



Legal Challenges of Transgender Restroom Facilities - Episode # 116

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Hosted by: John Czuba, Managing Editor

Guest Attorney: Brian Cafritz of [KPM Law](#)

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John Czuba: Welcome to the "Insurance Law Podcast," the broadcast about timely and important legal issues effecting the insurance industry. I'm John Czuba, managing editor of *Best's Directory of Recommended Insurance Attorneys*. We're pleased to have with us today attorney Brian Cafritz from [KPM Law](#) in Richmond, Virginia, with additional offices in Fairfax, Norfolk, and Roanoke, Virginia. Brian is a partner in the firm, and helped to expand the firm's regional defense network.

He focuses his practice on the defense of Fortune 500 companies that operate under large self-insured retentions. He co-founded the National Retail and Restaurant Defense Association to promote the education and communication channels of industry leaders and counsel. Brian was elected to the first two terms as the association's first president. He is also the only Virginia attorney selected to IALDA, a defense network dedicated to the defense of the amusements and leisure industry. We're very pleased to have you with us today, Brian.

Brian Cafritz: Thank you very much, proud to be here.

John: Today's topic is on legal issues pertaining to transgender restrooms, and Brian this has been a very topical issue of late, can you comment on which states have been the most impacted? How common is the issue, and how wide spread do you see this issue becoming?

Brian: As far as which states are impacted, right now the issue is not one on a uniform level by the federal government, but on a state by state basis, and in many instances by local municipalities. So every state is having its own unique or twist of view on it. How widespread it is, is an interesting question. Obviously transgenders have been around a very long time, and they live in every state, so the issue is going to touch everyone, no matter where they live.

More over as social acceptance evolves, and the numbers are growing, and medical technology changes, we're finding this to be a more and more pervasive situation. But I also think that with that growth in social acceptance, there's also some social resistance. There have been a lot of studies done to understand how widespread the issue really is, and there are a lot of analytics to help us understand how its rising up in the workplace.

What we do know, is that in states that have anti-discrimination policies in place, gay, lesbian, bisexual complaints are actually equivalent to the number of complaints filed based on sex, although fewer than the number of complaints filed based on race. What also appears to be the case is that transgender people are experiencing higher rates of discrimination than gay, lesbian, bisexual population.

There's a recent survey of transgender, and gender non-conforming people conducted by the National Center of Transgender Equality, and it found that 90 percent of respondents experienced harassment, mistreatment, or discrimination on the job, or took actions like hiding who they are to avoid it. In comparison, there have been a review of studies conducted by the Williams Institute in 2007, and that found that transgender people experienced employment discrimination at a rate of 15 to 57 percent.

What we do know is it's going on everywhere, and what's happening in response to that, laws have been offered up by legislatures of the different states, and that's what's kind of caused this recent reaction.

John: You mentioned that recently the 4th Circuit issued a ruling on transgender restrooms in Virginia, how broad was that ruling, and how does that impact the current state of the law on that topic?

Brian: It was actually an interesting opinion, and it's really kind of a narrow ruling, but it's a very important ruling, because it was the first time that the federal courts had looked at the issue. So by its very nature the opinion is critical, because it's a seminal case. However, it's not dispositive or controlling on every issue in the topic. First, the case was styled *GG v. The Gloucester School Board*, and it involved a biological girl that lived her life as a boy.

The critical facts are that the student had not undergone transgender surgery because he's a minor, but he was doing the hormone therapy and had legally changed his name to a standard boy's name, and in fact lived every aspect of his life as a boy. The child, with his parents, went to the principal and said, "Hey, I'm living my life as a boy, I want to use the male restrooms, locker rooms," and the school was on board with that.

But they ultimately rescinded that decision and decided to restrict the boy and require him to go to the restroom is in his biological gender restroom, the women's room. That change in the policy is what resulted in the lawsuit being filed. When we look at that case, GG sued for an injunction of that policy and sued under two theories, Title IX and the equal protection clause. Now the 4th circuit's ruling never discussed the equal protection clause, because the district court never based its ruling on that at the trial level.

Instead, it focused it entirely on the district court's dismissal of the Title IX claim and the denial of the injunction. By its very nature, because it's only a Title IX case, that limits the impact of the ruling. Now, Title IX is part of those series and systems of law that deal with gender equality in schools and buildings receiving federal funding. So the ruling from the 4th Circuit does not necessarily dictate policy, it doesn't make laws requiring certain actions by private businesses, so there's always that limitation.

But you'll want to keep in mind that it's a pretty well-reasoned opinion, and it gives some insight into how courts may interpret this issue as the legal problems expand. I guess just as important as what the ruling did say, and the ruling was that the boy would be allowed to use the boy's restroom, we need to keep in mind what the court did not do, because that tells us quite a bit about how this ruling is going to impact the issue. The 4th Circuit was very clear that they're not in the business of politics or setting social agendas.

The 4th Circuit's ruling was technically because the regulation surrounding Title IX only considered the dichotomous analysis of gender identification such as male or female, the law of Title IX and its regulations were vague as to transgenders. So they said that because of that vagueness, they have to look to the department of education and their interpretation of those regulations.

Well the Department of Education is currently comprised of Obama appointees, who maintain the current president's agenda, and the 4th Circuit said we're not here to say one way or the other what it should be, but right now because of the vagueness, the current Department is saying this is what it should be. If the Department of Education decides to change its position, that's going to be the ruling.

So it's interesting that the courts are simply saying, "We're not going to set the agenda, that's up to the politics of the day, and in this particular situation, Title IX and the regulations, until those laws are changed, the Department of Education's interpretation is what's going to control it."

John: Now a two-pronged question, Brian. Where do you see the law heading, and how will the ruling impact the day to day operations of retail entities, restaurants, and other property owned establishments?

Brian: I think we're going to see the law heading into some sort of amendment of federal discrimination laws, and have some kind of uniform handling on the issue, much like gender, age, and racial, and religious discrimination laws have been enacted. But I do think there's one very critical and key question that needs to be defined when we discuss this transgender issue, and I think that's really the rubbing point with a lot of people who have problems with some of the laws.

That is no one has really defined what transgender is. In the *GG v. Gloucester County* case we had a young boy who had fully committed to the process as far as hormone therapy and legal name changes, but what happens when a boy's just beginning to think about that, and wants to wear a dress to school one day? I think that's where the fear arises in people that we don't know when someone who is undergoing these questions, whether it's proper motives or not, when that person is going to be allowed access into those restrooms.

I think you'll find that when the laws get involved in this, I think you're going to find the legislature starts honing in on that question of when someone is considered transgender versus a simple day or two test case, or prank. So until the courts define what that step is, or until the legislature defines that, I think it's appropriate for the accommodations to take effect. I think there's going to be questions that are subject to abuse.

The second question you had is how it's going to impact the operations of the retail and restaurant entities, and private business owners, that's a little more interesting because the 4th Circuit's ruling was only based on Title IX, so it's going to have no direct controlling impact on private employers, it just lets you know where the topic is heading, and what the court is thinking. Obviously private employers must follow their local laws.

It's critical that every business finds out what their state or local municipality has enacted on that issue. As for employers, the Department of Labor's OSHA standards, they require that employers make toilet facilities available so that all employees can use them when they need to do so, and that the employer cannot impose unreasonable restriction on the use of those facilities. That's going to be an ongoing issue regardless of any other laws in force.

In addition, I think that you're going to see that regular training of employees, condition them to have a culture of respect of others in the workplace, just like they now do with sexual harassment and discrimination. I think those are going to start working their way into the everyday mainstream business training guidelines.

To that end, I think we also need to see more training in the customer service arena, because it's likely that transgender customers are going to be encountered, and maybe more so than employees, depending on how tightly knit or how small the employee force is. The irony of it is I think we've all dealt with transgender persons many times and never even knew it. I think the training impact is going to be the most critical and immediate impact we're going to find from this change in the law.

John: Brian, is there any difference how the transgender issue effects employees versus guests, and what liabilities do they face?

Brian: Well certainly with employees there are a number of concerns from the OSHA mandates, but you are also going to have exposures as an employer for cases of wrongful termination, hostile workplace, and other discriminatory issues. Further on the hiring front, I think there's going to be exposure if transgenders are not hired, if reasonable accommodations are not provided, and it doesn't impact the business. So I absolutely see the employee issues as being probably the most immediate.

As for customers, the equal protection clause, which was not addressed in the *GG* case, allows the federal government to intervene against state discrimination but it doesn't inhibit private discrimination. So companies, private companies, are left to make their own decisions, but they do risk public outcry, and it seems that the mobilization of these kinds of movements with social media are getting easier and stronger all the time.

So it's going to affect everything that we're doing, but I don't believe that as it's currently set, the legal framework is going to be an inhibitor for any private company to do exactly what they want to do at this time.

John: Brian, how will insurance companies potentially be impacted, and what should they be made aware of?

Brian: The civil arena allows attorneys to come up with creative applications of legal doctrines all the time. The longer that the situation exists, the more different avenues that are going to be tried. Certainly CGL policies that cover slander, defamation, assaults, or other discrimination acts are likely to be implicated. If something happens with transgender issues, I think negligent hiring or retention claims could also be raised, so that is certainly going to impact the policies that are covering these entities.

However, I think first and foremost, because of the framework that's already in place with the OSHA laws, and the discrimination laws with hiring and necessity of accommodations for employees, I think employment policies are going to have the most immediate impact.

John: What are the best and most practical solutions for business owners going forward, Brian?

Brian: The most simple and obvious solution, and something that we've seen happen in restaurants all the time is we're seeing the proliferation of single user unisex bathrooms more and more. This is not a new thing to society, if you think about it, since we've been making airplanes there's been unisex private stalls, so that's why you're seeing more and more unisex bathrooms in restaurants. But the reality is that not every facility lends itself to individual single user restrooms.

When multiuser restrooms are involved, the consensus has been that retrofitting those bathrooms to allow full door stalls that go from floor to ceiling for complete privacy, that's recommended. I think the other practical solution which we touched on earlier, is that training your own employment force to avoid conflict, to avoid unusual situations, that's going to be critical to minimize risk and exposure going forward.

John: Brian, thanks so much for joining us today.

Brian: My pleasure, thank you.



John: That was Brian Cafritz from [KPM Law](#), with offices in Richmond, Fairfax, Norfolk, and Roanoke, Virginia, and special thanks to today's producer John Weber. Thank you all for joining us for the Insurance Law Podcast. To subscribe to this audio program go to iTunes, or our Web page, www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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