




LGBTQ
Alphabet Soup

Ingredients for a more inclusive workforce

Presented By
Claudia D. Orr
Laura Dinon

Today's Presenters



Claudia D. Orr
 (313) 983-4863
 corr@plunkettcooney.com



Laura M. Dinon
 (231) 348-6417
 ldinon@plunkettcooney.com




LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELORS AT LAW

LGBTQ – What Does it Mean?

- **L**esbian
- **G**ay
- **B**i-sexual
- **T**ransgender
- **Q**uestioning (sometimes used for “queer” but that is offensive to many)



LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELORS AT LAW

Sexual Orientation Terminology

- *Sexual orientation* - a person's sexual attraction to members of the same or opposite sex, or both (homosexual, heterosexual or bisexual).
- *Homosexual* – a person who is attracted physically, romantically and emotionally to individuals of the same sex.

Continued



LGBTQ Alphabet Soup

PLUNKETT & COONEY

ATTORNEYS & COUNSELLORS AT LAW

Sexual Orientation Terminology

- *Heterosexual* – a person who is attracted physically, romantically and emotionally to individuals of the opposite sex.
- *Bisexual* – a person who is attracted physically, romantically and emotionally to individuals of either sex.



LGBTQ Alphabet Soup

PLUNKETT & COONEY

ATTORNEYS & COUNSELLORS AT LAW

Gender Identity Terminology

- *Gender identity* – a person's internal perception of him/herself as being male or female with or without regard to his/her sex at birth
- *Assigned sex* – identification by others at birth as being male or female based on physical indicators of sex
- *Gender expression* – how a person expresses his/her gender to others through behavior, clothing, hairstyles, voice, etc.



LGBTQ Alphabet Soup

PLUNKETT & COONEY

ATTORNEYS & COUNSELLORS AT LAW

Transgender Terminology

- *Transgender* – a person whose gender identity, expression or behavior is different than his/her assigned sex at birth (previously referred to as “transsexual”).

Continued



Transgender Terminology

- *Transitioning* – Process of changing gender presentation to conform to individual's personal gender identity. Includes physical, psychological, social and emotional change. Steps may include:
 - living as a member of one's personal gender
 - hormone replacement therapy
 - surgery (genitalia, breasts, Adam's apple)
 - legal (name change, birth certificate, etc.)



Miscellaneous Terms

- *Intersex* – Individual who is born with reproductive, sexual anatomy or chromosome pattern that doesn't fit those typical of male or female.
- *Cross Dresser* – Person who dresses in clothing that is stereotypically worn by a person of the opposite sex, but who has no intent to live full-time as a person of the opposite sex. Previously, such individuals were referred to as “transvestites.”

Continued



Miscellaneous Terms

- Individuals who cross dress when performing at bars or clubs are often called “drag queens” or “drag kings.” This is not a transgender person.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

ADA

- Americans with Disabilities Act – Homosexuality and bisexuality are not impairments and not disabilities.
- Disability does not include transvestism, transsexualism ... gender identity disorders not resulting from physical impairments or other sexual behavior disorders. 42 USC § 12211. Therefore, no duty to accommodate these conditions.

Continued



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

PWDCRA

- Michigan Persons with Disabilities Civil Rights Act – Michigan law does not expressly exclude transgendered individuals.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

FMLA Leave

- Gender transition procedures and treatments may be a serious health condition under FMLA.
- Male employee planning to undergo sex reassignment surgery declined employer's offer of FMLA leave because he did not want to have to submit medical certification form, then sued for FMLA violations. *Sanders v May Dept Stores*, 315 F3d 940 (8th Cir. 2003). Claim failed because employee had rejected employer's offer of FMLA leave.

Continued



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

FMLA Leave

- FMLA allows leave to care for seriously ill spouse, which, since 2015 under U.S. Supreme Court's *Obergefell* decision, may now be a person of same sex. 29 CFR § 825.112(a)
- In Michigan, employee who is not legally married to his/her partner (whether same or opposite sex), is not entitled to FMLA leave to care for partner because common law marriages are not recognized in Michigan. (i.e., *Copeland v Mid-Michigan Regional Medical Center* (E.D. Mich. 2/16/2012))



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

Non-Discrimination Laws

- No federal law (i.e., Title VII) prohibits discrimination in employment because of LGBT status.
- No Michigan state law prohibits discrimination in employment because of LGBT status.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

States Prohibiting LGBT Discrimination

- California ▪ Maryland ▪ Oregon
- Colorado ▪ Massachusetts ▪ Rhode Island
- Connecticut ▪ Minnesota ▪ Utah
- Delaware ▪ Nevada ▪ Vermont
- Hawaii ▪ New Hampshire ▪ Washington State
- Illinois ▪ New Jersey ▪ Wisconsin
- Iowa ▪ New Mexico ▪ Dist. of Columbia
- Maine ▪ New York



MI Cities & Counties with LGBT Employment Protection

- Adrian ▪ Ferndale ▪ Muskegon
- Ann Arbor ▪ Fenton ▪ Royal Oak
- Battle Creek ▪ Grand Ledge ▪ Saugatuck
- Dearborn Hts ▪ Grand Rapids ▪ Saugatuck Twp
- Detroit ▪ Huntington Wds ▪ Southfield
- Douglas (Village) ▪ Kalamazoo ▪ Traverse City
- East Lansing ▪ Lansing ▪ Ypsilanti
- E. Grand Rapids ▪ Mt. Pleasant



MI Cities & Counties with LGBT Employment Protection

- Delhi Township ▪ Meridian Twp ▪ Counties:
- Delta Township ▪ Oshtemo Twp Macomb,
- Flint ▪ Pleasant Ridge Wayne,
- Huntington Wds ▪ Saginaw Ingham,
- Jackson ▪ Trenton Kalamazoo,
- Kalamazoo Twp ▪ Union Twp Washtenaw
- Lake Orion Twp ▪ Ypsilanti
- Lathrup Village



Title VII Theories – “Sex Stereotyping”

- *Price Waterhouse v Hopkins* (US Sup Ct 1989)
- Female CPA associate passed over for partnership because too “aggressive,” and needed to act less “macho,” attend charm school, walk, talk, dress more femininely, style hair and wear jewelry.

Continued



Title VII Theories – “Sex Stereotyping”

- Supreme Court: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”
- Employment decisions based upon “sex stereotyping” are unlawful.



Post Price Waterhouse Case

- Sixth Circuit Court of Appeals - “The ultimate question ... is whether the City demoted Barnes ... because of his failure to conform to sex stereotypes.” *Barnes v City of Cincinnati* (2005)
- “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination irrespective of the cause of that behavior ...” i.e., transsexual. *Smith v City of Salem, Ohio* (2004)



Title VII Theories – “Same Sex Harassment”

- *Oncale v Sundowner Offshore Services* (US Sup Ct, 1998)
- Court rejected categorical rule excluding same-sex harassment claims from Title VII coverage.

Continued



Title VII Theories – “Same Sex Harassment”

- Actionable where: (1) there is evidence that harasser was homosexual, (2) harasser motivated by general hostility to presence of one gender in workplace, or (3) comparative evidence of how harasser treated members of both sexes in a mixed-sex workplace.
- Bottom line: harassment must be motivated because of person's sex.
- Trend: if harasser is gay, claim may succeed, but not where victim is gay.



Gilbert v Country Music Association (CA 6, 2011)

- Plaintiff called “faggot” by co-worker and threatened with being stabbed.
- Court thought there was a “curious distinction”... between sexual orientation and sex-stereotyping.

Continued



Gilbert v Country Music Association (CA 6, 2011)

- “No doubt, the events Plaintiff describes, if true, are at least in bad taste if not themselves deserving of condemnation,” but he cannot “bootstrap protection for sexual orientation into Title VII” under the guise of a sex-stereotyping claim.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

Title VII Theories – Hostile Work Environment

- *Vickers v Fairfield Medical Center* (CA 6, 2006)
- Vickers contended that, in eyes of co-workers, his sexual practices, whether real or perceived, did not conform to traditionally masculine role.
- Sixth Circuit Court of Appeals concluded that *Price Waterhouse* sex-stereotyping theory was not broad enough to apply to his claim.

Continued



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

Title VII Theories – Hostile Work Environment

- *Price Waterhouse* focused on characteristics that were demonstrable *in the workplace* (not outside of work).
- Plaintiff subjected to vulgar statements and graffiti regarding his sexual orientation and practices, and he was physically assaulted.
- Claim failed because discrimination was based on his sexual orientation, and not sex discrimination.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

Elliott-Larsen Civil Rights Act

- *Macreno v St James Capital* (Mich Ct Apps, 2011)
- Comments by vice president included calling plaintiff "a flaming faggot," stating that he "acted gay" and that he needed to "grow some balls."
- Michigan Court of Appeals reviewed dictionary definition of "ball," found that it included: "balls, Slang (often vulgar), a. boldness; courage."

Continued



Elliott-Larsen Civil Rights Act

- Complaint was simply about another employee's use of vulgar expressions denoting a lack of courage or boldness and claim failed.



Kalich v AT&T Mobility (CA 6, 2012)

- Numerous comments by supervisor who knew plaintiff is gay
- Supervisor had not made any sexual advances towards him and there was no evidence that supervisor singled plaintiff out "because of" his sex.
- Claim failed because, under Michigan law, as under Title VII, sexual orientation is not a protected classification.



Same Sex Benefits for Federal Employees

- On June 17, 2009, President Barack Obama issued a memo to all heads of executive departments and agencies to look for opportunities within existing law to extend to "same-sex domestic partners" benefits available to married persons to "help the Federal Government compete with the private sector to recruit and retain the best and brightest employees."



LGBTQ Alphabet Soup



Defense of Marriage Act

- Feb 23, 2011 - Attorney General Eric Holder announced that President Obama concluded that Section 3 (definition of marriage as legal union of one man and one woman for all purposes under federal law, (i.e., insurance benefits, social security survivor benefits; filing joint tax returns) as applied to *legally married* same-sex couples is unconstitutional.
- Holder was instructed not to defend the law in litigation.



LGBTQ Alphabet Soup



Michigan – Constitutional Amendment

- 2004 - voters amended state constitution to provide that marriage is between one man and one woman.
(Constitution Art I, sec. 25)



LGBTQ Alphabet Soup



2015 Game Changer – *Obergefell v Hodges*

- U.S. Supreme Court held that it is unconstitutional for a state to deny same sex couples the right to marry.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

Game Changer?

- But – there is still no state or federal civil rights law that prohibits discrimination in Michigan against LGBT in housing, schools or employment.
- Thus, legally married lesbian employees could be fired for displaying picture of wife on desk at work.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

EEOC View on Sexual Orientation Discrimination

- Discrimination based on sexual orientation is sex discrimination (i.e., a man would not be fired for placing a picture of his wife on his desk).
- Fiscal Year 2016 (Oct. 1, 2015 to Sept. 30, 2016) – EEOC resolved 1,650 charges of discrimination by LGBT employees and obtained \$4.5 million in relief.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

EEOC View on Transgender Discrimination

- EEOC ruled that Bureau of Alcohol, Tobacco, Firearms & Explosives violated law by withdrawing job offer to male applicant after learning during a background check that employee was transitioning to female. *Macy v Holder* (EEOC, 2012).
- EEOC found that discrimination against transgender employees is illegal sex stereotyping.



LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELLORS AT LAW

Michigan Department of Civil Rights

- 2014 Resolution – publicly supports expansion of federal, state and local laws to protect people from discrimination on bases of sexual orientation or gender identity in employment, housing, etc. and urging Michigan legislature to amend Elliott-Larsen Civil Rights Act.



LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELLORS AT LAW

EEOC – Examples of Unlawful Acts against LGBT

- Failing to hire or firing because of LGBT status
- Firing because employee is going through gender transition. [Discussion regarding how to handle issue]
- Denying spousal benefits to same sex married couples

Continued



LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELLORS AT LAW

EEOC – Unlawful Acts Against Transgender Employees

- Denying employee use of bathroom corresponding to their gender identity. [EEOC's position – can't request medical information regardless of situation]
- Intentionally and persistently refusing to use name and gender pronoun that corresponds to the gender identity of employee



Recent Court Cases

- February 2017 – EEOC asked 6th Circuit Court of Appeals to endorse its position that discrimination based on gender identity is *per se* discrimination based on the person's sex.

Continued



Recent Court Cases

- Dec 2016 - 11th Circuit Court of Appeals heard oral arguments in *Evans v Georgia Regional Hosp.* Decision pending.
- Case brought by lesbian security guard forced to resign because of sexual orientation.
- Feldblum (first openly gay EEOC Commissioner) was present – “it should have been clear in 1964 when Title VII passed that it protected gay and transgender employees.”

Continued



Recent Court Cases

- 11th Circuit Court ruled on March 10:
 - In pro per plaintiff should have been permitted to amend her claim to plead discrimination under Price Waterhouse theory (not conforming to gender stereotypes is sex discrimination).
 - But Title VII does not permit claims for discrimination based on sexual orientation. Failure to conform at issue (as argued by dissent) is behavioral only and not her “being” (i.e., how she looked and presented).

Continued



Recent Court Cases

- Dissent: “Plain and simple, when a woman alleges ... that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer’s image of what women should be – specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer’s stereotyped view of women.”

Continued



Recent Court Cases

- Jan 2017 - Texas Supreme Court agrees to hear challenge to Houston’s “same sex employee benefit program.”
- Issue is benefits for same sex couples married in another state *before* U.S. Supreme Court declared bans on same sex marriages unconstitutional.

Continued



Recent Court Cases

- Dec 2016 – Texas District Court blocked enforcement of ACA regulations – religious groups challenged claiming it required doctors to perform sex transition procedures contrary to medical judgment and religious beliefs.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

March 2016 – North Carolina 'Bathroom' Law

- Intended to establish "single-sex" multiple occupancy bathroom and changing facilities.
- Defines "biological sex" as "physical condition of being male or female, which is stated on a person's birth certificate."
- Requires "every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex."

Continued



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

NC 'Bathroom' Law

- Permits single occupancy rooms designated as "unisex."
- Forbes estimated that, as of November 2016, law cost NC economy over \$600 million.
- Efforts to repeal law in December 2016 failed.
- Renewed efforts to repeal in February 2017 at impasse.



LGBTQ Alphabet Soup

PLUNKETT COONEY
ATTORNEYS & COUNSELLORS AT LAW

U.S. Supreme Court & Bathroom Laws

- Oct 2016 - Supreme Court announced it would hear oral argument on bathroom case brought by Gavin Grimm. The 4th Circuit Court of Appeals had ruled that students should be allowed to use restrooms of their choice. Relied on guidance from Obama administration.
- Oral argument is set for March 28, 2017.



LGBTQ Alphabet Soup



U.S. Supreme Court & Bathroom Laws

- Guidance had required schools to allow transgender students to use restroom correlating with their gender identity.
- March 6, 2017 – Supreme Court announced it would not hear case because Trump administration reversed previous [Obama administration] guidance upon which lower court had relied.

Continued



LGBTQ Alphabet Soup



U.S. Supreme Court & Bathroom Laws

- 4:4 Supreme Court split would have meant that the 4th Circuit Court of Appeals' ruling would stay in place and students could use restroom of their choice.
- Other cases are working their way to the Supreme Court, but a conservative justice will likely be added before they are heard.



LGBTQ Alphabet Soup



Other Legal Issues

- 9th Circuit Court of Appeals upheld Senate Bill 1172, California law that prohibited state-licensed mental health providers from employing “dangerous sexual orientation change efforts” with minors (i.e., “ex-gay therapy”).



Questions?



Claudia D. Orr
(313) 983-4863
corr@plunkettcooney.com



Laura M. Dinon
(231) 348-6417
ldinon@plunkettcooney.com



Post-Webinar Survey



We want to hear
from you.



Thank You!!

Content of this webinar was intended to provide general information about legal issues and should not be taken as legal advice in any specific instance.

Information presented in this webinar was current at time of original presentation on March 21, 2017.

Information can become outdated or inaccurate as result of subsequent amendments to laws or issuance of new regulations or court decisions interpreting laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.



LGBTQ Alphabet Soup

PLUNKETT & COONEY
ATTORNEYS & COUNSELLORS AT LAW
