

Gender Identity & Sexual Orientation Discrimination in the Workplace
Part VIII. LGBT People in the Context of Culture, Religion, and Society



◀ Prev

Chapter 46. INTERACTING IN THE WORKPLACE WITH INDIVIDUALS WHO HAVE AN
INTERSEX CONDITION

Next ▶

Julie A. Greenberg, Esq.
Professor of Law, Thomas Jefferson School of Law, San Diego, California Board Member, Advocates for Informed Choice and Member,
World Professional Association for Transgender Health Legal Issues Committee

———— Page 46-2 ————

Editor's Note: As the discussion in preceding chapters illustrates, and as discussed specifically in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Sections III.E.2.–3., the idea that “sex” is a binary choice between “male” and “female” no longer holds up to analysis or social trends. Indeed, in 2012 and 2013, the American Psychiatric Association finally addressed the stigmatization it had caused transgender individuals when it officially acknowledged that “[b]eing transgender [or gender] variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities”^a and revised its *Diagnostic and Statistical Manual of Mental Disorders* to reflect that normal “[e]xperienced gender may include alternative gender identities beyond binary stereotypes.”^b And, in April 2014, just as this treatise was going through final editing, the high courts in Australia and India recognized that not everyone is male or female.^c

Julie Greenberg, professor of law at Thomas Jefferson School of Law, has written extensively on issues relating to gender and has shown that the binary gender construct is a fiction that has served to foster discrimination against persons who do not, and often cannot, conform to a strictly male/female dichotomy. She explained in a 1999 article that:

A binary sex paradigm does not reflect reality. Instead, sex and gender range across a spectrum. Male and female

———— Page 46-3 ————

occupy the two ends of the poles, and a number of intersexed conditions exist between the two poles. Millions of individuals are intersexed and have some sexual characteristics that are typically associated with males and some sexual characteristics that are typically associated with females.

Although the American legal system blindly clings to a binary sex and gender paradigm, anthropologists who have studied other societies have found cultures that reject binary sex and gender systems. These societies formally recognize that more

than two sexes and/or two genders exist. ^d

Professor Greenberg's writings in this area have repeatedly been cited by numerous tribunals, including in the June 2013 case of *Mathis v. Fountain-Fort Carson School District 8*, ^e where the Colorado Division on Civil Rights observed, “[g]iven the evolving research into the development of transgender persons, compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue.” ^f

Professor Greenberg's essay below provides readers an overview of the legal and social impacts of the binary gender construct, including an introduction to people with a difference in sex development (DSD) ^g or intersex condition, the legal issues they confront, and the pragmatic steps human resource professionals can take to ensure a welcoming environment for these individuals. ^h

————— Page 46-4 —————

46.I. INTRODUCTION

In 2009, Caster Semenya, a teenage runner from South Africa, made international headline news. When Ms. Semenya smashed all her previous records at the World Championships, other runners challenged her right to retain her world title and to compete in future international athletic competitions. Ms. Semenya had not used illegal performance-enhancing drugs or otherwise engaged in unethical behavior. Instead, her competitors challenged her status as a female and her right to participate in women's athletic events. Despite the fact that Ms. Semenya had been identified as a girl at birth, had lived her entire life as a female, and self-identified as a female, she was forced to undergo an intensive investigation to prove her right to participate as a female in athletic competitions. ¹

Why?

Ms. Semenya belongs to a large group of people whose physical characteristics do not fit neatly into the male/female binary norm. ² Most people assume that all people are biologically male or female. However, the reality is that millions of people are born with characteristics that are not all clearly male or clearly female. These people have an intersex condition or DSD.

Because the law sometimes distinguishes between males and females, the existence of people with an intersex condition calls into question how a person's legal sex should be determined. In addition, because state and federal laws prohibit “sex” discrimination in the workplace and many other settings, courts must grapple with determining whether discrimination against someone who does not conform to sex and gender stereotypes constitutes impermissible sex discrimination.

This chapter explores societal assumptions about sex and gender. It begins with an introduction to intersexuality and compares intersexuality to transgenderism and sexual orientation. It then discusses the most pressing issues facing the intersex community and compares them to the concerns of people who are lesbian, gay, bisexual, or transgender (LGBT). It next examines how the law affects people in the intersex community. Finally, it concludes with advice for employment lawyers and human resource managers about how to address issues that may arise in the workplace involving people with an intersex condition.

————— Page 46-5 —————

46.II. WHAT IS AN INTERSEX CONDITION OR DIFFERENCE OF SEX DEVELOPMENT?

A person with an intersex condition or a difference of sex development (DSD) is someone with a congenital condition whose sex chromosomes, gonads, internal reproductive anatomy, or external sexual anatomy do not fit clearly into the binary male/female norm. Some DSDs involve an inconsistency between a person's internal and external sex features. For example, some people with an intersex

condition may have female-appearing external genitalia, no internal female organs, and testicles. Other people with an intersex condition may be born with genitalia that do not appear to be clearly male or female. For example, a girl may be born with a larger than average clitoris and no vagina. Similarly, a boy may be born with a small penis or no penis. Some people with a DSD may also be born with a chromosomal pattern that does not fall neatly into the binary XX/XY norm. ³

Not all intersex conditions are apparent at the time of birth; some conditions are not evident until a child matures. In some conditions, genitalia that originally appear female may masculinize in puberty. Other intersex conditions may be discovered at puberty when the child does not develop typical male or female traits. For example, the condition may be discovered when a teenage girl does not begin to menstruate.

Because experts do not agree on exactly which conditions fit within the intersex classification, and because some conditions are not evident until years after a child is born, it is impossible to state exactly how many people have a DSD. Most experts agree, however, that approximately 1 to 2 percent of people are born with sexual features that vary from the medically defined norm for male and female. ⁴ Approximately one in 1,500 to one in 2,000 births involve a child who is born so noticeably atypical in terms of genitalia that a specialist in sex differentiation is consulted and surgical alteration is considered. ⁵

The term “intersex” itself is controversial. Many doctors and community activists favor abandoning the term “intersex” in favor of the term “disorders of sex development” (also abbreviated DSD). Some who support the use of DSD terminology have argued that the term “disorder” should not be used and the initial “D” should stand for “differences” rather than “disorders.” Throughout this essay, the terms intersex and DSD (denoting differences of sex development) will be used interchangeably.

46.III. HOW DOES INTERSEXUALITY COMPARE TO TRANSGENDERISM AND SEXUAL ORIENTATION?

Many people are confused about how intersexuality compares to transgenderism. In general, intersexuality refers to a condition in which a person's biological sex markers are not all clearly male or female, whereas transgenderism is typically used to describe people whose behaviors, gender expression, and/or gender identity do not necessarily conform with the binary sex norm or may be different from the sex assigned to them at birth. Not all communities use the term “transgender” consistently and different groups and individuals have strong feelings about whether they prefer the term “transgender,” “transsexual,” “trans,” “gender affirmed,” or some other term. ⁶

Society and legal institutions often confuse intersexuality and transgenderism, and frequently conflate the discrete concepts of sex, sexual orientation, gender presentation/gender role, and gender identity. Exhibit 46.1 illustrates prevailing societal presumptions about men and women and the groups that directly challenge those assumptions.

Exhibit 46.1. Societal Assumptions About Men And Women And The People Who Challenge These Assumptions

	Societal assumptions about males	Societal assumptions about females	Challengers
Sexual/reproductive anatomy	Penis, scrotum, testicles, XY chromosomes	Clitoris, labia, vagina, uterus, fallopian tubes, XX chromosomes	People with an intersex condition/DSD
Sexual orientation	Toward women	Toward men	Gays, lesbians, and bisexuals
Gender presentation/gender role	Masculine	Feminine	Gender-nonconforming people
Gender identity	Male	Female	Trans/gender-affirmed people

In general, society has assumed that men display the attributes in the second column and women display the attributes in the third column. In other words, men are presumed to have male anatomy, to be sexually attracted to females, to appear masculine and fulfill male roles, and to self-identify as men. Women are presumed to have female anatomy, to be sexually attracted to men, to be caregiving and feminine, and to self-identify as women. These presumptions are not true for the millions of people who have an intersex condition, are LGBT, or do not conform to gender stereotypes.

46.IV. THE MAJOR CONCERNS OF THE INTERSEX COMMUNITY

Most people are not familiar with the major priorities of the intersex community and assume that the paramount concerns of people with a DSD are identical to the issues that are important to the LGBT community. The two communities share similar concerns about the right to express one's gender identity and sexual orientation free from discrimination, but the most important goal of the intersex movement is to preserve their community members' rights to bodily autonomy.

46.IV.A. First Priority Of The Intersex Movement: Preserving The Right To Bodily Autonomy

Since the middle of the twentieth century, most infants born with an intersex condition have been subjected to invasive surgeries and other medical treatments to conform their bodies, and especially their genitalia, to a medically created, socially imposed binary norm. During the 1950s, physicians developed a medical protocol for the treatment of children who were born with ambiguous genitalia (e.g., a smaller than average penis or a larger than average clitoris). The treatment plan was based on two unproven assumptions: (1) infants are born without an innate sense of gender identity, and (2) children who grow up with atypical genitalia will suffer severe psychological distress.

Until recently, most doctors believed that children were not born with a gender identity. Therefore, they assumed that all infants, regardless of their chromosomes or gonads, could be successfully raised as either boys or girls. Because physicians also believed that growing up with atypical genitalia would lead to emotional distress, doctors would surgically alter any child with atypical genitalia. Because it was (and still is) difficult to surgically create a fully functional penis, the vast majority of infants with an intersex condition would be assigned a female gender. Then, they would be subjected to cosmetic genital surgery to sculpt female appearing genitalia, be given female hormones, and be raised as girls.

The two assumptions underlying the standard medical treatment protocol have been challenged by intersex activists who assert that both assumptions are false. First, they argue that infants are not blank slates in terms of gender identity, and newborns cannot be assigned a gender without careful

consideration of a number of factors. Second, they assert that cosmetic genital surgery on infants is physically and psychologically traumatic and should be stopped.

Many studies have shown that gender identity formation is not totally dependent on the appearance of the genitalia and the gender role in which a person is raised. Based on these studies, in 2006, a group of leading experts from a variety of disciplines published a "Consensus Statement on the Management of Intersex Disorders."⁷ These experts recognized that children are born with an innate sense of gender that cannot be easily manipulated by surgery and hormones. The Consensus Statement recommends that doctors consider a number of factors before assigning a gender to a newborn. Therefore, infants with an intersex condition (especially those with XY chromosomes and testicles) are no longer automatically surgically altered and raised as girls.

Although doctors are now more hesitant to suggest that XY infants with ambiguous genitalia be raised as girls, cosmetic genital surgeries designed to conform a child's genitalia to a binary sex norm have not abated. Even though most intersex conditions pose no medical risk, doctors continue to perform cosmetic surgeries on children whose genitalia do not fit the medically created norm. Doctors still perform a number of surgeries on infants, including reducing the size of a girl's clitoris if they believe it is too large or moving the urethral opening on a boy's penis if it appears someplace on the shaft rather than on the tip. A number of intersex activists and medical experts have challenged these practices. They argue that these surgeries often diminish or destroy the person's capacity to engage in satisfactory sex. In addition, the surgeries often result in pain, scarring, incontinence, and the need for additional surgeries. Many people with an intersex condition who have been subjected to these surgeries assert that the surgeries have led to life-long psychological harm. They believe that the physical and psychological trauma caused by these surgeries is far worse than the emotional harm they might have endured from growing up with atypical appearing genitalia. A number of adults with atypical genitalia who have not been subjected to these surgeries support a ban on these cosmetic genital surgeries. People opposing these surgeries assert that parents and doctors should not be able to legally consent to these medically unnecessary procedures. Given the potential life-altering consequences of these surgeries, many people believe that only the people with an intersex condition, when they reach the age of consent, should have the legal power to consent to these cosmetic surgeries.

Therefore, the major goal of the intersex movement is to curtail all non-medically necessary cosmetic genital surgeries on infants born with an intersex condition.

————— Page 46-9 —————

46.IV.B. Concerns Shared By The Intersex And LGBT Communities: The Right To Express One'S Sexual Orientation And Gender Identity Free From Discrimination

The major goal of most people in the LGBT movement is to ensure that people are not subjected to discrimination based on their sexual orientation, gender identity, or gender expression. In the workplace, freedom from discrimination means that the terms and conditions of employment should be unaffected by a person's sexual orientation, gender identity, or gender expression. The intersex movement also shares these goals.

Most people with an intersex condition are not subjected to discrimination in the workplace because their intersex condition is usually not apparent to their fellow workers and managers. Many people with an intersex condition, however, may be subjected to discrimination because of their sexual orientation, gender identity, or gender expression. Women with some intersex conditions have a higher likelihood of being bisexual or lesbian and often display behavior that is more typically associated with males. ⁸ In addition, between 5 to 25 percent of people with a DSD will ultimately reject the gender assigned to them at birth and will thus share the same concerns as the trans community about their right to transition from one gender to the other. ⁹

46.IV.B.1. Introduction To The Applicable Law

No statutes expressly protect people with an intersex condition, and given the relatively small size of the nascent intersex movement, it is unlikely that intersex activists will be able to marshal the financial and human resources necessary to undertake expensive legislative reform. It is possible, however, that members of the intersex community are protected under existing federal, state, and local statutory prohibitions against disability discrimination and sex discrimination in the employment setting.

46.IV.B.2. Disability Discrimination

The federal Americans with Disabilities Act (ADA) ¹⁰ is the primary avenue for pursuing a disability claim under federal law. In addition, most states have statutes prohibiting disability discrimination. Some intersex conditions cause actual physical impairments, and people with these types of conditions are clearly covered under the ADA. For example, people with an intersex condition that impairs the endocrine or

bladder functions or results in infertility meet the ADA's requirements of physical impairment. ¹¹

Even if a person with a DSD is not actually impaired under the ADA, the law also prohibits discrimination based on a perceived impairment. ¹² Therefore, to the extent that an employer discriminates against an employee based on the employee's intersex condition, the employee may be protected under the ADA and state laws prohibiting disability discrimination. ¹³

46.IV.B.3. Sex, Sexual Orientation, And Gender Identity Discrimination

Title VII of the federal Civil Rights Act of 1964 ¹⁴ and state and local statutes prohibit discrimination based on “sex” in the employment setting. In addition, a number of state and local laws prohibit discrimination based on “sexual orientation” and sometimes “gender identity.” ¹⁵ Despite the existence of this legislation, discrimination in the workplace against sex/gender nonconformists is pervasive. ¹⁶ Whether a person with a DSD is protected under these statutes depends on the wording of the statute (whether it prohibits sex, sexual orientation, or gender identity discrimination) and the court's interpretation of the applicable legislation.

46.IV.B.3.A. Laws Prohibiting Gender Identity Discrimination

A person with an intersex condition whose gender identity differs from the gender assigned to that person at birth who suffers discrimination because of this difference would be covered under gender identity discrimination prohibitions.

46.IV.B.3.B. Laws Prohibiting Sexual Orientation Discrimination

People with an intersex condition who also identify as gay or lesbian and suffer discrimination because of their sexual orientation would be covered under sexual orientation discrimination prohibitions.

46.IV.B.3.C. Laws Prohibiting Sex Discrimination

People with a DSD whose self-identity comports with the gender assigned to them at birth and who self-identify as heterosexual may be able to recover under a statute prohibiting sex discrimination if they suffer discrimination because of their intersex condition. Whether they may be covered under existing legislation may depend on the jurisdiction's interpretation of the word “sex.”

Before the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, ¹⁷ courts held a very narrow view of the reach of sex discrimination prohibitions. Before 1989, courts generally held that sex and gender nonconformists who suffered discrimination because they did not meet sex and gender stereotypes could not recover under Title VII. ¹⁸ This view was dramatically broadened in *Price Waterhouse*, when the Supreme Court ruled that a denial of partnership to a woman who did not meet societal stereotypes of femininity constitutes impermissible sex discrimination.

Since the decision in *Price Waterhouse*, many federal district and circuit courts have recognized the overlap between sex, sexual orientation, gender identity, and gender expression discrimination and have allowed LGBT people to recover when they suffer discrimination in an employment decision or are subjected to sexual harassment. ¹⁹

In most of these cases, the courts held that the employees could recover under the “sex stereotyping” theory adopted in *Price Waterhouse*. In other words, if LGBT people suffer discrimination because their sexual orientation, gender identity, or gender expression does not comport with societal stereotypes of masculinity and femininity, they have been subjected to

————— Page 46-12 —————

impermissible sex discrimination. Although no recent employment discrimination case has involved a person with an intersex condition, the sex-stereotyping theory would apply with equal force to people with a DSD if they suffer discrimination because their employer views them as not meeting male/female norms.

A person with a DSD could also recover under a straightforward sex discrimination analysis if a court adopts the reasoning of the court in *Schroer v. Billington*.²⁰ In *Schroer*, an applicant accepted a job offer, but before she started work, she told her employer that she was transgender and planned to live as a woman. The employer subsequently revoked the job offer. The court held that the employer had engaged in impermissible sex-stereotyping discrimination. In addition to allowing Ms. Schroer to recover under a stereotyping theory, the court also ruled that people who “change” their sex and suffer discrimination because of this transition have suffered straightforward “sex” discrimination. As part of its reasoning, the court stated the following:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII. In other words, courts have allowed their focus on the label “transsexual” to blind them to the statutory language itself.²¹

The holding of the *Schroer* court and the U.S. Equal Employment Opportunity Commission's approval of the *Schroer* holding and reasoning²² call into serious question the continuing validity of the single employment discrimination case involving an employee with an intersex condition, *Wood v. C.G. Studios*.²³ In 1987, a district court held that Wilma Wood had not been subjected to sex discrimination when her employer fired her after learning about her intersex condition. The court reasoned that sex discrimination prohibitions were designed to provide equal employment opportunities to women and were not meant to protect women who had undergone gender-corrective surgery. The holding in *Wood* is consistent with the understanding of the scope of sex discrimination prohibitions during the 1980s. All the cases at that time narrowly construed the reach of statutes prohibiting sex discrimination. Just as *Price Waterhouse*

————— Page 46-13 —————

eviscerated the holdings in earlier sex discrimination cases brought by gay, lesbian, transgender, and other gender-nonconforming people, *Price Waterhouse* should be interpreted to eviscerate the holding in *Wood*. Discrimination against people with an intersex condition should be treated similarly to the treatment of transgender people in the *Schroer* decision. If discrimination against transgender people who have transitioned from one sex to the other constitutes impermissible sex discrimination, people who have been discriminated against based on their intersex status also have been subjected to unlawful sex discrimination.

46.V. WORKPLACE ADVICE

To ensure compliance with the law and respect for the basic human rights of employees with a DSD, as well as LGBT employees, employers should consider the following recommendations, which amplify the human resource suggestions set forth in Part VII (Workplace Solutions) of this treatise:

1. Adopt a written policy in your workplace that specifically prohibits discrimination based on a person's intersex condition, sexual orientation, gender identity, or gender expression.
2. Do not make assumptions about a person's sex, gender, sexual orientation, or gender identity. Although many LGBT people are "out," not all are. Generally, people with a DSD are hesitant to share the existence of their intersex condition. Until the 1990s, most people with an intersex condition were not open about their condition, even with family and close friends. Since the intersex movement began in the mid 1990s, more people with a DSD have come out to their inner circle of intimate friends and family members, but the vast majority of people with a DSD have not shared information about their condition with a large circle of people and especially not their coworkers or employers. Be sensitive to sex and gender variations and do not make comments that presume that a person's sex, gender, sexual orientation, or gender identity is consistent with societal norms.
3. If employees share information about their intersex condition, be careful not to make assumptions about the employee's condition and concerns. Intersex conditions are diverse and different conditions raise discrete issues. In addition, not all people with the same DSD have had the same life experiences or share the same concerns.
4. Respect a person's gender self-identity. If someone identifies as a female, treat that individual as you would treat all female employees, and if someone identifies as a male, treat that individual as you would treat all male employees. Allow the employee to choose the restroom/locker room that is comfortable for that person.
5. Be sensitive to terminology. Use the pronouns and other terminology that the employee prefers. Ask people with a DSD what

———— Page 46-14 ————

terminology they prefer—intersex, DSD, some other term, or no term at all. Similarly, with respect to gender identity, ask people whether they prefer "trans," "transgender," "transsexual," "gender affirmed," some other term, or no term at all.

6. Be supportive of someone who is transitioning after starting employment.
7. Respect the person's desire for privacy and do not share information with other employees unless specifically given permission to do so.
8. Differential treatment of people with a DSD because of their intersex condition may violate laws that prohibit sex or disability discrimination. Educate your workers about the need to respect all sex and gender variations.

¹ American Psychiatric Association, Position Statement on Discrimination Against Transgender and Gender Variant Individuals 1 (July 2102), *available at* www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf.

^[9] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 453 (5th ed. 2013) (*DSM-5*). The *DSM-5* is discussed further in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973).

^[10] See *New S. Wales Registrar of Births, Deaths and Marriages v. Norrie*, No. S273/2013, [2014] HCA 11, slip op. at ¶¶35, 37 (Austl. High Ct. Apr. 2, 2014), available at www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/cases/cth/HCA/2014/11.rtf (holding that the New South Wales Registrar of Births, Deaths and Marriages should have recorded respondent's sex as "non-specific" given that respondent submitted evidence that her sex was ambiguous and the fact that "not everyone is male or female;" that is, "the sex of a person is not ... in every case unequivocally male or female."); *National Legal Services Authority v. Union of India*, Writ Petition (Civil) No. 400 of 2012, slip op. at ¶59 (India Sup. Ct. Apr. 15, 2014), available at <http://supremecourtindia.nic.in/outoday/wc40012.pdf> (in recognizing that transgender individuals have a constitutional right to self-identify and present as female, male, or a "third gender," the India Supreme Court held as follows: "Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16 [of the Constitution of India], therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.").

^[11] Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 275 (1999), available at http://papers.ssrn.com/abstract_id=896307 (footnotes omitted).

^[12] No. P20130034X (Colo. Div. Civ. Rts. June 17, 2013), available at www.transgenderlegal.org/media/uploads/doc_529.pdf (finding probable cause that a school district engaged in discrimination based on sex and transgender status when it denied a gender-affirmed girl the right to use the girls' restrooms).

^[13] *Id.* at 10. In February 2014, the *Mathis* case settled. The school district agreed that transgender students shall be permitted to use the "sex- or gender-segregated facilities that are consistent with their gender identity, without exception." Conciliation Agreement, §II.B, *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, No. P20130034X (Colo. Div. Civ. Rts. Feb. 27, 2014), available at www.transgenderlegal.org/media/uploads/doc_549.pdf.

^[14] As readers will see, Professor Greenberg prefers to use "of" instead of "in" when discussing "difference of sex development." Her approach is the predominant one in the literature. I prefer "difference in sex development" because I think it is grammatically better and, more important, it helps readers to more easily distinguish between the competing terms "difference in sex development" and "disorder of sex development." Some writers use both terms interchangeably. See, e.g., Milton Diamond & Jameson Garland, *Evidence Regarding Cosmetic and Medically Unnecessary Surgery on Infants*, 10 *J. Pediatric Urology* 2 (2014), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1477-5131/PIIS1477513113003112.pdf> or www.hawaii.edu/PCSS/biblio/articles/2010to2014/2013-evidence.html.

^[15] See Chapter 2 (The Transformative Power of Words) for a discussion of the debates concerning the use of the term "intersex" and whether persons with a DSD fit within the "transgender" umbrella.

^[16] The International Association of Athletics Federations conducted an 11-month investigation and concluded that Ms. Semenya should be allowed to compete in women's athletic events. This decision did not end speculation and international headlines about Ms. Semenya's sex during the 2012 Olympics, where she won the silver medal in the 800-meter race. June Thomas, *Did Caster Semenya Lose the Women's 800 Meters on Purpose?*, *Slate* (Aug. 11, 2012), available at www.slate.com/blogs/five_ring_circus/2012/08/11/caster_semenya_2012_olympics_did_the_south_african_runner_lose_the_women_s_800_meters_on_purpose_.html. Gender testing for world-class athletes is controversial. See Katrina Karkazis et al., *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 *Amer. J. Bioethics* 3 (2012), available at www.tandfonline.com/doi/abs/10.1080/15265161.2012.680533.

^[17] Ms. Semenya's lack of traditional feminine characteristics generated the challenge to her ability to participate as a woman. Whether Ms. Semenya has a DSD has not been publicly disclosed.

^[18] For a detailed description of the more common intersex conditions, see Intersex Initiative, *Intersex FAQ*, available at www.ipdx.org/articles/intersex-faq.html; *What Is Intersex?*, Intersex Soc'y of N. Am., available at www.isna.org/faq/what_is_intersex; Julie A. Greenberg, *Intersexuality and the Law: Why Sex Matters* 11–15 (2012).

^[19] Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *Am. J. Hum. Biology* 151, 161 (2000), available at [http://dx.doi.org/10.1002/\(SICI\)1520-6300\(200003/04\)12:2<151::AID-AJHB1>3.0.CO;2-F](http://dx.doi.org/10.1002/(SICI)1520-6300(200003/04)12:2<151::AID-AJHB1>3.0.CO;2-F).

^[20] *Id.* Some experts place the number of genital anomalies at birth as 1 in 4,500. Peter A. Lee et al., *Consensus Statement on*

Management of Intersex Disorders, 118 *Pediatrics* e488 (2006), available at <http://pediatrics.aappublications.org/content/118/2/e488>.

[8] See Chapter 2 (The Transformative Power of Words) for a discussion of LGBT-related terminology.

[9] Lee et al., *Consensus Statement*.

[10] Heino F.L. Meyer-Bahlburg, *What Causes Low Rates of Childbearing in Congenital Adrenal Hyperplasia?*, 84 *J. Clinical Endocrinology & Metabolism* 1844, 1845–46 (1999), available at <http://jcem.endojournals.org/content/84/6/1844>.

[11] Lee et al., *Consensus Statement*, at e491–92.

[12] 42 U.S.C. §12101 *et seq.* For a more in-depth discussion of the ADA, see Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973).

[13] 42 U.S.C. at §12102(2)(b).

[14] *Id.* at §12102.

[15] For a complete analysis of how a disability claim by a person with a DSD may proceed, see Julie A. Greenberg, *Health Care Issues Affecting People With an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 *Loy. L.A. L. Rev.* 849, 896–904 (2012), available at <http://digitalcommons.lmu.edu/llr/vol45/iss3/5>.

[16] 42 U.S.C. §2000e *et seq.* For a detailed discussion of Title VII, see Chapter 14 (Title VII of the Civil Rights Act of 1964).

[17] For a detailed discussion of the workplace discrimination laws in the 50 states, the District of Columbia, and Puerto Rico, see Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

[18] Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 *Loy. L.A. L. Rev.* 715 (2012), available at <http://digitalcommons.lmu.edu/llr/vol45/iss3/3>. For an additional discussion of the existence of persistent and pervasive employment discrimination against LGBT people, see Brad Sears and Christy Mallory's essay in Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact).

[19] 490 U.S. 228, 49 FEP 954 (1989).

[20] For earlier cases denying recovery to gays and lesbians under a statute prohibiting discrimination because of sex, see *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70, 50 FEP 95 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330–31, 19 FEP 1493 (9th Cir. 1979). A number of later cases have followed this approach, including *Simonton v. Runyon*, 232 F.3d 33, 36–37 (2d Cir. 2000), *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085–86, 84 FEP 443 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001), and *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261, 81 FEP 161, 9 AD 1555 (1st Cir. 1999). For cases denying recovery to transgender people under a statute prohibiting discrimination because of sex, see *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750, 27 FEP 1217 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663–64, 16 FEP 689 (9th Cir. 1977); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 285–86, 63 FEP 923, 2 AD 1567 (E.D. Pa. 1993); *Doe v. U.S. Postal Service*, 1985 WL 9446, at *1–2, 37 FEP 1867 (D.D.C. 1985); *Terry v. EEOC*, 1980 WL 334, at *1–3, 35 FEP 1395 (E.D. Wis. 1980); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 370–71, 15 FEP 1093 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457, 11 FEP 1199 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354, 18 FEP 866 (9th Cir. 1978); *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 WL 302, at *4, 11 FEP 1196 (D.N.J. 1975), *aff'd mem.*, 538 F.2d 319, 13 FEP 1360 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976). For a detailed discussion of pre-*Price Waterhouse* case law, see Chapter 14 (Title VII of the Civil Rights Act of 1964).

[21] For a discussion of the post-*Price Waterhouse* cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964) and Julie A. Greenberg, *Health Care Issues Affecting People With an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 *Loy. L.A. L. Rev.* 849, 879–87 (2012), available at <http://digitalcommons.lmu.edu/llr/vol45/iss3/5>.

[22] 577 F. Supp. 2d 293, 104 FEP 628 (D.D.C. 2008).

[23] 577 F. Supp. 2d at 306–07.

[24] *Macy v. Holder*, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012). Both *Schroer* and *Macy* are discussed extensively in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 39 (Law and Culture in the Making of *Macy v. Holder*).

[25]

660 F. Supp. 176, 63 FEP 677 (E.D. Pa. 1987).

Copyright © 2014 The Bureau of National Affairs, Inc.



◀ Prev

**Chapter 46. INTERACTING IN THE WORKPLACE WITH INDIVIDUALS WHO HAVE AN
INTERSEX CONDITION**

Next ▶