because of a lack of understanding and acceptance in some parts of society.

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“If this doesn't work, it's on your head.” These were the words my client said to me after I advised the client not to fire Jane,<sup>1</sup> an employee who had applied for the job as a man but had showed up for her first day of work as a woman. One of the managers of the company had hired his old army buddy, who arrived for work as Jane, for a position working on the plant floor. All of the other employees working in the plant were male. When Jane showed up, it created quite a stir. She was dressed in a short skirt, low-cut top, and

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<sup>1</sup> Pseudonym.

high heels. She spoke openly about her recent transition, including providing details about her medical treatments. None of the men in the plant had ever met a transgender person before, and many of them asked Jane highly personal questions, including questions about her body and sex life. Jane seemed all too willing to respond. By the afternoon, the plant was abuzz with gossip and jokes, and nobody was getting much done. The company's owner called the human resources (HR) manager and instructed her to fire Jane immediately. The HR manager persuaded him to seek legal advice first.

I explained to the client that our state fair employment practices agency, the Massachusetts Commission Against Discrimination (MCAD), has held that discrimination on the basis of transgender status can be a form of unlawful gender and/or disability discrimination. "We're not firing the employee because of gender or disability," the owner replied. "We're firing the employee because of the disruption." The owner argued that, by wearing provocative clothing and talking openly about personal matters, Jane was setting herself up to be sexually harassed. "It's only a matter of time before we end up getting sued," the owner told me. "It's better that we fire the employee now, before the situation gets even worse." I told the client that I thought the company was making a big mistake. I urged the client to give me until the following day to do additional research and analysis before taking any action. The client reluctantly consented but made it clear that if there was any more trouble, I would be held responsible.

After hanging up the telephone, I was in a quandary. The only thing I knew for sure was that, if the client fired Jane, it would be illegal and, in my opinion, wrong. But I didn't have any answers to the practical concerns the client had raised. I was over my head and needed help.

I started by calling a friend of mine who was dating a transgender man. I told her that I had a client with a transgender employee. I confessed that, as far as I knew, I had never met a transgender person, and I needed to get educated fast. My friend explained the concept of gender identity and how it was different from sexual orientation. She also shared with me that, when her boyfriend transitioned, he had similarly chosen to discuss it openly. His experience was that people were both curious and ignorant. For him, it was easier and in some ways therapeutic just to have it all out on the table. She also commented that her boyfriend constantly strived to "fit in" with other guys, to the point where (in her opinion) he sometimes "overdid it," for example, refusing to wear pink, hold a woman's handbag, or otherwise behave in a manner that others might associate with females. Thinking of the new employee and her über-feminine outfit (an inappropriate choice for a plant job for any woman, transgendered or not), the comments rang true. It occurred to me that Jane, like my friend's boyfriend, might just be over-compensating in an effort to fit in with her chosen gender at the expense of fitting in at the workplace.

At my friend's recommendation, I also spoke with Gunner Scott, the founder of the Massachusetts Transgender Political Coalition. I also consulted with a transgender legal scholar. Both of them encouraged me to

speak freely about my fears, prejudices, and practical concerns. With their help, I developed an action plan for the client. To its credit, the client agreed to adopt the plan:

- In Step One, the HR manager arranged for a confidential meeting with Jane:
  - During the meeting, Jane was assured that she was welcome at the company and that she would be treated in accordance with her gender identity. The HR manager reviewed the company’s antiharassment policy with Jane and instructed her to let HR know immediately if anyone mistreated her in any way, including teasing, comments about her transgender status, using incorrect pronouns, asking her personal questions, or making comments about her body or sex life.
  - The HR manager also informed Jane of the company’s expectations of her, including that she dress appropriately for her work duties, that she refrain from excessive personal conversations during work time, and that she herself not make comments about sex, genitals, or other topics that were not appropriate for a professional setting.
- In Step Two, and with Jane’s enthusiastic consent, the company also arranged for an outside speaker to provide transgender awareness training for Jane’s supervisors and coworkers. Jane stayed home during the training, so that the attendees could speak freely and ask questions that might otherwise have been perceived as insensitive or rude. In the course of the training, the employees were admonished to use the correct pronouns for Jane, to refrain from harassment, and, most of all, to treat Jane just like any other employee. Employees were told that if Jane said or did anything that made them uncomfortable, they should not confront Jane but should instead see HR in confidence.

I checked in with the HR manager a few days later. She told me that the buzz on the plant floor had died down, and everyone, Jane included, was focusing on work. However, a few of the female office employees had expressed some discomfort about sharing the bathroom with Jane. At my urging, the HR manager met with the employees who complained and explained that it would be hurtful and also unlawful to exclude Jane from the ladies’ room. After further discussion, the employees themselves came up with a solution: Any time any person was in the bathroom, that person would hang an “occupied” sign on the door. That way, anyone who felt uncomfortable could simply wait for the bathroom to be empty, without singling out Jane.

A week later, I checked in with the client and everything was going fine. Six months later, Jane was still employed and her transgender status was a nonissue. I was delighted and relieved. To my knowledge, the client had no further issues with Jane’s transition thereafter. The hire had been a success.

Some time thereafter, I hired a bird sitter who happened to be transgender. My bird sitter was a kind, witty, creative man, and Molly the cockatoo absolutely adored him. Over time, I grew very fond of him myself. He shared with me some of his struggles as a transgender person, including experiences of harassment and discrimination at work. The mistreatment he received made no sense to me. I knew him to be a highly dedicated, reliable, and effective worker. He comported himself in a professional manner. Yet, once people learned he was transgender, that seemed to be the only thing on which they could focus. They did not see what I saw, which was that his experiences as a transgender man had made him stronger and more compassionate. Most people held it against him. They viewed him as confused and mentally unstable, when in fact it was the very opposite: His gender affirmation had made him more confident, stable, and healthy. For this reason, I suggested that, when he applied for jobs, he not mention the fact that he was transgender. Yet, not revealing this fact felt dishonest to him. He had gone to school and had held many prior jobs under a female name. In his mind, not disclosing that he was transgender negated that part of his history that was spent living as a woman, which was still an important part of who he was.

Sadly, this kind, caring, and intelligent man died suddenly and unexpectedly of cancer at a relatively young age. I was devastated. Three days after his death, I received an e-mail from the Massachusetts Lesbian and Gay Bar Association (MLGBA). (The MLGBA subsequently changed its name to Massachusetts LGBTQ Bar Association, in express recognition of the diverse community it serves.) The e-mail stated that the association was seeking members for a newly formed Transgender Inclusion Task Force. I had only joined the MLGBA because its new president, someone I knew from the labor and employment law community, had asked me to. Before getting the e-mail, I had not done anything with my membership other than paying my dues. But in the wake of the loss of my bird-sitter friend, I was moved to get involved as a way of honoring his memory.

At the first meeting of the Task Force, the Chair informed us that a bill had recently been filed with the Massachusetts legislature that would make it unlawful to discriminate against transgender persons. One of the immediate goals of the Task Force was to persuade various bar associations to endorse the bill. I was very active with the Massachusetts Bar Association (MBA), and thus this seemed to be a good project for me. My first step would be to raise the issue with the MBA's Labor and Employment Law Section because if the Section did not endorse the bill, there was little chance of persuading the MBA's House of Delegates (HOD) to do so.

Persuading the employee-side advocates was easy; the employer-side advocates and business lawyers were a tougher sell. I myself am an employer-side labor and employment attorney and would not ordinarily be inclined to affirmatively push legislation that expands existing law. Compliance with the myriad labor and employment laws already on the books was tough enough, and in my opinion we didn't need to place additional burdens on employers. Yet, in my mind, this bill was different. The Massachusetts courts and the

MCAD had both already concluded that it was unlawful to discriminate against transgender persons. Thus, the bill would not “change” the law but simply make explicit what was already the case—which would actually be a good thing for employers. I was also mindful of that initial client situation I had faced and the discrimination my bird-sitter friend had endured. Most employers seemed to “get” that it is not right to fire someone because of their race, but feel justified in discriminating against transgender persons because of the “disruption” they caused—disruption that I had come to see was often more a result of the ignorance of others than anything that the transgender employee said or did. As a result of that ignorance, employers were losing out on good workers, and capable individuals were losing out on jobs in which they could add value. In short, the state of affairs was not good for employees, employers, or the Commonwealth of Massachusetts. Convinced I was doing the right thing, I got to work. Through meetings, telephone calls, e-mails, and other written materials, the other Task Force members and I persuaded person after person to support the bill. When it came up for a vote before the HOD, it passed unanimously.

The rest, as they say, is history. After we obtained the support of the MBA, we moved on to the Boston Bar Association and other organizations. Then there was a Judiciary Committee hearing on the bill, and I was asked to testify in support on behalf of the MBA. Over time, I became known as someone with experience in transgender rights issues, and additional opportunities came my way—conducting training seminars, writing articles, serving as a legal observer in transgender pride marches, consulting with businesses on issues related to gender-diverse employees, and handling pro bono cases for transgender individuals who had faced discrimination. The more work I did in the area, the more opportunities that came my way.

Although I may have “fallen into” transgender rights work thanks to serendipity—that initial client call, the death of my transgender bird-sitter, and the fact that there aren’t many lawyers who focus on this work—it is not happenstance that makes me stay. Transgender rights issues are inherently interesting. What does it mean to be male? What does it mean to be female? What role does/should gender play in the workplace and in society?

Being involved in this issue has also been incredibly good for my career. Having this niche area of practice improves my name recognition and gives me more credibility with my employee-side opponents and with tribunals such as the MCAD and the Equal Employment Opportunity Commission. In addition, the LGBTQ rights community is incredibly warm, welcoming, and supportive; I have formed many cherished friendships and professional associations. Best of all, this is an area in which one person can make a difference. Despite the law, discrimination against gender-affirmed and gender-diverse individuals is rampant. The perpetrators are often good, decent people who should know better. With a little education and persuasion, particularly from someone who understands the employer-side perspective, it is relatively easy to effectuate positive change. What could be more rewarding than that?