

Balancing Employers' Business Interests with Transgender Employees' Workplace Rights

The EEOC's Strategic Enforcement Plan, adopted in 2012, makes coverage of gay, lesbian, bisexual and transgender (GLBT) individuals under Title VII's prohibition of gender discrimination a top enforcement priority. The Commission has filed several well-publicized lawsuits seeking Title VII protection for GLBT employees under Title VII's prohibition of gender discrimination. While the issue Title VII protection of sexual orientation in and of itself is in flux, in the Eleventh Circuit – Alabama, Georgia and Florida – it has long been the law that Title VII prohibits employment discrimination against a transgender individual.

In 1989, the U.S. Supreme Court held that Title VII prohibits adverse employment action based on gender stereotypes. Title VII coverage expanded and prohibited discrimination in employment based on an employee displaying characteristics or mannerisms typically attributed to members of the opposite sex.

The Eleventh Circuit applied this principle of law in a transgender discrimination claim arising out of Georgia. A state employee announced his intention to transition from male to female. The employee's manager terminated his employment because, in the manager's view,

“...the intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make [the transitioning individual's] co-workers uncomfortable.”

The Eleventh Circuit affirmed the district court's entry of summary judgment in favor of the employee and created a per se rule that taking adverse employment action against a transgender employee because the employee is transgender is unlawful gender discrimination.

“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes... There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”

It is significant to note that the manager's concern of workplace disruption did not justify the termination. As with “traditional” Title VII claims, customer or co-worker perceptions or animus will not justify adverse action based on an employee's transitioning or transition to the opposite gender. The manager's moral concerns also did not exonerate the employer.

Despite recent news to the contrary, recognition of the right of transgender individuals to be free from discriminatory treatment in the workplace is not new. An employer must treat any complaint of transgender discrimination as a gender discrimination claim and any complaint of transgender harassment as a sexual harassment claim.

The new issue that employers face in today's business climate is accommodation. Is an employer required by Title VII to modify or ignore workplace policies and customs because an employee has stated a new gender identity, announced an intention to anatomically transition, or is in the process of undergoing an anatomical transition?

- Must an employer allow an employee to use the restroom or locker room of a stated gender identity opposite of the employee's current anatomical gender?
- To facilitate a transition, must an employer ignore its attendance policy or grant leave that is not available to other employees?
- Must an employer except an employee from dress code requirements?

According to the EEOC and OSHA, the answer is yes.

- Employment discrimination claims in the federal sector are decided by the EEOC. In 2015, an employee of the Redstone Arsenal in Huntsville, Alabama, who made it known that he intended to transition, claimed discrimination based in part on the refusal to allow him to use the women's restroom and, instead, being instructed to use a unisex restroom. The employee claimed this requirement was unlawful segregation. The EEOC agreed, ruling that the employee must be allowed to use the restroom consistent with gender identity, not anatomy.
- OSHA requires employers to provide employees with toilet facilities. OSHA's "A Guide to Restroom Access for Transgender Employees" states it is a "core belief" that "all employees, including transgender employees, should have access to restrooms that correspond to their gender identity."

Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

Private litigation is also pushing for such accommodations. In a pending case against Cabela's, a seasonal salesperson, an anatomical male transitioning to an anatomical female, alleged a violation of Title VII in part, because Cabela's would not allow him to use the women's restroom until the transition was complete. Later, as a voluntary accommodation, Cabela's authorized the employee to use a unisex restroom reserved for the customers that was 500 feet beyond the employee women's restroom. Despite this accommodation, the allegation of unlawful discrimination remains pending. Another pending case challenges an employer's dress code requirements as applied to a transgender employee.

The EEOC's federal sector ruling is not binding on private sector employment, and the OSHA guidelines are merely that – guidelines, not binding regulations. To date, no federal court sitting in Alabama, Georgia or Florida has held that an employer violates Title VII by not allowing an employee to use the restroom consistent with gender identity as opposed to anatomy, or by refusing a demand for leave that is not available to other employees. (Please note that some states have enacted laws prohibiting discrimination based on gender identity and sexual orientation. To date, Alabama, Georgia and Florida have not enacted any such legislation.)

However, no employer wants to be the test case. So, what should an employer do in the face of transgender accommodation requests? While gender identity is expressly exempted from the Americans with Disabilities Act, following the ADA's accommodation practices may be the best course of action for an employer:

- Engage in the interactive process.
- Have the employee specifically define the issue and offer a proposed accommodation.

- Determine if the request is reasonable in terms, does not adversely impact other employees, and if it can be reasonably implemented. If not, explore whether other possible accommodations and discuss options with the employee requesting the accommodation.

The employee may not be satisfied with the answer, but it is hard to fault an employer who attempted to work with a transgender employee rather than just dismissing a request for an accommodation without further thought. If you are interested in discussing potential issues relevant to your business, please don't hesitate to reach out to me for more information.

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