

TRANSGENDER DISCRIMINATION IN MALE LOCKER ROOM

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With the increasing recognition of civil rights for lesbian, gay, bisexual, and transgender (LGBT) individuals, administrators and agencies may question whether public recreation facilities are required by law to provide separate changing areas for transgendered individuals.

Good public relations can avoid many potential legal problems. Accordingly, if at all possible and practical, a policy of accommodation for the expressed special needs of any individual is preferable to confrontation, whether or not the law requires such accommodations. When a separate unisex changing area is available upon request, many people, including transgender individuals, may find this type of commonplace accommodation to be reasonable and acceptable under the circumstances.

Several federal agencies, including the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) have provided guidance for employers and transgender employees regarding restroom access in the workplace. This workplace guidance may also provide some insight into what might constitute an appropriate policy for providing restrooms and changing facilities for transgender individuals in a public recreation facility.

OSHA

On June 1, 2015, the Occupational Safety and Health Administration of the U.S. Department of Labor published a “guide to restroom access for transgender workers.” OSHA guidelines require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once he or she has begun working in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity.

Transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are inconsistent with the employee’s gender identity. Agencies are encouraged to provide unisex, single-user restrooms when feasible to maximize comfort and access for everyone, including individuals with disabilities and those with young children, however transgender employees should not be limited to using these facilities.

The OSHA publication also provides guidance to employers on best practices regarding restroom access for transgender workers, including single-occupancy gender-neutral (unisex) facilities or use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls. <https://www.osha.gov/Publications/OSHA3795.pdf>

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The OSHA publication cites federal, state and local laws that reaffirm the core principle of providing employees with access to restroom facilities based on gender identification.

EEOC

As noted in the OSHA publication, in April 2015, the Equal Employment Opportunity Commission (EEOC) ruled that a transgender 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. The EEOC held that such a denial of access constituted direct evidence of sex discrimination under Title VII.

The Equal Employment Opportunity Commission (EEOC) has also published information on EEOC Enforcement Protections for LGBT Workers.” In so doing, the EEOC acknowledged “Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases.” That being said, “consistent with case law from the Supreme Court and other courts,” the EEOC has interpreted Title VII’s “sex discrimination provision” as “prohibiting discrimination against employees on the basis of sexual orientation and gender identity.”

http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Title VII prohibits discrimination in the workplace. In the *Johnston* case described herein Title VII was not applicable because the alleged sex discrimination was unrelated to the workplace. Similarly, in this particular case, the Americans with Disabilities Act, requiring reasonable accommodations for disabled individuals would not be applicable because gender identity disorders are expressly excluded from the statutory and regulatory definition of “disability” under the ADA.

In *Johnston*, gender discrimination was alleged under Title IX. Title IX prohibits gender discrimination by federally funded educational institutions. In this particular instance, the federal district court found no basis for a claim of sex discrimination under Title IX. In so doing, the court applied the same reasoning described below to reject Johnston’s claim of sex discrimination in violation of the Equal Protection Clause. The reasoning of the federal district court in this particular case seems to be at odds with the guidance from OSHA and EEOC cited above. Specifically, in the absence of applicable federal law to the contrary, the federal court in *Johnston* found birth gender to be determinative, not gender identity for restroom and locker room access.

GENDER IDENTITY

In the case of *Johnston v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41823 (Dist.W.D. Penna. 3/31/2015), Plaintiff Seamus Johnston alleged the University of Pittsburgh at Johnstown (UPJ) “discriminated against him based on his sex and his transgender status by prohibiting him from using sex-segregated locker rooms and restrooms that were designated for men.”

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Johnston was born a female, but identifies as a transgender male. Although Johnston “was assigned the sex of female at birth,” he claimed he is “legally, socially, and medically recognized as a man.” Johnston stated he “understood his male gender identity at a very early age, informing his parents that he was a boy at age 9.”

In May 2009, Johnston transitioned to living in accordance with his male gender identity and began holding himself out as a male in all aspects of life. Beginning in 2009, as part of Johnston’s transition to living as a male, he “amended his identity documents and records to reflect his male gender identity.” In 2010, he obtained a common law name change to Seamus Johnston. In October 2011, he amended the gender marker to male on his Pennsylvania driver’s license. In July 2011, Johnston registered with the Selective Service. He amended the gender marker to male on his United States passport. In November 2013, Johnston amended the gender marker to male in his Social Security record.

Johnston attended the University of Pittsburgh at Johnstown (“UPJ” or “University”) as an undergraduate Computer Science major for five semesters from 2009 to 2011. When Johnston applied for admission to UPJ in March 2009, he listed his sex as “female” on his application form. However, when Johnston began attending classes at UPJ in August 2009, and at all times thereafter, he “consistently lived as male.” In August 2011, Johnston requested that UPJ change the gender marker to male in his school records.

MEN’S LOCKER ROOM

While enrolled as a student at UPJ, Johnston consistently used the men’s restrooms on campus. During the spring 2011 semester, he enrolled in a men’s weight training class, which was attended only by men. Johnston used the men’s locker room for the men’s weight training class throughout the spring 2011 semester. He again enrolled in a men’s weight training class for the fall 2011 semester, and again began using the men’s locker room. Johnston used the locker room approximately five times between the end of August and mid-September without incident.

On September 19, 2011, Johnston met with the executive director of health and wellness services at UPJ who informed Johnston that he could no longer use the men’s locker room. Instead, Johnston agreed to use a unisex locker room at the Sports Center normally reserved for referees.

On September 26, 2011, the UPJ vice president of student affairs, informed Johnston that “he would be allowed to use the men’s locker room if his student records were updated from female to male.” On September 29, 2011, the UPJ registrar informed Johnston that, in order to change the sex designation on his student records, he had to provide either a court order or a new birth certificate reflecting his current gender.

On October 19, 2011, Johnston registered a complaint with the university president to protest his exclusion from the men’s locker room. The university president responded by a letter dated October 21, 2011, confirming that, in order for Johnston to have access to the men’s locker room, he must officially change his gender in UPJ’s records by presenting a court order or birth certificate. In October 2011, Johnston began reusing the men’s locker room, using the locker room six times between October 24, 2011, and November 14, 2011, without incident.

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On November 16, 2011, the campus police issued a citation to Johnston for disorderly conduct because he used the men's locker room. Despite receiving this citation, Johnston continued to use the men's locker room. On November 21, 2011, Johnston received a second citation for disorderly conduct for using the men's locker room. During this confrontation, the campus police chief informed Johnston that, if he continued to use the men's locker room, he would be arrested and taken into custody.

On November 28, 2011, the coordinator for the office of student conduct and conflict resolution, issued an interim persona non grata (i.e., an unwelcome person) against Johnston, barring him from the Sports Center due to his continued use of the men's locker room. On November 28, 2011, Johnston again used the men's locker room, and campus police took him into custody and issued another disorderly conduct citation.

On December 2, 2011, at a disciplinary hearing, Johnston was found guilty of three charges resulting from alleged violations of the Student Code of Conduct, and was instructed that he was not to use any male locker rooms or restroom facilities on campus. On December 20, 2011, the coordinator for the office of student conduct and conflict resolution informed Johnston that, due to his use of the men's restrooms on December 7 and December 15, Johnston would be placed on interim disciplinary suspension and barred under an interim persona non grata from all UPJ property pending an adjudicatory hearing.

A disciplinary hearing was held on January 24, 2012, before a panel of students, who found Johnston guilty of exhibiting disorderly, lewd, or indecent behavior; failing to comply with lawful directions of a University official; and entering University facilities without authorization. As a result, Johnston was expelled from UPJ and prohibited from accessing all UPJ property.

EQUAL PROTECTION CLAIM

In response to these actions, Johnston filed a federal civil rights claim under 42 U.S.C. § 1983, alleging discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In his complaint, Johnston claimed the University, without justification, treated him “differently from other similarly situated students on the basis of sex, including his transgender status and perceived failure to conform to gender stereotypes.”

As described by the federal district court, 42 U.S.C. § 1983 “provides a remedy for the deprivation of a person's constitutional rights,” including Equal Protection under the Fourteenth Amendment.

To state a claim for relief under § 1983, a plaintiff must allege both the violation of a right secured by the Constitution or laws of the United States and that the alleged violation was committed by a person acting under color of state law.

In his federal civil rights claim, Johnston alleged the University “deprived him of his constitutional right to be free from discrimination on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment to the Constitution when they prohibited him from using

men's restrooms and locker rooms on the University's campus.”

As cited the federal district court, the Equal Protection Clause prohibits a State from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Moreover, to “state a claim for sex discrimination under the Equal Protection Clause pursuant to § 1983,” the court noted “a plaintiff must allege the existence of purposeful discrimination because of his sex.” Specifically, “to establish a gender discrimination claim under the Equal Protection Clause,” the court acknowledged that a plaintiff must allege the following:

- (1) disparate treatment in relation to other similarly situated individuals, and (2) that the discriminatory treatment was based on sex.

Within the context of the Equal Protection Clause, the court further found persons are similarly situated “when they are alike in all relevant aspects.” That being said, the court acknowledged the “Equal Protection Clause does not forbid classifications.” On the contrary, the court noted the Equal Protection Clause “simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.”

RATIONAL BASIS TEST

As described by the federal district court, “State action that does not burden a fundamental right [e.g. free speech] or target a suspect class [i.e. based on race, creed, color, religion or national origin] will be upheld if it bears a rational relation to some legitimate end.”

If state action does not burden a fundamental Constitutional right or target a suspect class, the challenged classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. On the other hand, gender-based discriminations must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives.

In his complaint, Johnston claimed a “constitutional right to be free from discrimination based on sex.” Specifically, Johnston alleged the University had “violated the Equal Protection Clause” by treating him “differently from other similarly situated students on the basis of his sex, including his transgender status and perceived failure to conform to gender stereotypes.” In so doing, Johnston claimed "non-transgender male students were permitted to use the men's locker room and restroom facilities on campus" while Johnston "was denied access to the men's locker rooms and restrooms." Johnston, however, conceded "transgender is not a suspect classification under the Equal Protection Clause.”

In response, the University argued Johnston had failed to state an Equal Protection Claim. In so doing, the University claimed it “had a rational basis in refusing to permit Plaintiff [Johnston] to use male locker rooms, showers, and bathrooms—namely, to protect the privacy rights of students” at the University. According to the University, “students have a constitutional right to privacy, which includes the right to disrobe and perform personal bodily functions out of the presence of members of the opposite biological sex.”

In the absence of a suspect class (i.e., race, creed, color religion or national origin) or a fundamental constitutional right (e.g. free speech, freedom of religion), the federal district court acknowledged “rational basis review” was the applicable judicial standard under the circumstances of this particular case. Accordingly, under rational basis review, the federal court would be required to uphold a challenged classification “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”

In considering this claim, the federal district court noted “society's views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years.”

[The] Court is mindful that the legal landscape is transforming as it relates to gender identify, sexual orientation, and similar issues, especially in the context of providing expanded legal rights. Within the context of these expanding rights and protections arises the profound question of self-identify, as exemplified by this case.

That being said, however, the court acknowledged “neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause.”

In reviewing Johnston’s discrimination claim, the federal district court would, therefore, apply the rational basis standard within the context of a “public university, whose mission is primarily pedagogical, but which is also tasked with providing safe and appropriate facilities for all of its students.”

BIRTH SEX

Accordingly, the federal district court had to determine “whether a university receiving federal funds [for Title IX purposes] unlawfully discriminates when it enforces the use of sex-segregated bathroom and locker room facilities based solely on a student's birth sex.”

Applying the rational basis test, the federal district court concluded “UPJ's policy of segregating its bathroom and locker room facilities on the basis of birth sex” was “substantially related to a sufficiently important government interest.” Specifically, the court found “UPJ explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex.”

Moreover, the court noted this particular “justification has been repeatedly upheld by courts.” Further, the court found discrimination on the basis of sex under these particular circumstances was permissible under the Constitution.

[S]eparating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause...

[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.

BIOLOGICAL SEX

In his complaint, Johnston had alleged the University's refusal to permit him access to facilities consistent with his male gender identity constituted sex discrimination against him as a male transgender individual. The federal district court disagreed.

As noted by the federal district court, "courts have defined the term 'sex' in the context of the Equal Protection Clause" as "the biological sex assigned to a person at birth." According to the court, "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." Accordingly, within the context of federal civil rights law, the court found the prohibition against sex discrimination "in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."

As a result, in the opinion of the court, federal civil rights law does "not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male." In other words, "a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."

The federal district court also noted that courts have "consistently upheld statutes where the gender classification is not invidious [i.e., discriminates unjustly], but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."

In this particular instance, the court noted that Johnston claimed in his complaint that he is a "male" while also admitting in his complaint that he "was assigned the sex of 'female' at birth." Further, the court found Johnston had not alleged that he had "undergone a sex change," specifically "any kind of sex reassignment surgery."

While Johnston might "identify his gender as male," the court found Johnston's "birth sex" was admittedly female. In the opinion of the federal district court, the fact that Johnston was "born a biological female" was "fatal" to his sex discrimination claim.

Regardless of how gender and gender identity are defined, the law recognizes certain distinctions between male and female on the basis of birth sex. Thus, even though Plaintiff is a transgender male, his sex is female, a fact alleged in Plaintiff's complaint and a fact that has legal significance in light of Plaintiff's discrimination claim.

Plaintiff alleges that he was assigned the sex of female at birth. To further this point, Plaintiff alleges that he did not become aware of his male gender identity

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until he was 9, and he did not start presenting as a male until sometime later, around the time he matriculated as a student at UPJ.

While Johnston had “held himself out as ‘male’ at all relevant times,” the federal district court also noted that Johnston had stated he was female when he applied to UPJ. Moreover, the court found Johnston had “failed to provide the school with requested documentation, consistent with UPJ's policy, to change the school records to reflect that his sex is male rather than female.”

In light of such facts, the federal district court determined that Johnston had “failed to allege that he was discriminated against because of his sex.” Having found Johnston had “failed to state a cognizable claim for relief under the Equal Protection Clause of the Fourteenth Amendment,” the federal district court dismissed Johnston’s complaint against the University.

SEE ALSO:

[Transsexual Advantage in Women’s Competition?](#)

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<http://cehdclass.gmu.edu/jkozlows/lawarts/08AUG09.pdf>

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