QUEER ACCOMMODATIONS

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ABSTRACT

Ever since the American Psychological Association's publication of the fifth edition of its Diagnostic and Statistical Manual (DSM-5) in 2013, wherein it embraced a diagnosis of gender dysphoria in lieu of gender identity disorder, a doctrinal debate has been reignited in the courts: can gender dysphoria be a "disability" or a "handicap" under accommodations mandate statutes like the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, or their state and municipal analogs? Yet, understandably, this debate has focused on whether gender dysphoria fits under the umbrella of these legal terms of art, not the incredible variety of work accommodations that queer identities necessitate. This article seeks to explore that terrain by explaining the sorts of accommodations needed not only by workers with gender dysphoria, but by queer workers writ large.

It begins by briefly recounting the development of the debate over gender dysphoria as a "disability," pre- and post-DSM-5. It then focuses on cataloging queer accommodations, both real and theorized, and justifying why they are crucial to LGBTQ+[1] workers. In doing so, it tells untold stories of queer workers and why their identities may require accommodations like being referred to by their chosen names, pronouns, and honorifics; using or eschewing gendered language; alterations to certain dress and grooming standards; access to bathrooms and other traditionally sex-segregated spaces; modifications to their job functions and physical workspaces; flexible work arrangements and leaves of absence; and changes to employee benefit plans and personnel policies. It concludes by reflecting on the breadth and depth of queer accommodations, predominantly by highlighting how queer accommodations further underscore the urgency of an equitable, universal accommodations mandate in work law.

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1. In lieu of alternative acronyms, this author uses LGBTQ+ to encompass everyone under the queer umbrella, *see infra* notes 103–104 & accompanying text, in an effort to embrace a persistent moniker that endures even as our understanding of sexualities, romantic orientations, and gender identities evolve.

INTRODUCTION

Title I of the Americans with Disabilities Act of 1990 ("ADA") and Sections 703 and 704 of the Rehabilitation Act of 1973 ("Rehab Act") require certain employers to make reasonable accommodations to qualified individuals with a "disability."[2] Infamously, though, the ADA and the Rehab Act exclude from their definitions of "disability" both "homosexuality and bisexuality," as well as "transvestism, transsexualism . . ., gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[3] As a result, until at least 2013, the consensus in the legal academy and on the ground in employment law firms was that workers with, or regarded as having, gender identity disorder ("GID") or its predecessor or

2. 29 U.S.C. §§ 793(a), 794(a), (d); 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.9(a) (2011); 41 C.F.R. § 60-741.21(a)(6) (2014). Some courts have held that Title II of the ADA and its implementing regulations, 42 U.S.C. § 12132; 28 C.F.R. §§ 35.130(b)(7)(i), 35.140(a) (2016), require the same for state and municipal government employers. Brumfield v. City of Chicago, 735 F.3d 619, 629–30 (7th Cir. 2013); McGary v. City of Portland, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) ("Although Title II of the ADA uses the term 'reasonable modification,' rather than 'reasonable accommodation,' these terms create identical standards.").

3. 29 U.S.C. § 705(20)(E)(ii), (F)(i); 42 U.S.C. § 12211(a), (b)(1). Underscoring the animus these statutes exhibit against workers who express their gender identity by wearing clothing typically associated with a sex other than their assigned sex—most of whom are transgender or gender nonconforming—and workers with transvestic disorder, Congress excluded "transvest[ism]" from the scope of "disability" under the ADA twice. 42 U.S.C. § 12208. Beating a dead horse shows animus against horses. The administrative agencies responsible for promulgating the regulations implementing the ADA and the Rehab Act—viz., the U.S. Department of Justice ("DOJ"), the U.S. Equal Employment Opportunity Commission ("EEOC"), and the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP")—also duplicated all of these statutory exclusions in their regulations implementing those statutes. 28 C.F.R. § 35.108(b)(3), (g)(1) (DOJ's ADA Title II regulations); 29 C.F.R. § 1630.3(d)(1), (e) (EEOC's ADA Title I regulations); 41 C.F.R. § 60-741.3(d), (e) (OFCCP's Rehab Act Section 503 regulations). However, per Hanlon's Razor (i.e., "Never attribute to malice that which is adequately explained by stupidity."), such redundancies are much more likely evidence of the widespread, inane agency practice of repeating statutory definitions in regulatory definitions, not the animus of these agencies. For more information about transvestic disorder, *see* AM. PSYCH. ASS'N., DIAGNOSTIC & STAT. MANUAL 702–04 (Susan K. Schultz and Emily A. Kuhl eds., 5th ed. 2013) [hereinafter "DSM-5"]. On the animus behind these statutory exclusions, *see* Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and A New Path for Transgender Rights*, 127 YALE L. J. FORUM 373, 379–80 (2017).

related diagnoses,[4] not to mention all other queer workers, fell outside the protection of these federal statutes' accommodations mandates.[5]

Then, in 2013, the American Psychological Association ("APA") replaced GID with gender dysphoria ("GD")[6] to "further focus[] the diagnosis on the gender identity-related distress that some transgender people experience (and for which they may seek psychiatric, medical, and surgical treatments) rather than on transgender individuals or identities themselves."[7] In the wake of this diagnostic sea change, impact litigation and legal scholarship began to challenge the status quo, arguing that GD is, or at least could be, a "disability" under the ADA and the Rehab Act.[8] Advocates advanced three primary arguments: (1) GD is a "distinct diagnosis with physical roots—not a disorder of identity"[9]; (2) even assuming *arguendo* that GD is a gender identity disorder, GD results from physical impairments, or at least some plaintiffs' GD results from physical impairments[10]; and (3) construing the ADA or the Rehab Act otherwise would run afoul of the constitutional right to equal protection emanating from the Fifth Amendment's Due Process Clause.[11] Thus, today, many stakeholders, including courts, administrative agencies, legal scholars, and practitioners, have concluded that GD is (or can be) a "disability" under the ADA and the Rehab Act, thereby triggering certain employers' obligations to reasonably accommodate employees with GD.[12] Part I of this article traces and contextualizes this relatively recent and monumental doctrinal transformation.

Throughout this doctrinal debate, the literature has focused, understandably, on doctrine. However, what deserves additional attention are the actual work

4. The now-moot diagnostic criteria for GID can be found at AM. PSYCH. ASSOC., DIAGNOSTIC & STATISTICAL MANUAL 481 (Michael B. First ed., 4th ed. rev. 2000). For the pre-2013 history of GID and its precursor and related diagnoses, see Judith S. Stern & Claire V. Merkine, Brian L. v. Administration for Children's Services*: Ambivalence Toward Gender Identity Disorder as a Medical Condition*, 30 WOMEN'S RTS. L. REP. 566, 567–70 (2009).

5. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 768 (2010) ("[T]he ADA expressly excludes transgender persons from the definition of disability. . . ."); Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 LAB. LAW. 121, 135 (2005) ("[D]oes discrimination against a transsexual constitute discrimination on the basis of disability or handicap? Under federal law, the answer is simple: no."). On employers' duty to reasonably accommodate an employee regarded as having a disability, *see* Marsha R. Peterson, Note, *Yes, There Is a Duty to Accommodate Someone "Regarded As" Disabled Under the ADA*, 7 NEV. L. J. 615, 638 (2007).

6. DSM-5, *supra* note 3, at 451–59, 814–15.

7. *Gender Dysphoria Diagnosis*, AM. PSYCH. ASS'N., https://perma.cc/2N4W-2GPC.

8. *See infra* notes 9–11.

9. Barry & Levi, *supra* note 3, at 382 (citing Brief for Gay & Lesbian Advocates & Defenders et al. as Amici Curiae Opp. to Def.'s Partial Motion to Dismiss at 12-15, Blatt v. Cabela's Retail, Inc., (No. 5:14-CV-4822-JFL), 2017 WL 2178123 (E.D. Pa. May 18, 2017)).

10. *Id*. at 382–83 (citing Second Statement of Interest of the United States at 5, *Blatt*, (No. 5:14-CV-04822-JFL), 2017 WL 2178123 (E.D. Pa. Nov. 16, 2015)).

11. *Id*. at 382 (citing Pl.'s Mem. of Law in Opp. to Def.'s Partial Motion to Dismiss Pl.'s First Am. Compl. at 15–39, *Blatt*, (No. 5:14-CV-04822-JFL), 2017 WL 2178123 (E.D. Pa. May 18, 2017)).

12. *See generally infra* notes 64, 75, 77–78, 81–83.

accommodations being requested and, all too often, denied. Who are the trans,[13] non-binary, and intersex workers requesting these accommodations? What are their names and stories? Where do they work? What are their jobs? What sorts of accommodations do they need? And what makes such accommodations so vital for queer workers? Part II of this article answers these questions by sharing queer workers' stories, the kinds of accommodations they need, and what makes accommodations like these so important. In so doing, it supplements the rich literature of storytelling as a mode of advancing queer liberation within legal scholarship, *inter alia*, as a means "to identify and counter pre-understanding about excluded groups" like LGBTQ+ workers.[14]

Moreover, to date, employment law scholarship has focused on accommodating workers with GD, as opposed to other queer workers, because the APA's 2013 diagnostic shift cleared the way for GD to qualify as a "disability" under federal laws. Yet, in so focusing, the literature has exacerbated a long-standing schism within the broader queer community: some queer workers—that is, those with GD—arguably have the right to equitable work accommodations because of their GD, whereas queer workers without GD have no such legal rights derived from their queer identities. That is not to say that legal scholarship furthering these arguments was a net negative for the queer community; on the contrary, its impact has been overwhelmingly positive. Nevertheless, with that sweet of progressive doctrinal transformation comes the sour entrenchment of queer hierarchies. Thus, Part II's storytelling seeks to tell a broader story: one of queer workers writ

13. This article uses the Trans Journalists Association's convention that "trans" and "transgender" are adjectives that can modify nouns like "woman" or "man," whereas one-word compounds like "transwoman" or "transman" should not be used as they are "outdated" and recently have been adopted by "anti-trans political groups." *Stylebook and Coverage Guide*, TRANS JOURNALISTS ASSOC., https://perma.cc/P8M3-7DP3. I tend to agree. That said, I wonder if avoiding words like "transwoman" and "transman" disappears the intersectionality of certain identities. Trans men are men, and trans women are women. Yet, some trans and non-binary people may go further, claiming only the noun, not an adjective, (e.g., "I'm a woman; I'm not transgender because that identity qualifies my womanhood."). Does that not imply that some trans people might claim their trans identity and their sexual identity as intrinsically intertwined? For instance, might one say, "I am a transwoman, and that identity is different—greater than—the sum of its parts?" Certainly, it would not be novel for one compound word to confer multiple identities (e.g., lesbian, often used by female homosexuals; Chicano, often used by Mexican-American males). That said, such nuance is far from obvious, even if it might be worthy of further debate, so this cis author will defer to the recommendations of trans voices. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 1002 (2015) ("language must be led by the person with that body").

14. *See, e.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 517 (1992). For examples of storytelling in queer legal scholarship, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS*: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS (2012); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 609 n.12 (1994) (collecting examples). For commentary about the efficacy of such storytelling, *see* Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 882–83 (2000); Ruthann Robson, *Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narratives*, 48 HASTINGS L. J. 1387 (1997).

large and the accommodations they need but cannot demand under the law. As detailed further below, this includes non-cishet workers of all stripes, as well as groups of workers with significant queer populations. To be clear, this article argues neither that extant federal law requires employers to accommodate the full array of queer workers on account of their queer identities qualifying as a "disability" nor that the law ought to be amended to expand the definition of "disability" to encompass all queer identities.[15] Rather, it explores the accommodations needed to ensure equitable treatment of all queer workers in justification of Part III's universalist prescriptions for all workers.

To that end, Part III reflects upon the implications of the breadth and depth of the accommodations identified in Part II. On one level, queer workers need accommodations that many non-queer workers do not,[16] but federal law does not yet include an equitable accommodations mandate that would require employers to accommodate those queer workers. In that respect, queer workers' accommodations needs are not the same as those of cishet workers. Yet, on another level, queer workers' accommodations needs are no different than those of any other workers: all workers will need an accommodation, for one reason or another, at some point during their work lives. As such, many employment law scholars have argued that employment laws ought to facilitate more equitable labor markets via a universal accommodations mandate instead of the piecemeal, "groups rights" accommodations mandates that only benefit enumerated classes of workers—be they workers with a disability (including workers with GD or its precursor and related diagnoses), pregnant workers, or workers who hold religious beliefs or engage in religious practices.[17] Hence, this article concludes by situating the queer accommodations it catalogs within the broader discourse on universal work accommodations.

I. TRANSFORMING DOCTRINE

This Part provides a brief chronology of the doctrinal transformation that made many of the queer accommodations that are discussed in Part II of this article a possibility. This chronology serves two distinct, valuable purposes. First, it provides the context necessary to appreciate the examples of the accommodations needed by queer workers and their subsequent accommodation requests that are

15. On the risks of framing queer rights as disability rights, *see* Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1789–1809 (2022).

16. *See infra* Part II.

17. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51–54 (2009); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–12 (2010); Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 403–04 (2001); Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 89 (2016); Michael Ashley Stein, Anita Silvers, Bradley A. Areheart, & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 695–701, 744 (2014); *but see* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1266–79 (2011).

discussed in Part II. Second, it highlights the potential for constructive doctrinal transformation when legal scholars and practitioners collaborate.[18]

A. STAGNATION AND TREPIDATION

From the Rehab Act's inception in 1973 and throughout the 1970s, no published opinions reflect any queer employees alleging that their queer identity qualified as a "handicap" under the Rehab Act or its state or municipal analogs; "disability" would not replace "handicap" in the Rehab Act until 1992.[19] That began to change in the 1980s with three trans workers: Audra Sommers, William Blackwell, and a trans woman known only as Jane Doe.

In 1980, Audra Sommers was a tall, blond, thin, and attractive 21-year-old trans woman living in West Des Moines, Iowa who had been taking hormone replacement therapy ("HRT") for a year and who presented as female full-time.[20] Sommers eventually hoped to save up enough money to afford gender-affirming surgeries (then sometimes called "sex-change surgery"), but such surgeries were expensive—about $7,000 at the time for the surgeries Sommers wanted, which would have the same purchasing power as $27,248.23 in September 2024.[21]

In April of 1980, Sommers was hired to perform clerical work for Budget Marketing in nearby Des Moines, Iowa.[22] She performed her job well for several days, receiving not a single criticism of her performance, after which one of her coworkers recognized her from before she had presented as a woman.[23] Before too long, word spread that Sommers was a trans woman, and scores of Budget's other female employees threatened to walk off the job if Sommers were allowed to use the women's restroom at work.[24] Management prohibited Sommers from using the women's bathroom at work "because she was not really a woman," while they concomitantly prohibited her from using the men's bathroom at work while she remained dressed as a woman.[25] "What did they expect me to do, go outside in a bush?", Sommers would later retort.[26] Concerned about Sommers's

18. For one project advancing such synergy in employment law, see *Converge for Impact*, UNIV. OF FLA. LEVIN COLL. OF LAW, https://perma.cc/V66X-TCL7.

19. Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 102(p)(31), (32), 106 Stat. 4344, 4360 (1992).

20. Peter Racher, *Transsexual seeks day in court*, DES MOINES REGISTER (Mar. 8, 1983), https://perma.cc/KT3P-4GWY; *see also Transsexual Audra Sommers has filed a sex discrimination suit*, UPI (Nov. 18, 1980), https://perma.cc/CC2U-FMSM [hereinafter "UPI Article"].

21. Racher, *supra* note 20; *CPI Inflation Calculator*, BUR. OF LAB. STATS., https://perma.cc/F876-XJ8E.

22. Sommers v. Budget Mktg., Inc., 667 F.2d 748, 748 (8th Cir. 1982) [hereinafter *Sommers* Federal Action]; Sommers v. Iowa C.R. Comm'n, 337 N.W.2d 470, 471 (Iowa 1983) [hereinafter *Sommers* State Action]; Racher, *supra* note 20; UPI Article, *supra* note 20.

23. *Sommers* State Action, *supra* note 22, at 471; Racher, *supra* note 20.

24. *Sommers* Federal Action, *supra* note 22, at 748–49; *Sommers* State Action, *supra* note 22, at 471; UPI Article, *supra* note 20.

25. UPI Article, *supra* note 20; *accord*. *Sommers* State Action, *supra* note 22, at 471; Racher, *supra* note 20.

26. UPI Article, *supra* note 20.

coworkers' threatened uprising and Sommers's need to use *a* bathroom while at work, and artificially upset that Sommers had allegedly "misrepresented herself as an anatomical female when she applied for the job,"[27] Budget's management fired Sommers just a few days after having hired her, despite Sommers having no performance issues.[28]

After she was fired, Sommers pursued redress against her former employer in two actions: one under color of federal law, and a second under color of state law.[29] The federal law action alleged that Budget had violated Title VII of the Civil Rights Act of 1964 ("Title VII") by committing sex discrimination, making Sommers one of the first plaintiffs to argue that discrimination because someone is "transsexual" is discrimination because of sex.[30] Unfortunately, the judges who heard Sommers's case disagreed, including a unanimous panel of the Eighth Circuit in a *per curiam* opinion, holding that such discrimination was not barred by Title VII.[31] In an article published in the *Des Moines Register* two months later, one of Sommers's attorneys, Linda Petit, articulated her belief that the Eighth Circuit's opinion "one day will be reversed."[32] In 2020, the U.S. Supreme Court proved Petit right.[33]

However, Sommers's federal law action did not include a cause of action under the Rehab Act, undoubtedly because Budget was neither a federal agency, a federal contractor, nor a federal funds recipient. This was a common limitation for transgender workers in the 1980s and, indeed, for employees of the majority of private employers whose disability discrimination fell outside the scope of federal protection; their plight laid much of the groundwork for the ADA.[34] With limited recourse under federal law, Sommers pursued a separate action under the Iowa Civil Rights Act, arguing that Budget had committed sex *and* disability discrimination under state law. Sommers filed her claim with the Iowa Civil Rights Commission, but that agency disclaimed jurisdiction, finding not only that transgender discrimination was not sex discrimination, but also that "transsexualism"

27. Management's allegation that Sommers had "misrepresented herself as an anatomical female" is false. For clerical positions, no employment application, job interview, or onboarding process anywhere has ever requested that an applicant disclose her anatomy (e.g., "Please list below all relevant employment history and whether you have a vulva."). Budget's management was just upset that a trans woman was following her physician's medical advice and presenting as female to treat her GD without disclosing the same. *Sommers* Federal Action, *supra* note 22, at 748.

28. *Sommers* Federal Action, *supra* note 22, at 748; *Sommers* State Action, *supra* note 22, at 471; UPI Article, *supra* note 20; Racher, *supra* note 20.

29. *Sommers* Federal Action, *supra* note 22; *Sommers* State Action, *supra* note 22.

30. Were they to bring suit today, Sommers and many of the other individuals highlighted in this article may describe themselves differently (e.g., transgender, not transsexual), but presuming as much is inappropriate. The choice of how one identifies may be permanent or ephemeral, just as that choice may be orthodox or idiosyncratic. Yet, how one identifies is, and ought to remain, a personal choice.

31. *Sommers* Federal Action, *supra* note 22, at 748; Racher, *supra* note 20.

32. Racher, *supra* note 20.

33. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

34. Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 271, 273–77 (2019).

was not a "disability" under Iowa state law.[35] A unanimous panel of the Iowa Supreme Court refused to disturb the agency's conclusions.[36]

Sommers's strategy was indicative of a litigation strategy that predominated for the 30 years that followed the dismissal of her claims in 1983: argue that a worker's GD (or its precursor or related diagnoses, like GID) was a "disability" or "handicap" under state or local laws. The paragraphs below highlight some of those stories, but it is worth briefly relating why that strategy prevailed for so long. After all, during the 1970s and 1980s, the Rehab Act contained no explicit exclusions that might remove transgender or other queer workers from the protection of the statute's accommodations mandate. To that end, in the mid-1980s, two queer applicants for positions with federal agencies sought redress under the Rehab Act. They were Jane Doe,[37] a trans woman who had applied for a typist position with the U.S. Postal Service, and William Blackwell, a gay man who dressed in feminine clothing and sought a position with the Treasury Department.[38] After these federal agencies denied them positions, Doe and Blackwell sued, alleging, *inter alia*, disparate treatment based on their disabilities under the Rehab Act and contending that transsexualism and transvestism, respectively, could constitute "handicap[s]" under the Rehab Act and its implementing regulations.[39]

They succeeded. In *Doe v. U.S. Postal Service*, the court concluded that transsexualism was a physical or mental impairment and, therefore, could be a "handicap" under the Rehab Act if it substantially limited one or more of Doe's major life activities, an issue of fact that the court reserved for trial.[40] In *Blackwell v. U.S. Department of Treasury*, the court similarly held that the agency regarding Blackwell as a transvestite was a "handicap" under the Rehab Act if the agency perceived it to substantially limit one or more of his major life activities.[41]

Then came the 1990s and the most significant federal law for individuals with a disability: the ADA. As the introduction to this article explains, Congress excluded from the ADA's scope "homosexuality and bisexuality," as well as "transvestism, transsexualism," "gender identity disorders not resulting from physical impairments," and "other sexual behavior disorders."[42] Yet, for a brief few years after the enactment of the ADA, the Rehab Act contained no such

35. *Sommers* State Action, *supra* note 22, at 474.

36. *Id*. at 471.

37. Doe, like many queer plaintiffs, used a pseudonym to shield her identity. For commentary on this phenomenon, *see* Carol R. Andrews, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1995).

38. Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446, at *1 (D.D.C. June 12, 1985); Blackwell v. U.S. Dep't of Treas., 639 F. Supp. 289, 289–90 (D.D.C. 1986).

39. *Doe*, 1985 WL 9446, at *1; *Blackwell,* 639 F. Supp at 290.

40. *Doe*, 1985 WL 9446, at *2–*3.

41. *Blackwell*, 639 F. Supp. at 290.

42. *See* Americans with Disabilities Act of 1990, Pub. L. 101-336, § 511(a), (b)(1), (b)(3), 104 Stat. 327, 376 (1990); *see also supra* note 3 and accompanying text for a legislative history of the ADA's exclusions.

exclusions. It was not until the Rehabilitation Act Amendments of 1992 that Congress not only changed "handicap" to "disability," thereby conforming the Rehab Act to the ADA, but also excluding the same string of LGBTQ+ identities from the Rehab Act,[43] "perhaps in response to [*Doe* and *Blackwell*]."[44]

Hence, from the 1990s to 2016, queer plaintiffs uniformly were unsuccessful at arguing that transsexualism and/or GID were disabilities under the ADA or the Rehab Act.[45] They included Barbara James, a trans woman who worked at a hardware store in Kansas until she was fired in 1993 after telling her employer that she would be transitioning;[46] Selena Johnson, a trans woman who worked for a meat-packing plant in Ohio until she was fired in 2001 for absenteeism arising out of her employer refusing to allow her to use the woman's bathroom;[47] Rebecca Kastl, a trans woman who worked as an adjunct faculty member at a community college in Arizona until she was fired in 2001 for refusing to use the male bathroom;[48] and Sue Anne Michaels, a trans woman who worked as a court security officer in Colorado and who was subjected to harassment in 2007 and 2008 after adopting a female name and beginning to use a female bathroom.[49]

To no one's surprise, therefore, plaintiffs during this timeframe sought redress under state and local laws. Notable examples include Belinda Smith, a trans woman who worked as a corrections officer, floor officer, sergeant, watch commander, and lieutenant at a prison in Florida until she was fired in 1985 after telling her employer that she intended to start socially transitioning;[50] Jess Evans, a trans woman who worked serving food in Illinois until she was fired in 1993 for refusing to cut her hair to conform to cisnormative grooming expectations;[51] and Carla Enriquez, a trans woman who worked as a medical director in New Jersey until she was fired in 1997 after she began to dress and groom herself like a

43. Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 102(f)(4), 106 Stat. 4344, 4349 (1992).

44. Doe ex rel. Doe v. Yunits, No. 00-1060A, 2001 WL 36648072, at *4 (Mass. Supp. Feb. 26, 2001).

45. Gulley-Fernandez v. Wisc. Dep't of Corr., No. 15-CV-995, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015); In re Outman, 49 Misc. 3d 1129, 1134 (N.Y. Sup. Ct. 2015); Mitchell v. Wall, No. 15-CV-108, 2015 WL 10936775, at *2 (W.D. Wis. Aug. 6, 2015); Diamond v. Allen, No. 7:14-CV-124, 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014); Rentos v. Oce-Off. Sys., No. 95 CIV. 7908, 1996 WL 737215, at *8 (S.D.N.Y. Dec. 24, 1996) (*dicta*).

46. James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 480 (D. Kan. 1995).

47. Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 998, 1001–02 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004).

48. Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV.02-1531PHX, 2004 WL 2008954, at *1, *5 n.10 (D. Ariz. June 3, 2004) (reserving holding whether GID could constitute a "disability" because plaintiff had not alleged a "substantial limitation in her ability to work").

49. Michaels v. Akal Sec., Inc., No. 09-CV-01300, 2010 WL 2573988, at *1 (D. Colo. June 24, 2010).

50. Smith v. Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882, at *4–*6 (Fla. Div. Admin. Hearings Oct. 2, 1991).

51. Evans v. Hamburger Hamlet, No. 93-E-177, 1996 WL 941676, at *1 (Chi. Comm'n Hum. Rel. May 28, 1996).

woman.[52] This strategy proved relatively successful in the handful of (mostly progressive) states and cities where it was mounted. To that end, administrative agencies and courts found that transsexualism, GID, GD, or their effects could qualify as a "handicap" or as a "disability" under the state laws of Connecticut, Florida, Massachusetts, New Hampshire, New Jersey, and New York, as well as the municipal laws of Chicago and New York City,[53] whereas the state laws of Iowa, North Carolina, and Washington were interpreted similarly to the ADA and the Rehab Act,[54] and Pennsylvania state law was interpreted both ways.[55]

All the while, federal law remained stagnant. Indeed, during this era, legal scholarship was resigned to the seemingly foregone conclusion that federal laws like the ADA and the Rehab Act excluded GD, GID, and the like from the scope of "disability."[56] Practitioners and law students all sang the same tune in the literature on the topic during this timeframe.[57] For example, in an influential book chapter from 2006, Professor Jennifer L. Levi and Bennett H. Klein, both affiliated with Gay and Lesbian Advocates and Defenders (now GLBTQ Legal Advocates and Defenders ("GLAD")), noted that, "[a]lthough the inclusion even within federal law of gender identity disorders resulting from physical impairments offers some hope for protection as the physical etiology of gender identity disorder is more thoroughly researched and understood, transgender people for

52. Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 506 (N.J. App. Div. 2001).

53. Wilson v. Phoenix House, 42 Misc. 3d 677, 697–98 (N.Y. Sup. Ct. 2013); Lie v. Sky Pub. Corp., No. 013117J, 2002 WL 31492397, at *6 (Mass. Super. Oct. 7, 2002); Jette v. Honey Farms Mini Mkt., 2001 WL 1602799, at *2 (Mass. Comm'n Against Discrimination Oct. 10, 2001); *Enriquez*, 342 N.J. Super. at 520; Doe v. Bell, 194 Misc. 2d 774, 778 (N.Y. Sup. Ct. 2003); *Doe*, 2001 WL 36648072 at *5; Conway v. City of Hartford, No. CV 950553003, 1997 WL 78585, at *5 (Conn. Super. Ct. Feb. 4, 1997); Doe v. Electro-Craft Corp., No. 87-E-132, 1988 WL 1091932, at *4–*7 (N.H. Super. Ct. Apr. 8, 1988); *Evans*, 1996 WL 941676, at *8; *Smith*, 1991 WL 833882, at *11–*12.

54. *Sommers* State Action, *supra* note 22, at 477; Arledge v. Peoples Servs., Inc., No. 02 CVS 1569, 2002 WL 1591690, at *3 (N.C. Super. Ct. Apr. 18, 2002); Doe v. Boeing Co., 121 Wash. 2d 8, 15–17 (1993).

55. *Compare* Holt v. Nw. Pa. Training P'ship Consortium, Inc., 694 A.2d 1134, 1139 (Pa. Comm. Ct. 1997); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 288–89 (E.D. Pa. 1993); *with* Transcript of Hearing Held on May 2, 2011 before the Hon. Eduardo C. Robreno at 33–34, Stacy v. LSI Corp., No. 10-4693, 2012 WL 4039851, at *33 (E.D. Pa. Sept. 12, 2012).

56. Kevin Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 4–6 (2013) (proposing, before the publication of the DSM-5, federal amendments to include GID as a "disability"); L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 540–43 (2009).

57. Jeannie J. Chung, Note, *Identity or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1, 2 (2011); Dishman, *supra* note 5, at 135–37; Joshua A. Jones, *Section 504 of the Rehabilitation Act of 1973: A Double-Edged Sword for the Protection of Students with Gender Identity Disorder*, 25 WIS. J.L. GENDER & SOC'Y 353, 364 (2010); Alok K. Nadig, Note, *Ably Queer: The ADA as a Tool in LGBT Antidiscrimination Law*, 91 N.Y.U. L. REV. 1316, 1339–40 (2016); Daniella A. Schmidt, Note, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155, 168–70 (2013); Zach Strassburger, Note, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337, 368 (2012).

the most part turn to state disability discrimination laws for coverage."[58] It was not until 2014, after the APA's 2013 publication of the DSM-5,[59] that the employment bar, the legal academy, a torrent of heavyweight LGBTQ+ non-profit organizations, and even the U.S. Department of Justice ("DOJ") joined forces to turn the tide.

Yet, it would misrepresent history to suggest that the doctrinal arguments prevalent today were always embraced by the queer and trans communities and their advocates. Quite the contrary. Many feared that conditioning legal rights on a diagnosis of GID (now GD), "especially in the hands of those who are transphobic," could be used "as an instrument of pathologization," stigmatizing trans people as "ill, sick, wrong, out of order, [or] abnormal"[60] as was the case for individuals with non-heterosexual sexual orientations.[61] Furthermore, using disability law to advance trans rights sets legal equality atop a pedestal that can usually be reached only by those with the resources to afford diagnosis.[62] Another critique sounded in postmodernism: conditioning legal rights on categorizations unjustifiably presumes an accurate comprehension of the boundaries of those categories when, in reality, categorical definitions can be elusive and dynamic.[63] In response, supporters have pointed to the great utilitarian potential of doctrinal transformation for workers with GID and criticized the ableist narratives that would denigrate on account of one's (dis)ability.[64] In light of this debate, it was not clear until relatively recently that disability laws would become a hospitable vehicle for queer workers' equality.[65]

B. TURNING THE TIDE

In August 2014, a trans woman named Kate Lynn Blatt filed a complaint in the Eastern District of Pennsylvania arguing that she had been fired from her job as a seasonal stocking clerk at Cabela's, a sporting goods retailer just outside of Allentown, Pennsylvania, *inter alia*, because of her GD after her management "wouldn't let her wear a gender-appropriate uniform, they forced her to wear a name tag with her birth name on it, and refused to let her use the women's

58. Jennifer Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS 84 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

59. *Supra notes* 6–7.

60. Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS, *supra* note 58, at 275.

61. *See generally* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565 (2015).

62. *See* Jae A. Puckett, Peter Cleary, Kinton Rossman, Michael E. Newcomb, & Brian Mustanski, *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 SEX RES SOC. POL'Y 48, 54 (2018) (discussing GID diagnosis as a barrier to gender affirming care); *contra* Levi & Klein, *supra* note 58, at 75–76 (acknowledging and pushing back the argument that the cost of GID diagnosis would be a significant barrier); *see also* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 70–81 (2021).

63. Butler, *supra* note 60, at 279.

64. Levi & Klein, *supra* note 58, at 76–77, 83, 89.

65. Levi & Klein, *supra* note 58, at 89.

restroom."[66] Cabela's promptly filed a motion to dismiss Blatt's claims arguing, *inter alia*, that GD was not a disability under federal law.[67]

Blatt's lead counsel was Neelima Vanguri of Sidney L. Gold and Assocs., a Philadelphia-based law firm specializing in employment law.[68] Within weeks, Vanguri was joined on the case by Professor Kevin M. Barry from Quinnipiac University School of Law, who marshaled a cavalcade of major national non-profit and advocacy organizations dedicated to transgender legal rights to submit an amicus curiae brief in support of Blatt's arguments: GLAD, Mazzoni Center, National Center for Lesbian Rights, National Center for Transgender Equality, National LGBTQ Task Force, and Transgender Law Center.[69] One of Professor Barry's contacts at GLAD was the organization's Senior Director of Transgender and Queer Rights, Professor Jennifer L. Levi,[70] who would go on to co-author with Barry several vanguard legal articles laying a groundwork for why GD was a "disability" under federal laws.[71]

Finally, Blatt argued that the exclusion of GD as a "disability" would be unconstitutional under the Equal Protection Clause.[72] The DOJ filed a statement of interest endorsing Blatt's claim that GD should be a "disability" under the ADA under the doctrine of constitutional avoidance.[73] As the DOJ argued, were the ADA interpreted to exclude GD from the scope of "disability," it would raise constitutional concerns (e.g., a denial of equal protection), which could be avoided in favor of a plausible statutory interpretation that includes GD within the scope of "disability" under the ADA.[74] After several unsuccessful settlement attempts over many months, in May 2017, the court in *Blatt v. Cabela's Retail, Inc.* finally released its opinion denying Cabela's partial motion to dismiss, holding, for the first time in any court anywhere, that GD could be a disability under the ADA.[75]

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66. Josh Middletown, *Allentown Trans Woman Sues Former Employer Over Discriminatory Behavior*, PHILA. MAG. (Sept. 8, 2014), https://perma.cc/6YJ4-JQ2J; *see also* First Am. Compl. at ¶¶ 5–6, 10, 13, 16, 19, 28, 30–31, 32, Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 (E.D. Pa. Nov. 5, 2014) (No. 5:14-cv-04822), 2014 WL 8276701. Providing name tags with chosen names for cisgender employees but not for Blatt suggests discrimination, not a denial of an accommodation.

67. Motion to Dismiss for Failure to State a Claim (Partial) Filed by Cabela's Retail, Inc., Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 (E.D. Pa. Nov. 18, 2014) (No. 5:14-cv-04822).

68. *Neelima Vanguri Named 2018 Attorney of the Year*, SIDNEY L. GOLD & ASSOCS., P.C. (June 28th, 2018), https://perma.cc/RJ2U-Z7ZU.

69. Br. of Amici Curiae Gay & Lesbian Advocates & Defenders, Mazzoni Center, National Center for Lesbian Rights, National Center for Transgender Equality, National LGBTQ Task Force, and Transgender Law Center in Opp. to Def.'s Partial Motion to Dismiss Filed by Kate Lynn Blatt, Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 (E.D. Pa. Dec. 1, 2015) (No. 5:14-cv-04822).

70. *Jennifer L. Levi*, GLBTQ LEGAL ADVOCATES & DEFENDERS (GLAD), https://perma.cc/8A54-SZSP.

71. Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25 (2019); Barry & Levi, *supra* note 3.

72. Pl.'s Mem. Opp'n to Def.'s Part'l Mot. to Dismiss at 15–17, Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 (E.D. Pa. Nov. 16, 2015) (No. 5:14-cv-04822), 2015 WL 13215247.

73. Second Statement of Interest of the United States at *2, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. Nov. 16, 2015).

74. *Id.*

75. Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017).

Blatt opened the floodgates to a drought-ravaged landscape. In the span of only a few years after *Blatt*, dozens of plaintiffs brought suit contending that their GD (or its precursor or related diagnoses) was a disability under a federal law.[76] Examples include Tracy Parker, a trans woman who worked as a truck driver in Portsmouth, Ohio from 2009 to 2014 and asked that she be able to use the female bathroom at work, be referred to with "female gender terminology," and to wear female clothes while at work;[77] Anna Lange, a trans woman who worked as a sheriff's deputy for Houston County, Georgia for fifteen years and sought an accommodation to the county's health insurance plan, which excluded coverage for "[d]rugs for sex change surgery" and "[s]ervices and supplies for a sex change and/or the reversal of a sex change";[78] and an unnamed trans person[79] who worked as a field engineer for the aerospace and defense giant, Northrop Grumman, in Huntsville, Alabama in 2018 and had planned on being deployed to a foreign position, but was denied deployment and fired as "something might happen" abroad due to their "rapidly-developing female characteristics."[80] What made these plaintiffs unique was not only their arguments that they qualified as having a "disability," but also their arguments that their disability entitled them to the positive right of work accommodations as opposed to merely the negative right of non-discrimination.[81] Put another way, post-2013 plaintiffs have been more likely to seek an accommodation based on their GD than pre-2013 plaintiffs were based on their GID—not merely because of the relevant distinctions in those diagnoses, but likely because of the recent increases in workers seeking accommodations for all sorts of mental health conditions.[82]

After the APA's 2013 publication of the DSM-5, dozens of transgender inmates at federal or state correctional institutes brought suit for the first time, alleging that their institutions failed to provide them with many of the same sorts

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76. Kozak v. CSX Transp., Inc., No. 20-CV-184S, 2023 WL 4906148, at *2 (W.D.N.Y. Aug. 1, 2023); Duncan v. Jack Henry & Assocs., Inc., 617 F. Supp. 3d 1011, 1050 (W.D. Mo. 2022); Lange v. Houston Cnty., 608 F. Supp. 3d 1340, 1345–46 (M.D. Ga. 2022); Doe v. Hosp. of Univ. of Pa., 546 F. Supp. 3d 336, 342 (E.D. Pa. 2021); Scutt v. Carbonaro CPAs n Mngmt Grp, No. CV 20-00362, 2020 WL 5880715, at *1 (D. Haw. Oct. 2, 2020); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 133, 137 (E.D. Pa. 2020); Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 924–26 (N.D. Ala. 2019); Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 747 (S.D. Ohio 2018); Third Am. Compl. & Jury Demand at 22–23, Washburn v. Kingsborough Cmty. Coll., 2023 WL 2682521 (E.D.N.Y. Apr. 21, 2022) (No. 20-cv-0395).

77. *Parker*, 307 F. Supp. 3d at 749; Pl.'s Mem. in Opp. to Def. Strawser Constr. Inc.'s Motion to Dismiss, Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744 (S.D. Ohio 2018), 2017 WL 11545460.

78. *Lange*, 608 F. Supp. at 1345–47.

79. During the relevant time periods to the facts of the case, the plaintiff identified as a trans woman. However, the complaint refers to them as a "formerly transitioning individual" and uses he/him pronouns.

80. *Doe*, 418 F. Supp. 3d at 924–26. Northrop Grumman declined to specify what that "something" was.

81. *See* Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates-Aren't They All the Same?*, 24 BERK. J. EMP. & LAB. L. 111, 122–23 (2003).

82. *See* Kelly Greenwood & Julia Anas, *It's a New Era for Mental Health at Work*, HARV. BUS. REV. (Oct. 4, 2021), https://perma.cc/SUV4-7ZVF.

of accommodations that workers often seek.[83] For instance, Jasmine Lynn Tetlow, a trans woman and inmate at the Maryland Correctional Institution in Jessup, Maryland, asked the state prison to accommodate her GD by providing her with gender-affirming care, female clothing, and cosmetics.[84] In a similar vein, Daisy Meadows, a trans woman and inmate at the Idaho State Correctional Center in Kuna, Idaho requested access to female commissary items to accommodate her GD.[85]

Not only were workers and inmates bringing suit, but they were winning, too. In 2018, the District of Massachusetts denied the defendant's motion to dismiss and held that the provision in the ADA excluding "gender-identity disorders *not resulting* from physical impairments" may not apply to the plaintiff's GD as it remains disputed whether her GD is the result of physical causes.[86] The court also rejected the defendant's argument that GD is categorically excluded from ADA protections due to the doctrine of constitutional avoidance.[87] The Southern District of Illinois in a 2019 case, *Iglesias v. True*, similarly denied a motion to dismiss.[88] Since 2020, district court rulings like these have been rather commonplace.[89] In 2023, the Fourth Circuit became the first federal appellate court to

83. Williams v. Kincaid, 45 F.4th 759, 763–65 (4th Cir. 2022), *cert. denied* 143 S. Ct. 2414 (2023); Gregory v. Bustos, No. 21-CV-4039, 2023 WL 5352887, at *7 (C.D. Ill. Aug. 21, 2023); Shorter v. Garland, No. 4:19CV108, 2021 WL 6062280, at *1 (N.D. Fla. Dec. 22, 2021); Doe v. Pa. Dep't of Corr., No. 1:20CV-00023-SPB-RAL, 2021 WL 1583556, at *1–*2 (W.D. Pa. Feb. 19, 2021), *report & rec. adopted*, No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021); Shorter v. Barr, No. 4:19CV108, 2020 WL 1942785, at *1 (N.D. Fla. Mar. 13, 2020), *report & rec. adopted*, 2020 WL 1942300 (N.D. Fla. Apr. 22, 2020); Iglesias v. True, 403 F. Supp. 3d 680, 683 (S.D. Ill. 2019); Williams v. Ferguson, No. 3:20-CV-P369, 2020 WL 3511590, at *1 (W.D. Ky. June 29, 2020); Meadows v. Atencio, No. 1:18-CV-00265, 2020 WL 2797787, at *5 (D. Idaho May 29, 2020); Tay v. Dennison, No. 19-CV-00501, 2020 WL 2100761, at *3, *6 (S.D. Ill. May 1, 2020); Tetlow v. Md. Dep't of Pub. Safety & Corr. Servs., No. CV TDC-18-1522, 2019 WL 4644271, at *1 (D. Md. Sept. 24, 2019); Williams v. Wright, No. CV 2:19-040, 2019 WL 2236257, at *1 (E.D. Ky. May 23, 2019); Doe v. Mass. Dep't of Corr., No. CV 17-12255, 2018 WL 2994403, at *4 (D. Mass. June 14, 2018); Williams v. Daley, No. CV 18-55, 2018 WL 1937339, at *1 (E.D. Ky. Apr. 24, 2018); Gulley-Fernandez v. Wis. Dep't of Corr., No. 15-CV-995, 2015 WL 7777997, at *3; In re Outman, 49 Misc. 3d 1129,1134 (N.Y. Sup. Ct. 2015); Mitchell v. Wall, No. 15-CV-108, 2015 WL 10936775, at *2 (W.D. Wis. Aug. 6, 2015); Diamond v. Allen, No. 7:14-CV-124, 2014 WL 6461730, at *4; *see also* Venson v. Gregson, No. 3:18-CV-2185, 2021 WL 673371, at *3 (S.D. Ill. Feb. 22, 2021) (declining to determine whether GD falls within the ADA's exclusionary language); London v. Evans, No. CV 19-559, 2019 WL 5726983, at *6 (D. Del. Nov. 5, 2019). For dueling visions of the propriety of this legal strategy, compare D Dangaran, *Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria*, 137 HARV. L. REV. F. 237 (2024) with A.D. Sean Lewis, *On the Limits of ADA Inclusion for Trans People*, HARV. L. REV. BLOG (May 17, 2024), https://perma.cc/F44H-T7TB.

84. *Tetlow*, 2019 WL 4644271, at *1.

85. *Meadows*, 2020 WL 2797787, at *5.

86. *Doe*, 2018 WL 2994403, at *6–*7.

87. *Doe*, 2018 WL 2994403, at *6–*8.

88. *Iglesias*, 403 F. Supp. 3d at 688.

89. *Kozak*, 2023 WL 4906148, at *4–*7; *Doe*, 546 F. Supp. 3d at 349 n.7; *Doe*, 2021 WL 1583556, at *11 (W.D. Pa. Feb. 19, 2021); *Shorter*, 2021 WL 6062280, at *2; *Venson*, 2021 WL 673371, at *3; *Doe*, 472 F. Supp. 3d at 134–35; *Shorter*, 2020 WL 1942785, at *10; *Tay*, 2020 WL 2100761, at *3.

hold similarly in *Kinkaid v. Williams*.[90] Yet, the debate over GD as a disability is far from over. Even post-2013, several courts have reaffirmed the traditional conclusion that GD is not—or at least need not always be—a "disability."[91] During this era, law professors,[92] practitioners,[93] and students[94] have helped transform the doctrine by advancing and stress-testing arguments before they are tried out in court.

One interesting, unexpected outcrop of my research was that the overwhelming majority of queer plaintiffs seeking accommodations for their queer identities were trans women and trans girls ("trans females"). Forty-eight of the 52 cases studied—viz., those with published opinions from 1973 to the present where a queer plaintiff argued that their GD (or a precursor or related diagnosis) was a "disability" or a "handicap," and a court or administrative agency considered the argument—were brought by trans females. Of the remaining cases, two plaintiffs were nonbinary, one identified only as a transvestite, and only *one plaintiff* was a trans man.[95] As such, of the 49 cases brought by a transgender plaintiff whose sex was identified, 48 of 49 were brought by trans females (i.e., 97.96%). This difference is stark, even accounting for the higher rate of GD diagnoses in trans females, as compared to trans men and trans boys ("trans males"), in the general population in recent decades. In fact, a recent meta-analysis of 4,355 "transsexual" patients

90. *Williams*, 45 F.4th at 766–75.

91. *Duncan*, 617 F. Supp. 3d at 1056–57; *Lange*, 608 F. Supp. 3d at 1362–63; *Doe*, 418 F. Supp. 3d at 928–30; *Williams*, 2019 WL 2236257, at *2; *Tetlow*, 2019 WL 4644271, at *7; *Parker*, 307 F. Supp. 3d at 755; *Williams*, 2018 WL 1937339, at *2.

92. *Supra* note 57; Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 U. D.C. L. REV. 97 (2020); Kevin M. Barry, *Challenging Inaccurate Sex Designations on Birth Certificates Through Disability Rights Law*, 26 GEO. J. ON POVERTY L. & POL'Y 313 (2019); Jeannette Cox, *Disability Law and Gender Identity Discrimination*, 81 U. PITT. L. REV. 315 (2019).

93. Jennifer Cobb & Myra McKenzie-Harris, *"and Justice for All" . . . Maybe: Transgender Employee Rights in America*, 34 ABA J. LAB. & EMP. L. 91 (2019); Victoria M. Rodríguez-Roldán, *The Intersection Between Disability and LGBTQ Discrimination and Marginalization*, 28 AM. U. J. GENDER SOC. POL'Y & L. 429 (2020); Nonnie L. Shivers, *A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage*, 33 ABA J. LAB. & EMP. L. 175 (2018).

94. *See* Katie Aber, Note, *When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law*, 50 COLUM. J.L. & SOC. PROBS. 299 (2017); Jennifer A. Knackert, Note, *Necessary Coverage for Authentic Identity: How* Bostock *Made Title VII the Strongest Protection Against Employer-Sponsored Health Insurance Denial of Gender-Affirming Medical Care*, 105 MARQ. L. REV. 179, 192–94 (2021); Taylor Payne, Note, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*: Blatt v. Cabela's Retail, Inc., No. 5:14-Cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017), 83 MO. L. REV. 799, (2018); Taylor J. Freeman Peshehonoff, Note, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA. L. REV. 479, 485 (2020); Julia Reilly, Note, Bostock*'s Effect on the Future of the ADA's Gender Identity Disorder Exclusion: Transgender Civil Rights and Beyond*, 59 SAN DIEGO L. REV. 181 (2022); Ali Szemanski, Note, *When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities* Act, 43 HARV. J. L. & GENDER 137 (2020).

95. *Doe*, 2021 WL 1583556, at *2 (nonbinary individual); *Morris*, 2020 WL 8073603, at *1 (nonbinary individual); *Blackwell*, 639 F. Supp. at 289 (transvestite); *Conway*, 1997 WL 78585, at *1 (trans man).

found the prevalence of "transsexualism" to be roughly 6.8 in 100,000 for trans females and roughly 2.7 in 100,000 for trans males.[96] Such a contrast indicates that 71.58% of trans patients from the included studies were trans females, whereas only 28.42% were trans males (i.e., 2.6 trans females for every 1 trans male).

The proportion of trans females to trans males in this meta-analysis (a proxy for the proportion of trans women in the population) compared to the proportion of trans female plaintiffs to trans male plaintiffs in my case study shows a statistically significant difference. We can compare the proportion of trans female patients in this recent meta-analysis ($\hat{p}_1 = .7158$, $n_1 = 4{,}355$, $Y_1 \approx 3{,}117.26$)[97] with the proportion of trans female plaintiffs in the cases brought by queer plaintiffs who contend that GD (or a precursor or related diagnosis) was a disability or a handicap ($\hat{p}_2 = .9796$, $n_2 = 49$, $Y_2 = 48$) by testing the null hypothesis (H_0: $p_1 = p_2$) against the alternative hypothesis (H_A: $p_1 \neq p_2$) at a 95% confidence interval ($\alpha = 0.05$). Utilizing the proportion of trans females in the two samples combined ($\hat{p} = .7187$), the test statistic for testing the null hypothesis is $Z = -4.08$, which yields $p < 0.0001$, far less than the significance level, $\alpha = 0.05$. Thus, we can reject the null hypothesis, adopt the alternative hypothesis, and conclude with great confidence that the proportion of trans female plaintiffs studied herein is higher than the proportion of trans female patients in this meta-analysis. This is probably representative of the proportion of trans females in the population given the high number of patients surveyed and the robustness of the studies included. In other words, there are far more trans female plaintiffs in this case study than one would expect given the already-high proportion of trans females in the general population.

It is unclear why. Perhaps it is relatively easier for trans men to pass as male than it is for trans women to pass as female, necessitating less legal interventions for trans men. Perhaps work accommodations for trans women tend to disrupt socially ingrained, patriarchal norms more so than those needed by trans men (e.g., trans women wearing dresses might draw more ire than trans men wearing jeans and t-shirts), leading to more trans women plaintiffs than trans men given the greater disruption they can bring to their workplaces. Perhaps trans women became accustomed to the privileges of appearing male for long enough pre-transition to experience its spoils (e.g., increased pay, greater expectations of respect

96. Jon Arcelus, Walter Pierre Bouman, Wim Van Den Noorgate, Laurence Claes, Gemma Witcomb, & Fernando Fernandez-Aranda, *Systematic Review and Meta-analysis of Prevalence Studies in Transsexualism*, 30 EURO. PSYCH. 807, 807, 811 (2015). This meta-study based its analysis on diagnoses of "transsexualism," which had been prescribed by ICD-10, the then-current version of the World Health Organization's International Statistical Classification of Diseases and Related Health Problems. ICD-11 changed "transsexualissm" to "gender incongruence." *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://perma.cc/7JD7-Y7YZ. I mirror the study's language so as not to misrepresent its methodologies or results.

97. The meta-analysis does not identify the number of transgender females in the sample of 4,355 trans patients; it identifies only the proportion of transgender females in the population and the proportion of transgender males in the population. Yet, from those proportions, we can derive the approximate number of transgender females in the sample as $4{,}355 * 0.7158 = 3{,}117.26$.

from peers), implying greater access to and reliance on the civil litigation system upon their social transition; trans men, in contrast, only would begin to experience these spoils upon transition, if at all. Further research into this disparity amongst trans plaintiffs' sexes is warranted.

Finally, with the rise of successful arguments that GD could be a disability under federal laws came an unexplained dearth of similar arguments under state and local laws, despite plaintiffs' relative success in making such arguments from the late 1980s until as recently as 2013. Indeed, it has been more than a decade since a *single court* last contended with a plaintiff's allegation that GD (or related or precursor diagnoses) is a "disability" or "handicap" under state or local laws in a published opinion.[98] Understandably for the plaintiffs' bar and for many advocates of queer and/or disability rights, convincing judges that federal law can require accommodating GD as a "disability" would be a sweeping victory. However, the prospect of such success federally ought not unduly beguile any counsel whose employee-clients work in a state or municipality where the law requires accommodating at least some workers with GD[99] or the many states and municipalities yet to weigh in on that open question.

II. ACCOMMODATING QUEER WORKERS

In 1966, disability rights activist and Professor Jacobus tenBroek called for the full integration of individuals with a disability into society, demanding "a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so."[100] Profoundly, tenBroek called this "the right to live in the world."[101] Queer people deserve nothing less. With that goal in mind, this Part catalogs the variety of work accommodations that queer people need to live in our world.

This Part lifts examples from pleadings and caselaw, as well as from documents obtained via Freedom of Information Act ("FOIA") requests submitted to the DOJ Civil Rights Division's Disability Rights Section.[102] It also borrows examples of actual and theoretical queer worker accommodations from the testimonials of queer workers and their advocates, including several examples from

98. Wilson v. Phoenix House, 42 Misc. 3d 677, 697–98 (N.Y. Sup. Ct. 2013) (2013 opinion considering whether GID was a "disability" under New York law).

99. Smith v. Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882, at *4–*6 (Fla. Div. Admin. Hearings Oct. 2, 1991).

100. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966).

101. *Id.* at 841.

102. EEOC charges of discrimination alleging a failure to accommodate and any records created during the investigation of such charges of discrimination are exempt from public disclosure. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1610.17(e). I also requested the disclosure of documents from the OFCCP, but OFCCP advised that, as of June 2024, "there is no record of any cases filed in the last 10 years with allegations or violations of disability discrimination with the disability being LGBTQ+-related (such as gender dysphoria, gender identity disorder, or intersex condition)."

this author's personal experience providing legal advice to queer workers and their employers. To be clear, there is no such thing as a one-size-fits-all accommodation for any medical condition; accommodations vary from worker to worker and employer to employer. Nonetheless, this article intends to show just how diverse queer work accommodations might be, without purporting to cover the entire spectrum of such accommodations.

Further, the intent of this Part is to facilitate this "right to live in the world" for the broadest definition of "queer" workers possible. For instance, this Part considers the sort of accommodations needed by transgender workers including, but not limited to, those with GD (or a precursor or related diagnosis); workers who are queer, transsexual, transvestites, genderqueer, gender nonconforming, genderfluid, bigender, nonbinary, intersex, third-gender, two spirit, demisexual, graysexual, aromantic, asexual, or non-heterosexual (e.g., homosexual, same-sex attracted, gay, lesbian, bisexual, pansexual, omnisexual);[103] workers who arguably fall under the queer umbrella or who may be associated with the queer community, such as workers who are polyamorous, non-monogamous, or polygamous;[104] as well as workers with medical conditions that disparately impact the queer community like heart disease, cancer (e.g., breast, cervical, prostate, testicular, colon, anal, ovarian, endometrial), mental health disorders (e.g., depression, phobias, post-traumatic stress disorder ("PTSD"), substance abuse, anxiety), eating disorders (e.g., bulimia, anorexia nervosa), sexually transmitted diseases or infections (e.g., syphilis, gonorrhea, chlamydia, pubic lice, human immunodeficiency virus ("HIV"), acquired immune deficiency syndrome ("AIDS"), anal papilloma, hepatitis, human papillomavirus), venous thromboembolic disease, Mpox (formerly Monkeypox), and tuberculosis.[105]

A. NAMES, PRONOUNS, AND HONORIFICS, AND GENDERED LANGUAGE

Individuals across several queer communities routinely adopt different first names, middle names, and/or surnames than the names they were given at birth. Chosen names may be recognized by one or more governments for one or more purposes—often after jumping through painstaking, piecemeal, and unnecessary hurdles[106]—or not; some individuals do not seek government recognition of their chosen name(s). Chosen names might be selected to express conformance with prevailing gender norms (e.g., a trans man choosing a name associated with men

103. For definitions of many of these terms and a discussion of the law's treatment of them, see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

104. On polyamory, non-monogamy, and polygamy (or at least civil unions with three or more partners) as queer identities, see Adejoke Mason, *What Is Polyamory? Queer Relationship Experts Explain Everything You Need to Know*, THEM (July 5, 2022), https://perma.cc/V8P5-ESLB.

105. On certain medical conditions disparately impacting different parts of the queer community, see U.S. DEP'T OF HEALTH & HUM. SRVS., SUBSTANCE ABUSE & MENTAL HEALTH SRVS. ADMIN., CTR. FOR SUBSTANCE ABUSE PREVENTION, TOP HEALTH ISSUES FOR LGBT POPULATIONS INFORMATION & RESOURCE KIT, https://perma.cc/6G9L-XU5B; Liam Stack, *'It's Scary': Gay Men Confront a Health Crisis with Echoes of the Past*, N.Y. TIMES (July 28, 2022), https://perma.cc/HN5Y-X5JX.

106. Austin A. Baker & J. Remy Green, *There Is No Such Thing as a "Legal Name"*, 53 COL. HUM. RTS. L. REV. 129, 132–35 (2021).

in his society) or to eschew them (e.g., a gender nonconforming person choosing a first name currently not associated with any gender). However, chosen names can reflect much more significance than expressing conformance or rejection of social norms.

A trans woman friend of mine chose a first name with the same first letter as her three best friends, all of whom shared a given name with the same first letter, as a show of friendship and solidarity. Another trans woman friend of mine paid homage to her deadname (i.e., the traditionally male name she had been assigned at birth) by incorporating it into her newly selected surname. Other transgender and/or gender nonconforming friends of mine have adopted truncated versions of their deadnames as their chosen first names to remember or honor their pasts and/or to mitigate against the confusion that adopting a new first name typically carries for family and friends.

Stories like these are common because queer people's chosen names reflect a diverse tapestry of meaning.[107] Queer people choose names based upon a book character they aspire to look like, a favorite color, a Biblical relationship they love, a character from a Tyler the Creator album or the *Sailor Moon* TV show that resonates with them, an homage to a grandparent, an inside joke that pokes fun at racist stereotypes, or a name that just "feels right."[108] Chosen names may mean something important in a foreign language, like when a trans woman chose her first name to be Valeria (meaning "to be strong" in Latin). They might also allude to something significant from lore or mythology, like when a trans man chose his first name to be Apollo (a more gender-neutral reference to his deadname and an enduring symbol of a "desire to keep growing toward greater things—like sunflowers to the sun above") or when a non-binary drag queen chose her first name to be Hera, after the Queen of the Gods in Greek mythology.[109] Chosen names can impart more than just gender identity; they can also reflect cultural or other personal identities.[110] Or they can connect you with your chosen family.[111] One teenager recounted choosing a

107. *See generally* Kasandra Brabaw, *9 Transgender People Share How They Chose Their Names*, REFINERY29 (Sept. 18, 2017), https://perma.cc/2NDA-9YNL; Jan Broekhuizen, *How to Find your Own, New Name*, TRANS, https://perma.cc/V2FQ-6JFA; Ashley J. Cooper, "*How'd You Pick Your Name?"*, MEDIUM (Apr. 21, 2017), https://perma.cc/NHC4-EH57; Melissa Dahl, *How Transgender People Choose Their New Names*, THE CUT (June 3, 2015), https://perma.cc/Y48C-5YT7; Chris Godfrey, *What's in Choosing a Name for Trans People*, ADVOCATE (Mar. 7, 2016), https://perma.cc/3G58-KX8N; Dan Stahl, *Making a Name for Yourself: For Trans People, It's 'Life-Changing'*, NBC NEWS (Sept. 6, 2019), https://perma.cc/MNH6-F2GB; Katy Steinmetz, *How Transgender People Choose Their New Names*, TIME (June 1, 2015), https://perma.cc/E4J4-MAPG; Louise Wilson, *How Do Trans People Choose Their Name?*, BBC (Jan. 1, 2019), https://perma.cc/KK5Q-AGMD.

108. Adryan Corcione, *How Transgender People Choose Their Names*, TEEN VOGUE (Aug. 2, 2018), https://perma.cc/T4UD-9G6T.

109. Apollo Baltazar, Hannah Good, N. Kirkpatrick & Anne Branigin, *What's in a Name?: How Six Trans and Gender-Nonconforming People Chose Their Names*, WASH. POST (June 29, 2023), https://perma.cc/BR6D-UAR2; Shelby Olson, *Jinkx Monsoon Chooses New Name of Queenly Proportions*, SEATTLE GAY NEWS (May 3, 2024), https://perma.cc/YV84-DQDH.

110. Dev Ramsawakh, *The Nuances of Choosing Your Name as a Transgender Person of Colour*, CBC LIFE (June 23, 2020), https://perma.cc/E5U7-JNSA.

111. Rosemary Ketchum, *Drag Culture Is About Family*, WEELUNK (Sept. 11, 2020), https://perma.cc/FPS7-36L8; Davide Passa, *"You Are All Sisters! We Are All Family!": The Construction of*

new first name and later learning that it was the name her parents had originally planned to give her had she been assigned female at birth; "[m]y heart knew," she said.[112]

Chosen names can also provide safety and security. Queer people have been targeted, attacked, stalked, harassed, raped, and murdered all because they are queer. However, hiding your queer identity from those who knew you before coming out and/or from those who might know you in the future can offer "safety, privilege, and invisibility."[113] Name changes are often a component of living "stealth"—that is, universal or semi-universal passing—or even a way of "covering" to assimilate into societal norms.[114] Name changes can also decrease suicidality and the impact of mental health impairments.[115] For all these reasons, and in pursuit of classical liberalism's ideal of autonomy, queer workers need to be referred to by their chosen name(s), as requested. Just as many cishet workers complete their Forms I-9 and W-9 and employee benefit plan enrollment documentation using one name (usually one recognized on one or more government IDs) while using another name in conversation, in an email address, on their nametags, and on business cards (e.g., a nickname), employers must be flexible in embracing not only queer workers' chosen names, but using those names at the times and in the places chosen by those workers.

Moreover, just as queer individuals may choose the noun or nouns by which they are called, they also may choose the pronoun(s) and honorific(s) by which they are referred. Nonetheless, misgendering—viz., "the assignment of a gender with which a party does not identify," especially with respect to pronouns and honorifics[116]—is commonplace, even in the judiciary.[117] Queer workers, no less

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Parenthood in RuPaul's Drag Race, 12 LINGUACULTURE 127, 137 (2021) ("As members of a family, drag queens adopt the name of the house they belong to as their last name, that is their drag mother's name . . . .").

112. Corcione, *supra* note 108.

113. Nat Vikitsreth, *The Safety, Privilege, and Invisibility I Found Living Stealth*, THEM (Mar. 31, 2022), https://perma.cc/PCN4-65WM; *accord* Andrea James, *Transgender Name Choice Tips and Info*, TRANSGENDER MAP, https://perma.cc/MQX2-K2KA.

114. *See* Vikitsreth, *supra* note 113; *Passing*, TRANSHUB, https://perma.cc/TKZ8-2Y3D; *Stealth*, THE TRANS LANGUAGE PRIMER, https://perma.cc/V9PU-TJXL; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 922 (2002).

115. Amanda M. Pollitt, Salvatore Ioverno, Stephen T. Russell, Gu Li, & Arnold H. Grossman., *Predictors and Mental Health Benefits of Chosen Name Use Among Transgender Youth*, 53 YOUTH & SOC'Y 320, 320 (2019); Stephen T. Russell, *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503 (2018); Stanley R. Vance, Jr., *The Importance of Getting the Name Right for Transgender and Other Gender Expansive Youth*, 63 J. ADOLESCENT HEALTH 379, 379 (2018); *see also* Sarah Steadman, *"That Name Is Dead to Me": Reforming Name Change Laws to Protect Transgender and Nonbinary Youth*, 55 U. MICH. J.L. REFORM 1 (2021).

116. Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2232 (2021).

117. United States v. Varner, 948 F.3d 250, 254–55 (5th Cir. 2020) (Duncan, J., joined by Smith, J.); Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) (Ho., J., joined by Smith, J.); *Gulley-Fernandez v. Wisconsin Dep't of Corr.*, 2015 WL 7777997, at *2 (Randa, J.). Thankfully, at least some current U.S. Supreme Court justices refer to queer parties as they identify themselves. *Bostock*, 140 S. Ct. 1731 at

than cishet workers, deserve the right to be referred to in a way that aligns with their identity. Indeed, requesting to be referred to by their chosen names, pronouns, and honorifics is one of the most common requested accommodations.[118]

Of course, anonymity can be an accommodation, too, especially in light of the many risks of coming out.[119] Once, I represented an employer whose human resources (HR) professionals notified me that one of their employees had announced their intention to transition genders. This employer maintained a gender transition policy that required gender transitions to be accompanied by a brief announcement meeting—after consulting with the transitioning employee, their management, HR, legal counsel, and any other key stakeholders—at which the employee's gender transition would be announced to coworkers, policies regarding discrimination and harassment would be shared and emphasized, and managers would field questions. The purpose behind such meetings was to prevent discrimination and harassment before it began, which is why the employer was adamant about holding them.

However, this employee did not want such a meeting to occur. Their name was already gender-neutral, and they did not intend to change it. They worked remotely full-time, and this was long before videoconferencing was normalized, so they never expected any of their coworkers to see any changes to their clothing and grooming standards (in fact, the employee was fairly confident that none of their current coworkers had ever laid eyes on them, so there was no way to notice any change in dress or grooming). And, to the extent HRT and any surgeries would affect the sound of the employee's voice on the phone, they intended to pitch their voice to conceal any changes from coworkers. In light of these plans, one might ask, "Why inform your employer at all?" Well, the employee needed their name and sex to be changed on certain personnel documents (e.g., the Form W-9, employee benefit plan forms), but the employee had absolutely no interest in coming out as transgender to any of their coworkers or dealing with the potential ramifications of doing so. They did not have a particular fear of discrimination, harassment, or retaliation; it was just preferable for them to work stealth.

Foregoing the gender transition announcement meeting would have violated the employer's policy and risked coworkers discovering the employee's gender transition and engaging in more or worse discrimination and harassment. Yet, those risks were relatively low, and outing a queer person can have devastating

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1738 (referring to trans woman Aimee Stephens with the pronouns "she" and "her") (Gorsuch, J., joined by Roberts, C.J., Ginsburg, Breyer, Sotomayor, Kagan, JJ.).

118. *Williams*, 45 F.4th at 763-65; *Doe*, 472 F. Supp. 3d at 137; *Tay*, 2020 WL 2100761, at *3; *Parker*, 307 F. Supp. 3d at 749; *Doe*, 2018 WL 2994403, at *4; *Blatt*, 2017 WL 2178123, at *4; *Doe*, 42 Misc. 3d at 506–07; *Michaels*, 2010 WL 2573988, at *1; *Dobre*, 850 F. Supp. at 286; Third Am. Compl. & Jury Demand at 42, 47, 48; *Washburn*, 2023 WL 2682521 at *3.

119. Reina Gattuso, *The Risks of Coming Out at Work*, BBC (June 1, 2021), https://perma.cc/SZ7J-6JLK; *see also* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 592–95 (2021) (discussing the risks of disclosing various identities).

consequences.[120] My client accommodated the employee's desire for anonymity and forewent the mandatory gender transition announcement meeting. As far as I know, everything worked out. The employee transitioned and successfully worked stealth without facing any discrimination or harassment thereafter.

Finally, queer workers may need written and oral language at work to reflect their gender (e.g., referring to a group of women coworkers, including a trans woman, as "ladies"), they might need that language to be gender-neutral (e.g., modifying the name of a handbook policy or room for "breastfeeding" to "chestfeeding" or "lactation"),[121] and what queer workers need may change from day to day and from worker to worker. After all, gender can be fluid. GD treatment can differ from individual to individual; sometimes, that treatment includes acknowledging the individual's gender, whereas other times that treatment includes neutralizing the prevalence of gender altogether. Gendering that which is not gendered can be dangerous and instigate violence.[122] And dysphoria does not wait around and ask politely when you would like it to crop up, so employers' approaches may need to be as adaptable as those for employees with other dynamic disabilities (e.g., allowing an employee with an anxiety disorder to take longer breaks at work one day, and to work remotely on another).

B. DRESS AND GROOMING STANDARDS

There's a wonderful moment in *The Devil Wears Prada* where Nigel, the gay art director of one of the world's leading fashion magazines, chides Andy, the recalcitrant, fashion-averse new assistant to the magazine's editor; after extolling some of the greatest clothing designers of the century—"Halston, Lagerfeld, de la Renta"— Nigel remarks, "And what they did, what they created was greater than art. . .because you live your life in it."[123] The clothes we wear, the hair we style, the makeup we don, the nails we file, the fragrances we spritz, the jewelry we drape, the shoes we sport—they are what we live our life in. They are how we express who we are to the outside world. They can convey our passions and allegiances, like the Florida Gators polo I wear on Saturdays each fall. They reflect our beliefs and traditions, like the sari, bindi, and henna my future mother-in-law donned on my wedding day. They can also show our creativity and guile, like the Marie Antoinette/Mrs. Claus drag queen getup my friend wore to a Christmas party last year, his hair an elaborate pouf wig, his face painted pale to emulate the

120. *Tyler Clementi's Story*, TYLER CLEMENTI FOUND., https://perma.cc/U4AL-6F6H; Jo Yurcaba, *Alabama Mayor's Apparent Suicide Underscores the Dangers of Outing*, NBC NEWS (Nov. 6, 2023), https://perma.cc/B3YF-WTK2.

121. *Inclusive and Gender-Neutral Language*, NAT'L INT. OF HEALTH, https://perma.cc/JGK4-YARA; *Tools for Inclusive Communication*, EIDOS LGBTQ+ HEALTH INITIATIVE, UNIV. OF PA. SCH. OF NURSING., https://perma.cc/G8CR-SMP6.

122. Chase Strangio, *What Is a "Male Body"?*, SLATE (July 19, 2016), https://perma.cc/MVM4-YF8A.

123. Christopher James, *Gay Best Friend: Nigel in "The Devil Wears Prada"*, THE FILM EXPERIENCE (Dec. 14, 2020), https://perma.cc/A4RU-XPX9.

late queen's famous eau d'ange regime, his red velvet pannier skirt with white fur fringe the epitome of North Pole rococo, and his brisé fan emblazoned with the motto, "Let them eat cookies."

How we present ourselves to the world matters. It is central to our identities. Yet, there is a rich, unfortunate history of employers denying workers dress and grooming autonomy. Consider Darlene Jesperson, the Harrah's bartender who resigned rather than groom herself the way her employer thought women ought to.[124] As Professor Deborah L. Rhode explained in the wake of *Jesperson v. Harah's Operating Co*., "discrimination based on appearance is a significant form of injustice, and one that the law should remedy."[125] Or, consider Renee Rogers, the American Airlines operations agent who sued after her employer forced her to style her hair the way that it thought Black women ought to.[126] In response to *Rogers v. American Airlines, Inc*., Professor Paulette M. Caldwell recounted that she "was outraged by the idea that an employer could regulate or force me to explain something as personal and private as the way that I groom my hair."[127] Finally, consider Marquita King, Rashemma Moss, and Carmen Sharpe-Allen, two nurses and an intake specialist at a prison who were forbidden from wearing Muslim head coverings at work because of preconceived notions of how prison employees need to dress.[128] As Professor D. Wendy Greene observed in response to *EEOC v. GEO Group. Inc*., these women's decision to dress in conformance with their identities was "an emancipatory act, which signifies a demand for equal treatment and full recognition of their dignity, personhood, freedom, and autonomy as women."[129] Compelling workers to assimilate to social norms imposes on those workers not only "time, money, and energy," but a loss of "identity itself."[130] Moreover, the health risks of imposing dress and grooming standards on workers—especially adolescent and younger workers—can be incredibly significant.[131]

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124. Jespersen v. Harrah's Op. Co., 444 F.3d 1104, 1108 (9th Cir. 2006).

125. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1035 (2009); *see also* Devon W. Carbado, G. Mitu Gulati, & Gowri Ramachandran, *The* Jespersen *Story: Makeup and Women at Work*, in EMPLOYMENT DISCRIMINATION STORIES 105, 116–18, 132–48 (Joel Wm. Friedman ed., 2006).

126. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

127. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 367 (1991); *see also* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1375–76 (2008); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1082–83 (2010).

128. EEOC v. GEO Grp., Inc., 616 F.3d 265, 267–69 (3d Cir. 2010).

129. D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 355 (2013).

130. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 397 (2008).

131. Lily Durwood, Katie A. McLaughlin, & Kristina R. Olson, *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 116, 116 (2017); Kristina R. Olson, Lily Durwood, Madeleine DeMeules, Katie A. McLaughlin, *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS (2016); *Transgender*

For these reasons, it is no surprise that workers often request modifications to dress and grooming standards as work accommodations.[132] As an example, after an unidentified engineer at Boeing began to socially transition at work in Washington state in 1985, she asked for an exception to the policy that she only wear male or unisex clothing; she wanted to wear "obviously feminine clothing" like "dresses, skirts, or frilly blouses" and "a strand of pink pearls."[133] Similarly, trans and gender nonconforming workers may need to be permitted to wear packers, stand-to-pee devices, breast forms, chest binders, gaffs, or hips or butt padding or to modify their bodies with piercings or tattoos that they perceive as gendered.[134] These accommodations to dress and grooming standards enable queer workers to bring their full selves to work with *de minimis*, if any, impact on the overwhelming majority of employers.

C. BATHROOMS AND OTHER TRADITIONALLY SEX-SEGREGATED SPACES

Very few physical spaces remain segregated by sex, but bathrooms and other private areas in certain workplaces like dormitories, showers, locker rooms, and dressing areas are some of them. Unsurprisingly, trans and non-binary workers need to use these spaces to the same extent as everyone else. Further, for workers with GD, using sex-segregated spaces corresponding to one's gender identity is often part of a course of treatment because of the substantial health and safety risks associated with being denied access to such spaces.[135] Hence, many worker-plaintiffs request access to bathrooms,[136] whereas many plaintiffs in jails, prisons, or rehabilitation facilities typically ask for access to a far broader array of sex-segregated spaces such as housing quarters, showers, dressing areas (e.g., for strip searches), and seating areas that are more common in correctional facilities than they are in most workplaces.[137]

Women Get Confidence Boost with Makeup Workshops, CEDARS SINAI, https://perma.cc/3SFU-NNQ3; Joanna Mills, *A Guide to Gender Dysphoria Coping*, MEDIUM (Feb. 8, 2022), https://perma.cc/C5RM-MA7D.

132. *Williams*, 45 F.4th at 763–65; *Tetlow*, 2019 WL 4644271, at *1–2; *Parker*, 307 F. Supp. 3d at 747; *Blatt*, 2017 WL 2178123, at *4; *Gulley-Fernandez*, 2015 WL 7777997, at *2; *Wilson*, 42 Misc. 3d at 680–81; *Doe*, 194 Misc. 2d at 777; *Arledge*, 2002 WL 1591690, at *1; *Lie*, 2002 WL 31492397, at *1; *Enriquez*, 342 N.J. Super. at 506; *Doe*, 2001 WL 36648072, at *1; *Holt*, 694 A.2d at 1136; *Evans*, 1996 WL 941676, at *1; *Dobre*, 850 F. Supp. at 286; *Smith*, 1991 WL 833882, at *7.

133. *Doe*, 121 Wash. 2d at 11–13.

134. Florence Ashley & Avy A. Skolnik, *Social Transition*, in TRANS BODIES, TRANS SELVES 201–205, 206–207 (2d ed., Oxford Univ. Press 2022).

135. Br. of Amici Curiae Medical, Public Health, and Mental Health Organizations in Support of Pl.-Appellee, Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952); *see also Best Practices: A Guide to Restroom Access for Transgender Workers*, OCC. SAFETY & HEALTH ADMIN. (2015), https://www.osha.gov/sites/default/files/publications/OSHA3795.pdf.

136. *Doe*, 472 F. Supp. 3d at 137; *Parker*, 307 F. Supp. 3d at 749; *Blatt*, 2017 WL 2178123, at *4; *Michaels*, 2010 WL 2573988, at *1–2; *Kastl*, 2004 WL 2008954, at *1; *Johnson*, 337 F. Supp. 2d at 1001; *Holt*, 694 A.2d at 1136; *Dobre*, 850 F. Supp. at 286; *Doe*, 121 Wash. 2d at 12.

137. *Gregory*, 2023 WL 5352887, at *7; *Williams*, 45 F.4th at 763–65; *Tay*, 2020 WL 2100761, at *3; *Iglesias*, 403 F. Supp. 3d at 683; *Doe*, 2018 WL 2994403, at *3; *Williams*, 2018 WL 1937339, at *3; *In re Outman*, 49 Misc. 3d at 1130; *Wilson*, 42 Misc. 3d at 680–81.

Notably, the medical benefits associated with using sex-segregated facilities corresponding to one's gender identity can be realized only while sex segregation persists. Efforts to entirely remove sex segregation from private spaces—for instance, maintaining *only* gender-neutral bathrooms, be they multiple or single occupancy—has some benefits, certainly (e.g., mitigating the risk of "othering" transgender and nonbinary workers who may feel out of place using a bathroom corresponding to their gender identity, especially in nascent social transitions),[138] but it also decreases opportunities to facilitate gender euphoria.[139] As such, one transgender worker may request access to sex-segregated spaces, while another wants access to sex-neutral spaces; accommodating each worker as an individual can look quite different despite their similar identities or diagnoses.

Accommodating workers with access to the men's room when the women's room is right across the hall presents no material downstream effects other than improving the workers' lives. However, not all accommodations are that straightforward. For one thing, some of the medications used in gender-affirming care can cause urinary incontinence, vaginal discharges, and vaginal bleeding as side effects,[140] so employers may need to allow for not only different bathroom use, but more frequent bathroom use and job location modifications, too. For example, Leah Kozak, a trans woman who worked as a freight conductor in Buffalo, New York, was fired for discreetly urinating in an outdoor rail yard when no nearby restroom was available; she had requested, but not been provided with, portable restrooms to accommodate her need to urinate more frequently as a result of taking HRT.[141]

Relatedly, I once advised an employer about the effects of accommodating a transgender employee's bathroom needs. A trans woman working at a customer service call center had announced her social transition, as well as her desire to use a gender-neutral restroom in the early stages of that transition; her employer was more than happy to oblige. However, the gender-neutral bathroom was a 15-minute walk to and from the employee's workspace. Hence, a single trip to the bathroom would often take more than a half hour, whereas her coworkers' trips to the sex-segregated bathrooms abutting their workspace typically lasted just 5–10 minutes. The employee and her coworkers were non-exempt under the Fair Labor Standards Act, meaning she was paid hourly with overtime for time

138. Heath Fogg Davis, *Why the "Transgender" Bathroom Controversy Should Make Us Rethink Sex-Segregated Public Bathrooms*, 6 POLITICS, GROUPS, & IDENTITIES 199, 199 (2016).

139. Will J. Beischel, Stéphanie E.M. Gauvin, & Sari M. van Anders, *"A Little Shiny Gender Breakthrough": Community Understandings of Gender Euphoria*, 23 J. TRANSGENDER HEALTH 274, 284 (2022).

140. Jody E. Steinauer, L. Elaine Waetjen, Eric Vittinghoff, Leslee L. Subak, Stephen B. Hulley, Deborah Grady, Feng Lin, & Jeanette S. Brown, *Postmenopausal Hormone Therapy. Does It Cause Incontinence?*, 106 OBSTET. GYNECOL. 940, 940 (2005); *Side Effects of Hormone Replacement Therapy (HRT)*, U.K. NAT'L HEALTH SERV., https://perma.cc/G8VS-EBPL/.

141. *Kozak*, 2023 WL 4906148, at *1–*2; *TLDEF Secures Health Care Victory for Railroad Workers Nationwide*, TRANSGENDER LEGAL DEF. & ED. FUND, https://perma.cc/UA9G-FVVF/.

worked in excess of 40 hours in a workweek.[142] This employer had adopted the common practice for these non-exempt employees whereby employees were allowed a finite number of bathroom breaks daily, and those bathroom breaks were compensable work time because the assumption was that they would only last "about 5 to 20 minutes."[143]

Therein lies the rub: the transgender employee could be compensated during her much longer bathroom breaks, but doing so would result in more overtime payments to her than to her colleagues who labored the same amount of time on customer service calls as she had. For instance, if the employee took a 30-minute bathroom break twice per day in a 40-hour work week, while her coworkers took a 5-minute bathroom break twice per day during the same workweek, assuming they clocked in and out at the same times, the transgender employee would undertake roughly 37.5 hours per week on customer service calls, whereas her colleagues would undertake roughly 39.16 hours. The employer arguably could require the transgender worker to work another 1.66 hours to make up the difference (so long as they would require the same of any worker who needed distant bathroom access, gender identity notwithstanding), but pursuant to the employer's policy, the employee would need to be paid for that time, and at the overtime rate. So, the options are: (1) allow the employee to earn the same 40 hours of pay as her coworkers, despite handling customer service calls 1.66 fewer hours than those coworkers every week; or (2) allow the employee to "make up" those 1.66 hours by working overtime, thereby guaranteeing that she takes home more pay than her coworkers for handling the same quantity of customer service calls.

There was no neat solution that would ensure equal work and equal pay for all parties; every possibility risked discrimination, a failure to accommodate, a violation of wage/hour laws, or morale problems between coworkers (which, to be clear, is a reoccurring implication of many accommodations[144]). Thankfully, my client and the employee engaged in an interactive dialogue and chose a path forward that they mutually agreed was best—earning 40 hours' worth of pay for handling slightly fewer customer service calls than her coworkers.

D. JOB FUNCTION AND PHYSICAL SPACE MODIFICATIONS

Sometimes queer workers need to revise non-essential terms and conditions of their employment. A counterfactual derived from *Doe v. Northrop Grumman Systems Corp.* is instructive. There, a transgender field engineer had planned on deployment to a foreign position, but she was denied her deployment and fired because her boss thought "something might happen" if she were deployed abroad

142. *See generally* 29 U.S.C. §§ 206, 207.

143. *Breaks and Meal Periods*, U.S. DEP'T OF LABOR, https://perma.cc/4WR7-8SW5.

144. Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 559 (2020); Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 1, 2–4 (2015); *see also* Groff v. DeJoy, 600 U.S. 447, 472–73 (2023) (in assessing "a possible accommodation's effect on the conduct of the employer's business," "coworker impacts" that go on to "affec[t] the conduct of the business" are relevant).

due to her gender expression, and deployment was a condition of her employment.[145] Suppose the employee had requested reassignment to a domestic position for a year or two until she believed that she passed as female better. Certainly, reassignment can be a reasonable accommodation,[146] and in such a situation, the employer might consider that alternative in lieu of termination.

In a similar vein, queer workers may need changes to their workspaces. As Professor Tristin K. Green has explained, the special features of workplaces and employers' failures to sufficiently mitigate their impacts can, and often do, result in discrimination,[147] the likes of which accommodations mandates can preempt. Consider a counterfactual derived from *Dobre v. National Railroad Passenger Corp*. Andria Dobre, a trans woman who worked for Amtrak in Pennsylvania, had her desk moved out of the public eye after she began socially transitioning.[148] In that case, Dobre was upset at the move, but one could imagine an employee with GD who wants less visibility to mitigate dysphoria. I recall a student with GD who I taught via Zoom during the early months of the COVID-19 pandemic when all of us felt oysgezoomt,[149] but some of us felt more oysgezoomt than others. As class began, I invited my students to turn their cameras on, if possible, to encourage a more interactive learning environment. A student sent me a private message indicating that their GD was flaring up and seeing themself on camera would make it worse, so they asked for my permission to attend class with their camera turned off, which I granted. Employees, like my student, might require a similar accommodation to their work environment to allow them to work in a suitable environment.

Finally, queer workers can feel isolated. Given the labor gap for LGBTQ+ workers generally,[150] queer workers routinely feel the uncomfortable burden of representing everything under the queer umbrella since they may be the only queer worker at their job. In light of these realities, it is no surprise that workers like to show their allyship with the queer community, as a member within it or as a supporter of it, by hanging pride flags in their workspaces, wearing rainbow pins, or otherwise showing that they welcome LGBTQ+ people. Creating safe spaces for queer workers is a vital step in fostering the inclusivity that lets our workplaces thrive. Queer workers may not feel safe at work, but allowing other workers to show their solidarity helps mitigate such fear. Of note, this is an area where a "groups rights" paradigm of accommodations falls short; that is, the most typical beneficiary of seeing a pride flag hanging in a worker's cubicle is not the worker who hung it. It is the "out group" member—the queer worker who sees a

145. *Northrop Grumman Systems Corp*., 418 F. Supp. 3d at 925.

146. 42 U.S.C. § 12111(9)(b).

147. Tristin K. Green, *I'll See You at Work: Spatial Features and Discrimination*, 55 U.C. DAVIS L. REV. 141, 149 (2021)

148. *Dobre,* 850 F. Supp. at 286.

149. Oysgezoomt means "fatigued or bored by Zoom." Larry Yudelson, *The Yiddish Word of 2020*, JEWISH STANDARD (Dec. 22, 2020), https://perma.cc/8VES-YP5C.

150. Caroline Medina, Lindsay Mahowald, Rose Khattar, & Aurelia Glass, *Fact Sheet: LGBT Workers in the Labor Market*, CTR. FOR AM. PROGRESS (June 1, 2022), https://perma.cc/J3ND-4HKE.

cishet ally's security badge hanging from a rainbow lanyard—who needs a safe space the most, yet such spaces might require accommodations to employer policies regulating workspaces.

E. FLEXIBLE WORK ARRANGEMENTS AND TIME OFF

Flexible work and leave can be conceptualized as modifications to the terms and conditions of employment, the likes of which all accommodations modify, but given their unique salience to queer workers, they deserve special attention as a subset of work accommodations. Just like my student needed time away from the camera to deal with GD flare-ups, an unidentified trans woman who worked as a certified nursing assistant for the Hospital of the University of Pennsylvania needed leave from work when her "GD flared up and she was unable to return to work" after a routine colonoscopy.[151] Another unidentified trans woman who worked as a cashier for Dunkin' Donuts in Bethlehem, Pennsylvania requested leave from work—specifically, leave without always being able to provide her employer with the otherwise-required two weeks' advance notice—to treat her HIV.[152] Indeed, many queer identities commingle with medical conditions (e.g., GD and its precursor and related diagnoses, intersex conditions) or appear more commonly alongside certain diagnoses,[153] and medical conditions often require flexibility at work to allow for diagnosis and treatment.

Another accommodation relevant to queer workers is time off after attacks on the queer community out of fears for safety or to mitigate PTSD triggers.[154] As management-side employment law firm Littler Mendelson P.C. advised its clients in the days after the horrifying 2016 Pulse Nightclub shooting where 49 people, most of whom were queer and all of whom were in what they thought was a safe space, were murdered at a gay bar in Orlando, Florida, "[e]mployees who are physically or emotionally injured as the result of the shooting may be entitled to reasonable accommodation under the [ADA]."[155] True. Moreover, employers ought to mitigate the trauma, discrimination, and PTSD facing many LGBTQ+ people caused by living in a world that marginalizes them at best and tries to murder them at worst[156] by providing queer workers with flexibility when the everyday burdens of queer living bubble (or surge) to the surface.

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151. *Doe v. Hosp. of Univ. of Pa.*, 546 F. Supp. 3d 339, 341 (E. D. Pa. 2021).

152. *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 133 (E. D. Pa. 2020); *see also Helping Patients with HIV Infection Who Need Accommodations at Work*, U.S. EQUAL EMP. OPP'Y COMM'N (Dec. 1, 2015).

153. *Supra* note 93.

154. Matthew McCord, *Resources for Those Affected by Trauma-Related Disability and LGBTQ Workplace Supports*, JOB ACCOM. NETWORK, (Jan. 6, 2016), https://perma.cc/HP4D-6V52.

155. Mark Phillis, Jean Schmidt, Jill Lowell, Greg Greubel, Kevin Kraham, Danton Liang & Anthony Hall, *When Tragedy Strikes: How Employers Can Assist Employees Affected by Mass Shootings and Disasters*, INSIGHT (June 16, 2016), https://perma.cc/X6MG-XGY3.

156. Sarah Valentine, Nicholas Livingston, Anna Salomaa, & Jillian Shipherd, *Trauma, Discrimination and PTSD Among LGBTQ+ People*, U.S. DEP'T OF VETERANS AFFAIRS, https://perma.cc/UN4P-YFKN.

F. BENEFITS AND PERSONNEL POLICY COVERAGE

About ten years ago, at a non-profit organization's fundraising happy hour, I met an attorney who specializes in LGBTQ+ family planning. I asked him how much it would cost for me and my then-boyfriend, now-husband, to have a child via surrogacy. His response, verbatim, was, "your surrogacy journey will cost you somewhere between $75,000 and $125,000." And, mind you, that was just the costs through birth and adoption, and that was a decade ago. Today, cost estimates can be more than double that in some cases (e.g., earlier this year, same-sex friends of mine were quoted about $275,000 for a single-child surrogacy through birth and adoption).

That said, most modern-day estimates for assistive reproductive technologies are about the same as I was quoted ten years ago: adoption costs can range from $0 to adopt certain foster children, up to $70,000 or more for adoptions of infants; artificial insemination typically costs a few thousand dollars or more per round; in vitro fertilization ("IVF") usually costs somewhere between $10,000 and $30,000; and surrogacy typically costs between $60,000 and $150,000.[157] These figures do not include the costs and burdens of an additional parent or caregiver adoptions—typically a few thousand dollars per parent or caregiver, in addition to the burden of petitioning your state's courts to be legally recognized as an additional parent or caregiver, in some states—or the other costs often associated with pregnancy and birth for cishet parents or caregivers, such as "diagnostic testing, lab visits[,] copays for doctor's visits," and the opportunity costs of taking time off work.[158]

Neither is gender affirming care cheap. Talk therapy—often the first step in gender affirming care—can cost under a hundred dollars per week,[159] but on average costs "$100 to $200 per session."[160] The annual price of HRT can be manageable, if the patient is insured and that insurance covers it (a major if[161]), whereas puberty blockers can be pricey even with insurance coverage:

> The average payer costs of gender-affirming hormones were consistently low for both testosterone and estrogen therapy, at $121 and $153 per year; GnRH therapy cost an average of $2,410 per person per year.[162]

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157. Lindsey Danis, *Here's How Much LGBTQIA+ Family Planning Costs*, SYNCHRONY BANK, https://perma.cc/QJV7-LC2E [hereinafter Synchrony Bank Blog Post]; Ed Harris & Amanda Winn, *Building LGBTQ+ Families: The Price of Parenthood*, FAMILY EQUALITY, https://perma.cc/S4PR-78ET.

158. Synchrony Bank Blog Post, *supra* note 157.

159. Christin Perry & Shawn M. Carter, *Pride Counseling Review*, FORBES (Oct. 3, 2013), https://perma.cc/5JKH-QPNS.

160. Ashley Lauretta, *How Much Does Therapy Cost In 2024?*, FORBES (May 4, 2023), https://perma.cc/JZ7E-7WSY.

161. Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 184 (2020); Daphna Stroumsa, Halley Crissman, Vanessa Dalton, Giselle Kolenic, & Caroline Richardson., *Insurance Coverage and Use of Hormones Among Transgender Respondents to a National Survey*, 18 ANN. FAM. MED. 528, 528 (2020).

162. Kellan Baker & Arjee Restar, *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, 50 J.L. & MED. ETHICS 456, 463 (2022). GnRH therapy

Surgeries typically cost a few thousand dollars in out-of-pocket costs per surgery, again assuming sufficient insurance coverage, ranging from an average of just over $1,200 for orchiectomies, mammoplasties (e.g., breast augmentation or reduction), and facial feminization surgeries, to approximately $4,000 for phalloplasties, with vaginoplasties, hysterectomies, and mastectomies falling somewhere in between.[163] And, that's not to mention over-the-counter gender affirming care, the likes of which insurance rarely covers like manicures and hair styling, which are relatively brief, inexpensive, and painless for most workers, or electrolysis and laser hair removal, which can take multiple sessions of several hours each spread over several days, cost thousands of dollars, and can be incredibly painful.[164] Finally, medical conditions that have historically impacted the queer community, like HIV/AIDS, may have treatments covered by insurance, but whether coverage persists remains to be seen. Queer people are waiting with bated breath for resolution in *Braidwood Management, Inc. v. Becerra* where plaintiffs seek to invalidate the federal mandate that most private insurers cover certain "preventive care," such as pre-exposure prophylaxis ("PreP") to prevent transmission of HIV, the human papillomavirus vaccine, contraceptive services, and the screening and behavioral counseling for sexually transmitted diseases and infections.[165]

In light of these massive (and potentially increasing) costs, queer individuals frequently request access to medical care as an accommodation. Queer inmates, for instance, often request access to gender affirming care.[166] Given the ubiquity of employer-sponsored health insurance, queer workers often request that their employee benefit plans include treatment for GD and that employers otherwise cover or defray the costs of their medically necessary treatment,[167] like providing policies that offer employees—regardless of their sexual orientations and gender identities—cash payments to cover the cost of assistive reproductive technology and/or adoption.

Queer employees might also ask that personnel policies and other employee benefit plans be amended to cover them. Consider, for example, a background check policy requiring a certain credit score or quantum of references by former

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"may be prescribed to transgender adolescents of any gender to delay the onset of puberty as a precursor to eventual hormone replacement therapy with testosterone or estrogens." *Id.* at 459.

163. *Id.* at 463.

164. *Transgender Electrolysis*, TRANSGENDER MAP, https://perma.cc/V2SQ-AZEB.

165. Eric Horvath, *Out-of-Pocket Cost Increase Could Put HIV Prevention Medications Out of Reach*, PENN MEDICINE NEWS, https://perma.cc/ND6S-ER3E (citing Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022), *appeal pending* (5th Cir.)).

166. *Williams*, 45 F.4th at 763–65; *Doe*, 2021 WL 1583556, at *1; *Shorter*, 2021 WL 6062280, at *1; *Shorter*, 2020 WL 1942785, at *1; *Tay*, 2020 WL 2100761, at *6; *Williams*, 2020 WL 3511590, at *1; *Iglesias*, 403 F. Supp. 3d at 683; *Williams*, 2019 WL 2236257, at *1; *Tetlow*, 2019 WL 4644271, at *1; *Gulley-Fernandez*, 2015 WL 7777997, at *3.

167. *Duncan*, 617 F. Supp. 3d at 1051; *Lange*, 608 F. Supp. 3d at 1345; *Doe*, 1988 WL 1091932, at *1. Several complaints made to the DOJ's Civil Rights Division's Disability Rights Section included allegations of denials of GD treatments like "estradiol valerate," a "double mastectomy," "puberty blockers," "facial feminization surgery, body contouring, and vocal surgery," as well as several requests for unspecified GD treatments.

employers. Transgender and nonbinary workers might need an exemption from requirements like these after changing their name.[168] Consider a policy offering paid leave to care for a sick child if the employee is a legal parent of that child, something conferred by the state for free to many opposite-sex parents after birth, but something conferred for a price in additional parent or caregiver adoptions to many same-sex parents or caregivers. Alternatively, consider a policy that offers paid bereavement leave when an employee's spouse dies, denying leave to a gay man in a polyamorous relationship with his legal husband and a third man they mutually consider to be their husband, but whose state denies him the right to marry more than one individual. Consider employer-sponsored life and automobile insurance policies where premium rates typically differ based on the reported sex of the insured person (typically calculated using sex-specific actuarial tables based on the different life expectancies and automobile accident propensities of women and men). Queer workers and insured dependents who eschew the sex binary might require an accommodation to be treated equitably—that is, with appropriate premiums and processes.

In that vein, I recall representing an employer that wanted to bring greater LGBTQ+ equity to its employee benefit plans and associated processes. Myriad problems cropped up. The employer's internal HR system could be tweaked, at a reasonable cost, to allow non-binary sex options. However, doing so would render that system incapable of interfacing with the systems of its benefit plan providers and third-party administrators ("TPAs"). Thus, whenever an employee identified their sex to my employer-client as non-binary or declined to identify their sex, my client's internal HR system eventually was able to accurately report their sex correctly when queried, but benefit plan providers' and TPAs' outdated systems could not even enroll the employee upon receiving a sex other than "M" or "F." This meant the employee's claims would all be denied unless and until they were manually overridden, imposing a major, recurring burden on the affected queer workers.[169] At best, TPAs discussed the possibility of updating their systems, at great cost, to provide a single, monolithic alternative sex code for non-binary employees—"X"—which would disappear the many heterogeneous gender identities outside the gender binary and the workers who claim them.[170]

To make matters worse, even when these workers were enrolled, the TPAs would often deny coverage that appeared fraudulent based upon traditional sex

168. *See Credit Reporting Industry: Helping Transgender and Nonbinary Individuals Prevent Potential Disruptions to Their Credit*, CONSUMER DATA INDUS. ASS'N (Feb. 2, 2022), https://perma.cc/E6SK-2W5C.

169. One complainant to the DOJ's Civil Rights Division's Disability Rights Section explained that their insurance carrier's denial of a non-binary option had caused them "significant stress and gender dysphoria, as well as huge delays in [their] medical care."

170. Florence Ashley, *'X' Why? Gender Markers and Non-binary Transgender People*, in TRANS RIGHTS AND WRONGS: A COMPARATIVE STUDY OF LEGAL REFORM CONCERNING TRANS PERSONS 33, 37–40 (1st ed., Isabel C. Jaramillo & Laura Carlson eds. 2021); *see also* Janet Dolgin, *Discriminating Gender: Legal, Medical, and Social Presumptions About Transgender and Intersex People*, 47 SW. L. REV. 61, 113 (2017).

norms (e.g., denying coverage for a hysterectomy to a trans man who identified as male and needed his uterus removed). Again, coverage required the affected employee to contact the TPA, appeal the denial, and wait and hope for equitable treatment, if it ever came. The plan providers and TPAs thankfully lamented their processes, but argued that the added burdens imposed on LGBTQ+ workers were modest (a justification queer and other marginalized communities tire of hearing), so the pricy, six- and seven-figure technical solutions would sit on the backburner, especially since my client was just one of their many employer-clients. My client considered the option of adopting new benefit plan providers or TPAs, but every other provider and TPA we spoke to had this or similar problems, and such transitions are expensive (read: potentially an undue burden). However, prophylactic solutions like "organ inventories and karyotyping"[171] of beneficiary-patients would enable benefit plan providers, the TPAs administering those plans, and employer-clients to more accurately assess coverage without reliance on sex stereotypes.

Queer workers deserve the same work experience as anyone else. Short of a world in which employment-based healthcare is optional, practically speaking, accommodating queer workers could mean adopting more-equitable employee benefit plans and TPA processes, but it could also mean adopting policies that mitigate disparity. For example, a policy might prophylactically require the employer to handle the administrative burdens detailed above (e.g., require HR to manually enroll non-binary employees with their employee benefit plan providers and TPAs and audit and correct discriminatory coverage denials without forcing employees to shoulder such burdens, especially given the extant burdens on employees when requesting accommodations[172]).

CONCLUSION

These hundreds of stories of queer workers across the nation, across generations, and across industries and occupations, markedly reveal just how little they have asked for. Nearly every single dispute reflected a worker who just wanted the dignity of being called by their name, wearing their clothes, and using their bathroom. They merely desired the "right to live in the world," to borrow Professor tenBroek's famous phrase.[173] When private ordering fails these queer workers, public ordering ought to step in. One day, maybe our laws can facilitate not just the right to live in the world, but the right to flourish.

Moreover, the vast majority of the queer accommodations cataloged herein are needed by the parts of the queer community that are already the most marginalized—

171. Clair A. Kronk, Avery R. Everhart, Florence Ashley, Hale M. Thompson, Theodore E. Schall, Tedd G. Goetz, Laurel Hiatt, Zackary Derrick, Roz Queen, A Ram, E. Mae Guthman, Olivia M. Danforth, Elle Lett, Emery Potter, Simón(e) D. Sun, Zack Marshall, & Ryan Karnoski, *Transgender Data Collection in the Electronic Health Record: Current Concepts and Issues*, 29 J. AM. MED. INFO. ASSOC. 271, 277 (2002).

172. Macfarlane, *supra* note 62, at 70–81.

173. *Supra* note 100.

that is, transgender and non-binary workers. Public ordering should consider not only the impact of limited accommodations mandates on marginalized communities like these, but also the dynamic nature of queer identity and how the evolution of those identities might weaken a "groups rights" approach to accommodation mandates. Indeed, we might add any number of new "in groups" (e.g., workers who need accommodations based on their sex, sexual orientation, or gender identity) to accommodations mandates only to realize a few years later that our understanding and definitions of those "in groups" has evolved. To that end, although this article could be seen through the lens of a cis author coming out in support of trans rights or a queer author coming out in support of queer rights, a more apt framing would consider this article through a Marxist lens. I advocate for neither trans equality among queer workers nor queer equality among workers regardless of sex, sexual orientation, or gender identity, but rather for workers' equality as a co-equal proletariat.

For now, however, public ordering is relatively limited, at least at the federal level—allowing accommodations only for workers with a disability; pregnancy, childbirth, and related medical conditions; or religious observance or practice.[174] Perhaps creative impact litigators will argue that other queer identities fall under these umbrellas, but the groups rights approach to accommodations law remains an impediment. As this article demonstrates, all stripes of workers need some kind of accommodation at some point. Indeed, although calls for universal accommodation mandates are nothing new, those calls are almost always premised on the difficulties of proof inherent in qualifying as the "in group."[175] An additional shortcoming of the movement for universal accommodations has been its reliance on storytelling largely through the lenses of disability, pregnancy, and religion. To be clear, this article does not materially engage with extant proposals for universal accommodations mandates (e.g., how they might operate to mitigate concerns like increased transaction costs); rather, it advances a single additional justification for such mandates: a "groups rights" approach to work accommodations necessarily implies a discrete number of in-groups, and increasing that number means the law will eventually begin to recognize the needs of all workers universally. Hopefully, this article hastens that eventuality by encouraging different communities of workers to raise their voices to explain why they, too, require accommodations. Justifying a versatile, universal accommodations mandate is easier if the whole universe speaks up.

174. *Supra* note 2; 42 U.S.C. §§ 2000e(j), 2000gg-1.
175. *See generally supra* note 17.