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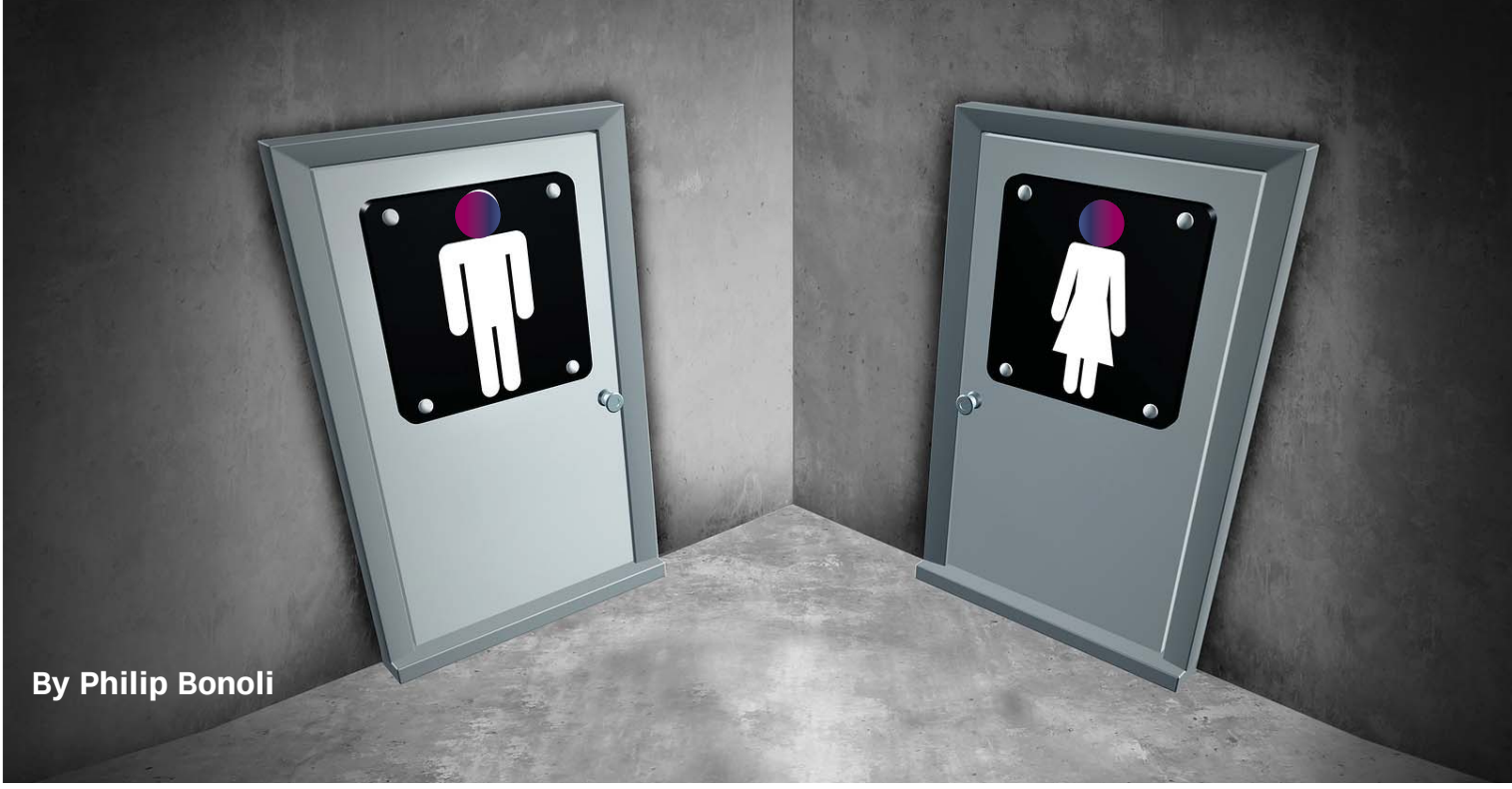

By Philip Bonoli

Gender Identity, Disability and Discrimination in a Changing Workplace

GENDER IDENTITY DISORDER and gender dysphoria have received a lot of publicity over the last few years. From celebrities to school children, gender identity is the new talking point and political hot button topic. As of now, however, federal and California state laws do not consider gender identity disorder or gender dysphoria as disabilities.

The Americans with Disabilities Act[1] (ADA) and California's Fair Employment and Housing Act[2] (FEHA) explicitly exclude gender identity disorder as a disability. Still, although there is no requirement that employers must accommodate individuals with a gender identity disorder in the workplace, employers are still prohibited from discriminating against employees based on their gender identity.

Introduced by the 100th Congress in 1988, passed by the 101st Congress the following year, and signed by President George H.W. Bush on July 26, 1990, the ADA mandated the elimination of discrimination against individuals with disabilities.

Specifically, Congress found that individuals with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[3]

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities of an individual.[4] Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[5]

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Specifically excluded from the definition of disability are sexual behavior disorders, including transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism and gender identity disorders not resulting from physical impairments.[6]

FEHA, California's counterpart to the ADA, prohibits employment discrimination on the basis of physical disability, mental disability and medical condition.[7] Like the ADA, however, FEHA also excludes sexual behavior disorders from its definition of physical and mental disabilities.[8]

Recently, the constitutionality of the ADA's exclusion of sexual behavior disorders was challenged in federal court. In the 2014 case *Blatt v. Cabela's Retail Inc.*,[9] a transgender woman challenged the constitutionality of the gender identify disorder exclusion embedded within the ADA.

Kate Lynn Blatt, who was born male with the given name James, filed a lawsuit against Cabela's Retail, Inc., claiming that the company had terminated her employment based on her sex and her perceived disability.

In her complaint, Blatt had alleged that she was diagnosed with "gender dysphoria, also known as gender identity disorder, a medical condition in which a person's gender identity does not match his or her anatomical sex at birth." Blatt claimed that gender dysphoria is a disability within the meaning of the ADA because it substantially impairs one or more of her major life activities, including interacting with others, the ability to reproduce, and social and occupational functions.

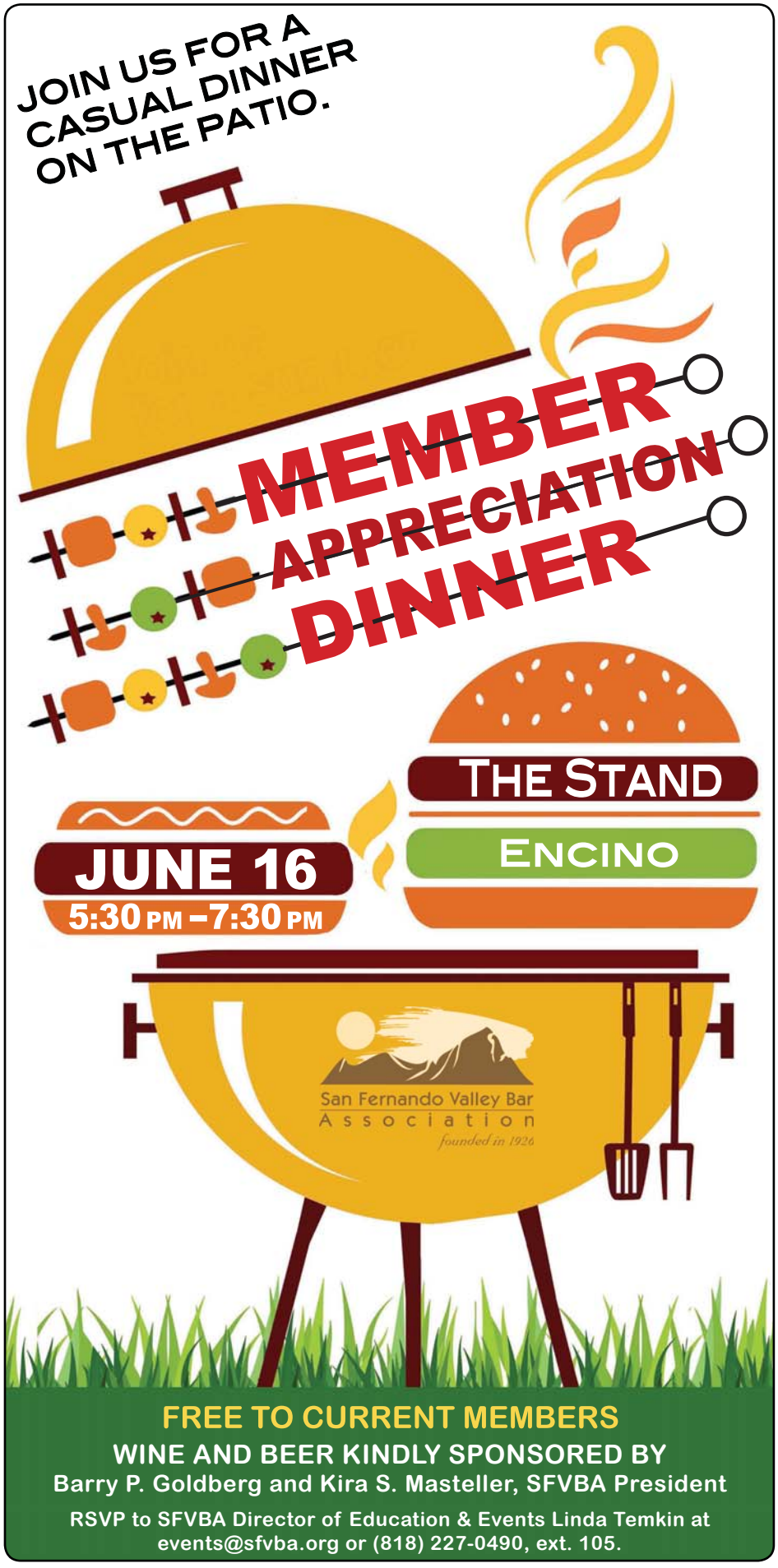
After Blatt was diagnosed in 2005, she claims that she changed her physical appearance to conform to her female gender identity, including wearing female clothing and growing her hair long. She was hired as a seasonal stocker at Cabela's Retail and, during an orientation, dressed in female clothing and used the women's employee bathroom. After starting her employment, Blatt alleged that Cabela's Retail denied a reasonable accommodation by forcing her to wear a nametag stating her name was James and use the men's employee restroom instead, that Cabela had created a hostile work environment, and had subjected her to sex discrimination based on her gender and gender nonconformity.

Blatt also claimed that Cabela's alleged failure to provide reasonable accommodations—a gender neutral bathroom and the use of a nametag with the name Kate Lynn—violated the ADA. Cabela's filed a partial motion to dismiss Blatt's ADA claims arguing that her Blatt's gender dysphoria did not constitute a disability under the ADA.

The court has not yet ruled on the motion. As a result, judicial determination of this issue is up in the air and, as it stands, gender identity disorder and gender dysphoria are not considered disabilities under the ADA and FEHA.

However, while employers are not required to make reasonable accommodations to employees merely because an employee has a gender identity disorder, this does not give employers carte blanche to discriminate against transgender employees based on their sexual identity.

Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq. prohibits employment discrimination against a protected individual because of his or her race, color, religion, sex or national origin. Recent decisions have extended Title VII protection to discrimination based on sexual orientation. For example, in *Hively v. Ivy Tech Community College*,[10] the Seventh Circuit extended Title VII protection to employment discrimination on the basis of an employee's sexual orientation.



In addition, Congressional Democrats recently reintroduced the Equality Act that would amend the Civil Rights Act to protect members of the LGBTQ community against discrimination in the workplace. So, under this proposed amendment, if an employee suffers from a gender identity disorder and was discriminated against because of behavior and appearance the employer felt failed to conform to gender norms or simply because the employee identified himself or herself as transgender, that employee may have suffered discrimination on account of sex.

Similarly, under FEHA, which also precludes employment discrimination based upon race, color, religion, sex or national origin, the definition of "sex" includes a person's gender identity and gender expression, which includes a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth.

Although individuals who identify as transgender cannot sue under the ADA or FEHA for discrimination on the grounds of a disability, they may still assert claims of discrimination under Title VII and FEHA based on sex. Generally, they will be required to show that even though they were qualified for the position, they were terminated, retaliated against, etc., because of their sex and replaced by someone outside of the protected class or similarly situated non-protected employees were treated more favorably.

Individuals who identify as transgender are also protected in the workplace. California law expressly prohibits an employer from denying an employee's right to appear or dress consistently with the employee's gender identity or gender expression.[11] Also, beginning in 2016, California's Fair Employment and Housing Council (FEHC) proposed

amendments to FEHA intended to protect transgender persons. The proposed amendments explicitly state that an employee has the right to use a bathroom that corresponds to the employee's gender identity or gender expression.

In addition, beginning March 1, 2017, California law required that all single-user toilet facilities in any business establishment, place of public accommodation or government agency must be identified as all-gender toilet facilities.[12] The proposed amendments also prohibit employers to inquire or require documentation or proof of an individual's sex, gender, gender identity or gender expression as a condition of employment, absent a bona fide occupational qualification.

Essentially, this amendment would prohibit employers from asking questions of prospective employees designed to determine the individual's sexual orientation or gender identity. Additional protection arrived on January 1, 2015, when California required all California employers subject to the mandatory training requirement to include prevention of abusive conduct as part of sexual harassment training.[13]

Under this anti-bullying law, "abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." Abusive conduct may also include "verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."[14]

Because reasonable persons may have differing opinions as to what constitutes abusive conduct, the scope of this law is still being developed. It may be difficult to label a supervisor's conduct as abusive if he or she merely tells an employee: "Your work product is terrible."

But if the supervisor tells an employee that his or her work product is terrible solely because he or she is transgender, a reasonable person may find this conduct hostile and offensive. Although an employee cannot sue for damages under the anti-bullying law, the employee may have a legitimate damages claim for discrimination or harassment if the bullying relates to his or her gender or sex.

The scope of protections is also seeping into the long-term care facility industry in California. On February 1, 2017, Senate Bill 219 was introduced that would make it unlawful for any long-term care facility to take certain actions specifically on the basis of a person's actual or perceived sexual orientation, gender identity or gender expression.

The workplace landscape is changing fast in California. Although employers are not presently required to accommodate individuals who identify as transgender under the ADA, employers must still be cognizant of an employee's gender identity or gender expression in the workplace. Employers must become aware of the impact of any proposed new legislation and treat this protected class with the same seriousness as they would members of other protected classes.

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[1] 42 U.S.C. §12191 et seq.
[2] California Government Code §12900 et seq.
[3] 42 U.S.C. §12101(a)(5).
[4] 42 U.S.C. §12102(1)(A).
[5] 42 U.S.C. §12102(2)(A).
[6] 42 U.S.C. §12211(b)(1).
[7] *Government Code* §12940.
[8] *Government Code* §12926.
[9] No. 5:14-cv-04822 (E.D. PA 2014).
[10] 853 F.3d 339 (7th Cir. 2017).
[11] *Government Code* §12949.
[12] *Health & Safety Code* §118600.
[13] *Government Code* §12950.1.
[14] *Id.*