

The State of Transgender Employment Discrimination

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VIRTUALLY EVERYONE HAS BEEN TALKING OVER THE LAST FEW MONTHS about Caitlyn Jenner, the transwoman (formerly known as Bruce Jenner, perhaps due to the potentially polarizing nature of the subject involving how to interact with transgender persons in our society.

At the same time, many employers, including those in the public sector, remain unfamiliar with the laws addressing the issue of transgender discrimination, including in the workplace. Many also still confuse the concept of transgender with sexual orientation. Regardless of how public sector employers in Ohio state and local government might feel personally about the subject of transgender people, suffice it to say that this subject is here to stay as are accompanying legal obligations to ensure transgender civil rights in the workplace. With this in mind, it now appears to be an opportune time to review some of the recent cases and developments that may apply to employers or, at the very least, noteworthy guides for employers to review.

In early June, 2015, the Occupational Safety and Health Administration ("OSHA") issued a guidance on transgender bathroom access. OSHA promulgated this guidance based on its pronouncement that transgender employees should have the right of restroom access that corresponds to their gender identity. This guidance has been instituted with an eye towards ensuring that transgender employees are given the right to work in a way that is consistent with how they live the rest of their daily lives—regardless of their actual birth gender. After reading this, you may be thinking, "this sounds all well and good—but how will the OSHA guidance affect me as a public employer in state or local government in Ohio?" After all, OSHA does not apply to me.

Yet, it is good to keep this in mind: in describing best practices, OSHA indicates that many employers have voluntarily adopted written policies of their own to ensure that all employees - including transgender employees - have prompt access to appropriate facilities. Workplace safety is implicated because OSHA states that restricting employees to using only restrooms that are inconsistent with their gender identity, for example, "singles out" transgender persons and may otherwise make them avoid using bathrooms altogether while at work, potentially causing them physical injury or illness as a result. OSHA's guidance calls for employers to find safe and convenient solutions while respecting transgender employees. While OSHA's pronouncements do not apply directly to public sector employers in Ohio, it is nonetheless important for public sector employers in Ohio to be aware of these concerns and their implications.

At the same time, and perhaps more important, Title VII of the Civil Rights Act does apply to Ohio state and local governments that employ fifteen or more employees. Recently, the Equal Employment Opportunity Commission ("EEOC") filed

an employment transgender discrimination lawsuit alleging a violation of Title VII by a Michigan employer in the U.S. District Court for the Eastern District of Michigan. This region is part of the Sixth Circuit, meaning that if the case is appealed, this decision could apply to employers in Ohio, not only private sector but also public sector. In this case, the plaintiff, Aimee Stephens, formerly worked as an employee at Michigan-based funeral home, where Stephens was its funeral director. By all indications, Stephens worked there for years until one day, July 31, 2013, she sent her employer a letter that she would be undergoing a gender transition from male to female and thereafter would be wearing appropriate female business attire while on the job. In the EEOC's complaint, it is alleged that the employer fired Stephens about two weeks later, telling Stephens that what she was "proposing to do" was unacceptable.

Filing suit, the EEOC asserted that this employer violated Stephens' rights based on gender-based considerations, thereby violating Title VII which prohibits sex discrimination in employment. More precisely, the EEOC alleged that Stephens was fired because she failed to



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conform to sex or gender-based preferences, expectations or stereotypes in the workplace.

In response, the employer moved to dismiss the EEOC's lawsuit on the grounds that transgender employees are not in a legally protected class under Title VII as other individuals are in the legally protected class based, for example, on race, color, religion, gender or national origin. Denying the employer's motion, the Court noted that the lawsuit should proceed based on the EEOC's legal argument that the employer in this case fired Stephens for failing to conform to its own gender-based preferences, expectations or stereotypes.

This analysis is important, and public sector employers should take heed: had the EEOC simply argued that Stephens, as a transsexual, should have legally protected class status, the Court would most likely have granted the employer's motion to dismiss the

Continues on next page.

“Transgender Employment Discrimination” from page 6

lawsuit. Instead, the Court focused on the point that the EEOC asserted that Stephens was being discriminated against in violation of Title VII **because she failed to conform to her employer's own gender-based preferences, expectations or stereotypes.** That is, Stephens was being discriminated against based on unlawful sex-stereotyping gender discrimination.

As such, this lawsuit will be allowed to proceed to adjudication. Further, it is precisely the legal issue of improper gender-based stereotyping against trans-gender individuals or, in some instances, individuals with a specific sexual orientation that many public sector employers do not understand. As such, many public sector employers, just like the employer in the above case, not only may not understand what they should be considering to do so as to comply with Title VII and other applicable state or local laws; they also may be subject to legal liability for failing to take proactive steps to address these issues.

Until recently, federal courts have largely held that transgender persons are protected from discrimination under Title VII and other sex discrimination statutes. Recently, however, based on decisions like the one above, some courts have found that Title VII does, indeed, protect transgender persons, insofar as gender stereotyping amounts to illegal sex discrimination.

At the same time, public sector employer must also remember that there is a difference between gender identity discrimination and sexual orientation discrimination. Simply stated, it is a mistake to automatically assume all transgender people are gay. Sexual orientation, by contrast, generally pertains to whether a person is has a sexual preference to others, namely are they homosexual (gay); heterosexual (straight) or bi-sexual. Of course, many local governments in Ohio also prohibit discrimination based on sexual orientation.

Consequently, given the heightened attention to the issues of transgender discrimination, it behooves public sector employers to

do the following in order to protect their workplace and comply with applicable laws:

- Adopt a well drafted policy prohibiting against gender and trans-gender discrimination and harassment;
- Ensure that these policies also are consistent with any other personnel policies, including those concerning workplace harassment, equal employment opportunity, and social media use;
- Consider adopting similar policies pertaining to preventing and correcting sexual orientation discrimination;
- Make sure your policies confirm to all applicable federal, state and local laws that apply to your workplace
- Provide appropriate training (including anti-harassment training) for all personnel, including both managers and employees, to identify and prevent and/or remedy gender and trans-gender discrimination and harassment;
- Ensure that these policies also are consistent with any other personnel policies, including those concerning workplace harassment, equal employment opportunity, and social media use;
- Consider adopting similar policies pertaining to preventing and correcting sexual orientation discrimination;
- Make sure your policies confirm to all applicable federal, state and local laws that apply to your workplace

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OHPELRA's Fall Conference

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