

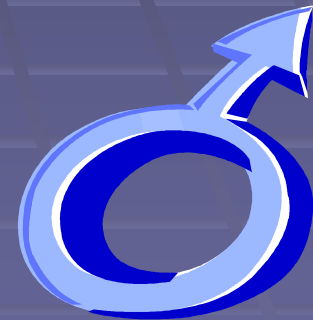
EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX:

Gender, Transgender, Sexual
Orientation and Appearance
Issues

Scott M. Abbott

The Birds and the Bees

- Sex:
 - Distinguishing biological or anatomical characteristics
- Gender:
 - One's sexual identity as a social or cultural construct (i.e., behavior, dress)



The Birds and the Bees

- Transgendered individuals:
 - Transsexuals
 - Transvestites
 - Androgynes

Transsexuals

- Those who live, or desire to live, in the gender role opposite from the one in which they were born
- Transition: Process by which one changes from one sex to another (physical, legal, behavioral)
- Living as the desired gender for an extended period of time

Transvestites

- Also known as cross-dressers
- Usually heterosexual men
- No desire to assume opposite gender



Androgynes

- Neither masculine or feminine in gender presentation



Distinctions

Gender Identity:

- How individuals view themselves in a certain gender role
- Transsexuals view themselves as member of opposite gender

Sexual Orientation:

- Orientation refers to one's sexual attraction to others
- Heterosexual, homosexual, or bisexual

Gender-Based Discrimination

- Price Waterhouse v. Hopkins (1989):
 - Failure to conform to gender stereotype
 - “Macho” female
 - Need for “charm school”
 - Act more feminine:
 - Makeup
 - Jewelry
 - Hairstyling

More Recently . . .

- Nichols v. Azteca Restaurant Enterprises (2001):
 - Failure to conform to masculine stereotype
 - Referred to as “her” and “she” by others
 - Mocked for carrying tray “like a woman”

Lessons Learned

- Failure to conform to particular gender stereotype is actionable as sex discrimination under Title VII
- Related teasing/mockery can also create sexually hostile work environment



Sexual stereotyping: Who decides?



NEW CASE: EEOC v. NEA (9th Cir. 9/2/05)

- Can offensive conduct that is not sex-specific violate Title VII?
- Allegations: shouting at female employees in loud, profane manner
- Physical conduct: standing/watching, shaking fist, grabbing shoulders
- Female employees intimidated
- Men subjected to similar behavior

Equal Opportunity “Offenders”

- Is this a viable defense?
 - NO
- Inquiry: Did the behavior affect women more adversely than men?
- “We now hold that evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently”

Sexual Orientation

- Discrimination not expressly prohibited under Title VII
- Prohibited under Nevada law (and that of 10 other states plus D.C.)
- Both actual and perceived orientation protected (homosexuality, heterosexuality, bisexuality)

The Legal Underpinnings

- Supreme Court:
 - Oncale v. Sundowner Offshore Services (1998)
- Ninth Circuit:
 - Rene v. MGM Grand Hotel, Inc. (2002)



Transgender Issues

- Protected by federal law?
 - Title VII?
 - ADA?
- State Law?
 - Only 5 states have specific legislation
 - California permits employees to appear and dress consistent with their “gender identity”

The Biggest Issue:

- Which restroom should a transgender employee use?



The Restroom Dilemma

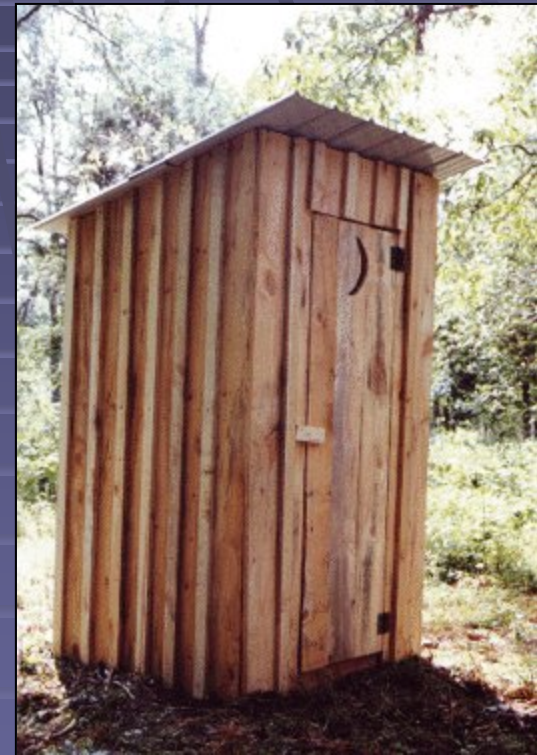
- The American Airlines policy
 - “An employee should use the facility based on his/her current gender”
- The SHRM Approach
 - Restroom use should be consistent with gender presentation . . . “should not depend on genitalia”

Competing Wisdom

- Both philosophies are aggressive in their own right
- American Airlines' policy reflects awareness of potential discomfort by other employees
- SHRM's approach is to focus on the employee (avoid awkwardness, humiliation and potential violence)

Single-occupancy restrooms

- A viable alternative?
- What if the employee refuses?
- A potential “separate but equal” theory for litigation?



Appearance Standards

- Traditionally, employers have been free to discriminate against the unattractive
- Studies show that good-looking people fare better the workplace
- Some nations (France) have outlawed discrimination based on physical appearance



Appearance as Sex Discrimination

- Flight attendant cases:
 - Possible BFOQ?
 - Customer preferences?
 - Weight standards?



Jespersen v. Harrah's (2004)

- “Personal Best Program”
- Females required to wear makeup, stockings, colored nail polish, hair “styled”
- Males required to have short haircuts, trimmed fingernails, no makeup
- Plaintiff refused to comply with makeup requirement -- terminated



Jespersen

- Different appearance standards for different genders not *per se* unlawful
- Standards must not impose greater burden on one sex than the other
- Evaluate and compare the **total** burden
- Failure to conform to feminine stereotype argument rejected by Ninth Circuit

GET ME SOMEBODY

HOT

Employer Preferences

Yanowitz v. L'Oreal USA (2003)

- Plaintiff fired for refusing male boss's directive to "get me somebody hot" by replacing female sales associate
- Boss pointed to attractive blonde and said, "God damn it, get me one that looks like that"
- Plaintiff's retaliation claim dismissed

L'Oreal – The Appeal (8/11/05)

- On appeal, California Supreme Court reversed
- Analysis: Read too much into boss's direction (no evidence of sexual desire)
- Court itself engaged in stereotyping by assuming that a male associate's appearance would not have been an issue

ADA-based claims

- Is it a disability?
 - Facial disfigurement
 - Obesity
- The EEOC's take:
 - “The opportunity to make a living . . . Is not restricted to models and movie stars but is the promise held out to every person with talent, skills and ambition”

Dress and Grooming Standards

- Employers remain free to impose such policies
- OK to mandate different standards for each gender (but not more burdensome)
- Greater latitude to regulate appearance in public contact positions

Should Unattractiveness Become a Protected Class?

- What is the criteria?
- Eye of the beholder standard?
 - By whom (employers, EEOC, juries)
- Bizarre possibilities:
 - “She’s not ugly enough to be protected”
 - “Oh yes I am”

Issues to Ponder

- Most employers do not make employment decisions merely based on looks
- Employers have right to expect their customer or public contact employees to adhere to certain standards of dress, grooming and presentation
- Civil rights protections should not be extended based on vague criteria

Thank You