

DISCRIMINATION AND HARASSMENT
ON THE BASIS OF SEXUAL ORIENTATION
IS AGAINST THE LAW IN THE
STATE OF COLORADO

Colorado Anti-Discrimination
Act [CADA] Includes Sexual
Orientation As A Protected Class

CADA Makes It Illegal to:

refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of sexual orientation

Relevant Terms

- Sex
- Sexual Orientation
- Gender
- Transgender
- Gender Identity
- Gender Expression
- Transsexual

Sex

Sex refers to a person's biological status and is typically categorized as male, female

Sexual Orientation:

A person's orientation towards heterosexuality, homosexuality, bisexuality, or transgendered status or an employer's perception thereof.

Sexual Orientation, Cont'd

The direction of one's sexual interest toward members of the same, opposite or both sexes.

Gender

Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity .

Transgender

An umbrella term for people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth.

Gender Identity

Gender identity refers to one's sense of oneself as male, female, or transgender

Gender Expression

- Refers to the way in which a person acts to communicate gender within a given culture.
- A person's gender expression may or may not be consistent with socially conventional gender roles, and may or may not reflect his or her gender identity.

Gender Expression, Cont'd

- Gender expression can be communicated with words, behavior, dress, etc.
- Examples of unconventional expression are: a man's "gay lisp," a woman's masculine demeanor, a man's effeminate demeanor, cross-dressing, etc.

Transsexual

An individual who wants to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex

“Harass” means:

To create a hostile work environment
based on an individual’s sexual
orientation

Harass, cont'd

- Generally, to “harass” has the same meaning in CADA as defined in Sexual Harassment Training.
- Under CADA, however, there is no harassment unless (i) a complaint is filed with management or HR as required by the Employee Handbook and (ii) DISH fails to conduct an investigation and take appropriate action

DISH slides 4 through 11 inserted here from
Manager Training on Harassment

Retaliation

CADA also makes it illegal to discriminate against any person (i) who has opposed unlawful discrimination based on sexual orientation, or (ii) who has participated in an investigation or proceeding regarding such discrimination.

Remedies

Beginning, January 1, 2015, successful complainants are entitled to:

- Emotional distress damages
- Punitive damages
- Front and back pay
- Attorney Fees

Remedies, Cont'd

State law claims may include:

- Wrongful termination suits
- Invasion of Privacy
- Violation of Off-duty conduct Statute

Avoid Pitfalls

- Apply dress codes consistently without respect to gender
- Prohibited conduct relates to “sex” but does have to be motivated by sexual desire
- Customer complaints about unconventional gender expression are not basis for discipline

Pitfalls, Cont'd

- Employers can insist that biological males use male restroom and biological females use women's restroom regardless of transgender status
- Always conduct an investigation of claim of discrimination based on sexual orientation

Case Study #1

A male call center employee with excellent annual reviews wears earrings and women's pants, and speaks in a manner stereotypically associated with gay men, e.g., a sibilant "s." The employee is told by a new manager that his work demeanor is unprofessional, and the employee complains about the comment to HR. Some time later the employee is terminated after a customer complaint.

Case Study #1 Issues

- What is nature of customer complaint
- Has employee previously been counseled about that type of complaint
- S/O discrimination
- Retaliation
- Gender Non-conformity (Title VII)

Case Study #2

Supervisory employee has excellent performance reviews but starts to miss significant time from work. Time off is result of complications from HIV virus. Supervisor critical of time off work and when employee explains his condition, supervisor becomes critical of employee's work. Supervisor references HIV in performance documentation.

Case Study #2 Issues

- S/O discrimination
- ADA duty to accommodate
- ADA discrimination
- HIPPA
- Privacy issues

Case Study #3

A bookish-appearing worker at a loading dock refused to discuss sexual encounters with women, female anatomy, etc. He was subjected to taunts and ridicule by his co-workers, such as calling him “faggot,” asking him if wears dresses at home, asking if he is a girl or a boy, and engaging in pelvis-thrusts in his direction. The harassed worker quits.

Case Study #3, Issues

- S/O discrimination
- Male on male harassment (Title VII)
- Hostile environment
- Wrongful termination

Conclusion

- Discrimination on the basis of sexual orientation in the workplace is prohibited in the State of Colorado
- Harassment on the basis of sexual orientation in the workplace is prohibited in the State of Colorado
- “Sexual orientation” includes unconventional gender expression