

LAW JOURNAL NEWSLETTERS

Employment Law Strategist

September 2012

Transgender Issues in the Workplace

By Ariel D. Cudkowicz, Laura Maechtlen, Asilia S. Backus and Natascha B. Riesco

Although no federal statute explicitly prohibits employment discrimination based on gender identity, courts have increasingly held that transgender individuals are protected from discrimination under federal law. (Note: The terms "sex," "gender," "sexual orientation" and "transgender" are distinguishable. "Sex" is a term used to denote whether an individual is biologically male or female. "Gender" refers to an individual's external characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine, regardless of their biological sex, with "gender identity" being a person's internal, deeply felt sense of being male, female, something other or in-between. "Sexual orientation" describes an individual's enduring physical, romantic and/or emotional attraction to another person. "Transgender" is an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth.) Indeed, on April 20, 2012, in the landmark ruling *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012), the Equal Employment Opportunity Commission (EEOC) held that transgender individuals may state a claim for sex discrimination under Title VII.

The *Macy* ruling by the EEOC serves as a reminder to employers that they must become more attuned to issues related to employees' gender identity and/or expression, in addition to other protected characteristics under federal law.

The EEOC's Ruling in *Macy*

Complainant Mia Macy applied for an open position with the Bureau of Alcohol, Tobacco, Firearms and Explosives. Macy was assured that she would receive the position pending completion of a background check. During the background check process, Macy informed the Bureau that she was in the process of transitioning from male to female. Five days later, Macy received an e-mail from the Bureau notifying her that, due to federal budget cuts, the position was no longer available. Macy later learned that the position was not eliminated, and another candidate was hired. Macy therefore believed that her transgender status resulted in the Bureau's failure to select her for the position.

Because Macy was a federal agency job applicant, she was required to follow the federal sector EEO process of filing an internal complaint with the Bureau, instead of filing a charge of discrimination directly with the EEOC. (See generally 29 C.F.R. § 1614.) In her EEO complaint filed with the Bureau, Macy checked the box for "sex" and alleged that she had been discriminated against and denied the position on the basis of her "sex, gender identity (transgender woman), and on the basis of sex stereotyping."

The Bureau accepted Macy's complaint, but limited adjudication of her charge solely to the discrimination claim based on "sex" pursuant to Title VII and the EEOC regulations that apply to federal agencies. The Bureau also accepted Macy's remaining claims based on

“gender identity stereotyping,” but informed Macy that such claims would only be processed and investigated according to the Department of Justice (DOJ) policy, which does not provide the same rights and remedies afforded by Title VII and EEOC regulations.

Macy appealed to the EEOC, arguing that the Bureau’s decision to bifurcate her claims amounted to a “*de facto* dismissal” of her entire Title VII claim, which included a claim of discrimination based on gender identity and transgender status. The EEOC accepted Macy’s appeal and, while it did not rule on the merits of her claims, determined that claims of discrimination based on transgender status and gender identity are cognizable as claims of sex discrimination under Title VII. The EEOC concluded that the Bureau had erroneously separated Macy’s complaint into distinct claims, and that each of the allegations contained in the complaint was simply a different means of stating a claim of discrimination based on sex, which is actionable under Title VII. Accordingly, it remanded Macy’s complaint to the Bureau.

The EEOC found support for its decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), in which the U.S. Supreme Court held that Title VII bars discrimination based on gender stereotypes, in other words, “failing to act and appear according to expectations defined by gender” — a form of sex discrimination that has since been described as “sex stereotyping.” (*Macy* at 6.) The EEOC also cited to *Smith v. City of Salem*, 378 F.3d 566, 568-575 (6th Cir. 2004), in which the Sixth Circuit held that Title VII prohibited sex stereotypes regardless of whether the plaintiff was labeled a transsexual. (*Macy* at 6.)

In sum, the EEOC reasoned that, “although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one way of proving sex discrimination.” (*Macy* at 12.) The EEOC went on to state that “Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort.” (*Id.*) While the EEOC acknowledged that transgender, like sex stereotyping, is not an independent protected status, it concluded that a transgender person “may establish a *prima facie* case of sex discrimination through a number different formulations.” (*Macy* at 12-13.)

What the Decision Means for Employers

The significance of the EEOC’s decision in *Macy* cannot be understated. In ruling that transgender employees may state a claim for sex discrimination under Title VII, the EEOC explicitly reversed course and overturned several of its own administrative decisions, and issued a holding that is contrary to several federal court rulings interpreting Title VII. While previously there was no apparent consensus on whether the EEOC would accept such charges (and no consensus among federal courts), and administrative decisions were likely relegated to individual district offices or investigators, the EEOC’s ruling makes clear that the EEOC will now accept charges of discrimination based on gender identity and/or transgender status at all of its 15 district offices.

Going forward, it is expected that the EEOC’s decision will result in an increased number of charges of discrimination filed and investigated based on gender identity and/or expression. We also anticipate that the EEOC will take a more aggressive stance in investigating and litigating charges based on gender identity and/or expression. Moreover, given the EEOC’s key objectives in its Strategic Plan for 2012-2016 to ensure that members of the public understand their rights as well as the recourse available to them, employers can expect that

the EEOC will take additional measures to educate future and potential claimants regarding this ruling.

Further, while the EEOC's ruling is not binding on federal courts, given the trend in federal decisions, employers should be mindful that transgender individuals may be protected under Title VII. (Note: Currently, the statutes of only 16 states and the District of Columbia specifically protect transgender identity as a separate protected category in employment.) Employers should also be mindful that any allegations concerning transgender discrimination, gender stereotyping or gender identity — to the extent they can be interpreted to fall within the EEOC's interpretation of "sex" — may expose them to liability, in addition to protections that may exist under state or local laws. This decision may also impact the Employment Non-Discrimination Act, a proposed amendment to Title VII that would add "sexual orientation" and/or "gender identity" to Title VII as protected categories. This decision by the EEOC could provide political support for the passage of the bill in Congress.

Based on these developments, and this evolving area of law, employers must familiarize themselves with issues related to gender identity and expression to avoid potential liability. While in certain respects an employer's approach to transgender employee issues may be similar to those already in place to prevent discrimination against individuals in other protected categories, claims by gender non-conforming individuals may present unique challenges and pitfalls while the law in this area develops.

Employer Best Practices

In order to avoid potential pitfalls in this emerging area of law, employers must be mindful of issues related to gender identity or expression that might arise during interviewing, hiring, discipline, promotion and termination decisions. Human Resources professionals and management must also be particularly vigilant when an employee identifies him or herself as transgender, or announces his or her plan to undergo sex change surgery. Moreover, the *Macy* decision, and the implications of *Price Waterhouse's* "sex stereotyping" theory are not just limited to transgender employees. Indeed, employers should be careful to understand that many forms of "sex stereotyping" may give rise to actionable claims, not just discrimination or harassment against individuals who identify as transgender.

Following the *Macy* decision, the following are best practices that employers should consider:

Revisit Non-Discrimination Policies

Although the EEOC's decision is not binding and there is no federal law that explicitly protects transgender employees from discrimination, employers should consider revising internal equal employment, non-discrimination and anti-harassment policies to include gender identity and expression as protected categories.

Conduct Training

Employers should also make their managers and employees more sensitive to gender identity and expression by incorporating these topics in EEO and harassment training programs. In addition to general training, employers may also consider conducting a more targeted training in this area when a transgender employee announces that he/she is transitioning. Such training will not only support the employee and help manage the specifics of the transition process, but may also foster respect, sensitivity and understanding from other employees.

Revise Dress Codes

Employers should revise dress codes and policies to make them gender-neutral. For instance, policies that specifically define the kinds of attire that males and females may wear tend to be based on sexual stereotypes and gender expectations. By contrast, policies that require professional business attire irrespective of sex or gender are recommended. For employers who have a “male” and “female” version of a uniform, employees should be allowed to wear the uniform that comports with their gender identity.

Modify Use of Pronouns

Employers should be mindful about using the appropriate pronouns consistent with the employee’s gender presentation. To the extent there is uncertainty about an employee’s gender, it may be appropriate to respectfully communicate with an employee regarding his or her preference in a confidential matter, and agree with the employee on a communications plan for notifying co-workers and customers of any change to pronoun or name use.

Consider Restroom Access

Employers should consider access to restrooms, locker rooms and other gender-specific facilities. An employer should consider an employee’s full-gender presentation and identity when making decisions regarding restroom access or whether unisex facilities may be appropriate for a temporary time period.

Develop Guidelines for Managing Workplace Transition

It also prudent for an employer to develop guidelines and procedures to manage situations where an employee announces that he/she will be transitioning. Employers should approach an employee’s transition as an interactive process. This may involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for the transitioning employee. The employer should have an open and continuous dialogue with the employee and set clear expectations regarding how the transition will occur, the steps that need to take place (*e.g.*, notification to clients, coworkers and others), and the information the employer will require from the transitioning employee.

Ensure Employee Privacy and Confidentiality

Employers must be mindful that although a transgender employee’s transition may become a matter of public knowledge in the workplace, personal details about any employee’s transition are private and entitled to confidentiality.

Make Appropriate Administrative And Personnel Changes

Employers should be prepared to update or change the employee’s name and sex in certain employee records.

Review Health Insurance and Benefits

Employers may also consider whether changes can be made to its disability and leave-related policies and/or to its health insurance plan offerings to better accommodate the needs of transgender employees.

Conclusion

In sum, employers should increase their awareness of, and sensitivity to, issues related to gender identity and expression in the workplace. Employers must be aware that transgender individuals may be protected under federal law in addition to relevant state or local laws, and that any allegations concerning transgender discrimination, gender stereotyping or gender identity require the same analysis, investigation and response as a

traditional sex discrimination complaint. Finally, employers must evaluate their internal policies, practices and procedures with an eye toward transgender issues to avoid potential complaints and liability.

Ariel D. Cudkowicz is a partner in the Boston office of Seyfarth Shaw LLP and **Laura Maechtlen** is a partner in the firm's San Francisco office. **Asilia S. Backus** and **Natascha B. Riesco** are associates in Seyfarth's Chicago office.

Reprinted with permission from the September 2012 edition of the Employment Law Strategist (c) 2012 ALM media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.