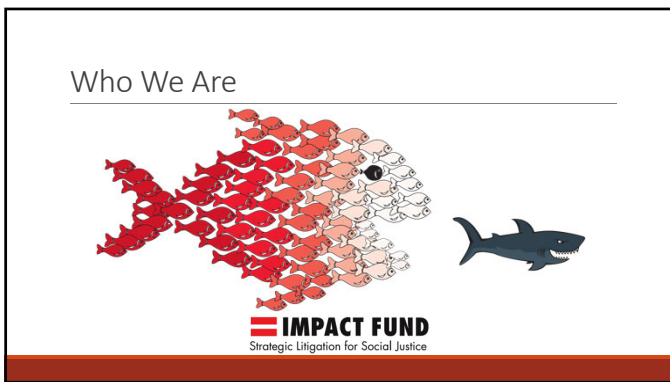


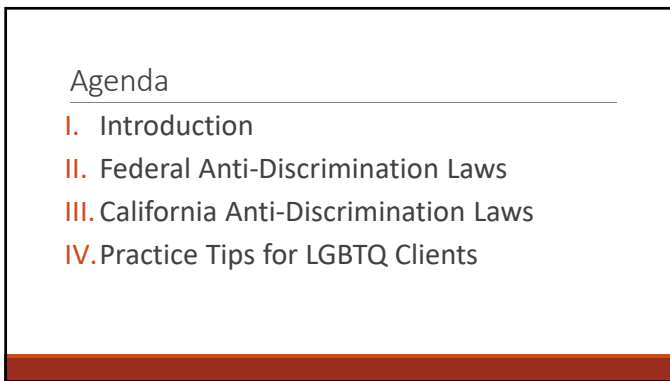


Recent Developments in LGBTQ Employment Discrimination Law
By Lindsay Nako and David Nahmias, Impact Fund
Marin County Bar Association MCLE Fair
November 14, 2019



Who We Are

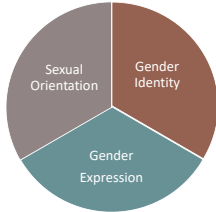
IMPACT FUND
Strategic Litigation for Social Justice



Agenda

- I. Introduction
- II. Federal Anti-Discrimination Laws
- III. California Anti-Discrimination Laws
- IV. Practice Tips for LGBTQ Clients

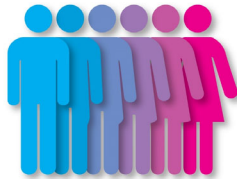
A Preliminary Distinction



"While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct."
Avendano-Hernandez v. Lynch,
 800 F.3d 1072, 1081 (9th Cir. 2015)

Using Inclusive Language

- Cisgender/transgender
- Transsexual
- Gender non-conforming
- Androgynous
- Queer
- Intersex
- Non-binary
- Gender transition/affirmation
- Gender dysphoria



Additional resources available at GLAAD's Media Reference Guide; National Center for Transgender Equality

Working Out: LGBTQ Discrimination By the Numbers

- 50%
- 25%
- 2x
- 22%
- 78%
- 15%
- 26%



What Does Discrimination Against LGBTQ Workers Look Like?

- "Traditional"
 - Harassment
 - Termination
 - Failure to hire, promote
- Dress code
- Unequal benefits (health insurance, disability, etc.)
- Health insurance denials
- Outing
- Assault, workplace violence
- Misgendering
- Restroom access

When Is Discrimination Actionable?

Adverse Employment Action

- Failure to hire
- Failure to promote
- Denial of benefits

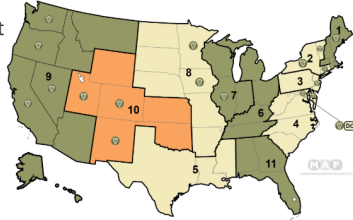
Workplace Harassment

- Quid Pro Quo
- Hostile Work Environment

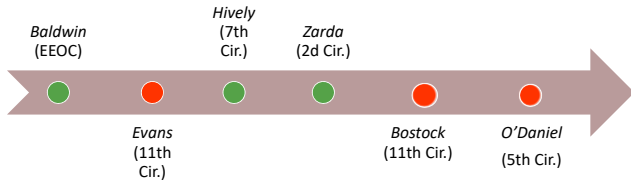
Federal Anti-Discrimination Laws

Title VII: Gender Identity Protections

- Employment Non-Discrimination Act / Equality Act
- "Because of sex"
 - Sex Stereotype Discrimination
 - Transgender Status
- Positive caselaw, EEOC rulings
 - 1st, 6th, 7th, 9th, 11th Cir.
 - *Maybe*: 3d, 5th, 8th, 10th



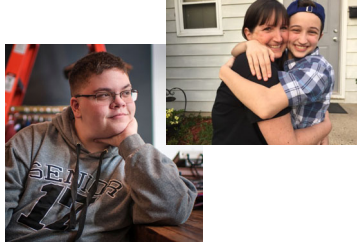
Title VII: Sexual Orientation Protections



Supreme Uncertainty for Title VII

Other Federal Workplace Anti-Discrimination Laws

- Equal Protection Clause (gov't employees)
- ADA
- ACA § 1557
- FMLA



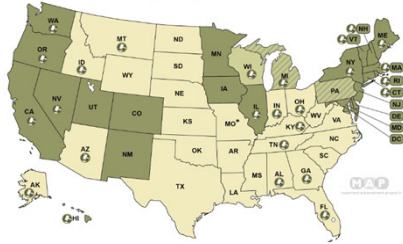
Administrative Guidance

- **Office of Federal Contract Compliance Programs (OFCCP)**
 - See Executive Order 11246, as amended and sex discrimination guidelines (2016)
 - Defines "sex" as including gender identity, transgender status
 - Prohibits unequal same-sex spousal/partner benefits
 - Requires healthcare coverage "on the same terms for all individuals" if medically appropriate, regardless of gender identity
- **Occupational Safety and Health Administration (OSHA)**
 - See Best Practices: A Guide to Restroom Access for Transgender Workers (2015)
 - Recommends gender-confirming restroom access for health/safety reasons



California Anti-Discrimination Laws

State LGBTQ Employment Laws



California Protections

o Fair Employment & Housing Act, Gov't Code § 12940

o Other state non-discrimination laws

- o Gov't Code § 12955 (housing)
- o Ed. Code § 220 (education)
- o Civ. Code § 51 (Unruh Act) (public accommodations)
- o Civ. Code § 51.7 (Ralph Act) (hate crimes)
- o Gov't Code § 11135 (public agencies)
- o Health & Safety Code § 1365.5, Ins. Code § 10140 (Insurance Gender Nondiscrimination Act) (healthcare)



Fair Employment & Housing Act Cal. Gov't Code § 12940

Prohibited classes:

- Sex
- Gender
- Gender Identity
- Gender Expression
- Sexual Orientation
- Physical Disability (defined as including HIV/AIDS)

Prohibited employment actions:

- Refusal to hire
- Discrimination
- Job applications
- Participation in labor organizations, training programs
- Sexual harassment
- Retaliation

FEHA Gender Identity Regulations (2017)

1. Updates definition of gender expression and gender identity
2. Covers non-binary gender applicants, transitioning status
3. Requires restroom availability, access, gender-neutral signage for single-occupancy facilities
4. Prohibits inquiries or requiring proof of gender, gender identity, gender expression
5. Bans mandatory gender box on job application
6. Prohibits imposing non-corresponding dress code
7. Mandates use of preferred name and pronouns

2 CCR §§ 11030-34

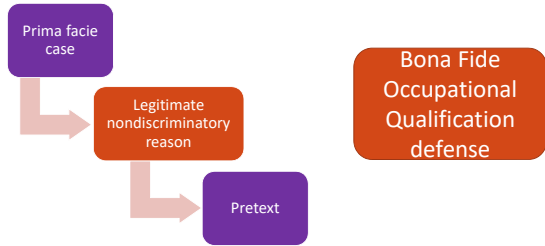
Administrative Exhaustion



Practice Tips for LGBTQ Cases



McDonnell Douglas Burden-Shifting



Sexual Harassment

Quid pro quo

Hostile work environment

- Conduct unwelcome
- "Severe or pervasive." *Meritor Savings Bank v. Vinson* (1986).
- "Disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with or undermine the victim's personal sense of well-being." Gov't Code § 12923(a) (2019).

CA Courts: Questions to Consider

o Did the employer **know** employee's sexual orientation and **direct derogatory comments** at her?
Terris v. Cty. of Santa Barbara (Ct. App. 2017)

o Did the employer act based on **stereotyped notions** of "being too gay"?
Husman v. Toyota Motor Credit Corp. (Ct. App. 2017)

o Did the employee in fact **identify as LGBTQ**?
Akoidu v. Greyhound Lines, Inc. (Ct. App. 2002)

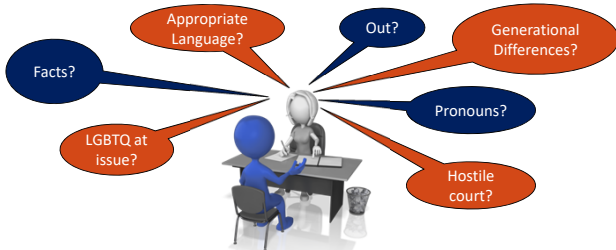


CA Rule of Prof'l Conduct 8.4.1



Lawyers may not discriminate or retaliate against, harass, or refuse/terminate representation of a client because of her gender identity, gender expression, or sexual orientation.

Special Considerations for LGBTQ Plaintiffs



Creating a Welcoming Environment

- Post visible LGBTQ-related images in your office.
- Make available inclusive materials.
- Post "gender-neutral" signage for public restrooms.
- Ask clients for preferred name and pronouns, then use them.
- Note gender and preferred name and pronouns on intake forms.
- Respect client confidentiality.
- Speak about sexual orientation/gender identity in a professional way.
- Identify and eliminate homophobic and transphobic language.
- Continue training and discussions with all staff, including reception.
- Model an affirming and respectful attitude!



Ask for Help!



Additional Resources

- Karen Moulding, 2 [Sexual Orientation and the Law](#) (2017) (treatise)
- Transgender Law Center, [Tips for Lawyers Working with Transgender Clients and Coworkers](#)
- GLAAD, [Media Reference Guide](#)
- Legal Aid at Work fact sheets
- Movement Advancement Project (statistics, maps)

Thank you!



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