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BLOGS

Class Action & Litigation; Discrimination; Harassment; Workplace Policies

EEOC Issues Important Transgender Rights Ruling, Finding that Restroom Use Should Match Gender Identity

The Equal Employment Opportunity Commission (EEOC) forged new ground earlier this month when it ordered the U.S. Army to pay damages to a transgender employee based on a discriminatory restroom policy. We have reported in past posts on the EEOCs increased enforcement focus on transgender rights in the workplace under Title VII of the Civil Rights Act of 1964, as well as the increased societal focus on this issue. (See, prior posts [here](#) and [here](#).) The EEOCs recent April 1st [ruling](#) in *Tamara Lusardi v. John M. McHugh, Secretary, Department of the Army* reflects this trend and sets forth important guidance on the EEOCs position on transgender restroom rights.

The EEOCs ruling stemmed from a charge of discrimination filed by Tamara Lusardi, a transgender woman. In its ruling, the EEOC found that the Army discriminated against Lusardi by prohibiting her from using the female restroom that matched her gender identity, repeatedly referring to her by male, rather than female, pronouns, and making other hostile remarks. In 2010, Lusardi talked with her supervisors about her process of transitioning her gender presentation/expression from male to female. At the time, Lusardi agreed to use a unisex restroom rather than the women's restroom until she had undergone a planned surgery. On several occasions when the unisex restroom was unavailable, however, Lusardi used the women's restroom. On each such occasion, she was confronted by her supervisor, told that her female restroom use made others uncomfortable, and that she must use the unisex restroom until she could show proof of having undergone a final surgery to become female.

The EEOC found that the Army's restroom restriction was a discriminatory adverse employment action based on Lusardi's sex, noting that equal access to restrooms is a significant, basic condition of employment and a crucial aspect of a transgender employees transition. The EEOC found that it was improper for the Army to condition access to the female restroom on any medical procedure, stating:

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 privilege of employment on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individuals gender identity.

In ruling against the Army, the EEOC rejected the Army's defense that Lusardi had agreed to use the unisex restroom, holding that an employee cannot prospectively waive Title VII rights. The EEOC also rejected the Army's argument that the discomfort of other employees was a legitimate reason to restrict a transgender individuals restroom use.

The EEOC also found that the harm to Lusardi extended beyond the denial of equal access to a resource open to others. By restricting Lusardi to use of a unisex bathroom, the EEOC found that the Army had isolated and segregated Lusardi from other persons of her gender and perpetuated the sense that she was not worthy of equal treatment, dignity, and respect.



The EEOCs decision in *Lusardi* makes clear the EEOCs position that transgender individuals must be permitted to use the workplace restroom that matches the individuals gender identity. While the *Lusardi* decision is not binding on federal courts, federal courts often defer to the EEOCs position on federal discrimination laws. As such, employers should review their restroom policies and practices to avoid discrimination risks and should be training managers and employees on transgender rights in the workplace.