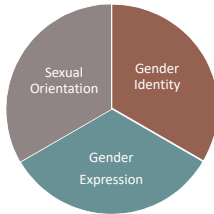


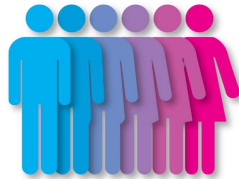
A Preliminary Distinction



"While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct."
Avendano-Hernandez v. Lynch,
 800 F.3d 1072, 1081 (9th Cir. 2015)

Using Inclusive Language

- Cisgender/transgender
- Transsexual
- Gender non-conforming
- Intersex
- Non-binary
- Gender transition/affirmation



Additional resources available at GLAAD's Media Reference Guide; National Center for Transgender Equality

Working Out: LGBTQ Discrimination By the Numbers

50%
 25%
 2x
 22%
 78%
 15%
 26%



What Does Discrimination Against LGBTQ Workers Look Like?

- "Traditional"
 - Harassment
 - Termination
 - Failure to hire, promote
- Outing
- Assault, workplace violence
- Misgendering
- Restroom access
- Dress code
- Unequal benefits (health insurance, disability, etc.)
- Health insurance denials

When Is Discrimination Actionable?

Adverse Employment Action

- Failure to hire
- Failure to promote
- Denial of benefits

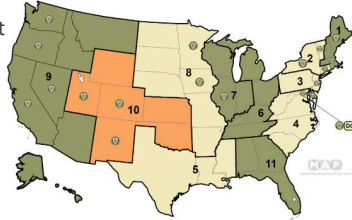
Workplace Harassment

- Quid Pro Quo
- Hostile Work Environment

Federal Anti-Discrimination Laws

Title VII: Gender Identity Protections

- Employment Non-Discrimination Act / Equality Act
- "Because of sex"
 - Sex Stereotype Discrimination
 - Transgender Status
- Positive caselaw, EEOC rulings
 - 1st, 6th, 7th, 9th, 11th Cir.
 - Maybe: 3d, 5th, 8th, 10th



Title VII: Sexual Orientation Protections

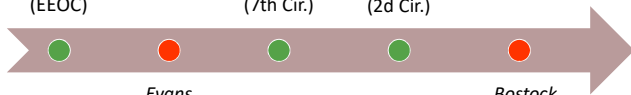
Baldwin
(EEOC)

Hively
(7th Cir.)

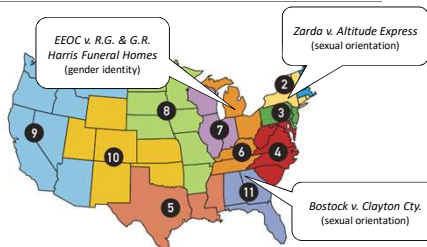
Zarda
(2d Cir.)

Evans
(11th Cir.)

Bostock
(11th Cir.)



Supreme Uncertainty for Title VII



Other Federal Workplace Anti-Discrimination Laws

- Equal Protection Clause (gov't employees)
- ADA
- ACA § 1557
- FMLA



Administrative Guidance

- **Office of Federal Contract Compliance Programs (OFCCP)**
 - See Executive Order 11246, as amended and sex discrimination guidelines (2016)
 - Defines "sex" as including gender identity, transgender status
 - Prohibits unequal same-sex spousal/partner benefits
 - Requires healthcare coverage "on the same terms for all individuals" if medically appropriate, regardless of gender identity
- **Occupational Safety and Health Administration (OSHA)**
 - See Best Practices: A Guide to Restroom Access for Transgender Workers (2015)
 - Recommends gender-confirming restroom access for health/safety reasons



California Anti-Discrimination Laws

State LGBTQ Employment Laws



California Protections

o Fair Employment & Housing Act, Gov't Code § 12940

o Other state non-discrimination laws

- o Gov't Code § 12955 (housing)
- o Ed. Code § 220 (education)
- o Civ. Code § 51 (Unruh Act) (public accommodations)
- o Civ. Code § 51.7 (Ralph Act) (hate crimes)
- o Gov't Code § 11135 (public agencies)
- o Health & Safety Code § 1365.5, Ins. Code § 10140 (Insurance Gender Nondiscrimination Act) (healthcare)



Fair Employment & Housing Act Cal. Gov't Code § 12940

Prohibited classes:

- Sex
- Gender
- Gender Identity
- Gender Expression
- Sexual Orientation
- Physical Disability (defined as including HIV/AIDS)

Prohibited employment actions:

- Refusal to hire
- Discrimination
- Job applications
- Participation in labor organizations, training programs
- Sexual harassment
- Retaliation

FEHA Gender Identity Regulations (2017)

1. Updates definition of gender expression and gender identity
2. Covers non-binary gender applicants, transitioning status
3. Requires restroom availability, access, gender-neutral signage for single-occupancy facilities
4. Prohibits inquiries or requiring proof of gender, gender identity, gender expression
5. Bans mandatory gender box on job application
6. Prohibits imposing non-corresponding dress code
7. Mandates use of preferred name and pronouns

2 CCR §§ 11030-34

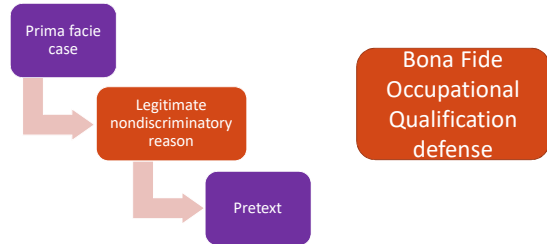
Administrative Exhaustion



Practice Tips for LGBTQ Cases



McDonnell Douglas Burden-Shifting



Sexual Harassment

Quid pro quo

Hostile work environment

- Conduct unwelcome
- "Severe or pervasive"
- See, e.g., *Donovan, Hope* (Cal. Ct. App.)

CA Courts: Questions to Consider

- Did the employer **know** employee's sexual orientation and **direct derogatory comments** at her?
Terris v. Cty. of Santa Barbara (Ct. App. 2017)
- Did the employer act based on **stereotyped notions** of "being too gay"?
Husman v. Toyota Motor Credit Corp. (Ct. App. 2017)
- Did the employee in fact **identify as LGBTQ**?
Akoidu v. Greyhound Lines, Inc. (Ct. App. 2002)
- Was there evidence of "severe and pervasive" homophobic/transphobic harassment?
Donovan v. Poway Unified Sch. Dist. (Ct. App. 2008);
Hope v. Cal. Youth Authority (Ct. App. 2005)

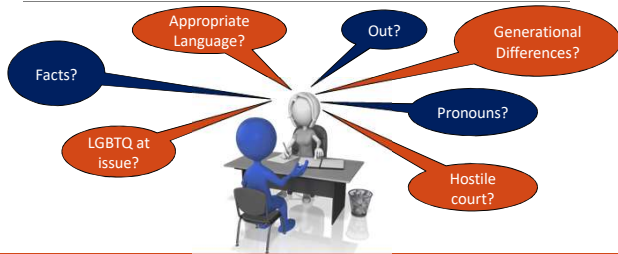


CA Rule of Prof'l Conduct 8.4.1



Lawyers may not discriminate or retaliate against, harass, or refuse/terminate representation of a client because of her gender identity, gender expression, or sexual orientation.

Special Considerations for LGBTQ Plaintiffs



Ask for Help!



Additional Resources

- Karen Moulding, 2 Sexual Orientation and the Law (2017) (treatise)
- Transgender Law Center, Tips for Lawyers Working with Transgender Clients and Coworkers
- GLAAD, Media Reference Guide
- Legal Aid at Work fact sheets
- Movement Advancement Project (statistics, maps)

Thank you!



Strategic Litigation for Social Justice

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