

May Flowers and ENDA's Showers

By Marti Abernathey

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Abstract

I pulled a couple of well versed legal minds in to shed more light on the shared space concerns: "It's problematic for employees who have transitioned prior to employment. As I read it, it means that shower or locker rooms without private stalls are exempt, so long as employees get a shower or locker room [...]"

Article

I pulled a couple of well versed legal minds in to shed more light on the shared space concerns:

"It's problematic for employees who have transitioned prior to employment. As I read it, it means that shower or locker rooms without private stalls are exempt, so long as employees get a shower or locker room 'not inconsistent with' their self-identified gender. Thus, a transgender person, regardless of surgical status, can be singled out for placement in a single-person shower room, though everyone else uses a multi-person gendered shower room. However, this would only happen, according to the text, if the rooms involved 'unavoidable nudity.' Many shower and locker rooms these days have some stalls for private use. ENDA does not require employers to segregate transgender employees. Rather, it specifically notes that when the locker/shower room has private spaces, ENDA applies to permit the transgender person to use the room appropriate to their gender identity. But when there is no private space in the locker/shower room, then ENDA leaves it up to the employer to segregate or not to segregate - it is up to them to do the right thing, and I hope they would." - Dr. Jillian Weiss (Dr. Jillian T. Weiss, has a J.D., Ph.D (Law), 20 years of experience in the corporate world, and is experienced in working with large companies and public agencies. She blogs at <http://transworkplace.blogspot.com>)

Katrina Rose:

I think I'm going to have to plead guilty to having briefly fallen victim to long-term slave mentality. My initial reaction was 'Perhaps there could be better language, but this language certainly could be worse. It probably won't completely foreclose a *Goins v. West* situation, but I will say that it is better than I'd expected to see.'

I'd grown so accustomed to seeing either double-talk or blatant 'penis panic' histrionics from Barney Frank and his worshipers that I was initially happy to see something that at least seems to be better than a full shower/bathroom exclusion.

Yes, it is better than I expected to see. Yes, it could be worse. However, the 'certain shared facilities' clause of the newly-introduced ENDA gives the employer total control over de facto identity determination for transsexuals (I'm sorry if this ruffles the political correctness feathers of the

Wilchins-wonks and other radical gender libertines, but transsexuals are who this provision impacts; presumably this version of ENDA would also alleviate Oiler v. Winn-Dixie situations, but mere crossdressing at work is not something that should be enforced by law and if the concept in any way becomes associated with this bill it is DOA) subject to work-site use of “shower or dressing facilities.”

A hyper-technical concern is: While “shower facilities” should have an obvious meaning, but how far will the creative employer who truly does not want to have a transsexual employee be able to stretch the term “dressing facilities”? I’m hoping that perhaps an existing OSHA regulation defining the latter would plug this loophole, but I’m not optimistic.

This hyper-technical concern is something of a predicate to the broader problem: the provision is a de facto evisceration of legitimate legal protection for the transitioned transsexual by allowing the employer to do something critical and ever so basic: it gives the employer a free pass to ask up front - and at any time - about the person’s gender status and/or HISTORY.

West’s position in the Goins v. West Group case (a bathroom usage case involving an MTF for those who have forgotten already; though she personally identifies as ‘transgender’ rather than ‘transsexual,’ the realities of her situation are contiguous with those of one who does identify as ‘transsexual’) implied to the court - and to the public - that everything would have been okay with Juli Goins’ use of the women’s restroom if she had a vagina AND (and this would be even more critical for someone who is not out) was willing to submit to the employer’s questions about that issue and prove vaginal presence to the employer’s satisfaction.

This cannot be accepted as how reality would have played out, however.

The alleged complaints came from women (who were never identified, but that’s a different problematic aspect of the case) who saw her enter the restroom fully-clothed. The desire of these never-identified female co-workers to prevent her from doing so further - and the immediately-thereafter-asserted right of the employer to ask her about her gender status in spite of trans-inclusive state employment anti-discrimination law - was based on these never-identified female co-workers’ personal perceptions of how she looked fully-clothed.

I see no reason to believe that this will not be the scenario that lays out regarding any potential dispute regarding “shower or dressing facilities” pursuant to the 2007 ENDA. And, can anyone envision any federal judge NOT looking to Goins v. West Group (and the subsequent Doe v. City of Minneapolis, which DID involve shower facilities) for guidance on who to interpret our rights under this language?

Sadly, I’m left with the following ultimate assessment: Meet the new ENDA, same as the old Goins v. West Group.

- Katrina C. Rose, Attorney at Law (with apologies to both Pete Townsend and Juli Goins)

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