Transgender Employees: Legal Issues for Employers

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Introduction

• Recent Headlines
  – November 2010 – first transgender trial judge elected (Cal.)
  – November 2010 – Transgendered head of San Francisco Human Rights Commission (former Police Commissioner) loses close race for SF Board of Supervisors
  – October 2010 - Transgendered golfer sues LPGA for right to compete
  – November 2010 – Transgendered player joins Division I woman’s basketball team
Introduction

• Guiding Principles
  – evolving area of law
  – states ahead of feds
  – do best to accommodate, to avoid being test case
Definitions

• Transgender: Umbrella term for people whose gender identity, expression or behavior differs from those typically associated with their sex at birth. Includes transsexuals, cross-dressers, androgynous people, gender queens, and gender non-conforming people.

• Transgender Man (FTM): Female at birth, identifies and lives as a male.
Definitions

• Transgender Female (MTF): Male at birth, identifies and lives as female.

• Transsexual: People whose gender identity differs from sex at birth. Often alter/wish to alter bodies through hormones or surgery.

• Gender Identity: Individual’s internal sense of being male or female, or something else.
Definitions

- **Sex Reassignment Surgery**: Multiple procedures to change one’s body to conform to person’s gender identify. May include “top surgery” (breast augmentation or removal) or “bottom surgery” (genitals).

- **Transition**: Period when person begins to live as their new gender. May include name change, taking hormones, surgery, changing documents (driver’s license, SS record, birth certificate).

Source: National Center for Transgender Equality
Definitions

• Gender Identity Disorder (GID): Psychiatric diagnosis (DSM IV) where there is evidence of a strong and persistent cross-gender identification or gender dysphoria (the desire to be, or the insistence that one is of the other sex), coupled with persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.
Why Do Transgenders Need Protection?

• Depends on your point of view regarding transgenders:
  – suffering mental illness?
    or
  – part of diversity of life?
Why Do Transgenders Need Protection?

• Transgenders report:
  – double rate of unemployment
  – harassment on the job
  – significant job/career loss
  – poverty
  – housing instability
  – lack of health insurance

Source: National Transgender Discrimination Survey (Nov. 2009)
Legal Overview

Currently no federal statute expressly prohibits discrimination against transgendered employees.
Legal Overview

The ADA – specifically exempts transgendered individuals but related issues may be covered under the FMLA, especially if employee undergoes hormonal treatment or surgery.

Check for

– covered employee?
– serious medical condition?

Treat same as any other FMLA leave.
Legal Overview

13 states and D.C. explicitly protect employees based on sexual orientation and gender identity, either by statute or case law:

- California
- Colorado
- Iowa
- Illinois
- Maine
- Massachusetts
- Minnesota
- New Jersey
- New Mexico
- Oregon
- Rhode Island
- Vermont
- Washington

and more probably coming.
Legal Overview

9 states have statutes that protect based on sexual orientation only:

Connecticut  Nevada
Delaware     New Hampshire
Hawaii       New York
Maryland     Wisconsin
Massachusetts
Legal Overview

Public employees protected by Executive/Administrative Orders:

– Both sexual orientation/transgendered status:
  Indiana   New York
  Kansas    Ohio
  Michigan  Pennsylvania

– Sexual Orientation:
  Arizona
  Missouri
  Montana
Legal Overview

• Over 90 municipalities and counties, including the cities of New York and San Francisco, have ordinances protecting transgendered individuals from discrimination
Legal Overview

Recent case law under Title VII – sex stereotyping theories may or may not be recognized, depending upon the facts and the jurisdiction.

Examples:


– **Creed v. Family Express Corp.** (N.D. Ind. 2009) – no


– **Michaels v. AKAL Security** (D. Colo. 2010) - yes
Legal Overview

– *Trevino v. Center for Health Care Servs.* (W.D. Tex. 2008) - yes

– *Morales v. ATP Health and Beauty Care* (D. Conn. 2008) – yes

– *Miller v. City of New York* (2d Cir. 2006) - yes

– *Barnes v. City of Cincinnati* (6th Cir. 2005) – yes

– *Etsitty v. Utah Transit Auth.* (10th Cir. 2007) – no

– *Kastl v. Maricopa Cty* (9TH Cir. 2009) - yes
Legal Overview

• *Price Waterhouse v. Hopkins* (SCT 1989)
  – Female associate at accounting firm passed over because she was “aggressive”
  – Partners told her she could improve her chances for partnership if she were less “macho,” took a course at a charm school, walk, talk, dress more femininely, style her hair and wear jewelry
  – SCT held that firm had violated Title VII by sex stereotyping associate
Legal Overview

• *Price Waterhouse v. Hopkins*
  – “We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their [gender].”
  – “[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”
Legal Overview

• *Lopez v. River Oaks Imaging and Diagnostic Group, Inc.*
  – Transgendered job applicant for job as Scheduler at medical clinic
  – Friends of Lopez also worked there and likely informed interviewers of her transgendered status
  – Plus she put both her female and legal names on her job application
  – Offered position, contingent upon drug screen and background check
Legal Overview

• *Lopez v. River Oaks*
  – Passed screens, formally offered position, gave notice to her current employer
  – Offer withdrawn because HR Director learned through background check that Lopez was male
  – Claimed that Lopez had “misrepresented herself” in interview, because she presented as a female and was, in fact, a male
  – Court permitted case to go to trial
Legal Overview

• **Lopez v. River Oaks**
  – Neither Title VII nor *Price Waterhouse* “make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes.”
Legal Overview

• *Creed v. Family Express Corp.*
  – Sales associate at Family Express Store applied for employment as a male but gradually changed appearance
  – Store manager supportive of gender transition
  – Allegedly refused to follow company’s sex-specific dress code: males must maintain neat and conservative hair, above the collar, no earrings or body piercings; females must maintain neat and conservative hair but not necessarily above the collar, makeup and jewelry if conservative and businesslike
Legal Overview

• *Creed v. Family Express Corp.* (cont’d.)
  – Customer complaint: uncomfortable with makeup, nail polish and feminine hairstyle
  – Employee told she could no longer present herself in a feminine manner at work, despite transgender transition
  – Court concluded that Creed did not have enough evidence to sustain claim of sex stereotyping
  – Family Express said the grooming policy was uniformly applied and court found no evidence that it was not
Legal Overview

- *Creed v. Family Express Corp.* (cont’d.)
  - Court found that
    - Creed could not produce evidence of a similarly-situated female who had violated the grooming policy and not been terminated
    - Creed could not produce evidence of direct discrimination
Legal Overview

• *Glenn v. Brumby*
  – Male to female transsexual employee entitled to summary judgment on sex bias-based equal protection claim under s. 1983 against the head of the state assembly’s general counsel’s office.
  – Brumby fired Glenn after learning that she planned to start presenting as a woman
  – Intermediate level of scrutiny applied
Legal Overview

• *Glenn v. Brumby* (cont’d.)
  – No legitimate governmental interest in reducing state’s exposure to potential lawsuits for sexual harassment and invasion of privacy that would stem from Glenn’s use of women’s restroom
  – Glenn’s desire to come to work dressed as a woman did not comport with how Brumby believed a biological man should act (*Price Waterhouse* theory)
Legal Overview

• *Glenn v. Brumby* (cont’d.)
  – No equal protection claim for discrimination based on a medical condition (rational basis analysis)
  – Court ordered reinstatement, but in August, the parties agreed to cash settlement in lieu of reinstatement
Legal Overview

• *Michaels v. Akal Security*
  – Male to female Court Security Officer at federal courthouse, diagnosed with gender dysphoria
  – Required to undergo additional medical examinations to determine if she was physically capable of performing CSO job duties
  – Ordered to use restrooms compatible to her anatomical gender until tangible evidence of sex change
  – Ultimately placed on leave without pay and disciplined for minor misconduct
Legal Overview

• *Michaels v. Akal Security (cont’d.)*
  
  – Claimed harassment/HWE based on gender; disparate treatment and retaliation in violation of Title VII; discrimination and harassment based on perceived disability; 5th Amendment Due Process and Equal Protection claims
  
  – Under *Etsitty v. Utah Transit Authority* (10th Cir. 2007), discrimination against employee because of transsexual status is not discrimination because of sex under Title VII
Legal Overview

• *Michaels v. Akal Security (cont’d.)*
  – But *Price Waterhouse* gender stereotyping claim was presumed available; AG’s motion to dismiss denied on this count
  – Retaliation claim would have been valid, but Michaels never engaged in protected conduct
  – Constitutional claims pre-empted by Title VII for federal employees
Legal Overview

• Morales v. ATP Health and Beauty Care
  – Transgendered employee terminated for performance problems
  – After termination claimed disparate treatment under Title VII and state law
  – Unsatisfactory job performance torpedoed that claim, plus same actor inference
  – Also claimed HWE/harassment
Morales v. ATP Health and Beauty Aids (cont’d.)

– Court recognized that her allegations could be construed as claims of discrimination based on sexual orientation and failure to comply with socially accepted gender rules

– But court granted summary judgment to employer because Morales could not show that treatment based on these two protected classes was sufficiently severe and pervasive to constitute a hostile work environment
Legal Overview

Future –

ENDA – Employment Non-Discrimination Act would add gender identity as protected class.

• In the House, ENDA is presently in House Education, House Administration, House Oversight and House Judiciary Committee. House Committee hearings were last held on 9/23/09.

• In the Senate, ENDA is presently in the Health, Education, Labor and Pensions Committee.
Legal Overview

• ENDA
  – At Senate hearings, Sen. Harkins (D. Ind.) promised that ENDA would be on President Obama’s desk in 2010
  – Current prospects dim, but with increasing network of state and local laws, pressure will grow over time.
  – Previously, inclusion of transgendered individuals seen as obstacle to federal protections for gay and lesbian individuals
Legal Overview

Bottom Line: More states and perhaps eventually the federal government will expressly protect employees based on gender identity/transgender status.
Practical Issues

• How to plan for employee’s transition to new gender?
• Whether and how to adapt policies?
• How to respond to requests for accommodation?
• What are reasonable accommodations?
• What can be said to other employees?
Practical Issues

• How to handle name changes?
• What about leaves of absence related to GID?
• Planning for employee’s transition:
  – communicate, communicate, communicate
  – treat like an FMLA/ADA type of issue
  – maintain confidentiality
  – get employee’s consent before breach confidentiality
Practical Issues

• Changing policies:
  – review anti-discrimination, dress code, and leave policies
  – add “sexual orientation, gender identity or expression” to protected categories
  – require reasonable dress on the job – and apply consistently
  – encourage communication/early complaints
Practical Issues

• Responding to requests for accommodations:
  – promise confidentiality?
  – promise anything?
Practical Issues

• Reasonable Accommodations:
  – dress code – reasonable, consistently applied dress code is not discriminatory
  • maintain image with customers/competitors
  • protect safety
  • do not regulate off-the-job dress
  – medical leave may be required under FMLA or your STD plan
Practical Issues

- Reasonable Accommodations:
  - restrooms, locker rooms, changing areas during and after transition
  - requiring to use restroom of biological sex is not discriminatory
  - during transition – unclear - consider
    - uni-sex restroom?
    - lockable restroom?
    - other privacy solutions?
- communicate and get consent
Practical Issues

• Communications with other employees:
  – when adapting policies
  – when employee asks for accommodations
  – balancing confidentiality needs with need to know
  – dealing with religious concerns of employees or customers

• Training employees – part of diversity/inclusiveness training
Practical Issues

• Communications with other employees (cont’d.):
  – training employees – part of diversity/inclusiveness training
  – training of co-workers who work with transitioning employee
  – prohibiting gossip/respecting confidentiality and privacy
Practical Issues

• How to handle complaints?
Exactly like you would any complaint about discrimination:
  – complaint procedure in policies
  – prompt, unbiased investigation
  – prompt remedial action if appropriate

See Cady v. Bristol-Myers Squibb Co.
Practical Issues

• Name change:
  – name plates, ID badges
  – personnel records
  – health records
Recommendations from HRC Foundation

• Include “Gender Identity or Expression” as a Protected Category

• Establish Gender Transition Guidelines by instituting protocols for gender transitions that clearly delineate responsibilities and expectations of transitioning employees, their supervisors, colleagues and other staff.

• Education & Compliance: Incorporate education about gender identity and gender expression in diversity and Equal Employment Opportunity compliance training programs.
Recommendations from HRC Foundation

• Ensure Employee’s Privacy: Keep the employee’s health status private and confidential, limited to the fewest people necessary and, to the extent possible, limited to Human Resources professionals: need-to-know basis.

• Update Personnel Records: Change a transitioning employee’s name and gender in all personnel and administrative records, including internal and external personnel directories, e-mail address and business cards.
Recommendations from HRC Foundation

• Facilities: Grant Restroom and Locker Room Access according to an Employee’s Full-time Gender Presentation; permit an employee to use sex-segregated facilities that correspond to his/her full-time gender presentation, regardless of what stage that person is in terms of his/her overall transition process.
Recommendations from HRC Foundation

• Make Dress Codes Gender-Neutral and Apply Consistently: Dress codes should be modified to avoid gender stereotypes and should apply consistently to all employees. Transgender employees may dress consistently in accordance with their full-time gender presentation.

• Remove Discriminatory Health Insurance Exclusions: Medically necessary treatments and procedures should be included in employer-provided healthcare and short-term disability coverage.
Going Beyond Practicalities

• Resources:
  – Transgender Law and Policy Institute
  – National Center for Transgender Equality
  – Transgender Law Center, San Francisco
  – National Center for Lesbian Rights
  – Human Rights Campaign Foundation