



MINTZ

Gender Inclusiveness at Work

Issues Facing Transgender and Gender Non-Conforming Employees

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Policies

Equal Employment Opportunity Policy

- The Company is an equal employment opportunity employer. Our policy is to recruit, hire and promote qualified individuals without regard to race, color, religion, sex, age, national origin, disability, veteran status, sexual orientation, **gender identity** or any other status protected by state or local law.

Harassment Policy

- The Company does not tolerate verbal or physical conduct that harasses, disrupts, or interferes with another employee's work performance, or that creates an intimidating, offensive, or hostile work environment. Intimidating, hostile, or offensive behavior relating to your race, color, creed, citizenship status, marital status, sex, age, religion, national origin, disability, veteran status, **gender identity** or sexual orientation, or any other status protected by federal, state, or local law, is prohibited.

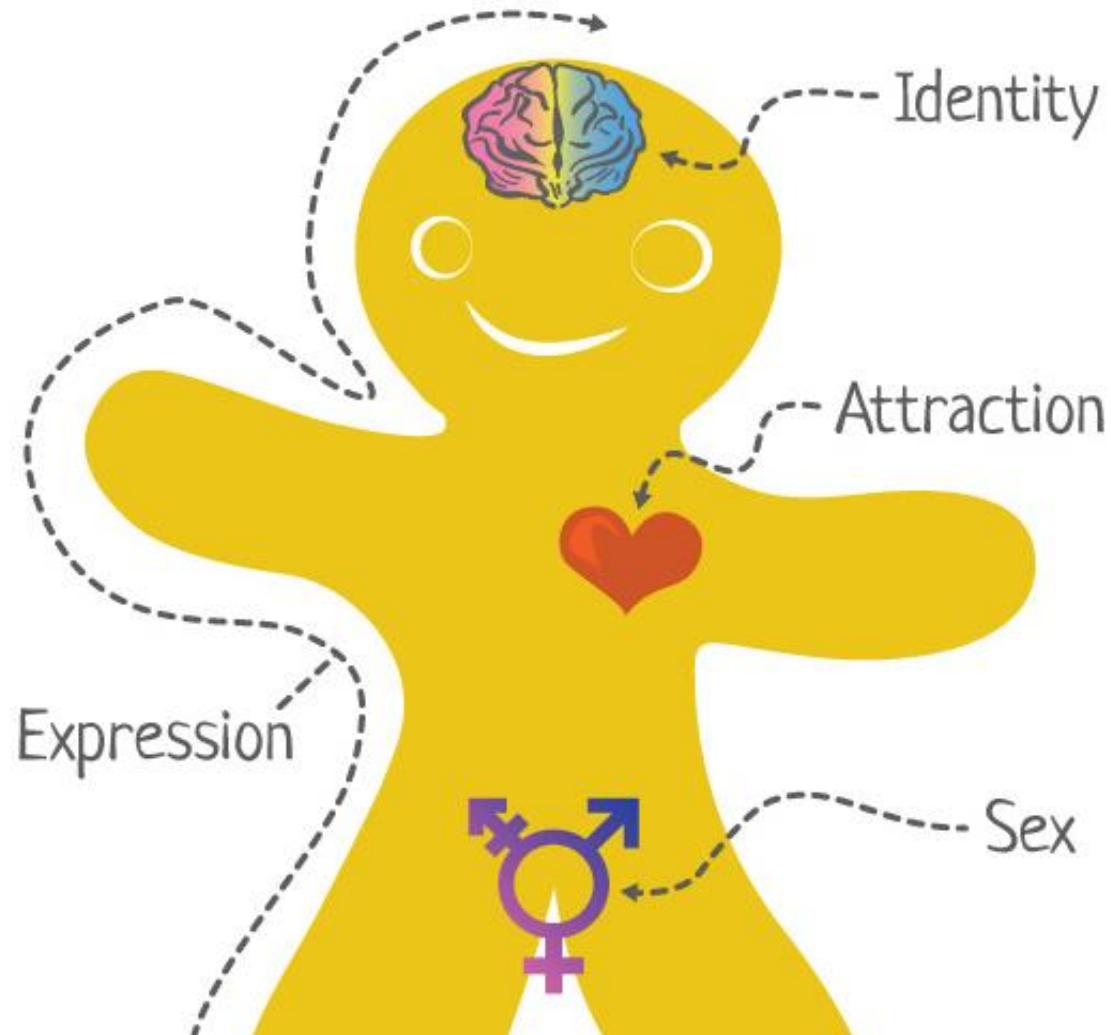
Sex v. Gender

- **Sex:** the biological assignment of reproductive organs based upon an X or Y chromosome
 - Generally, XX or XY
 - Anatomy of reproductive system
 - Secondary sex characteristics (e.g., facial hair, enlarged breasts, wider hips, etc.)
- **Gender:** the range of characteristics pertaining to, and differentiating between, masculinity and femininity
 - May include a combination of traits such as biological sex, sex-based social structures (i.e., gender roles), or gender identity
 - Gender is not a biological reality
 - Typically assigned at birth to be consistent with observed sex
 - Observed sex = female; Assigned gender = girl
 - Sometimes matches sex, sometimes doesn't (sex = female; gender = boy)
 - It isn't binary or either/or (some feel like both or neither gender)
 - Based on internal awareness (often realized at very young ages)
 - Internal identity vs. external identity

Sex v. Gender

- **Cisgender:** Gender identity matches biological/observed sex
- **Transgender:** Gender identity does not match biological/observed sex
 - May be living “in the closet” and choose not to express
 - May not yet be aware of one’s identity
 - May choose to express through:
 - Clothing, hair, makeup
 - Hormone treatment
 - Sex reassignment surgery
 - Any or all of the above
- **Gender Non-Conforming (“GNC”) or Non-Binary:** Gender identity does not fit into the traditional binary social construct
 - May identify as transgender
 - May identify in some other way (pangender, trigender, two-spirit, gender-queer, etc.)
- **Intersex:** Born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones, or genitals that do not fit the typical definitions for male or female bodies

The Genderbread Person



Limitations of Our Current Narrative

- Binary construct (male and female) versus non-binary spectrum of GNC / transgender identities
- Even best practices that we can adopt do not account for limitations in language and the vastly different experiences of transmen and transwomen
 - Don't assume the experience or opinions of any two transgender persons is similar or alike
- Gender dysphoria is a condition defined by the severe distress a person feels when his/her body does not match his/her gender identity
 - Forcing restroom use inconsistent with gender identity exacerbates gender dysphoria and makes it very difficult for transgender employees to focus and perform as expected
 - “Separate but equal” facilities also exacerbate gender dysphoria, and enforce the notion that the transperson is “other”

Reporting Process for Managers and HR Professionals

- When transgender identity becomes known, front-line manager or recruiter should be trained to:
 - (1) Give a simple statement of support and validation to the employee / applicant
 - (2) Immediately report to HRBP or Employee Relations
 - (3) Does NOT have to be in response to a problem, issue, or negative report – be proactive
- First point of HR contact must funnel notice upward to Senior Employee Relations staff immediately
- Senior Employee Relations staff notifies Legal
- Legal supervises and advises ER as necessary and ER contacts manager or recruiter directly to guide and counsel
- Manager or Recruiter/ER/Legal to remain in constant communication until employee issues resolved
- Manager to engage in interactive process / cooperative dialogue to ensure employee needs are met
- If applicant, recruiter will detail how Company supports trans/GNC employees

Case Study 1: Transition Planning & Announcement

- Anthony is a long-time employee
- Customer-facing position
- Begins to wear hair accessories, make-up, necklaces, and bracelets to work
- Anthony tells Manager she wants to be called Aimee and that she plans to transition and will express as a woman
- A Company leader from HQ visits the worksite, notes Aimee's accessories, and contacts HR to express his disapproval that a man is dressing like a woman

Case Study 1: Transition Planning & Announcement

- What should Aimee's manager do?
 - Process:
 - Front-line manager provides assurance and affirms support for the employee
 - Front-line manager and/or HRBP (if the HRBP was informed) immediately and confidentially informs HR representative and/or HRBP
 - HR representative or HRBP immediately escalates to Senior ER
 - Senior ER informs Legal
- HR will notify Senior ER immediately about the Company leader's comments, and Senior ER will contact the Company leader to explain and reinforce the Company policy and commitment to equal dignity and respect for all employees
- Senior ER will work closely with Legal and the manager to
 - Review the Company policies regarding non-discrimination and non-harassment and
 - Engage in a cooperative dialogue with Aimee and build a support checklist to ensure a smooth transition and protection from discrimination/harassment

Case Study 1: Transition Planning & Announcement

- Senior ER will train Aimee's manager on how to:
 - Collaboratively discuss key issues
 - Name choice and preferred pronouns
 - Document, email, and PeopleSoft changes
 - Dress code: Assuming the dress is professional, we must permit Aimee to present as she chooses
 - Restroom use: Must permit Aimee to use restroom that matches her/his/their gender identity
 - Develop action plan
 - When transition will occur (transition means any change in identity or expression)
 - When and how to inform others
 - Aimee's needs moving forward, such as leave or questions about application of employee benefits
 - (the Company offers a transgender-inclusive health plan)
 - Identify a support team and resources for Aimee

Case Study 2: Restroom Use

- After having worked for several years for the Company as “Shannon” and having presented as a woman, Shane notifies his supervisor in December that he wishes to be called Shane and will present as a man when he returns from the holiday break in January
- Shane asks his manager whether he will be able to use the men’s restroom at work without question, or whether he should use one of the four single-stall restrooms located in the facility
- When he returns from holiday break, Shane reports to his manager that someone said to him in the men’s room, “Get out of here, Shannon!”

Case Study 2: Restroom Use

- **Company Policy (and the Legal Requirement):**
 - Employees must be permitted to use the restroom that reflects their gender identity, regardless of whether it aligns with their biological sex.
 - Forcing employees to use unisex or segregated facilities is a violation of the Company policy (and is akin to “separate but equal” facilities).
 - Even where there are gender-neutral facilities available in addition to gender-specific facilities, the gender-neutral facilities should be available as a voluntary alternative for anyone – regardless of gender identity/expression – to use according to their comfort level.

Case Study 2: Restroom Use

What does the law say?

- EEOC Ruling 4/2015
 - Employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees may have negative reactions to allowing the employee to do so.
- OSHA Guidance issued 6/1/15
 - “Best Practices: A Guide to Restroom Access for Transgender Workers”
 - Available at <https://www.osha.gov/Publications/OSHA3795.pdf>
- Federal and state court decisions
- Statutes and ordinances

Case Study 2: Restroom Use

Practical Guidance for ER and Managers

- Face-to-face communications with Shane about logistics planning for the transition (similar to cooperative dialogue / interactive process)
- Clearly and explicitly articulate support for Shane and desire for input on the smooth transition, including timing issues
- Document concerns expressed by Shane along the way and continue to bring to Senior ER/Legal's attention
- If Shane communicates a different gender identity but is not yet apparently expressing that identity, have a conversation about which restroom the employee feels most comfortable using. If a single-stall facility is available, let him know that it is available as an alternative, if he feels more comfortable using it, but that he is not required to do so.

Case Study 2: Restroom Use

What about harassment?

- the Company should immediately address the separate issue regarding harassment or bullying
- An investigation should be conducted
- The situation should be monitored closely
- Prompt remedial action should be taken to correct any identified violations
- Top-down reinforcement of the Company's policies, including dignity and respect for all, is critical

Case Study 3: Dress and Grooming Standards

- Shania, a phlebotomist, comes to work wearing some of the new perfume she got as a holiday gift from her husband, Mutt
- Local policy at the the Company facility forbids the use of fragrances by employees because of customer sensitivity
- Employee's manager smells the perfume and asks Shania to make sure she doesn't wear it again to work
- Shania says she wants to continue to wear perfume because it makes her feel like a woman

Case Study 3: Dress and Grooming Standards

General Hygiene and Grooming Policy

- ...Recognizing that employees and visitors to our offices may have sensitivity and/or allergic reactions to various fragrant products, employees are asked not to wear **an excessive amount of** personal products, such as fragrances, colognes, lotions, and powders.

Case Study 3: Dress and Grooming Standards

- Can the Company enforce its fragrance policy and discipline Shania if she continues to wear the perfume to work?
- The policy on its face is gender-neutral because applies to male and female employees and is rooted in a legitimate business reason.
- But application / enforcement of the policy has a subjective element
 - As long as the policy is also enforced equally against male customer-facing employees who wear “excessive” cologne or fragrances to work
 - Beware: managers might be consciously or unconsciously enforcing the policy in an inconsistent manner pursuant to their own gender biases or personal dislikes
- The Company should, however, allow Shania to express as a woman in accordance with a gender-neutral application of the dress and grooming policies

Case Study 4: Intersections with Coworkers

- Jolene works as a technologist in one of your facilities
- Jolene, with the full and vocal support of her manager and some of her co-workers, begins to transition and begins presenting as a woman at work
- Jolene uses the women's restroom one evening during second shift and while in the restroom, she runs into Linda
- Linda knows that Jolene used to go by Joe and previously didn't wear women's attire to work
- Linda reports Jolene to HR for being in the wrong restroom

Case Study 4: Intersections with Coworkers

- ER contacts Linda and explains to her that Jolene has a right to be in the women's restroom under the Company's policy because she identifies as a woman
- Linda tells ER that the Company's support of Jolene infringes on her privacy rights
- Linda also tells ER that the Company's refusal to make Jolene use the bathroom of her biological sex (male) amounts to discrimination against Linda based on her faith because she is not permitted to voice her objections to the transgender "lifestyle" and has to work next to this individual
- What should ER do?

Case Study 4: Intersections with Coworkers

- Reaffirm support for the rights and privacy of all employees
- Ask Linda specifically how Jolene's use of the women's restroom infringes on Linda's religious observance or expression
- Explain the Company's restroom use and non-discrimination policy to Linda
- Also explain the Company's non-harassment policy, which forbids harassment of any employee, including while using the restroom, and that the policy applies equally to Linda and Jolene
- Tell Linda that should she experience any violation of privacy or unprofessional or harassing conduct while she is using the restroom, that she should report it to HR
- Tell Linda that if she does not feel comfortable using the women's restroom, she may use a gender-neutral single-user facility (if one exists)
- You may also want to consider permitting Linda to move to another work space to avoid conflict between Linda and Jolene
- You must continue to protect Jolene's rights because there is no actual infringement on Linda's privacy or her religious rights. Your obligation to accommodate Linda's religious beliefs or expression does not mean that you must sacrifice the rights of other employees to do so.

Case Study 5: Interactions with Customers

- Aimee works as a phlebotomist, is a trans woman, and transitioned years ago and has been highly performing and is generally well-liked by patients
- One day, a patient that Aimee did a blood draw for seeks out her manager
- The patient complains about Aimee being a safety threat because Aimee used the women's restroom and because she believes most transgender people have AIDS
- The customer informs the manager that she and the other members of her house of worship will not only boycott the Company but will also protest on site until Aimee is fired
- After Aimee's car and other of her supportive co-workers' cars are keyed, a few of Aimee's coworkers suggest to Aimee that it would be easier if she would just quit

Case Study 5: Interactions with Customers

- Preventative and remedial education is key
- Management training to report situation to ER
- Handling of customer complaints and explaining the Company employment nondiscrimination policy
- Implicit and explicit support of inclusion of transgender individuals
- Investigate keying incident and discipline any employees who may have been involved in accordance with policies and procedures
- Collaborate with Aimee to fully understand and address concerns and reiterate support
- Counsel coworkers (especially those who mentioned that Aimee should quit)
- Things to consider: Should the Company involve local law enforcement regarding the destruction of property on its premises? Is there a threat of imminent danger to Aimee or others?
 - Communication with ER / Legal
 - Does Aimee get a say in how this is handled, or should she comply with the company's decision on how to handle?

Process and Practices Takeaways

- Provide assurance and affirm support for the employee and support for the Company policy
- Don't fall prey to stereotypes and fears!
- Collaboratively discuss key issues
- Restroom/locker room access must be granted consistent with employee's gender identity
- Name change/pronouns consistent with employee preference
- Document and systems changes
- Dress code and grooming policies should be gender-neutral and applied evenly
- Coworker and customer prejudices – be polite and acknowledge their beliefs, but be firm and explain that supporting transgender persons does not infringe on privacy or religious rights

Process and Practices Takeaways

- Develop action plan
- When transition will occur
- When and how to inform others
- Employee's needs moving forward, such as leave
- Identify support team/resources
- Update personnel records
- Explain to employee technological or software challenges that preclude easy or quick updates in the Company's HR or IT systems, but assure that the company is dedicated to ensuring proper name and pronoun use

questions?

- Contact Don Davis at dcdavis@mintz.com