

THARRINGTON

Est. 1964

ATTORNEYS AT LAW

SMITH LLP

# Transgender Employees: Equity on Our Campuses

2022 Spring PANC Conference  
Colin Shive



**Shifting Legal Landscape:  
What's the Law Now for  
Employees (And Students)?**

# Which of These Laws Applies to Employee Transgender Issues



- Section 1983
- Title VII
- Title IX
- Equal Protection Clause of the US Constitution
- N.C. Gen. Stat. § 14-293

# Title VII of the Civil Rights Act of 1964

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

# Title VII of the Civil Rights Act of 1964

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise.

Meritor Sav. Bank, FSB  
v. Vinson (Supreme  
Court, 1986)

Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.

## Price Waterhouse v. Hopkins (Supreme Court, 1989)

- Female partnership candidate was refused admission as partner in accounting firm and brought sex discrimination action against firm.
- The Supreme Court held that: (1) when plaintiff in Title VII case proves that her gender played part in employment decision, defendant may avoid finding of liability by proving by preponderance of the evidence that it would have made same decision even if it had not taken plaintiff's gender into account, and (2) evidence was sufficient to establish that sexual stereotyping played a part in evaluating plaintiff's candidacy.

Price Waterhouse v.  
Hopkins (Supreme  
Court, 1989)

“We take these words to mean that gender must be irrelevant to employment decisions.”

## Price Waterhouse v. Hopkins (Supreme Court, 1989)

There were clear signs. . . that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” . . . . But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

## Bostock v. Clayton County (Supreme Court, 2020)

Gerald Bostock was an employee of Clayton County. In 2013, he joined a gay softball league and promoted it at work trying to recruit volunteers. In April 2013, Clayton County conducted an audit of funds controlled by Bostock and fired him for “conduct unbecoming a county employee.” Bostock believed that the county used the claim of misspent funds as a pretext for firing him for being gay, and sued the County in federal district court.

## Bostock v. Clayton County (Supreme Court, 2020)

“An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is the law, and all persons are entitled to its benefit.”

## Bostock v. Clayton County (Supreme Court, 2020)

“They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”



## Practical Considerations

- Hopefully there will be no issue! But if there is:
  - What does the employee say to students?
  - What can/should the school say to parents?
  - Personnel Privacy

## Practical Considerations

Guiding principle: Don't discriminate.

- Consider whether the direction the school system is giving the transgender employee differs from direction the school system would give a non-transgender employee.

## Communication with Transitioning Employee

- Consider meeting with employee to provide support and assistance with responding to questions from students and parents.
- Advice will vary depending on age of students, role of the employee, and other individual circumstances.
- Consider providing sample responses to student inquiries.
- What if teacher wants to talk to students about their transition?

What can we say in  
response to  
questions from  
parents about a  
transitioning  
employee?

- Don't make public what's not public.
- Can share information regarding the district's curriculum. Will it be addressed in the classroom or not?
- Can note what the law requires.



*Can we discipline a student who refuses to use a teacher's preferred name/pronoun?*

- Apply your code of conduct.
- How would you address a student who refuses to use the preferred name of a non-transgender employee?

# Transgender Students



- Title IX
- Equal Protection Clause of the US Constitution
- N.C. Gen. Stat. § 115C-407.15

## State of the law

Under North Carolina law (N.C. Gen. Stat. § 115C-407.15 (2009)), students are protected from bullying and harassment by students or employees based on actual or perceived sexual orientation, gender, gender identity, and physical appearance. Also, the United States Court of Appeals (4th Circuit) stated in *Gavin Grimm vs. Gloucester County School Board* (2020) that it is illegal for schools to prevent student access to restrooms and locker rooms matching a student's gender identity.

## State of the law

School systems may offer transgender and non-binary students an alternate single occupancy restroom but cannot not require its use. *Gavin Grimm vs. Gloucester County School Board* (2020) also makes clear that students can request to update their education records (such as transcripts and new documents after providing appropriate documentation) to reflect a student's gender identity.



What about employees' interactions with transgender students?

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- Music and orchestra teacher refused to comply with BOE policy that required teachers to use students' preferred names and pronouns.
- Employee informed Superintendent Dr. James Snapp that the requirement that he use the students' names as listed in PowerSchool ("the Policy") conflicted with his religious beliefs against affirming gender dysphoria, and Dr. Snapp responded that Mr. Kluge could either "use the transgender names, say he was forced to resign from BCSC, or be terminated without pay."
- Because Mr. Kluge refused to use the names listed in PowerSchool, Dr. Snapp initiated an administrative leave of absence for Mr. Kluge and Dr. Bret Daghe, the principal of BHS, "issued Mr. Kluge an ultimatum...mandating the use of transgender preferred names, and giving Mr. Kluge [three days] to decide if he would comply."

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- Mr. Kluge then requested “an accommodation for his religious beliefs,” and proposed the solution of “addressing all students by their last names only, similar to a sports coach.”
- Dr. Snapp and Jodi Gordon, the BCSC Human Resources Director, agreed in writing to allow Mr. Kluge to address all students by their last names only (“the last-names-only arrangement”) and assigned someone to distribute gender-specific uniforms to students so Mr. Kluge would not have to.
- Despite this agreement, the school board retroactively administered a two-day suspension in response to Dr. Snapp's previous action.

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- On December 13, 2017, Mr. Kluge met with Dr. Daghe, at which time Dr. Daghe informed Mr. Kluge that the last-names-only arrangement had created “tension” and that Mr. Kluge should resign by the end of the school year. However, Mr. Kluge alleges that the last-names-only arrangement created no undue hardship for Defendants, and no Defendant identified in writing any undue hardship that was purportedly caused. Instead, he asserts, “nothing dramatic occurred” between July and December 2017, and there were no student protests, written complaints, classroom disturbances, or cancelled classes.
- Mr. Kluge again attempted to explain “that he believes encouraging students to present themselves as the opposite sex by calling them an opposite-sex first name is sinful and potentially harmful to the students,” but Ms. Gordon advised him that he could either resign by May 1, 2018 and be paid over the summer or be fired without pay. He states that Defendants’ contentions that the last-names-only arrangement created tension or offended students were not based in fact but were simply pretexts for religious discrimination.

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

Mr. Kluge sued and brought thirteen claims for relief:

- (1) religious discrimination based on failure to accommodate under Title VII
- (2) retaliation under Title VII;
- (3) hostile work environment under Title VII;
- (4) retaliation under the First Amendment;
- (5) content and viewpoint discrimination under the First Amendment;
- (6) compelled speech under the First Amendment;
- (7) violation of his right to the free exercise of religion under the First Amendment;
- (8) violation of the right to be free from unconstitutional conditions;

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- (9) violation of the right to due process under the Fourteenth Amendment;
- (10) violation of the right to equal protection under the Fourteenth Amendment;
- (11) violations of the rights of conscience and free exercise of religion under the Indiana Constitution;
- (12) intentional infliction of emotional distress under Indiana common law;
- and (13) fraud under Indiana common law.

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- First Amendment Ruling:
  - “Here, Mr. Kluge has failed to state any claim under the First Amendment because, as a matter of law, the speech at issue is not constitutionally protected.”
  - “Thus, the speech at issue was part of Mr. Kluge's official duties, and this alone is sufficient to preclude any free speech claim under the First Amendment.”

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- Free Exercise of Religion Ruling:
  - “Because the Policy is neutral and generally applicable and Mr. Kluge has not alleged facts showing that it targeted or otherwise was motivated by an animus toward any particular religion or religious belief, he has not stated a claim for violation of the Free Exercise Clause.”

## Kluge v. Brownsburg Cmty. Sch. Corp (SD Ind. 2020)

- Title VII Religious Accommodation:
  - Survived Motion to Dismiss
  - Dismissed at Summary Judgment: “In sum, BCSC has demonstrated as a matter of law that it cannot accommodate Mr. Kluge's religious belief against referring to transgender students using their preferred names and pronouns without incurring undue hardship.”

## Cross v. Loudoun County School Board (Virginia 2021)

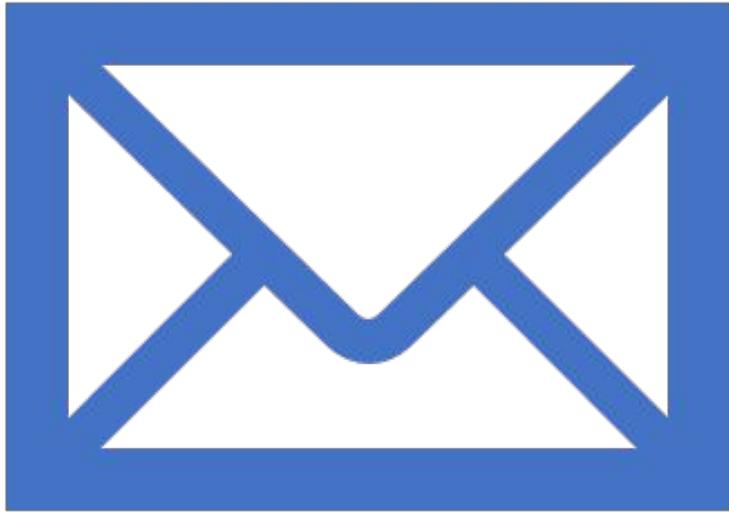
- Teacher suspended and barred from giving public comment after stating his opposition to a proposed transgender policy during public comment at a school board meeting.

## Cross v. Loudoun County School Board (Virginia 2021)

- The circuit court found that the school system had unlawfully retaliated against the teacher for his speech on a matter of public concern and granted an injunction, which was upheld by the State Supreme Court.
- Case was subsequently settled with the BOE agreeing to pay a portion of teacher's attorney's fees.

## Takeaways

- Title VII prohibits discrimination against transgender employees, which includes hostile work environment claims.
- We probably can provide some direction to teachers with respect to their interactions with students in the classroom – but be wary of applying stricter rules to transgender employees.
- Teachers can likely be disciplined for failing to use preferred names and pronouns of students in the classroom, but not for statements outside of the classroom about school board policies on matters of public concern.



# Questions?

Colin Shive

[cshive@tharringtonsmith.com](mailto:cshive@tharringtonsmith.com)

919-821-4711