



The Legal Aid Society
EMPLOYMENT LAW CENTER

EMPLOYMENT DISCRIMINATION PROTECTIONS FOR TRANSGENDER PEOPLE IN CALIFORNIA

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This outline describes the law protecting employees in California from employment discrimination based on gender identity.

I. Local Law Prohibiting Gender Identity Discrimination

As of January 2001, four localities in California (San Francisco, City and County of Santa Cruz and West Hollywood) had passed laws that *expressly* prohibit gender identity discrimination in employment. Usually, these ordinances cover only employers within the locality, although some extend coverage to employers who do business with the municipality (such as San Francisco).

Complaints alleging discrimination under these ordinances generally are handled by a local human rights commission, such as the San Francisco Human Rights Commission (SFHRC). After an employee has filed a charge of discrimination, the commission notifies the employer, performs an investigation and makes findings. In some cases, such as under the San Francisco ordinance, an employer's contract with the locality may be suspended or revoked for non-compliance with the law.

II. State and Federal Law Protecting Transgender Employees from Discrimination

Although no state or federal law *explicitly* protects transgender employees from workplace discrimination in jurisdictions in California other than those noted above,²

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² California Assembly Bill 1649, introduced in the 2000-2001 legislative session, would amend FEHA to explicitly prohibit gender-identity-based discrimination. Two states – Minnesota and Rhode Island – and

transgender people are protected under existing federal and state laws barring discrimination on the basis of sex and, depending on the circumstances, may also be protected under laws prohibiting discrimination on the basis of sexual orientation, disability, and political activity.

A. Sex Discrimination

Both **Title VII of the Civil Rights Act of 1964** (“**Title VII**”) and the **California Fair Employment and Housing Act** (“**FEHA**”) prohibit employment discrimination based on sex. 42 U.S.C. § 2000e-2; Cal. Gov’t Code § 12940(a).

1. What is Prohibited?

Under either of these statutes, it is illegal for an employer to fire, fail to hire, or **discriminate in any way** against an employee with respect to compensation or in terms, conditions, or privileges of employment because the employee is a man or a woman, because the employee fails to conform to stereotypical notions of how a man or a woman should act, or because the employee undergoes sex reassignment.

These statutes also prohibit **harassment** targeted at an employee for any of these reasons. Harassment is a form of discrimination that occurs when an employee is subject to hostile, offensive or intimidating behavior by a supervisor or co-worker because of the employee’s sex (or race, disability, etc.). Such conduct rises to the level of illegal harassment when it is so “severe or pervasive” that it interferes with the employee’s ability to perform her job.

2. Are Transgender People Protected?

Until recently, federal courts uniformly held that transsexual people were not protected under **Title VII**’s prohibition of sex discrimination, on the ground that Congress did not intend the term “sex” to include transsexualism. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that “the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., . . . a person born with a female body who believes herself to be a male”); *Somers v. Budgets Marketing*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (same).

More recently, however, federal and state courts and administrative bodies increasingly find that sex discrimination includes discrimination against transsexual and gender non-conforming people. In a recent decision, the Ninth Circuit repudiated its prior holding in *Holloway* and concluded that transsexual persons are protected from sex discrimination under Title VII and other sex discrimination statutes. *Schwenk v. Hartford*, 204 F.3d

over forty jurisdictions have enacted statutes that expressly prohibit discrimination based on gender identity. For a complete listing, see www.transgenderlaw.org.

1187 (9th Cir. 2000) (holding that the “initial judicial approach taken in such cases as *Holloway* has been overruled by the logic and language of *Price Waterhouse*”).

In *Schwenk*, the Ninth Circuit relied on the Supreme Court’s ruling in *Price Waterhouse v. Hopkins*, which established that discriminatory conduct toward an employee for failure to conform to gender stereotypes is impermissible under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). The Ninth Circuit stated: “What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one. . . . Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.” *Schwenk*, 204 F.3d at 1202.

Under this gender stereotyping analysis, courts and administrative bodies in multiple jurisdictions have held explicitly that transsexual people are protected from discrimination under Title VII and other sex discrimination statutes. *See, e.g., Schwenk v. Hartford, supra; Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in “masculine attire”); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman’s claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law); *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super. 2001) (concluding that state law prohibiting sex discrimination in employment protects transsexual people); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting “gender” discrimination protects transsexuals and disagreeing with the reasoning of federal cases which hold that Title VII does not protect transsexuals); *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding Title IX prohibits sexual harassment of a transsexual woman); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm’n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals); *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super.), *aff’d sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass. App. 2000) (denying defendant’s motion to dismiss transsexual student plaintiff’s complaint requesting injunctive relief allowing her to wear clothing customarily worn by female teenagers).

Courts have invoked the same analysis in cases of non-transsexual employees discriminated against and harassed for failure to conform to stereotypical notions of how a man or a woman should act. *See, e.g., Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment “based upon the perception that [the plaintiff] is effeminate” is harassment because of sex, in violation of Title VII and the Washington Law Against Discrimination, and overruling *DeSantis v. Pacific Tele. & Tele. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979)); *Bibby v. Phila. Coca Cola Bottling Co.*, 260

F.3d 257 (3rd Cir. 2001) (holding that a plaintiff may be able to prove a claim of sex discrimination by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000) (noting that discrimination based on a failure to conform to gender norms might be cognizable under Title VII); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (noting that “sex stereotyping may constitute evidence of sex discrimination”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (citing *Price Waterhouse* and stating, “[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (holding that the plaintiff had stated a Title VII claim where the “harassment included rumors that falsely labeled him as homosexual in an effort to debase his masculinity”); *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (holding that “Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles” and explaining that “[a] man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex’”).

Although no appellate court has yet had an opportunity to rule on a sex discrimination case brought by a transgender plaintiff under FEHA, California courts have long interpreted FEHA to be consistent with Title VII and similarly held that California sex discrimination law is at least as protective as federal law.³ Accordingly, since the Ninth Circuit has held that transgender people are protected from sex discrimination under Title VII, then they should be protected under FEHA as well.

3. Significant Others, Friends, Families and Allies (SOFFA’s)

FEHA also protects employees from **associational discrimination**. Therefore, an individual may not be discriminated against for being a significant other, friend, family or ally of a transgender person.

B. Perceived sexual orientation discrimination

Transgender workers frequently face discrimination or harassment because they are incorrectly *perceived* to be lesbian, gay, or bisexual. FEHA prohibits employment discrimination on the basis of sexual orientation, including *perceived* sexual orientation. Therefore, if a transgender employee is being discriminated against or harassed because the employee is mistakenly believed to be lesbian, gay, or bisexual – for example, if the

³ See *Flait v. North Am. Watch Corp.*, 3 Cal.App.4th 467 (1992); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d 590 (1989); *Valdez v. Clayton*, 88 Cal. App. 4th 1162, 1172-1173 (2001). Moreover, California courts are required to interpret FEHA “liberally” and are not bound by federal cases that apply a more restricted view of protected rights. See *Johnson Controls, Inc. v. FEHC*, 218 Cal.App.3d 517 (1990).

employee is the target of homophobic slurs – the employee may seek protection under FEHA’s provisions prohibiting discrimination on the basis of perceived sexual orientation.

C. Disability Discrimination

Under state and federal law, an employer cannot discriminate against a qualified individual with a disability. In other words, if an employee has a disability and is able to do the basic duties of the job (with accommodations, if necessary), that employee cannot be harassed, demoted, terminated, paid less, or treated less well because of his or her disability, nor may he or she be rejected as an applicant on that basis.

Due to political compromises necessary to ensure the passage of the federal Americans with Disabilities Act (“**ADA**”), both the ADA and the Rehabilitation Act of 1973 (“**Rehabilitation Act**”) exclude transsexualism and gender identity disorder from coverage under federal disability rights law. *See* 42 U.S.C. § 12211(b)(1) (1997); 29 U.S.C. § 706(8)(F)(i) (1997).

Although the California law protecting people with disabilities used to have the same exclusions, that is no longer the case. The **Prudence K. Poppink Act** (Assembly Bill 2222 in the 2000 legislative session), which became effective on January 1, 2001, removed transsexualism and gender identity disorder from the list of conditions that were excluded from disability protections under **FEHA**. *See* Cal. Gov’t Code 12926(i)(5), (k)(6). Thus, under FEHA as amended, individuals with gender identity disorder or gender dysphoria are entitled to the same legal protections as persons who have other medical conditions.

1. Who is covered under FEHA’s disability provisions?

To be covered under the disability provision in FEHA, an employee must have a **medical condition that limits a major life activity**. Gender identity disorder or gender dysphoria may limit major life activities such as reproduction, engaging in sexual relations, concentration, sleeping, working, and interacting with others. Thus, if an employee has gender dysphoria and is so limited, that employee is entitled to the same legal protections as persons with other conditions.

Additionally, if an employee has a “**record of**” a disability, that person is protected from discrimination. For example, if an employee previously had been diagnosed with gender identity disorder and had undergone sex reassignment as treatment, the employee would be protected if the employer found out about the employee’s transsexual status and terminated the employee for that reason.

FEHA also provides protection if an employee is mistakenly “**regarded as**” having a disability or potentially disabling condition, even if the person does not. Thus, FEHA prohibits discrimination directed against an employee on the ground that that employee is believed to be transsexual or to have gender identity disorder.

2. What rights does an employee with a disability have?

In addition to prohibiting disability-based discrimination, FEHA provides that an employee may obtain **reasonable accommodation** of his or her disability to enable the employee to perform his or her job. Reasonable accommodations are adjustments or modifications made to a job or the workplace that enable the employee to successfully perform the basic job duties, without changing the essential job functions.

Reasonable accommodations for gender identity disorder might include: being referred to with appropriate gender pronouns, being permitted to dress in accordance with your gender identity, being permitted to use the appropriate bathroom, and receiving time off for treatment such as health care appointments or surgery.

D. Gender identity as protected political activity

California Labor Code Sections 1101 and 1102 prohibit employers from preventing or punishing an employee's political activity. The California Supreme Court has interpreted "coming out" by lesbian, gay and bisexual employees to constitute such protected political activity.⁴ Similarly, if an employee is discriminated against after disclosing her gender identity or openly transitioning from one gender to another, that employee may be protected under these sections on the ground that those actions are protected political acts.

⁴ *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979).