



# MCAD ADVISORY: AN ACT RELATIVE TO GENDER IDENTITY



On July 1, 2012, Massachusetts General Laws Chapter 151B was amended to prohibit discrimination in employment, housing, lending, credit and mortgage services based on an individual's gender identity. The Massachusetts Commission Against Discrimination (MCAD) enforces G.L. c. 151B and has developed this advisory to educate the public about discrimination based on gender identity, to inform individuals of their rights, and to assist employers, providers of housing and mortgage services and other entities in understanding their obligations under the law.

## I. Introduction

Since 2001, the MCAD has held that discrimination against transgender individuals could constitute sex and disability discrimination. In Millett v. Lutco, 23 Mass. Discrimination Law Rptr. 231 (2001), the MCAD's Commissioners, acting as the Full Commission, issued an Order stating that discrimination against a transgender individual constituted illegal sex discrimination. In Jette v. Honey Farms Mini Market, 23 Mass. Discrimination Law Rptr. 229 (2001), the Full Commission, issued another Order reasoning that transgender individuals with an underlying diagnosis of gender dysphoria may have a claim for disability discrimination under G.L. c. 151B. The Full Commission further recognized that an employer may be liable for discrimination based on sexual orientation if it perceives a transgendered individual to be homosexual, and discriminates based on that belief. Millett v. Lutco, *supra*. Pursuant to these decisions, the Commission has routinely investigated and issued findings in discrimination cases filed by transgender individuals under the Fair Employment Practices Act, G.L. c. 151B and the Massachusetts Public Accommodation Act, G.L. c. 272. For more information, see section IV.

On the federal side, the U.S. Equal Employment Opportunity Commission (EEOC) has taken steps to ensure that the rights of LGBT individuals are protected under Title VII—the federal law which prohibits employment discrimination. In 2012, the EEOC ruled that discrimination against a transgender individual, based on transgender identity specifically and gender identity generally, is prohibited under Title VII's sex discrimination provision.<sup>1</sup> In April 2015, the EEOC ruled that restricting a transgender employee from using a restroom facility consistent with the employee's gender identity and refusing to use the transgender employee's preferred name and gender pronoun constituted sex discrimination and sex-based harassment under Title VII.<sup>2</sup>

## II. The Law's coverage

This new law amended G.L. c. 151B to include gender identity as a protected class in employment, housing, credit and mortgage services. In addition to prohibiting discrimination based on gender identity, the new law expanded the definition of a hate crime to include criminal acts motivated by prejudice towards transgender individuals and prohibited discrimination based on gender identity in public schools. G.L. c. 22C, § 32 (hate crimes); G.L. c. 71, § 89 (public schools); G.L. c. 76, §§ 5, 12B (public schools). These latter provisions of the Act are not enforced by the MCAD.<sup>3</sup> The areas in which gender identity discrimination is enforced by the MCAD are described below.

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<sup>1</sup> Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).

<sup>2</sup> Lusardi v. McHough, EEOC Appeal No. 0120133395 (April 1, 2015).

<sup>3</sup> In certain circumstances, the victim of a hate crime may bring an action at the MCAD. For example, if an employee is the victim of a gender-identity based hate crime perpetrated by his/her supervisor in the context of employment, this could constitute discrimination and/or harassment.

## A. Employment

It is an unlawful discriminatory practice for an employer,<sup>4</sup> or an employee or agent thereof, to discriminate against any employee or applicant for employment based upon that individual's gender identity with regard to recruitment, hiring, firing, discipline, promotion, wages, job assignments, training, benefits, and other terms and conditions of employment. Discrimination may take the form of unwelcome verbal or physical conduct, including but not limited to, derogatory comments, jokes, drawings or photographs, touching or gestures. Examples of discrimination in employment include the following:

- An employee takes a leave of absence to undergo transition from male to female, and upon her return from leave, her employer reduces her hours, downsizes her office, and demotes her.
- A male job applicant is rejected solely because the employer learns, after checking his employment references, that the applicant identified as a woman in previous employment.
- A male employee is constantly harassed or made fun of by his supervisors for mannerisms perceived to be feminine.
- A transgender employee is consistently excluded from office meetings, office parties, and work-related events to which all other employees are invited.
- A transgender employee notifies his employer that his co-workers persistently mock and deride him because of his gender-identity, and the employer fails to take prompt remedial action to stop the harassment.

In evaluating a claim of hostile work environment based on gender identity, the Commission considers the employer's evidence of its support for the employee. In a case where the company president met with all staff, communicated that the employer would not tolerate discrimination or harassment of a transgender employee and directed that the employee be treated with respect; disciplined an employee who sought not to interact with the transgender employee; changed company records to reflect the employee's name change; provided a leave of absence for surgeries; assisted the transgender employee in obtaining insurance coverage for the surgeries; arranged for the employee's use of a private bathroom prior to the completion of her sexual reassignment surgery and welcomed the employee's use of the women's restroom following gender reassignment surgery, the Commission found the Complainant was not subjected to a hostile work environment. *Millett and MCAD v. Lutco, Inc.*, 30 Mass. Discrimination Law Rptr. 77, 85 (2008) (holding that "matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf"). The Commission has set forth a list of best practices as guidance for employers in Section IV.

## B. Housing

With the exception of certain categorical statutory exclusions, G.L. c. 151B makes it an unlawful discriminatory practice for an owner, lessor, managing agent or other person having the right to sell, rent or lease or approve the sale, rental or lease of housing, to refuse to sell, rent, lease, approve the sale, rental or lease, or otherwise deny or withhold housing, or an interest therein, or otherwise discriminate against any person because of his or her gender identity. In addition, real estate brokers, real estate salespersons, and employees or agents thereof, may not discriminate on the basis of gender identity. Prohibited behavior includes all aspects of real property transactions, such as the refusal to show, rent or sell real property that is

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<sup>4</sup>An employer is generally defined under G.L. c. 151B as one that employs six or more persons. Public employers are included regardless of the number of people employed.

available for sale or lease, and the refusal to provide services or make repairs or improvements for any tenant or lessee based on gender identity.<sup>5</sup> Examples of discrimination in housing include the following:

- A landlord, whose apartment does not fall within any of the statutory exclusions in G.L. c. 151B, refuses to show a transgender male an apartment for rent for reasons related to the prospective tenant's gender identity.
- A landlord adversely changes the terms and conditions of a transgender tenant undergoing gender reassignment therapy, resulting in the tenant's eviction.
- A realtor steers a transgender individual away from an apartment because he does not feel that the individual would "be a good fit for the neighborhood."
- The owner of a commercial property refuses to lease the property to a transgender rights group because of prejudice toward transgender individuals.

#### C. Credit and mortgage services

Banks or other lending institutions may not discriminate against an applicant for credit on the basis of gender identity. Examples of discrimination in lending and credit include the following:

- A mortgage broker steers a transgender borrower, who is eligible for prime loans, into a sub-prime loan with high monthly payments and interest rate and excessive prepayment penalties.
- A credit card company refuses to issue a credit card to a transgender male because he previously identified as a female.

#### D. Retaliation

It is unlawful to retaliate against an individual who has opposed a discriminatory practice or filed a charge of discrimination, or who has testified, assisted or participated in a Commission investigation, proceeding or hearing. It is also unlawful for an employer to issue a negative reference about an employee in retaliation for that employee's protected activity, such as formally or informally charging the employer with discrimination.

### III. Definitions and Proof

#### A. Definition of Gender Identity

G.L. c. 151B defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Gender identity is an individual's sense of being male or female.<sup>6</sup> The way an individual expresses his or her gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender.<sup>7</sup>

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<sup>5</sup> The U.S. Department of Housing and Urban Development regulations explicitly require that eligibility determinations for HUD-assisted or insured housing must be made without regard to actual or perceived gender identity. They also preclude owners and operators of HUD-assisted housing or housing with financing insured by HUD from inquiring about the sexual orientation or gender identity of an applicant for, or occupant of, a dwelling. See, Final Rule issued February 3, 2012; (codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

<sup>6</sup> U.S. Office of Personnel Management: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

<sup>7</sup> Id.

The law protects individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth.<sup>8</sup> Transition is the process by which a transgender person goes from presenting as one gender to another.<sup>9</sup> For some, the process of transition may be lengthy. Some transgender individuals seek medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some may not pursue medical treatment or gender reassignment surgery. The statutory definition of gender identity does not require the individual to have undergone transitional surgery or intend to undergo surgery, nor does it require evidence of past medical care or treatment. Gender identity is distinguished from sexual orientation.<sup>10</sup> Sexual orientation is based on the direction of one's physical and romantic attractions, which may be identified as heterosexual, homosexual, lesbian or bi-sexual. Gender identity refers to a person's internal sense of their own gender its expression.

The law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. Prior to the Act, courts and the MCAD issued decisions concluding that gender stereotypes may be the source of unlawful bias.<sup>11</sup> For example, discrimination against a person designated as female at birth and whose identity is female but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on sex and gender identity.

## B. Proof Requirements

A person may establish gender-related identity through medical history, medical/psychiatric care or treatment of the gender-related identity; by consistent and uniform assertion of the gender-related identity or by any other evidence that one's gender-related identity is sincerely held as part of one's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose, see *infra* Section III C. Examples of the type of evidence which will assist the Commission in investigating claims of gender-identity discrimination are:

- Sworn statements by a Complainant and/or witnesses relating to the Complainant's sincerely held core gender-related identity;
- Sworn statements from the Complainant and/or witnesses relating to the Complainant's routine activities and conduct, such as dress, grooming, actions and use of gendered pronouns;
- Sworn statements and/or medical records from medical and/or mental health professionals involved in the treatment/ transition of individuals seeking, in the process of, or who have completed gender reassignment;
- Evidence of hormone use, sex reassignment surgeries, and/or other procedures that alter appearance;

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<sup>8</sup> Id. An individual who was assigned the male sex at birth but who identifies as female is a transgender woman. Likewise, a person assigned the female sex at birth but who identifies as male is a transgender male.

<sup>9</sup> Id.

<sup>10</sup> Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass. Super. Ct. 2002).

<sup>11</sup> Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender-based remarks reflecting view that female manager was not sufficiently feminine are evidence of gender discrimination); Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252, 259 (1<sup>st</sup> Cir. 1999) (Court stated, in dicta, that just as a female may claim gender discrimination for being viewed as failing to meet stereotypical expectations of femininity, a male may base a claim of gender discrimination on evidence that he was viewed as not conforming to stereotypical expectations of masculinity); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (an employer who makes employment decisions based on stereotypes about sexual roles or allows the creation of a hostile or abusive work environment based on sexual stereotypes, may be liable under Title VII's prohibition of discrimination on the basis of sex); Ianetta v. Putnam Investments, Inc., 142 F. Supp. 2d 131 (D. Mass. 2002) (discrimination against a male for failing to conform to gender stereotypes); Connor v. Hub Folding Box Co., 15 Mass. Discrimination Law Rptr. 1494 (1993), *aff'd*, Hub Folding Box Co., Inc. v. Mass. Comm'n Against Discrimination, 52 Mass. App. Ct. 1104 (Rule 1:28 decision, July 12, 2001) (gender stereotype that a woman with a tattoo was a prostitute, on drugs, or from a "broken home" reflects gender bias).

- Evidence of a legal name change, revision of birth certificate, passport, or social security card, re-designation of gender on a Massachusetts Department of Transportation Registry of Motor Vehicles form, or other legal documents reflecting gender identity.

#### C. Meaning of “Sincerely Held and Part of a Person’s Core Identity”/Improper Purpose

The courts have yet to give significant guidance on how to interpret the requirement that gender identity be “sincerely held and part of a person’s core identity.” The considerations bearing on this requirement will necessarily be developed as the case law evolves; however, evidence of consistent conduct over a period of time is likely to support a claim of sincerely held core gender identity.

The law excludes from its coverage a gender-related identity that is “asserted for any improper purpose,” which would include an unlawful purpose. For instance, a fraudulent representation to obtain an otherwise unavailable employment-related benefit or a fraudulent effort to evade a legal obligation or an effort to commit a crime would constitute improper unlawful purposes.

#### D. Restrooms and Sex-Segregated Facilities

No provision of G.L. c. 151B prohibits restrooms from being designated by gender. Prohibiting an individual from using a restroom or other sex-segregated facility consistent with his/her gender identity may be evidence of discriminatory animus. Requiring an employee to provide identification or proof of any particular medical procedure (including gender reassignment surgery) in order to access gender designated facilities, may also evidence discriminatory bias.

### IV. Transgender Protection under the Massachusetts Public Accommodation Act and the Massachusetts Fair Educational Practices Law

While the Act did not explicitly amend the Public Accommodations Act, G.L. c. 272, § 98 and the Fair Educational Practices Act, G.L. c. 151C, MCAD investigates and adjudicates claims brought pursuant to these statutes, where there is evidence of discrimination based on gender, disability and/or perceived sexual orientation. As described in Section I, the Commission has held that discrimination against transgender individuals may be prohibited under the proscriptions against gender and disability discrimination. *Millett v. Lutco*, *supra.*; *Jette v. Honey Farms Mini Market*, *supra.* (gender dysphoria can constitute a disability). The facts of a particular case may also support a claim of discrimination based on sexual orientation. *Id.*

Examples of discrimination in a place of public accommodation are:

- A restaurant refuses to seat a group of transgender patrons on the grounds that “this is a quiet restaurant,” and “you will draw too much attention from our other patrons.”
- A hotel refuses to host a conference of transgender individuals.

Examples of discrimination in an educational institution are:

- A graduate school refuses to admit a male transgender applicant when it learns from the applicant’s educational records that he previously identified as a female.<sup>12</sup>
- A graduate school refuses to allow a transgender female graduate student to serve as a resident assistant in a female dormitory because she previously identified as a male.

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<sup>12</sup> The Fair Educational Practices Act prohibits discrimination against any person seeking admission to a vocational training institution or to a program or course of study leading to a degree, beyond a bachelor’s degree, because of sex or to discriminate against any student admitted to a vocational training institution in providing benefits, privileges, and placement services.

## V. Best Practices

The Commission encourages employers, housing providers, and entities subject to the law to foster an inclusive and welcoming environment by following best practices recommended by the American Bar Association<sup>13</sup> which may include the following:

- Revise non-discrimination, equal opportunity, non-harassment, and other employment-related policies to include a statement that discrimination and harassment on the basis of gender identity is prohibited;
- Update personnel records, payroll records, email systems, and other documents to reflect employee's stated name and gender identity, and ensure confidentiality of any prior documentation of an employee's pre-transition name or gender marker;
- Prohibit derogatory comments or jokes about transgender persons from employees, clients, vendors and any others, and promptly investigate and discipline persons who engage in discriminatory conduct;
- Use names, pronouns, and gender-related terms appropriate to employee's stated gender identity in communications with employee and with others;
- Avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity;
- Provide employees access to any sex-segregated facility, i.e. bathrooms, locker room facilities, based on the employee's stated gender identity;
- Incorporate in any diversity, anti-discrimination, and anti-harassment trainings information about transgender employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace;
- Employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace;
- Landlords or property owners should take appropriate remedial action to ensure cessation of harassment by other tenants based on gender identity.

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<sup>13</sup> American Bar Association's Commission on Sexual Orientation and Gender Identity, "Best Practices for Promotion LGBT Diversity" published 2011.