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DOJ Weighs in on Transgender Employment Rights: Gender Dysphoria Can Be Covered by the ADA

Labor & Employment Workforce Watch

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On January 8, 2024, the United States Department of Justice filed a [statement of interest](#), explaining that gender dysphoria can be a covered disability under the Americans with Disabilities Act (“ADA”). The DOJ’s statement supports a 2022 holding by a federal appellate [court](#) that, in a first-of-its kind decision, likewise found that individuals with gender dysphoria are entitled to the protections of the ADA and the Rehabilitation Act of 1973.

For decades, gender dysphoria, transgender status, and associated conditions have been excluded from the ADA—the federal statute that protects people with disabilities from discrimination and ensures they receive reasonable accommodations. The ADA specifically excludes from coverage “gender identity disorders not resulting from physical impairments” and “transsexualism,” among other things. See [42 U.S.C. § 12211](#). Historically, courts interpreting the ADA have relied on this language to find that conditions associated with a person’s transgender status were “gender identity disorders” and therefore excluded from the protections of federal law.

In 2022, the United States Court of Appeals for the Fourth Circuit deviated from historical precedent and, for the first time ever, determined that, despite the exclusionary language in the ADA, the law covers gender dysphoria as a disability. In reaching that decision, the court reasoned that gender dysphoria was distinct from gender identity disorders. Its opinion focused on the diagnostic criteria of gender dysphoria recently established by the American Psychiatric Association, noting the “clinically significant distress felt by [individuals] who experience incongruence between their gender identity and their assigned sex.” The court further noted that the “significant distress” of gender dysphoria is felt by some—but not necessarily all—individuals with gender identity disorder or individuals who identify as transgender. For many transgender people, the court explained, the incongruence between gender identity and assigned sex does not interfere with their lives or result in “significant distress,” and they are comfortable living just the way they are. In light of this distinction, the Court found that gender dysphoria is a condition entirely separate from gender identity or transgender status, and therefore it *is* covered by the ADA.

In 2023, the United States Supreme Court declined to review the Fourth Circuit’s decision, letting the lower court’s ruling stand, though not weighing in on the issue substantively. The DOJ’s statement of interest, which comes only a few months after the Supreme Court’s silence, was filed in support of a new case out of a federal district court in Georgia in which a transgender inmate is seeking to invoke the protections of the ADA for gender dysphoria (*Jane Doe v. Georgia DOC*). As the Eleventh Circuit, which encompasses the federal district in Georgia,

has not yet considered the question of whether gender dysphoria is protected by federal law, the DOJ's statement seeks to persuade the federal trial court in Georgia to follow the Fourth Circuit's lead and find that individuals with gender dysphoria can seek the benefits and protections of the ADA.

To date, the Fourth Circuit's opinion is binding only in states that fall within its geographic territory—Maryland, North Carolina, South Carolina, Virginia, and West Virginia—and, in turn, on employers who employ individuals within those states. This list of states could expand, depending on the final results of the *Jane Doe* case. The DOJ's statement of interest suggests that transgender rights will be a focus of federal agencies during the Biden administration, very likely including the Department of Labor. Because of the government's heightened focus on this issue, all employers should be aware of the developing legal landscape surrounding transgender rights under the ADA and other state and federal discrimination laws.

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