

APPENDIX

Fair and Just Prosecution, *Joint Statement from Elected Prosecutors and Law Enforcement Leaders Condemning the Criminalization of Transgender People and Gender-Affirming Healthcare* (June 2021)

U.S. Equal Employment Opportunity Commission, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021)

*Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015)



## JOINT STATEMENT FROM ELECTED PROSECUTORS AND LAW ENFORCEMENT LEADERS CONDEMNING THE CRIMINALIZATION OF TRANSGENDER PEOPLE AND GENDER-AFFIRMING HEALTHCARE

June 2021

As elected prosecutors and law enforcement leaders, we condemn the ongoing efforts to criminalize transgender people and gender-affirming healthcare across the country. These blatantly unconstitutional attacks on some of the most vulnerable Americans will deeply harm public safety. We call on policymakers to cease this extraordinary overreach and leave healthcare decisions to patients, families, and medical providers, and we pledge to use our discretion and not promote the criminalization of gender-affirming healthcare or transgender people.

As criminal justice leaders, we are responsible for pursuing justice for *all* members of our communities. Unfortunately, the full and equal protection of the law has consistently been denied to transgender people living in this country. Transgender individuals endure unconscionably high rates of violent victimization.<sup>1</sup> However, rather than fighting for their protection the criminal legal system has painted their very existence as a threat, often criminalizing trans survivors of violence rather than protecting them. As a result, transgender people, while disproportionately likely to be victims of or witnesses to serious crime, too often receive inadequate assistance from police and prosecutors or face further victimization at their hands.<sup>2</sup> These failings are both a moral travesty and an obstacle in our collective efforts to prevent crime, build public trust, and promote community well-being.

Rather than working to remedy these harms, many state legislatures have instead intensified their efforts to isolate, discriminate against, and criminalize transgender people. In fact, in just the first half of this year, state legislators have introduced a record-breaking number of bills targeting the transgender community.<sup>3</sup> Since the beginning of 2021, at least 105 bills that discriminate against transgender people have been proposed in 34 states, and 10 have been signed into law<sup>4</sup> — a significant increase from the 2020 legislative session, during which 52 such proposals were introduced in legislatures around the country.<sup>5</sup>

---

<sup>1</sup> Andrew R. Flores et. al., Gender Identity Disparities in Criminal Victimization, UCLA School of Law Williams Institute, March 2021 *available at* <https://williamsinstitute.law.ucla.edu/publications/nevs-trans-victimization/>.

<sup>2</sup> National Center for Transgender Equality, Failing to Protect and Serve: Police Department Policies Towards Transgender People, May 7, 2019, *available at* <https://transequality.org/issues/resources/failing-to-protect-and-serve-police-department-policies-towards-transgender-people>.

<sup>3</sup> Wyatt Ronan, Breaking: 2021 Becomes Record Year For Anti-Transgender Legislation, Human Rights Campaign, March 13, 2021, *available at* <https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation>.

<sup>4</sup> American Civil Liberties Union, Legislation Affecting LGBT Rights Across the Country, 2021 *available at* <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country>.

<sup>5</sup> American Civil Liberties Union, [Past Legislation Affecting LGBT Rights Across the Country](https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020), 2020 *available at* <https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020>.

Among these concerning restrictions are bills that aim to block trans youth from receiving life-saving gender-affirming healthcare. So far this year, 20 state legislatures have considered a total of 29 proposals that would prevent many trans youth from receiving this essential medical care. The ongoing discrimination and hostility that trans youth face has already had a grim impact: in 2020, a national survey found that *over half* of trans and non-binary youth seriously considered suicide.<sup>6</sup> Research has firmly established that access to gender-affirming healthcare not only reduces the risk of suicide in youth<sup>7</sup>, it significantly reduces their lifetime risk of suicidal ideation.<sup>8</sup> Accordingly, a slate of medical organizations — including the American Medical Association, American Academy of Pediatrics, and Endocrine Society — all agree that access to gender-affirming care is crucial in maintaining the health of trans youth.<sup>9</sup> And yet, these dangerous bills will not only restrict the ability of healthcare providers to administer life-saving gender-affirming care, some will criminalize parents who allow their trans children to receive medically recommended treatments.

Additionally for several years, anti-trans legislators have worked to pass laws that prohibit trans people from using single-sex facilities — mainly restrooms — that align with their gender identity. Six such bills have been introduced in two states during the 2021 legislative session. Their goal is clear: to reinforce stigmatizing falsehoods that trans people pose a public safety threat and to prevent trans people from freely living, working, and traveling in these communities. These bills have no legitimate public safety justification and will only increase harassment and violence against trans people forced to use facilities that do not align with their gender identity.<sup>10</sup>

Prosecutors are trusted with immense discretion to decide how best to promote the interests of justice. We have been elected to run offices funded by taxpayers and to represent the people in court. And both chief prosecutors and law enforcement leaders have an obligation to ensure we

---

<sup>6</sup> The Trevor Project, National Survey on LGBTQ Youth Mental Health 2020, *available at* <https://www.thetrevorproject.org/survey-2020/?section=Introduction>.

<sup>7</sup> The Trevor Project, Research Brief: Gender-Affirming Care for Youth, Jan. 2020, *available at* <https://www.thetrevorproject.org/2020/01/29/research-brief-gender-affirming-care-for-youth/>.

<sup>8</sup> Tim Fitzsimmons, Puberty blockers linked to lower suicide risk for transgender people, NBC News, Jan. 2020, *available at* <https://www.nbcnews.com/feature/nbc-out/puberty-blockers-linked-lower-suicide-risk-transgender-people-n112210>.

<sup>9</sup> American Medical Association, AMA to states: Stop interfering in health care of transgender children, April 26, 2021, *available at*

<https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children>;

American Academy of Pediatrics, Pediatricians say state bills would harm transgender youths, March 9, 2021, *available at* <https://www.aappublications.org/news/2021/03/09/transgender-legislation-030921>; Endocrine Society, Endocrine Society opposes legislative efforts to prevent access to medical care for transgender youth, April 15, 2021, *available at*

<https://www.endocrine.org/news-and-advocacy/news-room/2021/endocrine-society-condemns-efforts-to-block-access-to-medical-care-for-transgender-youth#:~:text=The%20Endocrine%20Society%20opposes%20legislative.accessin,g%20gender%2Daffirming%20medical%20care.&text=The%20proposals%20reflect%20widespread%20misinformation,of%20gender%2Daffirming%20medical%20care>; Alexander Chen, Gender-Affirming Care Doesn't Just Help Trans Youth Survive. It Allows Them to Flourish., Slate, April 7, 2021, *available at* <https://slate.com/human-interest/2021/04/anti-trans-bills-youth-gender-affirming-care-survive-flourish.html>.

<sup>10</sup> Stevie Borrello, Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth,' ABC News, April 22, 2016, *available at* <https://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019>.

are directing our offices' and departments' limited resources to pursuits that advance fairness and justice for *all* members of our communities. Bills that criminalize safe and crucial medical treatments or the mere public existence of trans people do not promote public safety, community trust, or fiscal responsibility. They serve no legitimate purpose. As such, we pledge to use our settled discretion and limited resources on enforcement of laws that will not erode the safety and well-being of our community. And we do not support the use of scarce criminal justice and law enforcement resources on criminalization of doctors who offer medically necessary, safe gender-affirming care to trans youth, parents who safeguard their child's health and wellbeing by seeking out such treatments, or any individuals who use facilities aligned with their gender identity.

We are committed to ending this deeply disturbing and destructive criminalization of gender-affirming healthcare and transgender people. And we urge other policymakers to join us in standing up and standing together on this important issue.

Respectfully,

**Diana Becton**

District Attorney, Contra Costa County, California

**Wesley Bell**

Prosecuting Attorney, St. Louis County, Missouri

**Buta Biberaj**

Commonwealth's Attorney, Loudoun County, Virginia

**Richard Biehl**

Chief, Dayton Police Department, Ohio

**Sherry Boston**

District Attorney, DeKalb County, Georgia

**Chesa Boudin**

District Attorney, City and County of San Francisco, California

**RaShall M. Brackney, Ph.D.**

Chief, Charlottesville Police Department, Virginia

**Aisha Braveboy**

State's Attorney, Prince George's County, Maryland

**John Choi**

County Attorney, Ramsey County, Minnesota

**Jerry L. Clayton**  
Sheriff, Washtenaw County (Ann Arbor), Michigan

**Shameca Collins**  
District Attorney, 6<sup>th</sup> Judicial District, Mississippi

**John Creuzot**  
District Attorney, Dallas County, Texas

**Satana Deberry**  
District Attorney, Durham County, North Carolina

**Parisa Dehghani-Tafti**  
Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

**Steve Descano**  
Commonwealth's Attorney, Fairfax County, Virginia

**Thomas J. Donovan, Jr.**  
Attorney General, Vermont

**Michael Dougherty**  
District Attorney, 20<sup>th</sup> Judicial District (Boulder), Colorado

**Mark Dupree**  
District Attorney, Wyandotte County (Kansas City), Kansas

**Matt Ellis**  
District Attorney, Wasco County, Oregon

**Keith Ellison**  
Attorney General, Minnesota

**Kim Foxx**  
State's Attorney, Cook County (Chicago), Illinois

**Kimberly Gardner**  
Circuit Attorney, City of St. Louis, Missouri

**José Garza**  
District Attorney, Travis County (Austin), Texas

**George Gascón**

District Attorney, Los Angeles County, California  
Former District Attorney, City and County of San Francisco, California  
Former Chief, San Francisco Police Department, California  
Former Chief, Mesa Police Department, Arizona

**Sarah F. George**

State's Attorney, Chittenden County, Vermont

**Sim Gill**

District Attorney, Salt Lake City, Utah

**Joe Gonzales**

District Attorney, Bexar County (San Antonio), Texas

**Deborah Gonzalez**

District Attorney, Western Judicial Circuit (Athens), Georgia

**Eric Gonzalez**

District Attorney, Kings County (Brooklyn), New York

**Mark Gonzalez**

District Attorney, Nueces County (Corpus Christi), Texas

**Andrea Harrington**

District Attorney, Berkshire County, Massachusetts

**Mark Herring**

Attorney General, Commonwealth of Virginia

**Jim Hingeley**

Commonwealth's Attorney, Albemarle County, Virginia

**John Hummel**

District Attorney, Deschutes County, Oregon

**Natasha Irving**

District Attorney, 6<sup>th</sup> Prosecutorial District, Maine

**Letitia James**

Attorney General, New York

**Kathy Jennings**

Attorney General, Delaware

**Zach Klein**

City Attorney, Columbus, Ohio

**Justin F. Kollar**

Prosecuting Attorney, County of Kaua'i, Hawaii

**Lawrence S. Krasner**

District Attorney, Philadelphia, Pennsylvania

**Brian S. Mason**

District Attorney, 17<sup>th</sup> Judicial District, Colorado

**Beth McCann**

District Attorney, 2<sup>nd</sup> Judicial District (Denver), Colorado

**Ryan Mears**

Prosecuting Attorney, Marion County (Indianapolis), Indiana

**Spencer Merriweather**

District Attorney, Mecklenburg County (Charlotte), North Carolina

**Marilyn Mosby**

State's Attorney, Baltimore City, Maryland

**Jody Owens**

District Attorney, Hinds County (Raymond and Jackson), Mississippi

**Alonzo Payne**

District Attorney, 12<sup>th</sup> Judicial District (San Luis), Colorado

**Joseph Platania**

Commonwealth's Attorney, City of Charlottesville, Virginia

**Bryan Porter**

Commonwealth's Attorney, City of Alexandria, Virginia

**Abdul Pridgen**

Chief, Seaside Police Department, California

**Karl A. Racine**

Attorney General, District of Columbia

**Kwame Raoul**

Attorney General, State of Illinois

**Rachael Rollins**

District Attorney, Suffolk County (Boston), Massachusetts

**Jeff Rosen**

District Attorney, Santa Clara County, California

**Ellen Rosenblum**

Attorney General, Oregon

**Marian Ryan**

District Attorney, Middlesex County, Massachusetts

**Tori Verber Salazar**

District Attorney, San Joaquin County (Stockton), California

**Dan Satterberg**

Prosecuting Attorney, King County (Seattle), Washington

**Eli Savit**

Prosecuting Attorney, Washtenaw County (Ann Arbor), Michigan

**Mike Schmidt**

District Attorney, Multnomah County (Portland), Oregon

**Daniella Shorter**

District Attorney, 22<sup>nd</sup> Judicial District, Mississippi

**Carol Siemon**

Prosecuting Attorney, Ingham County (Lansing), Michigan

**David Soares**

District Attorney, Albany County, New York

**David Sullivan**

District Attorney, Northwestern District, Massachusetts

**Shannon Taylor**

Commonwealth's Attorney, Henrico County, Virginia

**Raúl Torrez**

District Attorney, Bernalillo County (Albuquerque), New Mexico

**Gregory Underwood**

Commonwealth's Attorney, City of Norfolk, Virginia

**Matthew Van Houten**

District Attorney, Tompkins County (Ithaca), New York

**Cyrus R. Vance**

District Attorney, New York County (Manhattan), New York

**Andrew Warren**

State Attorney, 13<sup>th</sup> Judicial Circuit (Tampa), Florida

**Todd Williams**

District Attorney, Buncombe County (Asheville), North Carolina

**Monique H. Worrell**

State Attorney, 9<sup>th</sup> Judicial Circuit, Florida

**Organizations**

**Law Enforcement Action Partnership**

**National Organization of Black Law Enforcement Executives**





U.S. Equal Employment Opportunity Commission

# Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

**OLC Control Number:**

NVTA-2021-1

**Concise Display Name:**

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

**Issue Date:**

06-15-2021

**General Topics:**

Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, Retaliation

**Summary:**

This document briefly explains the Supreme Court's decision in *Bostock v. Clayton County* and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues

**Citation:**

Title VII

**Document Applicant:**

Applicants for employment, employees, employers covered by Title VII; related representatives and practitioners

**Previous Revision:**

No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*,<sup>[1]</sup> ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn1](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn1)) which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

This fact sheet briefly explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country. It also explains the Equal Employment Opportunity Commission's (EEOC or Commission) established

legal positions on LGBTQ+-related matters, as voted by the Commission. Before *Bostock*, the Commission decided an array of matters involving employment discrimination based on sexual orientation and gender identity. For example, the EEOC has authority under Title VII to decide employment discrimination appeals by employees of the federal government and, in 2012, decided that discrimination against an applicant for federal employment based on gender identity is discrimination based on sex.[2] ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn2](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn2)) In 2015, in a federal sector matter involving a decision not to permanently hire an individual, the Commission decided that sexual orientation discrimination states a claim of sex discrimination under Title VII.[3] ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn3](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn3)) More recently, the Commission also applied the *Bostock* decision in the federal sector.[4] ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn4](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn4))

This information is not new policy. This publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law.

### **1. What happened in the *Bostock* case?**

The *Bostock* case involved a trio of cases alleging discrimination against LGBTQ+ workers, which the Supreme Court decided together in a single opinion. Gerald Bostock, a child welfare services coordinator, was fired after his employer learned he had joined a gay softball league. Donald Zarda, a skydiving instructor, was fired after his employer learned he was gay. In a case filed by the EEOC, funeral director Aimee Stephens was fired after her employer learned that she was going to transition from male to female. In deciding these cases, the Supreme Court held that employment discrimination based on sexual orientation (Bostock and Zarda) or transgender status (Aimee Stephens) is discrimination “because of sex,” and is therefore unlawful under Title VII.

The Supreme Court in *Bostock* recognized that to discriminate against a person based on sexual orientation or transgender status is to discriminate against that individual based on sex. Therefore, the Supreme Court held that Title VII makes it unlawful for a covered employer to take an employee’s sexual orientation or

transgender status into account in making employment-related decisions. The Court explicitly reserved some issues for future cases.

## **2. Does Title VII protect all workers?**

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees, if their employer has 15 or more employees. Employers with fewer than 15 total employees are not covered by Title VII.

Title VII protects employees regardless of citizenship or immigration status, in every state, the District of Columbia, and the United States territories.

Title VII generally does not apply to individuals who are found to be independent contractors. Figuring out whether someone is an employee or an independent contractor is a fact-specific inquiry. To find out more, see the EEOC's guidance on **Threshold Issues** (<https://www.eeoc.gov/laws/guidance/section-2-threshold-issues>).

## **3. Does Title VII apply to all employers?**

Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.

Title VII does not apply to Tribal nations. However, private employers with 15 or more employees are covered by the statute, even if they operate on a Tribal reservation.

Title VII allows “religious organizations” and “religious educational institutions” (those organizations whose purpose and character are primarily religious) to hire and employ people who share their own religion (in other words, it is not unlawful religious discrimination for a qualifying employer to limit hiring in this way). Courts also apply a “ministerial exception” that bars certain employment discrimination claims by the employees of religious institutions because those employees perform vital religious duties at the core of the mission of the religious institution. Courts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws. For more information on those defenses and other issues related to religious organizations

and discrimination based on religion, see **EEOC Compliance Manual, Section 12: Religious Discrimination** (<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>).

Other defenses might also be available to employers depending on the facts of a particular case.

#### **4. Does Title VII protect employees who work in places where state or local law does not prohibit employment discrimination based on sexual orientation or gender identity?**

Yes. As a federal law, Title VII applies nationwide and protects employees from discrimination based on sexual orientation or gender identity regardless of state or local laws.

#### **5. What kind of discriminatory employment actions does Title VII prohibit?**

Title VII includes a broad range of protections. Among other things, under Title VII employers cannot discriminate against individuals based on sexual orientation or gender identity with respect to:

- hiring
- firing, furloughs, or reductions in force
- promotions
- demotions
- discipline
- training
- work assignments
- pay, overtime, or other compensation
- fringe benefits
- other terms, conditions, and privileges of employment.

Discrimination also includes severe or pervasive harassment. It is unlawful for an employer to create or tolerate such harassment based on sexual orientation or gender identity. Further, if an employee reports such harassment by a customer or client, the employer must take steps to stop the harassment and prevent it from happening again. For more information, visit the EEOC's harassment page at <https://www.eeoc.gov/harassment> (<https://www.eeoc.gov/harassment>).

## **6. Are non-LGBTQ+ job applicants and employees also protected against sexual orientation and gender identity discrimination?**

Yes—employers are not allowed to discriminate against job applicants or employees because the applicants or employees are, for example, straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth). Title VII prohibits harassment and other forms of discrimination based on sexual orientation or gender identity.

## **7. Could an employer's discriminatory action be justified by customer or client preferences?**

No. As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

## **8. Is an employer allowed to discriminate against an employee because the employer believes the employee acts or appears in ways that do not conform to stereotypes about the way men or women are expected to behave?**

No. Whether or not an employer knows an employee's sexual orientation or gender identity, employers are not allowed to discriminate against an employee because that employee does not conform to a sex-based stereotype about feminine or masculine behavior. For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

## **9. May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?**

No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.<sup>[5]</sup>

**([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn5](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn5))**

## **10. Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?**

Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.<sup>[6]</sup> ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn6](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn6)) In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

## **11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?**

Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*,<sup>[7]</sup> ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_edn7](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn7)) the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

## **12. If a job applicant's or an employee's Title VII rights have been violated, what can the applicant or employee do?**

For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for help in deciding what to do next. If the individual decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation to determine if applicable Equal Employment Opportunity (EEO) laws have been violated. Because an individual must file an EEOC charge within 180 days of the alleged violation in order to take

further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early.

For more information about filing a charge, visit <https://www.eeoc.gov/how-file-charge-employment-discrimination> (<https://www.eeoc.gov/how-file-charge-employment-discrimination>). To begin the process of filing a charge of discrimination against a private company or a state or local government employer, go to the EEOC Online Public Portal at <https://publicportal.eeoc.gov> (<https://publicportal.eeoc.gov/>) or visit your local EEOC office (see <https://www.eeoc.gov/field-office> (<https://www.eeoc.gov/field-office>)) for contact information). For general information, visit the EEOC website at <https://www.eeoc.gov> (<https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity>), or call 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces regulations that prohibit certain federal contractors from engaging in employment discrimination based on sexual orientation and gender identity, under Executive Order 11246, as amended. Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than \$10,000. For more information, see <https://www.dol.gov/agencies/ofccp/faqs/lgbt> (<https://www.dol.gov/agencies/ofccp/faqs/lgbt>) and <https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2> (<https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2>).

For applicants and employees of the federal government, the process for seeking legal redress for Title VII violations is different than the process that individuals in the private sector and state and local governments must use. Federal applicants and employees must first contact the EEO Office at the specific federal agency that they believe committed the unlawful employment discrimination. In general, federal applicants and employees must start this federal sector EEO process by contacting the relevant federal agency's EEO office to request EEO counseling. *Most federal agencies list contact information for their internal EEO offices on their external agency website.*

A federal applicant or employee generally must request EEO counseling from the appropriate agency **within 45 calendar days of the date of the incident(s) the**

**employee or applicant believes to be discriminatory. Failure to adhere to this time limitation could result in an individual forfeiting legal rights and remedies that otherwise would be available. Nevertheless, if a federal applicant or employee alleges that they were subjected to a hostile work environment, and at least one incident occurred within 45 calendar days of contacting an EEO counselor, then incidents occurring outside of the 45-calendar day window may still be considered for investigation.**

Federal applicants and employees can also find out more information on the federal sector process for alleging employment discrimination on the EEOC's website **[here](https://www.eeoc.gov/federal-sector/federal-employees-job-applicants)** (**<https://www.eeoc.gov/federal-sector/federal-employees-job-applicants>**).

Other processes may be available for federal applicants and employees seeking relief for sexual orientation or gender identity discrimination, including filing grievances under applicable collective bargaining agreements and/or filing a prohibited personnel practice complaint under the Civil Service Reform Act of 1978 with the **[U.S. Office of Special Counsel](http://www.osc.gov/)** (**<http://www.osc.gov/>**).

### **13. If I contact the EEOC or file a charge or complaint of discrimination, could I be fired?**

It is unlawful for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment discrimination that the employee reasonably believed was unlawful;
- filing an EEOC charge or complaint;
- or participating in any investigation, hearing, or other proceeding connected to Title VII enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from making or supporting a charge of discrimination. To learn more about retaliation, see **<https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>** (**<https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>**).

**[1]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref1](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref1)) 590 U.S. \_\_\_\_, 140 S. Ct. 1731 (2020).

**[2]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref2](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref2)) In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), a Commission-voted decision involving an applicant for federal employment, the EEOC determined that transgender discrimination, including discrimination because an employee does not conform to gender norms or stereotypes, is sex discrimination in violation of Title VII based on a plain interpretation of the statutory language prohibiting discrimination because of sex. Specifically, the Commission explained that discrimination based on an employee's gender identity is sex discrimination "regardless of whether an employer discriminates against an employee [for expressing the employee's] gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."

**[3]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref3](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref3)) In *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), a Commission-voted decision involving a failure to permanently hire an individual as an air traffic controller, the Commission concluded that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

**[4]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref4](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref4)) See *Bart M. v. Dep't of the Interior*, EEOC Appeal No. 0120160543 (Jan. 14, 2021).

**[5]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref5](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref5)) See *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

**[6]** ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref6](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref6)) See *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer

denies an employee equal access to a common restroom corresponding to the employee's gender identity).

**[7] ([https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#\\_ednref7](https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref7)) *Id.***



EEOC DOC 0120133395 (E.E.O.C.), 2015 WL 1607756

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

TAMARA LUSARDI, COMPLAINANT,

v.

JOHN M. MCHUGH, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY.

Appeal No. 0120133395

Agency No. ARREDSTON11SEP05574

April 1, 2015

### DECISION

\*1 On September 23, 2013, Complainant filed an appeal from the Agency's September 5, 2013, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e et seq.](#) The Commission accepts the appeal pursuant to [29 C.F.R. § 1614.405\(a\)](#). For the following reasons, the Commission REVERSES the Agency's final decision.

### ISSUE PRESENTED

The issue presented is whether Complainant proved that she was subjected to disparate treatment and harassment based on sex when the Agency restricted her from using the common female restroom, and a team leader (S3) intentionally and repeatedly referred to her by male pronouns and made hostile remarks.

### BACKGROUND

This case concerns allegations of disparate treatment on the basis of sex in the terms and conditions of Complainant's employment and allegations that harassment based on sex subjected Complainant to a hostile work environment. Although Complainant was hired as a civilian employee with the U.S. Army Aviation and Missile Research Development and Engineering Center ("AMRDEC") at Redstone Arsenal in Huntsville, Alabama in 2004, the allegations in this complaint relate only to the period from October 2010 to August 2011 (the "relevant time period"). Complainant was employed at the AMRDEC Software Engineering Directorate ("SED") under the supervision of S1, the Quality Division Chief. During the relevant time period, however, Complainant was co-located in a separate unit - the Project Management Office, Aircraft Survivability Equipment ("ASE") where she worked as a Software Quality Assurance Lead under the direction of S3, the Software Engineering Lead, who was in turn supervised by S2, the Technical Chief. In August 2011, Complainant returned to her primary job at SED.

#### *Complainant's Transition and Bathroom Access*

Complainant is a transgender woman. Although Complainant had discussed her gender identity with S1 as early as 2007, she began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court changing her name from one commonly associated with men to one commonly associated with women. At that time, she also requested that the government change her name and sex on all personnel records. The Office of Personnel Management ("OPM") effected those changes on October 13, 2010. This caused Complainant's work e-mail address to reflect her new name.

On October 26, 2010, at the request of S2, Complainant met with S2 and S1 to discuss the process of transitioning from presenting herself as a man to living and working, in conformance with her gender identity, as a woman. At that meeting, Complainant and her supervisors discussed how Complainant would explain her transition to colleagues and the estimated timeline for any medical procedures.

\*2 As part of that meeting, they also discussed which bathrooms Complainant would use when she began presenting as a woman. The plan, written in the form of a memorandum from Complainant to management, indicated that Complainant would use a single-user restroom referred to as the “executive restroom” or the “single shot rest room” rather than the multi-user “common women’s restroom” until Complainant had undergone an undefined surgery.

S2 testified that in his recollection no one “insisted” that Complainant utilize only the executive restroom but that the plan was mutually crafted by himself, S1, and Complainant. Report of Investigation (ROI), Volume (Vol.) 1, 2323; Transcript of Fact-Finding Conference (TR) 123. According to Complainant, “We agreed up front in order to allow people to become accustomed to me and not feel uncomfortable that I would use the front bathroom for a period of time.” ROI Vol. 1, 2223; TR 23. She testified that she agreed to use the executive bathroom for the initial period “[b]ecause I have a good heart and I did believe there were people who might have issues with it and the ability for them to grow comfortable with who I was . . . would have provided it.” ROI Vol.1, 2223-2224; TR 23-24. S1 expressed at the time that it was her belief, after consulting with Human Resources, that because Complainant was a woman, she was free to use whichever women’s restroom she wanted. ROI Vol. 1, 2224, 2389; TR24, 189.

Regardless of the motivations behind the creation of the transition plan, it apparently had to be “approved” by higher level management. The Deputy Program Manager of the Program Executive Office testified that he made the final decision as to which bathroom Complainant would use. ROI Vol. 1, 2451; TR 251. He stated:

I made the decision based on the fact that I have a significant number of women in my building who would probably be extremely uncomfortable having an individual, despite the fact that she is conducting herself as a female, is still basically a male, physically.

And that would cause as many problems if more problems [sic] than having the individuals use a private bathroom. I also thought that under the circumstances, a male restroom would be inappropriate. So, that was left [sic] to use the single use bathrooms.

ROI Vol. 1, 2452; TR 252. Additionally, a Lieutenant who supervised S2 testified that Complainant’s bathroom access was conditioned on a medical procedure:

[W]e all agreed back then that there was a procedure, operation that was to take place that would essentially signify a complete transformation to a female. . . And that procedure would be the point of where all the bathrooms would be on limits for or within limits for [the Complainant] to use for that point.

ROI Vol. 1, 2491; TR 291.

The transition plan was given final approval by the Deputy Program Manager in early November 2010. Complainant e-mailed the entire staff on November 22, 2010, explaining her situation and indicating that for an initial period, she would use the executive restroom. She began presenting as a woman at work following the Thanksgiving holiday. Complainant regularly used the executive restroom except on three occasions in early 2011. On one occasion, the executive restroom was out of order for several days. On another occasion, the executive restroom was being cleaned. In these incidents, Complainant felt that her only options were to leave the facility to locate a restroom off-site, use the common women’s restroom, or use the common men’s restroom. She chose to use the restroom associated with her gender. After each incident, Complainant was confronted by S2 who told her she’d been observed using the common women’s restroom, that she was making people uncomfortable, and that she had to use the executive restroom until she could show proof of having undergone the “final surgery.” ROI Vol. 1, 2245; TR 45.

\*3 Complainant testified that in January 2011 when S2 confronted her about using the common women’s restroom, she responded, “I am legally female. I used it.” ROI Vol. 1, 2229; TR 29.

### *Harassment*

During the relevant time period, S3 repeatedly referred to Complainant by her former male name, by male pronouns, and as “sir.” Complainant testified that S3 referred to her using these male signifiers on at least seven occasions when he did not correct himself, on four additional occasions when he did correct himself, and, specifically, in a July 2011 e-mail exchange. Complainant stated that S3 referred to her using male signifiers during heated discussions and meetings. S3 made these

comments in front of coworkers and contractors and sometimes in front of people who had no prior knowledge of her transition. Complainant did not correct S3 because she did not want to question her supervisor in front of other people. Additionally, Complainant did not correct S3 in private because she felt she “was in enough hot water” and “anything else ... would have gotten [her] kicked out of there.” ROI Vol. 1, 2264; TR 64.

S3 admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition, but attempted to excuse his behavior by saying it was not meant in a malicious way and was merely a “slip of the tongue.” ROI Vol. 1, 2299-2300; TR 99-100. Complainant acknowledged that there were occasions when S3’s usage of male signifiers was merely a “slip of the tongue,” but Complainant also believes there were occasions when S3 intentionally used male pronouns to refer to Complainant in order to elicit a response from her. ROI Vol.1, 2299, 285; TR 85. Complainant testified that she could tell S3 used male signifiers during heated discussions or moments of anger because “[h]is veins were popping out of his forehead, his face was red, and he was quite agitated.” ROI Vol.1, 2286; TR 86. Complainant also stated that during these exchanges S3’s demeanor and body language were ““representative of a negative connotation.” ROI Vol. 1, 2275; TR 75.

In July 2011 Complainant and S3 exchanged a series of e-mails regarding Complainant’s belief that her team members did not treat her as an equal. In a July 26, 2011 e-mail, in response to Complainant’s statement that S3 was on the side of other employees who do not treat her as an equal, S3 responded to Complainant, “Sir, not on anyone’s side.” ROI Vol. 1, 488. Complainant testified that S3 wrote “sir” in this e-mail out of anger because during their “verbal conversation that ensued after that e-mail ... he was fairly agitated.” ROI Vol. 1, 2268; TR 68.

Witness testimony corroborates that during the relevant time period S3 intentionally referred to Complainant by her former male name and as “sir” well after Complainant’s November 2010 letter notifying her colleagues of her transition. ROI Vol. 1, 2531; TR 331. Specifically, a witness stated that S3 smirked and giggled in front of others while joking, “What is this, [Complainant’s former male name] or [Complainant’s name]?” Vol. 1, 2534; TR 334. This witness also testified that Complainant stated she was working in a hostile or uncomfortable environment.

\*4 After Complainant’s e-mail address changed to reflect her name, but before she began presenting as female, curious coworkers questioned Complainant about the situation. As a result of the questions S2 asked Complainant to “hold down the chatter with people that were inquiring” about her transition. ROI Vol.1, 2222; TR 22.

Complainant testified that, although she did not inform management that she felt she was being subjected to a hostile work environment, she did tell Colonel 2 that there were “some issues.” ROI Vol. 1, 2269, TR 69.

#### *EEO Investigation and Final Agency Decision*

Complainant initiated EEO counselor contact on September 6, 2011, and filed a formal complaint on March 14, 2012, alleging that the Agency subjected her to disparate treatment and a hostile work environment based on sex when the Agency restricted her from using the common female restroom and a team leader (S3) repeatedly referred to her by her former male name and called her “sir.” The Agency accepted the complaint and conducted an investigation, including a fact-finding conference. The Agency issued Complainant a copy of the investigative file and a notice of right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision (FAD). Complainant elected an immediate FAD, which the Agency issued on September 5, 2013.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged. Specifically, the Agency concluded that it had provided legitimate, non-discriminatory reasons for its requirement that she use the executive restroom, and that Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency determined that, during a meeting with management, Complainant agreed to use the “single shot” executive restroom until she “had surgery,” and that testimony and e-mails between Complainant and management reflected that management was supportive of Complainant and “committed to ensuring [Complainant] would be treated with dignity and respect.” Additionally, the Agency concluded that Complainant had not shown that she was subjected to disparate treatment based on sex because Complainant did not tell management that the amenities in the executive restroom were inadequate compared to the common female restroom facility and, therefore, management did not deny her access to equal facilities.

The Agency further determined that, although S2 reminded Complainant about the bathroom access plan she had with management, the comments were not sufficiently severe or pervasive to constitute harassment.

With respect to Complainant's claim that S3 referred to her by male pronouns, names, and titles, the Agency concluded that these were isolated incidents that were not sufficiently severe or pervasive to constitute a hostile work environment.

\*5 On September 23, 2013, Complainant filed this appeal of the agency's final decision.

### CONTENTIONS ON APPEAL

Complainant contends that the Agency erred when it found that she failed to show that she was subjected to sex discrimination and harassment. Complainant contends that, by restricting her to the single stall restroom because she is transgender, the Agency changed the terms and conditions of her employment solely based on her sex, in violation of Title VII. Complainant also reiterates her claim that the Agency subjected her to a hostile work environment by allowing S3 to refer to her by a male name and pronouns. Complainant contends that, although S3 claimed that his use of incorrect gender pronouns and names was a "slip of the tongue," S3 only did this in heated exchanges or group settings and in a manner that communicated a derogatory connotation. Complainant maintains that "these daily humiliations and reminders that the Agency did not accept her gender identity created a hostile work environment." Complainant's Brief, p. 10.

In its reply, the Agency requests that we affirm its final decision. The Agency maintains that, taking into account the concerns of Complainant's female co-workers who had known her as male for years, management asked Complainant to use the single-stall restroom in the executive suite, and she agreed to do so until her surgery was "complete." The Agency maintains that there is no law that mandates that agencies allow transgender individuals to use restrooms that are consistent with their gender identity. The Agency further maintains that, if it had been aware of Complainant's concerns about the restroom facilities, arrangements could have been made to accommodate her needs, but it is unclear whether her inability to use a restroom with equivalent amenities constitutes an adverse action. The Agency contends that the record reflects that it was "very supportive of the complainant's transition from male to female," and that Complainant was grateful for her managers' and co-workers' support. Agency Brief, p. 7. The Agency concludes that, in the absence of legal precedent, management worked out a "fair solution" that took into account the concerns of all employees. *Id.*

### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Nov. 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

### ANALYSIS AND FINDINGS

#### *Disparate Treatment: Restroom Facilities*

\*6 Title VII states that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1), (2) (making it unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of sex).

To establish a claim of disparate treatment on the basis of sex, a complainant must show the agency took an adverse employment action against the complainant because of the complainant's sex. This can be shown through either direct or

indirect evidence.

“Direct evidence” is either written or verbal evidence that, on its face, demonstrates bias and is linked to an adverse action. [Pomerantz v. Dep’t of Veterans Affairs](#), EEOC Appeal No. 01990534 (Sept. 13, 2002). Where there is direct evidence of discrimination, there is no need to prove a prima facie case or facts from which an inference of discrimination can be drawn. [Trans World Airlines, Inc. v. Thurston](#), 469 U.S. 111, 121 (1985). Moreover, where the trier of fact finds that there is direct evidence of discrimination, liability is established. [Guidance on Recent Developments in Disparate Treatment Theory](#), No. 915.002, July 14, 1992, Section III; [EEOC Compliance Manual § 604.3](#), “Proof of Disparate Treatment,” at 6-7 (June 1, 2006).

Complainant is a transgender individual. “Transgender” is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. American Psychological Association, [Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression](#), p. 1 (2011);<sup>2</sup> see also [Glenn v. Brumby](#), 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”). “Gender identity” refers to a person’s internal sense of being male or female (or, in some instances, both or neither); “gender expression” refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. *Id.* In this case, Complainant identified as female and has consistently presented herself as female since at least November 2010.

\*7 Complainant alleges that the Agency subjected her to sex discrimination when it treated her differently than other employees because she is transgender. In [Macy v. Department of Justice](#), EEOC Appeal No. 0120120821 (April 20, 2012), the Commission held that discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination violates Title VII, absent a valid defense. We stated:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” See [Schwenk](#), 204 F.3d [1187] at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that “an employer may not take gender into account in making an employment decision.” [Price Waterhouse](#), 490 U.S. at 244.

[Macy](#), EEOC Appeal No. 0120120821.

Here, the Agency acknowledges that Complainant’s transgender status was *the* motivation for its decision to prevent Complainant from using the common women’s restroom. The Deputy Program Manager testified that the restriction was imposed due to the Agency’s belief that a significant number of women in the building would be “extremely uncomfortable having an individual [use the common female restroom because], despite the fact that she is conducting herself as a female, [the individual] is still basically a male, physically.” Likewise, the Agency acknowledges that it restricted Complainant from the common women’s restroom because of concerns about employee reaction to Complainant as a transgender individual. S1, for example, testified that management limited Complainant to the front executive restroom because it otherwise would have been a “real shocker for everyone in the workplace.” This constitutes direct evidence of discrimination on the basis of sex.

The Agency defends its actions in part by pointing out that the Complainant agreed to use the “single shot” restroom while other employees adjusted to her transition. In this case, the “agreement” in question was a one-page memorandum from the Complainant to the management team. It outlined the reasons for Complainant’s transition and a tentative list of next steps under the heading ““Path Forward.” The first step, starting in mid-November, was for Complainant to start dressing consistent with her gender identity. During this time, her plan said she would “use [the] single shot restroom.” The next step, set to occur about a month later, was for Complainant to undergo an undefined ““Surgical Procedure” and then put in a request to use the common facility. In accordance with her plan, Complainant used the single-shot restroom in the period following her change in dress. She apparently did not undergo a surgical procedure in December and did not submit a formal request to use the common facility exclusively. On two occasions, however, she found that the single-shot restroom was out-of-order or closed and decided to use the common facility. She was confronted by S2 after each time she used the

common facility. He told her that she could not use those facilities until she had undergone “final surgery.” Complainant asserted in response that she was “legally female” and entitled to use the women’s restroom if needed.

\*8 This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.<sup>3</sup>

On this record, there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- *is* female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women’s restrooms. This “real life experience” often is crucial to a transgender employee’s transition. As OPM points out:

[C]ommencement of the real life experience [i]s often the most important stage of transition, and, for a significant number of people, the last step necessary for them to complete a healthy gender transition. As the name suggests, the real life experience is designed to allow the transgender individual to experience living full-time in the gender role to which he or she is transitioning. . . . [O]nce [a transitioning employee] has begun living and working full-time 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. . . . [T]ransitioning 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.

OPM Transgender Guidance.

Agencies are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions. For a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one. See id.

Circumstances can change, however and an employee is never in a position to prospectively waive Title VII rights. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (“[W]e think it clear that there can be no prospective waiver of an employee’s rights under Title VII.”); see also Vigil v. Dep’t of the Army, EEOC Request No. 05960521 (June 22, 1998) (“ . . . [an] agreement that waives prospective Title VII rights is invalid as violative of public policy.”) Agencies should, as the OPM Guidance suggests, view any plan with a transitioning employee related to facility access as a “temporary compromise” and understand that the employee retains the right under Title VII to use the facility consistent with his or her gender. OPM Transgender Guidance.<sup>4</sup>

\*9 The Agency states that it would not allow Complainant to use the common female restroom because co-workers would feel uncomfortable with this approach. We recognize that certain employees may object -- some vigorously -- to allowing a transgender individual to use the restroom consistent with his or her gender identity. Some, like the Agency decision makers in this case, may not believe a transgender woman is truly female, and thus entitled or eligible to use a female bathroom, unless she has had gender reassignment surgery. Some co-workers may be confused or uncertain about what it means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker.

But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort. See Macy, EEOC Appeal No. 0120120821; see also Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer’s foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants). Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.<sup>5</sup> See Diaz, 442 F.2d at 389 (“While we recognize that the public’s expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large, extent, these very prejudices the Act was meant to overcome.”); Olsen v.

[Marriott Int'l, Inc.](#), 75 F. Supp. 2d 1052 (D. Ariz. 1999); cf. [Cruzan v. Special Sch. Dist., No.1](#), 294 F.3d 981 (8th Cir. 2002) (school's policy of allowing transgender women to use women's faculty restroom did not create a hostile work environment for other employees).<sup>6</sup>

Finally, the Agency maintains that it is unclear whether restricting Complainant from using the common restrooms is even an adverse employment action. The Commission has long held that an employee is aggrieved for purposes of Title VII if she has suffered a harm or loss with respect to a term, condition, or privilege of employment. [Diaz v. Dep't of Air Force](#), EEOC Request No. 05931049 (Apr. 21, 1994). Equal access to restrooms is a significant, basic condition of employment. See e.g., OSHA, [Interpretation of 20 C.F.R. 1910.141 § \(c\)\(1\)\(i\): Toilet Facilities](#) (Apr. 4, 1998) (requiring that employers provide access to toilet facilities so that all employees can use them when they need to do so). Here the Agency refused to allow the Complainant to use a restroom that other persons of her gender were freely permitted to use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment.<sup>7</sup>

\*10 But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a "single shot" restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect Cf. [42 U.S.C. § 2000e-2\(a\)\(2\)](#) (making it unlawful to "segregate" employees in any way that deprives or tends to deprive them of equal employment opportunities); [Religious Garb and Grooming in the Workplace: Rights and Responsibilities](#), Q. 8 and Ex. 8 (limiting employees who wear religious attire that might make customers uncomfortable to "back room" positions constitutes religious segregation and violates Title VII). The Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse.<sup>8</sup>

In sum, we find that the Agency's decision to restrict Complainant's access to the common women's restroom on account of her gender identity violated Title VII. We further find that the record contains direct evidence that the decision was based on the gender identity of the Complainant. The Agency, therefore, erred when it found that Complainant was not subjected to sex-based disparate treatment.

#### *Harassment: Gender Pronouns, Titles, and Access to Facilities*

To establish a claim of hostile work environment harassment, Complainant must show (1) that she was subjected to harassment in the form of unwelcome verbal or physical conduct because of a statutorily protected basis and (2) that the harassment had the purpose or effect of unreasonably interfering with the work environment and/or created an intimidating, hostile, or offensive work environment. See [Harris v. Forklift Systems](#), 510 U.S. 17, 21 (1993).

In this case, Complainant contends that she was subjected to a hostile work environment because management restricted her from using the common women's restroom even after Complainant made clear that she no longer agreed with the initial plan restricting her to the executive bathroom facility, and S3 engaged in demeaning behavior toward her by refusing to refer to her correct name and gender.<sup>9</sup>

Complainant testified that S3 called her male names and "sir" in moments of anger or in group settings, and that his body language reflected a negative connotation and intentional conduct when he did so. Complainant testified that S3 called her "sir" on approximately seven occasions, including in an e-mail in which he engaged Complainant in a heated discussion about work matters. Complainant is not the only witness to testify that S3 intentionally referred to Complainant with male names. We note that one witness testified that he thought that S3 intentionally referred to Complainant as "sir" and by her former male name well after Complainant announced her transition to co-workers in November 2010. The witness further testified that S3 also smirked and giggled and said to her, "Oh well, do we call her [by her male or female name]?" Further, the record contains a copy of e-mail correspondence between Complainant and S3 on July 26, 2011. The e-mails reveal that, after Complainant wrote that S3 was on the side of other employees who do not treat her as an equal, S3 responded, "No Sir, not on anyone's side." The e-mails also reflect that this exchange occurred in the context of heated exchanges about work activities between Complainant and S3. S3 maintains that calling Complainant "sir" or referring to her with a male name was "just a slip of the tongue and only occurred twice.

\*11 After reviewing witness testimony and the e-mail exchanges between Complainant and S3, we are persuaded that S3's use of "sir" in this and several other situations was intentional. The e-mail exchanges reflect that S3 sometimes used male names and pronouns to insult Complainant or to convey sarcasm. Additionally, witness testimony indicates that S3 sometimes laughed and smiled when mentioning Complainant in groups and would say her feminine name with a smirk. Further, Complainant testified in detail about S3's agitated demeanor when referring to her with male pronouns and names and another witness spoke of S3's "general feeling of hostility" toward Complainant and the snide comments S3 made that pertained to Complainant's transition and clothing. Complainant also testified that S3 seemed to especially call her male names when in the presence of other employees as a way to reveal that Complainant is transgender, as well as to ridicule and embarrass her.

The Commission has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee. See [Jameson v. U.S. Postal Serv., EEOC Appeal No. 0120130992 \(May 21, 2013\)](#). Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when "judged from the perspective of a reasonable person in the employee's position. See [Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 \(1998\)](#); see also [Jameson, EEOC Appeal No. 0120130992](#); [OPM Transgender Guidance](#) ("Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.").

In this case, Complainant had clearly communicated to management and employees that her gender identity is female and her personnel records reflected the same. Yet S3 continued to frequently and repeatedly refer to Complainant by a male name and male pronouns. While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.

\*12 Moreover, in determining whether actionable harassment occurred, S3's actions must be considered in the context of the Agency's actions related to Complainant's restroom access. As we note above, even after Complainant indicated that she no longer wished to abide by her initial plan regarding bathroom use, the Agency refused to allow Complainant to use the restroom consistent with her gender identity. It publicly segregated and isolated Complainant from other employees of her gender and communicated that she was not equal to those other employees because she is transgender. S3's comments compounded that discrimination and sent the message that Complainant was unworthy of basic respect and dignity because she is a transgender individual. Additionally, S3 was a team leader and his actions sometimes occurred in the presence of other employees and during meetings, signaling that such conduct was endorsed by Agency leadership.

Considering all these circumstances as we must, we find that these actions were sufficiently severe or pervasive to subject Complainant to a hostile work environment based on her sex. Because Complainant established that she was subjected to a level of severe or pervasive sex-based harassment that meets the Title VII standard for liability, the final element of our analysis is whether the Agency itself is liable for that harassment.

An agency may be vicariously liable for unlawful harassment by an employee when the agency has empowered that employee to take tangible employment actions against the victim -- i.e., the harassing employee is a supervisor of the victim. [Vance v. Ball State University, 570 U.S. \\_\\_\\_, 133 S.Ct. 2434 \(2013\)](#). In cases where the harassing employee (or employees) is a co-worker of the victim, an agency is responsible for acts of harassment in the workplace when the agency was "negligent in permitting the harassment to occur." [Id. at 2451](#). Negligence in permitting harassment to occur can take many forms. An assessment of whether an Agency is liable under this standard depends on the facts and circumstances of each case and the unique context of each workplace. See [id. at 2451](#) (discussing "variety of situations" that a negligence standard can address).

In her appeal, the Complainant alleged that the Agency was liable under the negligence theory. We therefore analyze her claim under that standard.<sup>10</sup>

In this case, Complainant did not report S3's harassment to management. However, we note that S3's conduct sometimes occurred in groups or in the presence of other employees. For example, a witness testified that she witnessed S3 among a group of employees in which he would laugh and smile when Complainant's name was mentioned, and the group would laugh. Another witness testified that S3 would openly refer to Complainant by her former masculine name in the presence of other employees and smirk and giggle about it, well after he was aware of Complainant's gender identity as female. This witness testimony reflects that S3's conduct was pervasive, well-known, and openly practiced in the workplace. Consequently, we find that the Agency knew or should have known about S3's harassment. See [Mayer v. Dep't of Homeland Security](#), EEOC Appeal No. 0120071846 (May 15, 2009) (Agency had constructive knowledge of sexual harassment because employees were aware that harasser was harassing Complainant); [Taylor v. Dep't of the Air Force](#), EEOC Request No. 05920194 (July 8, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees). There is no evidence that the Agency took prompt and effective corrective action to address the harassment. In fact, the only Agency actions we find in the record are when Complainant's supervisors chastised her for using a facility consistent with her gender and for discussing her transition with other employees. Consequently, we find that the Agency was negligent in permitting the harassment to occur and is therefore liable.

\*13 In summary, we find that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant's gender identity was female.

#### *Decision of the Office of Special Counsel*

Complainant filed a prohibited personnel practice complaint against the Agency with the U.S. Office of Special Counsel (OSC) based on the events described above. On August 29, 2014, OSC issued a report finding that the Agency had discriminated against Complainant based on conduct not adverse to work performance, in violation of [5 U.S.C. §2302\(b\)\(10\)](#). U.S. Office of Special Counsel, Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (August 28, 2014) (the "OSC Report"). The report's findings were based, in part, on OSC's interpretation of Title VII requirements. OSC explained that, while it was not making any explicit findings related to sex discrimination, "EEO law and federal policies relating to discrimination based on sex, including gender identity and expression, . . . circumscribes the permissible considerations that an agency may make when determining whether conduct adversely affects work performance for purposes of [section 2302\(b\)\(10\)](#)." OSC Report at 1. Specifically, OSC found that "the Agency unlawfully discriminated against [Complainant] on the basis of gender identity, including her gender transition from man to a woman--conduct which did not adversely affect her performance or the performance of others." *Id.* at 5.

OSC recommended that the Agency provide appropriate lesbian, gay, bisexual, and transgender (LGBT) diversity and sensitivity training to AMRDEC employees at Redstone Arsenal. OSC further recommended that appropriate remedial training regarding prohibited personnel practices, especially as they relate to transgender employees, be given to AMRDEC supervisors at Redstone Arsenal. OSC also found that Complainant did not suffer any economic harm that would require back pay, and that Complainant was ineligible to collect compensatory damages because the facts of this case arose before Congress created a compensatory damages remedy under section 107(b) of the Whistleblower Protection Enhancement Act of 2012; that provision is not retroactive.<sup>11</sup> OSC noted that it made no finding regarding Complainant's ability to recover damages under Title VII.<sup>12</sup>

\*14 The OSC report does not moot the claim before the Commission. OSC addressed whether the Agency's actions violated U.S. government personnel practices. The answer to that question was affected, but not settled, by Title VII principles. Our decision today addresses the Agency's actions in light of the sex discrimination provisions in Title VII. However, in the Order below, we take notice of the remedies already prescribed by OSC in order to avoid duplicative actions by the Agency.

#### CONCLUSION

Consequently, based on a thorough review of the record and the contentions on appeal, including those not specifically

addressed herein, the Commission REVERSES the Agency's final decision. We REMAND this matter to the Agency to take remedial actions in accordance with this decision and the ORDER below.

ORDER (E0610)

The Agency is ORDERED to undertake the following actions:

1. The Agency shall immediately grant Complainant equal and full access to the common female facilities.
2. The Agency shall immediately take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct directed at Complainant, and ensure that Complainant is not subjected to retaliation because of her EEO activity.
3. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford her an opportunity to establish a causal relationship between the hostile work environment to which she was subjected and her pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
4. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least eight hours of EEO training to all civilian personnel and contractors working at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. Additionally, the training shall inform employees about the EEO process and how to report harassment in their workplace organization. The Agency may count the diversity and sensitivity training ordered by OSC towards the eight hours required by this Order
5. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least 16 hours of in-person EEO training to all management officials at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office, regarding their responsibilities to ensure equal employment opportunities and the elimination of discrimination in the federal workplace. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. The Commission does not consider training to be disciplinary action. The Agency may count in-person diversity and sensitivity training ordered by OSC towards the sixteen hours required by this Order.
- \*15 6. The Agency shall consider taking appropriate disciplinary action against S2 and S3 and report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S2 or S3 have left the Agency's employ, the Agency shall furnish documentation of the departure date.
7. The Agency shall post the notice referenced in the paragraph below entitled, "Posting Order."
8. The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation and evidence that the corrective action has been implemented.

POSTING ORDER (G0610)

The Agency is ordered to post at its Redstone Arsenal, Alabama, and the Huntsville, Alabama, Project Management Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of

attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with [29 C.F.R. § 1614.501](#).

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. [29 C.F.R. § 1614.503\(a\)](#). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. [See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503\(g\)](#). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." [29 C.F.R. §§ 1614.407 and 1614.408](#). A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in [42 U.S.C. 2000e-16\(c\)](#) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** [See 29 C.F.R. § 1614.409](#).

#### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

**\*16** The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. [See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 \(EEO MD-110\)](#), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. [See 29 C.F.R. § 1614.604](#). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. [See 29 C.F.R. § 1614.604\(c\)](#).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0610)

**\*17** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request

from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

FOR THE COMMISSION:

Bernadette B. Wilson  
Acting Executive Officer  
Executive Secretariat

Footnotes

- <sup>1</sup> The factual background as laid out here is not exhaustive. Two comprehensive reports of the facts relevant to this case have already been compiled: the EEO Report of Investigation and the Agency’s Final Agency Decision (FAD). We have considered those documents as well as the Complainant’s Brief in Support of Appeal and the extensive transcript from the Fact-Finding Conference conducted on October 17-18, 2012. The facts pertinent to the legal analysis necessary are largely not in dispute.
- <sup>2</sup> Available online at <http://www.apa.org/topics/sexuality/transgender.pdf>.
- <sup>3</sup> Gender reassignment surgery is in no way a fundamental element of a transition. Transitions vary according to individual needs and many do not involve surgery at all. As the Office of Personnel Management has explained:  
Some individuals will find it necessary to transition from living and working as one gender to another. These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some individuals, however, will not pursue some (or any) forms of medical treatment because of their age, medical condition, lack of funds, or other personal circumstances. Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.  
Office of Personnel Management (OPM), Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, (OPM Transgender Guidance), available online at <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.
- <sup>4</sup> This is not to say that plans have no place in the transition process. Properly developed, transition plans ensure that a transitioning employee is treated with dignity and respect. The process of developing a plan also opens important channels of communication between the transitioning employee and management. The plans should not, however, be used as a means for restricting a transitioning employee. Rather, they should serve as tools for enabling the employee to complete his or her transition in an open and welcoming way.
- <sup>5</sup> Thus, for instance, employers may not prohibit a transgender female worker from using the female bathroom based on speculation or stereotypes that such workers are somehow inherently dangerous or prone to violence, any more than a sheriff’s office can exclude men from supervisory positions in female inmate housing based on unsubstantiated concerns that substantially all male deputies are likely to engage in sexual misconduct. See [Ambat v. City & County of San Francisco](#), 757 F.3d 1017, 1029 (9th Cir. July 14, 2014) (concluding the assumption that “‘all or substantially all’ male deputies are likely to perpetrate sexual misconduct [against female inmates]” without evidence to support it “amount[s] to ‘the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII’”). Of course, if a transgender woman using a common female restroom were to assault a co-worker using the same restroom, then the matter could and should be dealt with like any other workplace conduct violation -- just as it would be if any other woman using a common female restroom assaulted a co-worker.
- <sup>6</sup> For this reason, the Commission disagrees with the holdings of cases like [Kastl v. Maricopa County Cmty. College Dist.](#), 325 Fed. Appx. 492 (9th Cir. 2009), and [Etsitty v. Utah Transit Auth.](#), 502 F.3d 1215 (10th Cir. 2007). In [Kastl](#), the employer contended “that it banned Kastl from using the women’s restroom for safety reasons.” [Id.](#) at 494. In [Etsitty](#), the employer claimed that it did so out of fear of being sued for allowing one of its employees to use the “wrong” restroom. In both cases, the courts found that these respective explanations were legitimate, non-discriminatory reasons under the circumstantial evidentiary framework from

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the transgender employee had not proven that the proffered reason was pretextual. Kastl, at 493-94; Etsitty, 502 F.3d at 1224. The Commission finds the rationale of these cases unpersuasive. First, an employee need not use the McDonnell Douglas framework when there is direct evidence that an adverse employment action has been taken on the basis of a sex-based consideration such as an employee's transgender status. Second, where an employer proffers an explanation inextricably linked to the protected trait -- such as admitting that it refused to allow a transgender worker to use a restroom consistent with the worker's gender identity because of a belief that the worker's transgender status might raise safety or liability issues -- that rationale is not non-discriminatory. Instead, that proffered justification is indistinguishable from the protected trait at issue and thus cannot serve as a "legitimate" explanation. Cf. Johnson v. State of NY, 49 F. 3d 75, 80 (2nd Cir. 1995) (holding that a policy requiring active membership in an organization where membership was automatically rescinded at age 60 was not neutral; it was, instead, "inextricably linked" with age). Indeed, the Etsitty Court itself acknowledged that: "It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual." However, as the Etsitty court went on to explain, it had already concluded that "Etsitty may not claim protection under Title VII based upon her transsexuality *per se*" and thus Etsitty's claim had to "rest entirely on the Price Waterhouse theory of protection as a man who fails to conform to sex stereotypes." Etsitty at 1224. In light of that fact, the Etsitty court concluded that "[h]owever far Price Waterhouse reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms." Id. Of course, as noted previously, the Commission in Macy has held that discrimination on the basis of transgender status is *per se* sex discrimination, finding that a plaintiff need not have specific evidence of gender stereotyping by the employer because "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." Id., 2012 WL 1435995, at \*8 (EEOC Apr. 20, 2012).

7 In this case, the Agency's restroom policy also deprived Complainant of the use of common locker and shower facilities that non-transgender employees could use, which also constituted a material employment disadvantage for Complainant.

8 Cf. John Doe, et al. v. Regional School Unit, 86 A.3d 600 (2014) (where it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the Maine Human Rights Act); Mathis v. Fountain-Fort Carson School District 8, Colo. Dep't of Regulatory Agencies, Div. of Civil Rights, Charge No. P20130034X, Determination available at <http://www.transgenderlegal.org/media/uploads/doc529.pdf> (June 18, 2013) (restroom restriction placed on female transgender student created "an exclusionary environment which tended to ostracize the [student]."); Statement of Interest of the United States in Tooley v. Van Buren Public Schools, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015)(citing Doe and Mathis).

9 Complainant did not avail herself of a hearing. Therefore, we must assess the credibility of witnesses on the record, without the assistance of a neutral EEOC AJ's personal observations of witness demeanor and tone. Wagner v. Dep't of Transp., EEOC Request No. 0120101568 (Aug. 23, 2010). We note, however, that the Agency conducted a fact-finding conference at which witnesses other than the Complainant gave testimony.

10 Given that the decision to restrict Complainant from the common restrooms consistent with her gender was instituted by management, there is an argument to be made that the supervisor liability standard is appropriate. We do not need to reach this issue, however, because Complainant has invoked the negligence liability standard and we find that she has met her burden under that analysis. See Wilson v. Tulsa Junior College, 164 F. 3d 534, 540 n. 4 (10th Cir. 1998) ("The Supreme Court recognized in [Faragher] and Ellerth the continuing validity of negligence as a separate basis for employer liability").

11 See King v. Dep't of the Air Force, 119 M.S.P.R. 663, 668 (2013).

12 We address the matter of compensatory damages under Title VII in our Order, below.

---

EEOC DOC 0120133395 (E.E.O.C.), 2015 WL 1607756