



Frequently Asked Questions: The EEOC's Decision in Lusardi v. McHugh

Updated April 8, 2015

On April 1, 2015, the Equal Employment Opportunity Commission issued a groundbreaking decision confirming that some of the most common forms of harassment faced by transgender employees should be recognized as what they are: unlawful discrimination in violation of Title VII, the federal employment nondiscrimination statute.

The decision is available on TLC's website: <http://transgenderlawcenter.org/archives/11521>

1. What happened in this case?

Ms. Lusardi is a disabled veteran who worked as a Software Quality Assurance Specialist in the U.S. Army Aviation and Missile Research, Development and Engineering Center ("AMRDEC") in Alabama. When Lusardi transitioned from male to female in 2010, she was required to use a separate single-user restroom, out of concerns that other employees might feel "uncomfortable" sharing a restroom with her. Ms. Lusardi was counseled by her supervisor on the few occasions that she used the general women's restroom because the single-user restroom was out of order. In addition, Ms. Lusardi's supervisor repeatedly used male pronouns and her old name in front of her co-workers and others.

Ms. Lusardi filed a complaint with the Army's EEO office alleging that she had been discriminated against based upon her sex and gender identity in violation of Title VII, the federal employment nondiscrimination law. The Army investigated but determined that she had failed to prove that she was subjected to discrimination or harassment. With Transgender Law Center's help, Ms. Lusardi appealed the Army's decision to the U.S. Equal Employment Opportunity Commission ("EEOC").

She also made a separate complaint to another federal agency, the Office of Special Counsel ("OSC"), alleging that her supervisor's harassment was a "prohibited personnel practice," which the OSC has jurisdiction to investigate and prosecute. In October 2014, the OSC completed its investigation and [concluded](#) that the Army had engaged in a "prohibited personnel practice" by discriminating against Ms. Lusardi for reasons unrelated to work performance. The OSC ordered the Army to provide LGBT sensitivity training to employees in Ms. Lusardi's workplace. However, the OSC did not award any financial compensation.

The EEOC's finding reverses the Army's decision to dismiss Ms. Lusardi's Title VII complaint, and expressly concludes that intentionally referring to a transgender person by incorrect gender pronouns and prohibiting them from using the restroom consistent with their gender identity violates Title VII. Among other things, the EEOC ordered the Army immediately to ensure Ms. Lusardi's access to the women's restroom; to investigate and determine if Ms. Lusardi is entitled to back pay or other financial damages; and to provide training on gender identity issues to all civilian staff and supervisors in Ms. Lusardi's workplace.

Ms. Lusardi was represented by Transgender Law Center with the pro bono assistance of Leiff Cabraser Heimann & Bernstein.

2. Why is this decision significant?

This decision confirms that some of the most common forms of harassment faced by transgender employees constitute unlawful discrimination in violation of Title VII. It builds on the 2012 EEOC decision in *Macy v. Holder*, another case brought by Transgender Law Center, in which the agency held for the first time that transgender people are protected from discrimination by Title VII. Mia Macy was an applicant for a federal job who alleged she hadn't been hired because of her transgender identity; the EEOC determined that Title VII prohibited this type of misconduct by prospective employers. Today the EEOC went further and addressed harassment in a current employee's workplace, providing clear guidance that intentional misuse of gender pronouns and denying restroom access based upon gender identity both constitutes harassment, and is unlawful under Title VII.

3. What is the EEOC and what does it do?

The Equal Employment Opportunity Commission ("EEOC") is an independent federal agency that is responsible for interpreting and enforcing all the federal laws that prohibit employment discrimination, including Title VII, which prohibits sex discrimination. For federal employees, the EEOC can decide discrimination complaints itself and order that remedies like money damages be paid to individuals. For employees in the private sector and in state and local governments, EEOC staff can investigate complaints of discrimination and issue findings; provide mediation between employers and individuals who have experienced discrimination; and EEOC attorneys can bring lawsuits in federal court against employers who discriminate.

4. Is a decision by the EEOC "binding" on employers?

It is a precedent-setting decision, which was approved by a vote of the full five-member Equal Employment Opportunity Commission. It will be binding on all federal agencies and federal contractors and on EEOC offices and investigators across the country. The decision affects transgender people throughout the United States, because Title VII applies to all employers with 15 or more employees, including private sector employers and federal, state, and local government employers. The EEOC's interpretation of the law will also be entitled to significant respect from the courts when they are considering employment discrimination claims brought by transgender people in future cases.

5. What is Title VII?

Title VII refers to Title VII of the Civil Rights Act of 1964, which is a federal law that prohibits employment discrimination based upon race, religion, sex, color, and national origin.

6. How will this decision affect me?

This means that if you experience discrimination and harassment at work – including intentional misuse of pronouns, being referred to by your previous name, or being denied appropriate restroom access – you can make a complaint to the EEOC and expect that it will investigate this misconduct as a violation of federal nondiscrimination law (Title VII).

7. How can I file an employment discrimination complaint with the EEOC?

Transgender Law Center has a guide to the EEOC complaint process available on our website: <http://transgenderlawcenter.org/issues/employment/eecocomplaint>. You can also contact your nearest EEOC office for information about how to file a complaint.

Generally, a person has 180 days from the date of the alleged discrimination to file a complaint with the EEOC. This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local nondiscrimination law. To locate the EEOC office nearest to your home, contact the EEOC at 1-800-669-4000 or look on the EEOC website for a list of field offices:

<http://www.eeoc.gov/field/index.cfm>. For more on the process for filing a complaint, see <http://www.eeoc.gov/employees/howtofile.cfm>.

If you are a federal employee, the timeline for filing a complaint is even shorter. Generally, federal employees have only 45 days from the time of the incident to contact their agency's EEO counselor, who will attempt to resolve the matter informally before referring it to the EEOC. To learn more about how to file a complaint with the EEOC as a federal employee, contact the EEOC at 202-663-4599 or look on the EEOC website:

http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

If you live someplace that has a state law prohibiting employment discrimination based on gender identity or expression, you may want to make a complaint with the appropriate state agency and ask them to "cross-file" (that is, to open a parallel complaint) with the EEOC. To find out if your state has a nondiscrimination law that includes gender identity and expression, check out this map from The Task Force:

http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_new.pdf

8. Can the Army appeal this decision?

No. The Army has no ability to appeal a decision by the EEOC to court or anywhere else. The EEOC is the final word.

9. How is this EEOC ruling different than a court decision?

Decisions by courts—other than the U.S. Supreme Court—are only binding on other courts in the same geographic area. A decision from the EEOC is binding on EEOC offices and investigators throughout the country, which means that transgender people anywhere in the country can file complaints of discrimination with the EEOC and have access to that process for investigation and enforcement. An EEOC decision interpreting Title VII would also be entitled to serious respect from the courts in future cases, because it's the agency that Congress charged with interpreting and enforcing federal discrimination law.

10. Does the decision apply to other types of discrimination, or just employment?

Title VII, the law involved in this case, is an employment discrimination law. But the logic of the EEOC's decision should be applied to other types of discrimination, such as cases involving discrimination in schools or in public accommodations.

11. Does this mean I can use the restroom of the gender I identify as at work?

Yes! This decision specifically addresses the issue of restroom access for transgender employees. Title VII prohibits discrimination in the “terms and conditions” of employment. This decision affirms that having access to a safe and appropriate restroom is a condition of employment, and that an employer’s decision to prohibit access based upon gender identity violates federal law.

12. Does this mean that transgender people can serve openly in the Army and other branches of the armed forces?

Unfortunately not. Ms. Lusardi, while a veteran, is a civilian employee of the U.S. Army not an active duty service member. At this time, all branches of the U.S. military continue to prohibit active open service by transgender individuals. Transgender Law Center continues to work with transgender veterans and other community members to overturn the ban. The federal government is the largest employer in the country. It is unjust, unlawful, and bad for business to discriminate based upon gender identity.

13. Do we still need employment nondiscrimination laws like ENDA that explicitly protect transgender people?

Yes. It’s important to have protection from all sources of law. The *Macy* and *Lusardi* decisions were issued by the agency that interprets and enforces federal sex discrimination laws. That’s hugely important and will be binding on EEOC offices and investigators across the country. Every transgender person in the country now has access to that process and those protections. It’s also crucial to have clear protections enacted by Congress, state legislatures, and local governments, and affirmed by the courts. In order to ensure that employers are aware of their responsibilities and transgender people know their rights, we still need states and the federal government to pass nondiscrimination laws that explicitly state that discrimination based on gender identity and expression is illegal.