

## Does ADA Cover Accommodations For Transgender Workers?

By **Lindsey Conrad Kennedy** (January 16, 2019, 1:53 PM EST)

Whether transgender employees are protected by the federal civil rights laws is an evolving and seemingly fickle area of the law. Much has been written about whether Title VII of the Civil Rights Act covers discrimination based on transgender status or gender identity, but how the Americans with Disabilities Act comes into play — if at all — has remained rather uncharted territory. Until now.

Within the last six months or so, at least three transgender employees — in *Mackenzie Parsons v. ZapLabs*, *Jane Doe v. The Gardens for Memory Care at Easton*, and *Skyler Musgrove v. The Board of Regents of the University System of Georgia* — have filed lawsuits against their employers alleging various ADA violations.[1] These complaints come on the heels of a trio of recent court decisions regarding whether a transgender person suffering from gender dysphoria is an individual with a disability entitled to ADA rights and protections.[2] In the three cases where a court has reached a decision on this issue, the results have been mixed.



Lindsey Conrad  
Kennedy

As with many other workplace matters affecting the LGBTQ community, employers facing this issue are left in a quandary. This is particularly true regarding the ADA's reasonable accommodation requirement. To be sure, many employers recognize — whether pursuant to another law or a moral compass — a need to prevent disparate treatment on the basis of an employee's transgender status, gender dysphoria diagnosis or an employer's perception of either. The trickier question, perhaps, is what must an employer do if a transgender employee requests an accommodation due to gender dysphoria or related conditions?

### The ADA's Definition of Disability

The ADA and its amendments generally require covered employers to make reasonable accommodations for employees who suffer from a disability, unless the accommodation would impose an undue hardship.[3] Individuals without a "disability" as defined by the ADA are not entitled to accommodations.

A disability covered under the ADA is a "physical or mental impairment that substantially limits one or more major life activities ..." [4] Although the definition of disability must be construed broadly, it expressly excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, or other sexual behavior disorders." [5]

Transgender individuals seeking the right to an accommodation under the ADA must, of course, allege they have a disability. Most courts and commentators to address this issue have also couched the relevant disability as “gender dysphoria,” as defined and described in the American Psychiatric Association’s Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders, or DSM.

The DSM defines gender dysphoria as a “marked incongruence between one’s experienced/expressed gender and assigned gender, of at least six months’ duration,” as manifested by at least two of the six defined factors, and notes that it “is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning.” The term “gender dysphoria” does not appear in the Section 12211(b)(1) carve-out or anywhere else in the ADA.

Not many courts have interpreted the boundaries of the carve-out in Section 12211(b)(1). Those doing so have interpreted the provision straightforwardly to mean that any gender identity disorder not related to a physical impairment is not a disability and individuals suffering from such are not entitled to accommodations.[6]

### **Enter: Blatt v. Cabela’s**

In May 2017, the Eastern District of Pennsylvania reached an unprecedented conclusion when addressing Section 12211(b)(1)’s “gender identity disorders” carve-out. In *Blatt v. Cabela’s Retail Inc.*, a transgender woman filed a complaint alleging, inter alia, that her employer failed to accommodate her under the ADA by denying her requests for a female uniform, a name tag with her chosen name, and permission to use the women’s restroom. [7] As described in her complaint, the plaintiff suffered from “Gender Dysphoria, also known as Gender Identity Disorder,” which substantially limited several of her major life activities, including “interacting with others, reproducing, and social and occupational functioning.”[8] The defendant moved to dismiss this claim based on the ADA’s exclusion of gender identity disorders from the definition of “disability.”

The court in *Blatt* narrowly interpreted the ADA’s “gender identity disorders” carve-out to exclude the plaintiff’s condition — meaning that her condition could indeed be a disability under the ADA. Specifically, it read the carve-out “to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like *Blatt*’s gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.”[9] Gender dysphoria, the court held, is distinct from the other exceptions listed in Section 12211(b); it qualified as a disability under the ADA because, unlike the condition of simply identifying with a different gender, it can be disabling.[10] Thus the court denied the employer’s motion to dismiss.

Of course, *Blatt* did not definitively hold that the plaintiff was a disabled individual entitled to an accommodation, nor did it opine on any particular accommodations related to gender dysphoria. It did, however, open the door for transgender employees seeking to assert their rights under the ADA.

### **Other ADA Cases**

Just two other courts have opined on the unprecedented conclusion reached in *Blatt*.

In April 2018, the Southern District of Ohio refused to follow it. In *Parker v. Strawser Construction* the court strongly disagreed with *Blatt*’s interpretation of Section 12211(b)(1) and explained it is “clear ... that Congress intended to exclude from the ADA’s protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment.”[11]

Conversely, in June 2018, a federal district court in Massachusetts agreed with Blatt in *Doe v. Massachusetts Department of Correction*. It found that gender dysphoria and related disorders may indeed qualify as disabilities under Title II of the ADA governing public entities.[12] The Doe case also recognized the growing body of medical research into gender dysphoria, including studies suggesting that gender dysphoria has a physical etiology, meaning that it may not fall into the “gender identity disorders *not resulting from physical impairments*” carve-out in the ADA.[13]

It remains to be seen how the federal courts will handle Blatt and its progeny as the new lawsuits in California, Georgia and Pennsylvania press forward.

### **What’s an Employer to Do?**

Whether transgender employees are entitled to ADA protections brings up a host of complicated questions. In addition to the legal analysis courts are beginning to grapple with, categorizing transgender individuals as suffering from a medical condition — let alone a “disability” — solely on the basis of their gender identity is an inherently sensitive issue. The transgender community espouses differing views with respect to this topic.

Practically speaking, employers should remember that other conditions resulting from, or coextensive with, gender dysphoria may in fact qualify as disabilities under the ADA. For example, the Blatt and Doe cases (and the DSM) recognize that gender identity disorders may manifest themselves in, or be associated with, other conditions which may qualify as disabilities under the ADA, e.g., anxiety. Moreover, unlike the ADA, state and local laws may expressly consider gender identity disorders to be disabilities entitling employees to reasonable accommodations.

Additionally, employees seeking an accommodation for any disability must meet the other requirements under the ADA. In other words, even if a transgender plaintiff can overcome the hurdle imposed by the “gender identity disorder” carve-out, an employee must show that the condition substantially limits a major life activity and that an accommodation would allow the employee to perform essential job functions or to enjoy equal employment benefits and privileges.

One scenario in which a transgender employee’s ADA rights may come to the forefront is a request for an accommodation relating to time away from work, e.g., for therapy or treatments related to gender reassignment. No courts have opined on whether, or what type of, accommodations in this scenario are reasonable under the ADA. Nonetheless, a growing body of ADA case law guides employers dealing with the oftentimes thorny question of whether schedule modifications, leaves of absence and the like are reasonable under the ADA.

In sum, the law is unsettled as to whether gender dysphoria is a disability under the ADA which would entitle a qualified employee to a reasonable accommodation. The Blatt case, bolstered by the Doe case, certainly may have sparked a trend. Until the law settles — which, as we know from related civil rights statutes, may take a very long time or never happen at all — employers should proceed cautiously through the interactive process when a transgender employee seeks a reasonable accommodation.

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*Lindsey Conrad Kennedy is an associate at Eckert Seamans Cherin & Mellott LLC.*

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[1] Mackenzie Parsons v. ZapLabs LLC, No. 4:18-cv-07089 (N.D. Cal., filed Nov. 21, 2018); Jane Doe v. The Gardens for Memory Care at Easton, et al., No. 5:18-cv-04027 (E.D. Pa., filed Sept. 18, 2018); and Skyler Musgrove v. The Board of Regents of the Univ. System of Georgia, et al., No. 3:18-cv-00080 (M.D. Ga., filed June 28, 2018).

[2] *Blatt v. Cabela's Retail Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017); *Parker v. Strawser Constr. Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018); *Doe v. Mass. Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018).

[3] 42 U.S.C. § 12101 et seq.

[4] § 12102(1).

[5] § 12211(b)(1) (emphasis added).

[6] See, e.g., *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018) (collecting cases).

[7] No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

[8] *Id.* at \*2.

[9] *Id.* at \*2.

[10] *Id.* at \*4.

[11] *Parker v. Strawser Constr. Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).

[12] *Doe v. Mass. Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 2994403, at \*6 (D. Mass. June 14, 2018) (finding "a dispute of fact as to whether [plaintiff's] GD [gender dysphoria] falls outside the ADA's exclusion of gender identity-based disorders as they were understood by Congress twenty-eight years ago.>").

[13] *Id.* at \*6; § 12211(b)(1) (emphasis added).