



Transgender Employment Discrimination: Issues and Updates

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Session Outline

- Background
 - Terminology, concepts - OPM Guidance
 - Two main approaches to transgender discrimination claims under Title VII (Per se and Gender Nonconformity)
 - Understanding the issue – transgender employment discrimination study results
- Current Issues: Updates
 - Harassment case: “Officer T”
 - Hiring case: Hunter v. UPS
 - BFOQ termination case: Devoureau
 - BFOQ, EE safety, bathroom use & termination case: Yang
- EEOC ruling on Macy v. Holder
 - Discrimination against transgender persons is discrimination based on sex under Title VII
 - Implications
- Summary and Recommendations

Background and Definitions (OPM)

- *Gender identity* is the individual's internal sense of being male or female. ... The way an individual expresses his or her gender identity is frequently called “gender expression,” and may or may not conform to social stereotypes associated with a particular gender.
- *Transgender*: Transgender individuals are people with a gender identity that is different from the sex assigned to them at birth. Someone who was assigned the male sex at birth but who identifies as female is a *transgender woman*. Likewise, a person assigned the female sex at birth but who identifies as male is a *transgender man*. Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity.

Background and Definitions

- “**Transgender/gender non-conforming**” describes people whose gender identity or expression is different, at least part of the time, from the sex assigned to them at birth. (Nat’l Transgender Discrimination Survey)
- **Transgender**: An umbrella term used “to represent all of the innumerable genders and forms of gender expression that fall within and outside of stereotypical gender norms.” (Transgender Law Center).
 - Not only those who identify with the “other” gender
 - This broader spectrum reveals transgender persons to be much less easily categorizable
 - Often shortened to “trans”
 - Distinguish from “transgendered”

Background and Definitions (OPM)

- *Transition*: Some individuals will find it necessary to transition from living and working as one gender to another.
- These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery.
- Some individuals, however, will not pursue some (or any) forms of medical treatment because of their age, medical condition, lack of funds, or other personal circumstances.
- Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.

Other Important Concepts

- **Passing:** To be seen or “read” as the gender you are presenting as, or to go undetected as being transgender.
- **Stealth:** To live passing as non-trans and without disclosing status as transgender.
- “Passing” or being “stealth” are goals for some transgender people, but not all.
- Passing tends to be seen as desirable by non-trans people (and often within the trans community) and is afforded a higher social status as compared to those who do not pass.
- Not passing places one at greater risk of discrimination, hostility and violence.

Approaches to Discrimination Protection under Title VII

- **“Gender nonconformity” approach**
 - Sex-stereotyping claim as under *Price Waterhouse*.
 - “[P]laintiff’s transgender status ... should not spoil what would otherwise be an actionable sex-stereotyping claim.”
 - As in *Smith v. City of Salem* (6th Cir.): Discrimination based on perceived failure to adhere to gender stereotypes states a claim under Title VII.
- **“Per se” approach**
 - “[D]iscrimination on the basis of a person’s transgender status is per se actionable under Title VII.
 - As in *Schroer v. Billington*: Discrimination based on change of sex/gender is discrimination because of sex.

Scope of Discrimination

- “Injustice at Every Turn” – Report on large-scale (6,500 survey respondents) study of transgender discrimination issued in 2011.
- Ninety percent (90%) of respondents said they had directly experienced harassment or mistreatment at work or felt forced to take protective actions that negatively impacted their careers or their well-being, such as hiding who they were, in order to avoid workplace repercussions.
- Fifty percent (50%) of respondents reported experiencing harassment in the workplace.
- Forty-seven percent (47%) said they had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender or gender non-conforming.

Scope of Discrimination

- Eighty-six percent (86%) of those who have not lost a job due to bias reported that they were able to access restrooms at work appropriate for their gender identity, meaning that 14% of those who kept their jobs were denied access.
- Forty-four percent (44%) of respondents reported that they considered themselves under-employed.
- Large majorities attempted to avoid discrimination by hiding their gender or gender transition (71%) or delaying their gender transition (57%).
- The vast majority (78%) of those who transitioned from one gender to the other reported that they felt more comfortable at work and their job performance improved.

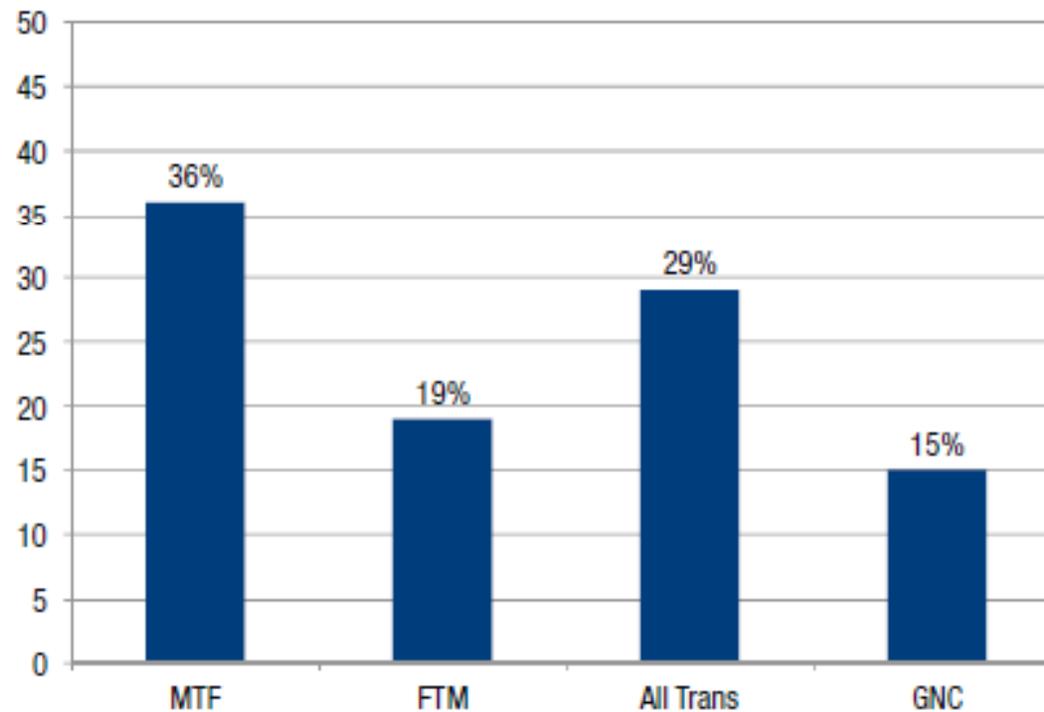
Scope of Discrimination

- Results varied across gender, race, income, and educational attainment.
- People of color in the sample generally reported higher levels of mistreatment than the sample as a whole.
- Risk of harassment was higher for those earning lower incomes.
- Male-to-female respondents experienced discrimination including refusal to hire, job loss due to bias, and denial of promotion due to bias at rates higher than those of female-to-male respondents

Scope of Discrimination

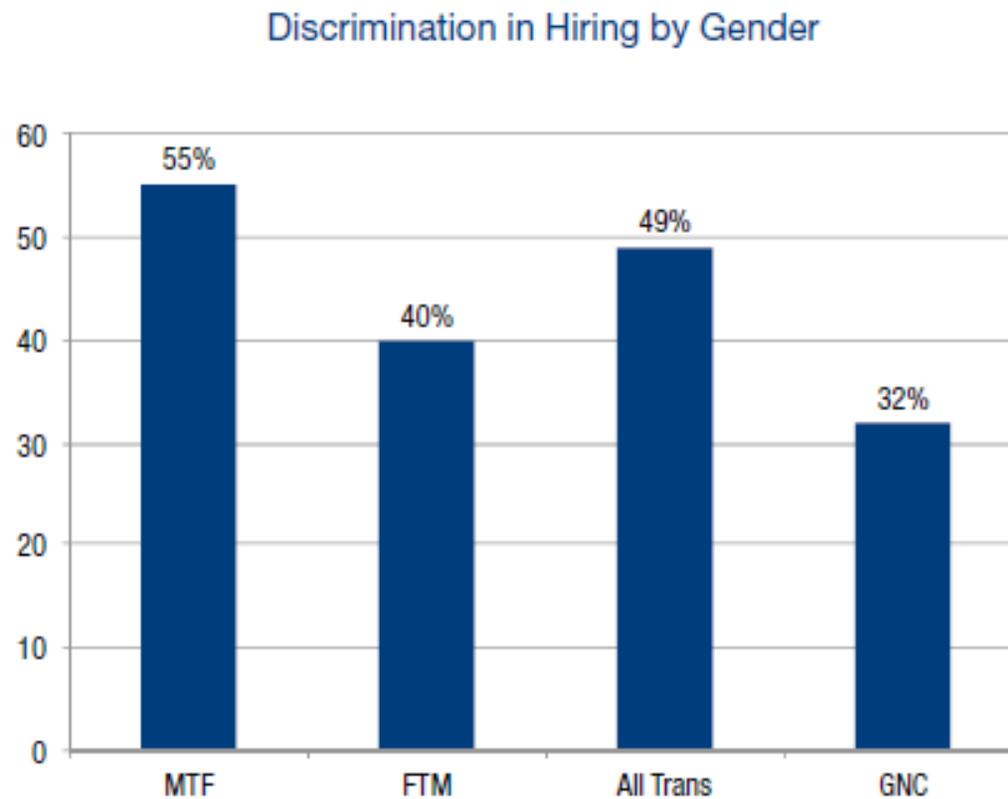
- Study results

Loss of Job by Gender



Scope of Discrimination

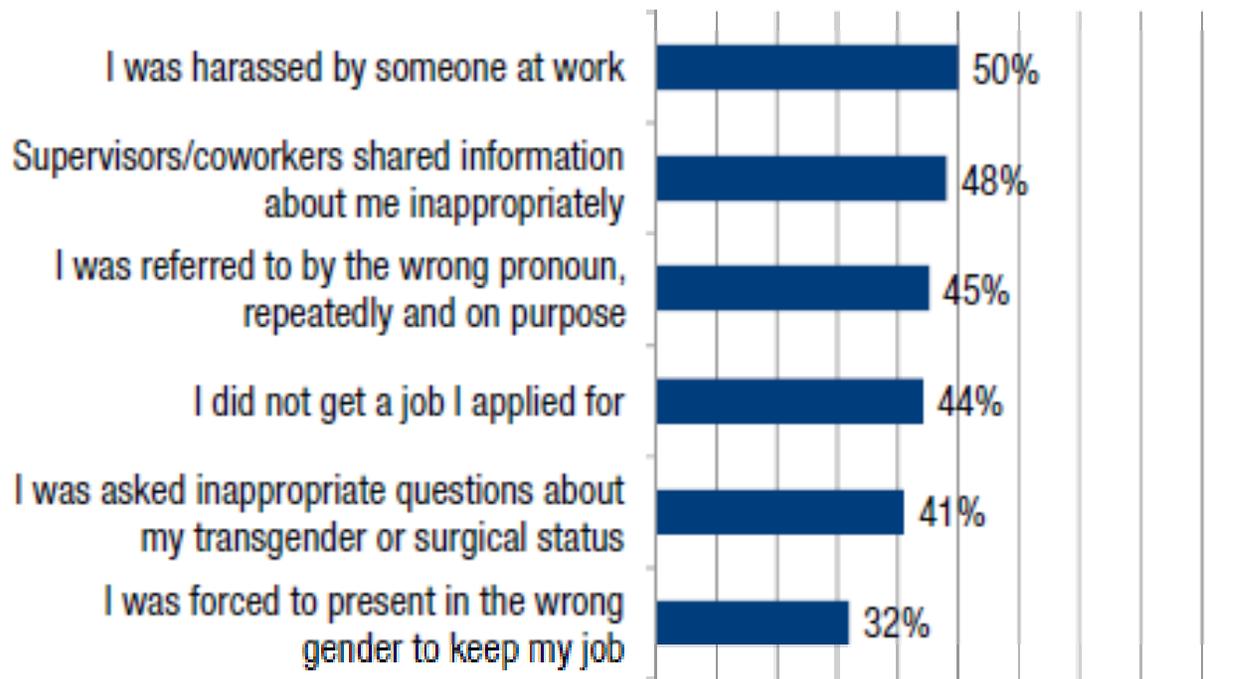
- Study results



Scope of Discrimination

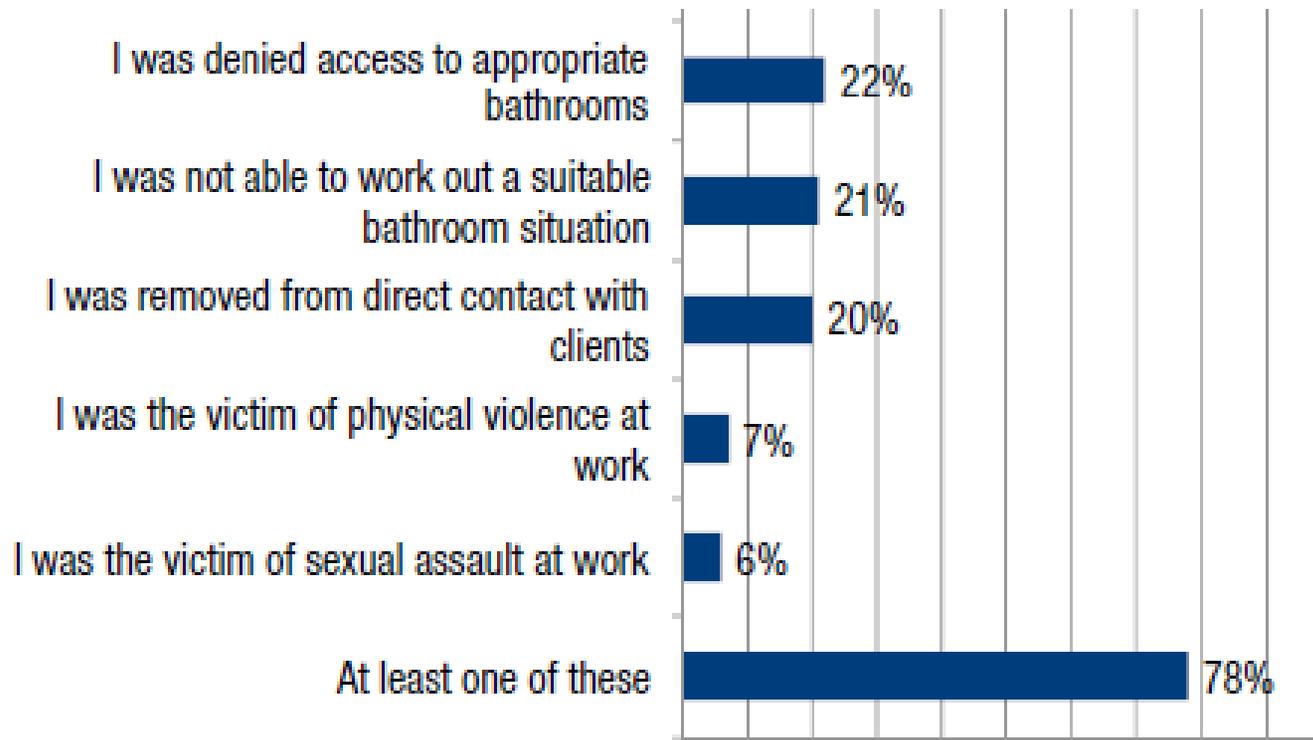
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Direct Mistreatment and Discrimination in the Workplace



Scope of Discrimination

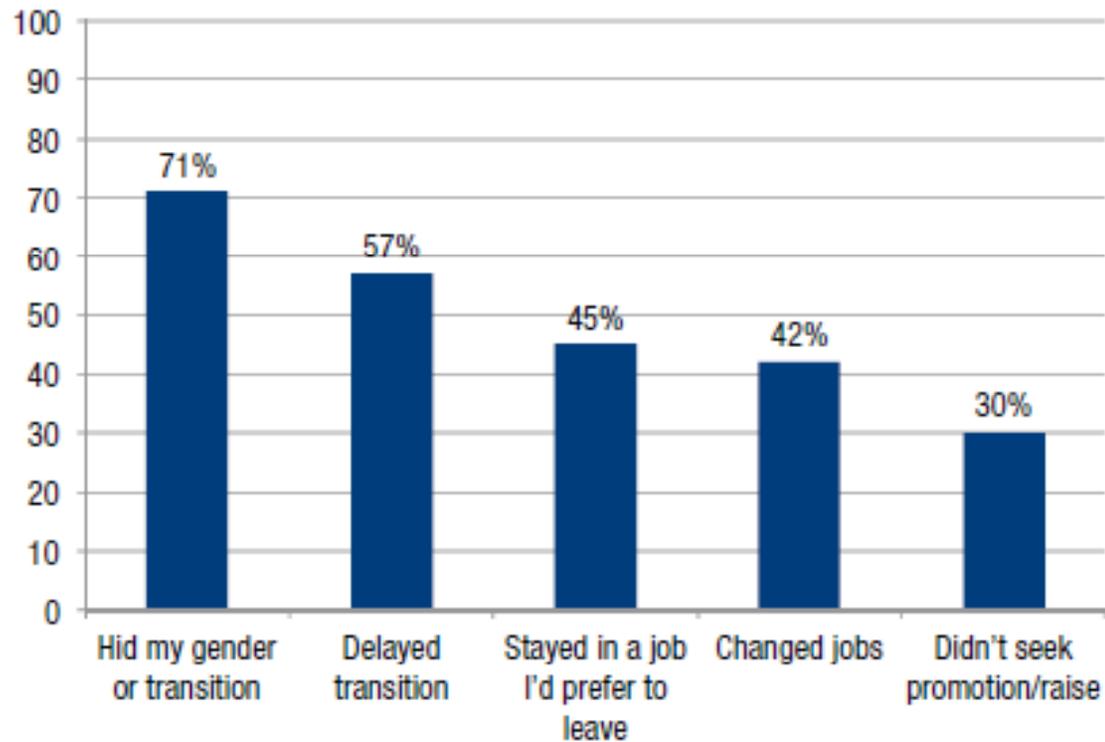
- Study results



Scope of Discrimination

- Study results

- **Discrimination-Avoidant Behaviors, Overall Sample**



Case Example: “Officer T”

- Case of 17-year police department veteran “Officer T” who transitioned from female to male.
- Officer T. repeatedly notified superior officers of the harassment, which included being intentionally called by the wrong pronoun and being called to incident scenes and instructed to pat down female suspects. Officer T. alleges that the harassment went on for nearly seven years, and that his station commanders refused to stop it or to discipline the officers involved.
- June 14, 2013: A settlement was reached in the case brought by Transgender Law Center and the Legal Aid Society-Employment Law Center.

Case Example: Hunter v. UPS

Hunter v. United Parcel Service, Inc. United States Court of Appeals, Eighth Circuit. September 17, 2012 697 F.3d 6972012 WL 4052403

- Hunter first submitted an application for employment with UPS in 2006. At the time of his 2006 application, Hunter was presenting as female and submitted his application under his birth name. He was offered a position, but declined it because he was interested in a position with a different employer.
- In 2008 Hunter submitted another application, again with his birth name, for a part-time package handler position. At that time, Hunter had begun presenting as male.
- Hunter had not had any surgeries but had begun taking male hormones, and wore a binder on his chest, men's clothing and a short haircut.
- Hunter was interviewed for the position with the hiring official (Trendle). At the end of the interview, another individual came in and whispered something in Trendle's ear. Trendle then told Hunter that UPS was not hiring.
- Trendle coded Hunter's application as "poor interview answers," and testified that Hunter's job history was also problematic.
- The evidence shows that, during March, April, and May 2008, Trendle hired several applicants with sporadic or no job history.
- UPS claimed it had no knowledge of Hunter's transgender status.
- Case dismissed on summary judgment by district court. 8th Circuit affirmed.

Case Example: Hunter v. UPS

Gage Elon Hunter v. United Parcel Service, Inc., Case No. 11-3186 (8th Cir., September 17, 2012).

- “Hunter's primary argument on appeal is that he was discriminated against based on his non-conformity to gender stereotypes or his being perceived as transgendered. The district court found that Hunter had failed to establish a prima facie case of discrimination because there was no evidence that Trendle knew Hunter was transgendered or perceived him as transgendered and discriminated against him on that basis. We agree.”
- “In some cases, the claimant's protected status is obvious and it is reasonable to assume the employer was aware of such status But here the evidence does not show that it was obvious that Hunter was born female and attempting to deviate from his traditional gender stereotypes. In cases of discrimination based on a protected status that is not necessarily obvious, as is sometimes the case with religion or national origin, the employee must show that the employer was sufficiently aware of the employee's status to have been capable of discriminating based on it.”

Case Example: Hunter v. UPS

Gage Elon Hunter v. United Parcel Service, Inc., Case No. 11-3186 (8th Cir., September 17, 2012).

- At the time of the interview, Hunter had not undergone any surgical procedures related to gender reassignment. There is no evidence that he had any facial hair, that he told Trendle he identified as male or transgendered, or that Trendle engaged in any dialogue or action that suggested he was aware of Hunter's protected status. Instead, the evidence shows that Hunter applied to UPS using the name Jessica Axt, yet came to the interview with his breasts bound, a short haircut, and wearing clothing and shoes he purchased from the men's department. None of these facts, even when taken together and even when viewed in the light most favorable to Hunter, are exclusive to transgendered or gender non-conforming individuals. Many fashion trends have called for women to wear short haircuts, men's clothes, or men's shoes. To hang a rule of law on fashions that may change with the times would create an unworkable rule. Although there is no particular type of evidence that is required to establish a prima facie case of gender or sexual orientation discrimination, some evidence that Trendle was aware of Hunter's protected status was required.
- Ultimately, Hunter failed to establish that Trendle knew Hunter was transgendered or gender non-conforming; he therefore cannot prove that UPS discriminated against him because of a protected status of which it was unaware.

Case Example: Hunter v. UPS

Gage Elon Hunter v. United Parcel Service, Inc., Case No. 11-3186 (8th Cir., September 17, 2012).

- Reasoning behind denying Hunter's claim of being gender-nonconforming and thus being able to pursue a gender-stereotyping theory shows some of the limitations of discrimination protections.
- In one analysis, Hunter might be considered an example of an "imperfect gender nonconformist" "whose behavior fails to conform to the norms stereotypically associated with the sex that is the 'opposite' of their birth sex (assuming that there are only two sexes). Imperfect gender-nonconformists might act somewhat masculine and somewhat feminine, or they might reject gender entirely."
- Those who are not clearly categorizable as exhibiting appearance/behavior assigned to the "other" gender may fall outside the scope of protection under gender stereotyping theory. Like Hunter, such persons may still be subjected to discrimination based on gender, creating a "Catch-22" not unlike that which existed for some persons under the ADA prior to the Amendments Act of 2008 (disabled enough to be discriminated against but not enough to be covered under the law).

Case Example: Hunter v. UPS

Some issues raised:

- Transgender plaintiffs will not always prevail in gender stereotyping claims - more evidence linking challenged action to application of gender stereotypes is needed.
- “Didn’t know” as a defense to discrimination claim
- Documents and legal name not matching gender presentation – common problem for trans people. Hiring officials should be aware of issue.
- Inappropriate emphasis on surgery as marking transgender status
- Elaborate efforts to excuse the possibility of discrimination - reluctance to apply gender-stereotyping theory

Case Example: El'Jai Devoureau

El'Jai Jordan Devoureau v. Camden Treatment Associates, LLC, t/a Urban Treatment Associates, Inc. Superior Court of New Jersey, Law Division. April 08, 2011.

- Devoureau had unspecified gender-reassignment surgery and began taking male hormones in 2006.
- Had gender changed on documents, including birth certificate, Social Security records, and driver's license.
- Had lived as a man for many years.
- Did not disclose transgender status to hiring official.
- Applied for and received position as a drug test monitor – BFOQ of male.



Case Example: El'Jai Devoureau

El'Jai Jordan Devoureau v. Camden Treatment Associates, LLC, t/a Urban Treatment Associates, Inc. Superior Court of New Jersey, Law Division. April 08, 2011.

- Shortly after hire someone who claimed to know Devoureau informed hiring official that he was transgender.
- Hiring official told Devoureau she heard he was transgender and he replied that he was male. She then asked Devoureau if he had had any surgeries.
- Devoureau declined to answer for privacy reasons and was fired.
- Defendant claimed termination was legitimate, “since the sex of the employee engaged in that particular job position is a bona fide occupational qualification.”

Case Example: El'Jai Devoureau

El'Jai Jordan Devoureau v. Camden Treatment Associates, LLC, t/a Urban Treatment Associates, Inc. Superior Court of New Jersey, Law Division. April 08, 2011.

- Raises questions:
- Can a transgender employee perform a position with a BFOQ for sex?
- At what point in the transition will this be appropriate?
- Dependent on position?

Case Example: Ashley Yang

Ashley Yang v. TSA (2011)

- Transgender woman began taking female hormones and living as a woman in 2006.
- Driver's license gender marker changed to female.
- In 2008 applied for and received position as TSA security checkpoint screener at LAX.
- She informed the agency she was transgender before a background check revealed the name she used when she was a man.
- The agency informed her that agents had to be the same gender as the passengers they search and asked whether she had gone through sex reassignment surgery, which she had not.



Case Example: Ashley Yang

Ashley Yang v. TSA (2011)

- Offered a position working with baggage instead, but declined.
- Required to work as a man, including wearing short hair and doing pat-downs of men.
- Male passengers made comments such as “I haven’t had a girl touch me for a long time” and “I really enjoyed that pat down.”
- Despite harassment Yang continued working for nearly two years until management became aware that she was using the women’s restroom.

Case Example: Ashley Yang

Ashley Yang v. TSA (2011)

- Yang informed her managers that she believed that using the women's room was her right under California law prohibiting discrimination based on gender identity.
- Manager stated her behavior constituted a failure "to comply with the instructions given to you by management." Her supervisors told her they would research the issue, but did not change their position. She was fired.
- Case settled for five months of back pay and a five-figure award for emotional distress.
- LAX TSA employees also required to undergo training in transgender issues.
- Advocacy organization asserts she should have been permitted to work as a woman.

Case Example: Ashley Yang

- Other issues presented by Yang case:
- Bathroom use issue: OPM issued guidelines in March 2011.
- Safety issue: Requiring Yang to use men's restroom placed her safety at risk.
- Yang also placed at risk due to requirement to pat down male passengers – sexually harassing comments.
- However BFOQ and other issues are resolved, safety must be a primary concern.

Updates: *Macy* ruling

- EEOC ruling issued in April 2012
- Macy was denied a position five days after making her transgender status known to the hiring agency. She was told the position had been cut.
- She later discovered the position had actually been filled with different candidate, and filed an EEO complaint.
- She was informed that the portion of her complaint alleging gender identity discrimination would be handled through the agency's complaint process rather than through the EEOC.
- She challenged that decision since the EEOC process offers greater remedies.



Updates: *Macy* ruling

- EEOC ruling:
- “We find that the Agency mistakenly separated Complainant’s complaint into separate claims: one described as discrimination based on ‘sex’ (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as ‘sex stereotyping,’ ‘gender transition/change of sex,’ and ‘gender identity’...
- Each of the formulations of Complainant’s claims are simply different ways of stating the same claim of discrimination ‘based on . . . sex,’ a claim cognizable under Title VII.”

Updates: *Macy* ruling

- “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’
- This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that ‘an employer may not take gender into account in making an employment decision.’ *Price Waterhouse*, 490 U.S. at 244.”

Updates: *Macy* ruling

- “Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination.
- Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort. ...
- Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.
- These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.”

Updates: *Macy* ruling

- “Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on ... sex,” and such discrimination therefore violates Title VII.”
- Reversed and remanded.
- July 8, 2013: The Department of Justice issued its decision ordering the ATF to re-offer Macy the job and awarded her back pay with interest and other compensatory damages. The decision also ordered ATF to take action to ensure no future employees or job applicants are discriminated against on the basis of gender identity.

Macy implications

- The ruling recognizes the distinction between approaches to seeking Title VII protection, and declares it unnecessary to use the nonconformity approach exclusively.
- Expected effect on:
 - Federal agencies
 - EO 11246
 - Private sector
- As with other forms of discrimination, overt examples will likely become a smaller proportion of total incidents following the EEOC's ruling.

Concluding Points

- EEOC's ruling in Macy v. Holder is a significant breakthrough for transgender employees.
- Definition discrimination against transgender persons as discrimination based on sex means plaintiffs can avoid having to prove specifically that they were gender-nonconforming, which has presented a barrier in some cases.
- Questions remain around BFOQ's and surgery expectations – unsettled area.
- In the NCTE/NGLTF study, harassment occurred over twice as often as denial of gender-appropriate restrooms.
- Consider seriously the transgender employee's safety when crafting solutions.
- Ensure hiring officials are trained on issues related to hiring transgender employees – background checks, prior names, privacy. Consistency in application of rules.
- Be cognizant of differences across intersections such as class, race, and gender.
- Expect more pretext and less direct admission of discriminatory motivation.