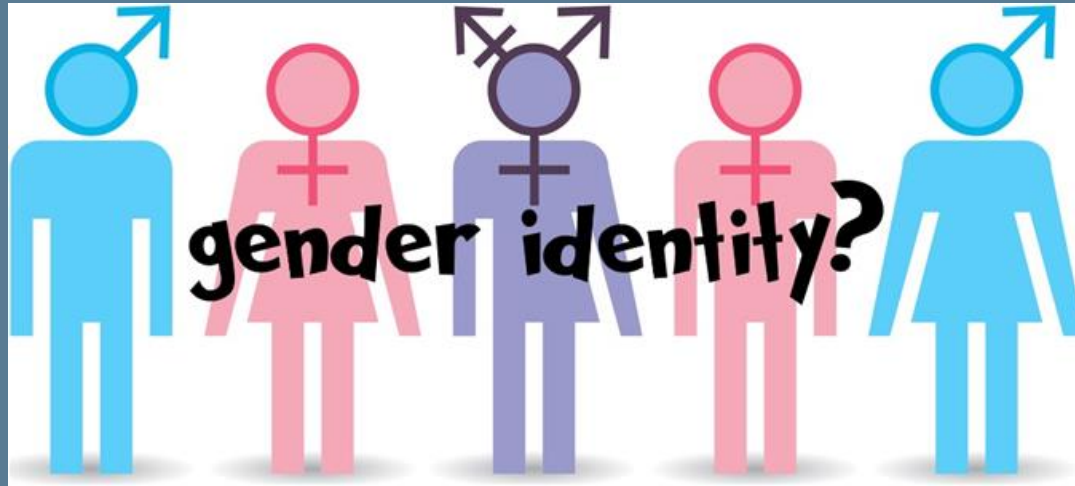


Transgender Issues



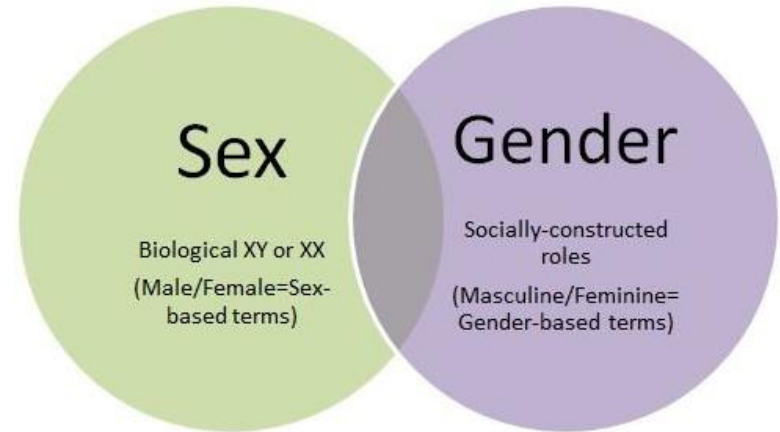
Helpful Definitions and Distinctions

- Gender Identity: how an individual perceives themselves and what they call themselves. This can be the same or different from their sex assigned at birth.
- Sex: Biological; assigned at birth.
 - Most current issues involve the definition of “sex” in Title VII and Title IX or other antidiscrimination laws.
- Gender Dysphoria: distress caused when a person’s assigned birth gender is not the same as the one with which they identify.
- Gender Expression: external appearance of one’s gender identity which may or may not conform to socially defined behavior and characteristics typically associated with being either masculine or feminine.
- Transgender: umbrella term for people whose gender identity/expression is different from cultural expectations based on the sex they were assigned at birth.

Source: <http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>

Federal Law Concerns

- Employment: Title VII
 - 42 U.S.C. § 2000e-2
 - * Prohibits discrimination based on “sex”
 - Nothing definitive yet about “gender identity”
- Education: Title IX
 - 20 U.S.C. § 1681
 - * Prohibits discrimination based on “sex”
 - Nothing definitive yet about “gender identity”
- In both cases, the major changes are likely to come from the definition of “sex.”
- Compare with many states that have amended or created legislation to specifically include “gender identity” in antidiscrimination laws.



Current Tenth Circuit Case Law

- *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007)
 - UTA Employee filed Title VII claim alleging she was fired for being transsexual and did not conform to defendants' expectations of stereotypical male behavior (similar to *Price Waterhouse*).
 - 10th Circuit held that transsexuals are not a protected class under Title VII.
 - “Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.” *Etsitty*, 502 F.3d at 1222.
 - * Discrimination based on gender identity is not discrimination under Title VII.
 - “Transsexuals may not claim protection under Title VII from discrimination based **solely** on their status as transsexual...such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.” *Etsitty*, 502 F.3d at 1222.

Price Waterhouse v. Hopkins Reasoning

- Female employee failed to make partner at accounting firm and sued the firm under Title VII.
- “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).
- *Price Waterhouse* has allowed many employees to successfully state a claim under Title VII for sex discrimination when they have been discriminated against for not living up to gender norms.

Reconciling *Price Waterhouse* and *Etsitty*

- Four Circuits have recognized that discrimination against a transgender individual based on the person's transgender status is discrimination “because of sex” under federal rights statutes.
 - *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of *Price Waterhouse*) (also a 1983 case).
 - *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (holding that a transgender employee had stated a claim under **Title VII** based on the reasoning of *Price Waterhouse*).
 - *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the **Equal Credit Opportunity Act** based on *Price Waterhouse*).
 - *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that a transgender individual could state a claim under the **Gender Motivated Violence Act** under the reasoning of *Price Waterhouse*) (also a 1983 case).

Utah Employment Law

- Title 3A, Chapter 5: Labor Code
- UCA 34A-5-106: Utah Antidiscrimination Act
 - Unlike Title VII, this specifically includes “gender identity” and not just “sex.”
 - This section enumerates seven actions or categories of actions an employer is prohibited from taking because of an employee’s race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; disability; sexual orientation; **or gender identity**.
 - These actions include:
 - Refuse to hire, promote, discharge, demote, terminate, retaliate against, harass, or discriminate;
 - Refuse to list and properly classify for employment, or refuse to refer an individual for employment, in a known available job for which the individual is otherwise qualified;
 - Exclude an individual otherwise qualified from full membership rights in a labor organization, expel the individual from the labor organization, or otherwise discriminate against or harass;
 - Print, circulate, inquire, or use a form of application for employment that directly expresses a limitation, specification or discrimination based on the above categories; or
 - Deny admittance to on-the-job-training, training, apprenticeship, etc.

Utah Employment Law

However, there are some allowances made for employers to implement certain standards so long as they make “reasonable accommodations” for transgender employees.

➤ UCA 34A-5-109

- “This chapter may not be interpreted to prohibit an employer from adopting **reasonable dress and grooming standards** not prohibited by other provisions of federal or state law, provided that the employer’s dress and grooming standards afford **reasonable accommodations** based on gender identity to all employees.” (emphasis added).

➤ UCA 34A-5-110

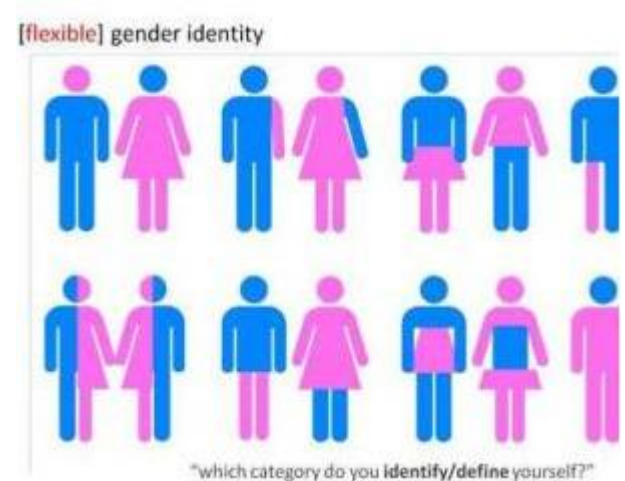
- “This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate **sex-specific facilities**, including restrooms, shower facilities, and dress facilities, provided that the employer’s rules and policies adopted under this section afford **reasonable accommodations** based on gender identity to all employees.” (emphasis added).

Utah Fair Housing Law

- Title 57, Chapter 21: Utah Fair Housing Act
- 57-21-6: Discriminatory housing practices
 - Gender identity is specifically included
 - Prohibits the following discrimination based on gender identity:
 - ❑ Availability of residential real-estate related transactions, or terms or conditions of the residential real estate-related transaction
 - ❑ Deny access to, membership or participation in, a multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings; or
 - ❑ Discriminate in the terms or conditions of access, membership, or participation in the organization, service, or facility.

Utah Law

- UCA 34A-5-102 (Labor Code) and 57-21-2 (Fair Housing)
 - “Gender identity” is defined in both Sections pursuant to the Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association
 - Gender identity can be shown by providing evidence of medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person’s core identity, and not being asserted for an improper purpose.



Hot Issue: Bathroom Accommodations

- North Carolina Law
 - March 24, 2016: Bill blocking cities from allowing transgender individuals to use public bathrooms for the sex they identify as, as well as restricting cities from passing nondiscrimination laws more broadly. (House Bill 2, Public Facilities Privacy & Security Act)
 - Justice Department sent letters to NC's governor and university system notifying them that law violates Civil Rights Act.
 - Justice Department filed a civil rights lawsuit over bill; North Carolina filed suit saying department trying to rewrite national law



Bathroom Accommodations: What do Utahns think?

- According to a recent poll, a majority of Utahns oppose making accommodations in public bathrooms for transgender people.
 - 57% of residents are against people having the right to use public bathrooms based on their gender identity
 - 48% say they are strongly opposed
 - 34% support bathroom accommodations
 - 9% are undecided

Source: <https://ksl.com/?sid=40528382>

Bathroom Accommodations: Case to Watch

- *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016)
- This case is likely to have big impacts on this issue. There was no real determination whether Title IX applies. The Fourth Circuit only stated that claim should not have been dismissed—it is likely going to get appealed no matter what the decision on remand.
 - Gloucester County School Board recently asked the Supreme Court to block the boy from using the boys' restroom when school starts until the Court decides whether to review the case. The Fourth Circuit had rejected the school board's request for the injunction.
 - On 08/3/16, the Supreme Court stayed the Fourth Circuit's order and granted the injunction of the school board. The boy will not be able to use the boys' bathroom when school resumes on September 6, 2016.
 - The Supreme's Court's ruling on the school board's petition for review of the Fourth Circuit's April 2016 decision is due on August 29, 2016.

Directive from President Obama 5/13/16

- Non-binding law but encourages accommodations based on gender identity
 - “[M]ust allow transgender students access to such facilities [restrooms and locker rooms] consistent with their gender identity.”
 - “A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.”
 - Other explicit allowances:
 - Athletics:
 - NCAA policy: Male To Female (MTF): one calendar year of testosterone suppression treatment
 - Single-sex classes
 - Housing and Overnight accommodations
 - Update education records to reflect gender identity and new name

Source: <https://www.justice.gov/opa/file/850986/download>

Directive from President Obama 5/13/16 Continued...

Utah State Board of Education's Response

- 05/16/16: “State Board is not providing a directive on this topic to [local education agencies] and does not necessarily expect a change in current practices or behavior. We anticipate you will continue accommodating the needs of individual students according to your local policies and procedures...The State Board believes local schools are best equipped to meet the needs of students with sensitivity and timeliness.”
- 3 members of the Alpine School Board wrote a letter to state leaders
 - Called the directive “morally reprehensible” and is considering rejecting \$40 million in federal funding in its next budget.

Source: <http://schoolboard.utah.gov/news/response-to-u-s-department-of-education-and-justice-release-of-joint-guidance-to-ensure-the-civic-rights-of-transgender-students>

Directive from President Obama 5/13/16 Continued...

Response of Utah Legislature:

- A hearing will be conducted looking at how schools and transgender students will be affected by President Obama's Directive. A committee will look at the effect on transgender students and issues they face such as bullying or violence. No hearing date has been set yet.

Lawsuit opposing Obama Directive

- *State of Texas, et al. v. United States of America, et al.*, 7:16-CV-00054, filed May 25, 2016, N.D. Tex. (Utah is a party.)
 - “...Believe that the solemn duty of the executive branch is to enforce the law of the land, and not rewrite it by administrative fiat.”
 - “Defendants’ rewriting of Title VII and Title IX is wholly incompatible with Congressional text.”
 - Should “sex” be redefined? Arguing that should not include “gender identity”
 - Potential for loss of federal funding if not compliant

Potential Changes/Trends

- California settled a recent court case and agreed to pay for a prisoner's sex reassignment surgery.
 - *Quine v. Beard*, 14-cv-02726 (N.D. Cal. 2015)
 - *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015)

Recommendations

➤ Bathroom Use

- What should you do?
 - If you want to avoid litigation:
 - * Allow/create policy similar to President Obama's Directive that allows for an individual to use the bathroom associated with their gender identity.
 - If you do not want to avoid litigation:
 - * Expect a long and expensive legal battle.

➤ Employment

- What should you do?
 - If you want to avoid litigation:
 - * Implement policies that provide for accommodations for transgender employees. Recognize that in the state context, employment discrimination based on gender identity is actionable. Be cautious and instruct employees regarding discrimination as you would for issues based on race, age, national origin, etc.
 - If you do not want to avoid litigation:
 - * Expect a long and expensive legal battle.