

Taking Transgender Workplace Obligations Seriously

Law360, New York (May 07, 2015, 12:40 PM ET) -- Bruce Jenner's announcement that he is transitioning from a man to a woman, as well as Amazon.com Inc.'s popular TV show "Transparent," are increasing awareness of transgender issues, specifically how family and friends (and in Jenner's case, the public) react and adjust to the transition. But other recent events, including a federal case in Michigan, demonstrate the need for employers to become more educated about legal obligations to transgender employees and to be proactive in controlling how the workforce might react to a transitioning co-worker.

To be clear: Michigan laws and federal laws do not expressly prohibit discrimination based on transgender status. Presently, only 16 states and the District of Columbia have enacted laws prohibiting discrimination based on transgender status, gender identity or gender expression. Transgender status is not a protected class under Michigan and federal law. However, state and federal laws ban sex discrimination. Even in states where discrimination based on transgender status is not expressly prohibited, employers have legal obligations to transgender employees because the ban against sex discrimination includes treating employees differently for failing to conform to sexual stereotypes.



Susan D. Koval

Over 25 years ago, the U.S. Supreme Court determined that the ban against sex discrimination in Title VII of the Civil Rights Act precludes treating an employee differently for failing to conform to sexual stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The *Price Waterhouse* case was brought by a female senior manager in an accounting firm who was denied partnership in the firm, in part, because she was considered "macho" and was advised she could improve her chances for partnership if she were to take "a course at charm school, walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry."

In its decision, the Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an 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."

Some 15 years later, the Sixth Circuit relied upon the *Price Waterhouse* case to conclude that "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination ..." *Smith v. City of*

Salem, 378 F. 3d 566, 574 (6th Cir. 2004). Through the years, some courts have expanded the Price Waterhouse case's principles to encompass discrimination based on an employee's change of sex. See, e.g., Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008). Unquestionably, "gender" is gradually being redefined so that it no longer simply refers to a person's sex but also to a person's gender identity, self-image, appearance, behavior or expression. Generally, transgender individuals are people with a gender identity that is different from the sex assigned to them at birth. Gender identity is often defined as an individual's "internal sense of being male or female."

In 2012, the U.S. Equal Employment Opportunity Commission determined Title VII prohibits discrimination based on gender identity. Several months ago, the U.S. attorney general issued a memorandum interpreting Title VII to ban discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.

The issue recently presented itself in Michigan when a male funeral home director informed his employer that he intended to live and work full time as a woman and dress like a woman. According to the lawsuit, the funeral home objected and promptly fired the funeral director. The EEOC sued the funeral home in federal court on behalf of the employee. The funeral home immediately filed a motion to dismiss, arguing in part that "gender identity disorder" is not a protected class under Title VII. The court properly found this argument to be irrelevant and ruled that the case could go forward because the EEOC alleged that the employee was fired because he failed to conform to sex stereotypes and that his failure to conform was the driving force behind the decision to fire him. EEOC v. RG & GR Harris Funeral Homes Inc. (April 23, 2015). Ultimately, a jury will likely have to determine whether the funeral home terminated the funeral director because she did not conform to sexual stereotypes for someone born male.

Although the law may be in a state of development for some time, there are steps an employer may wish to take to minimize potential liability.

- Amend nondiscrimination and anti-harassment policies to include gender identity and conformity with gender-based preference, expectations or stereotypes.
- Establish gender transition protocols: Identify clear expectations for management and the transitioning employee and procedures for adjusting personnel records. Model gender transition guidelines used by some major corporations are available online, including at the Human Rights Campaign's website here.
- Educate/train the workforce about transgender issues and company policies.
- Update restroom and locker room access policies: Ensure that employees have access to restrooms in accordance with their gender identity. If possible, add a gender-neutral option or a single occupant facility. The U.S. Occupational Safety and Health Administration prohibits employers from placing "unreasonable restrictions" on restroom access.

- Name and gender pronouns: Use preferred names and pronouns for transgender employees. Update internal and external personnel directories, email addresses, business cards, social media profiles, etc.
- Consider changing gender-based dress codes. Employers should not force transgender employees to dress and present according to birth sex rather than in accordance with gender identity.

As recent events make the public more aware, and courts increasingly explore these issues and find Title VII protection for gender identity and transgender employees, employers must adapt and prepare the workplace. At the same time, however, employers must respect a transitioning employee's privacy and be careful not to embarrass a transitioning employee who does not want the information disclosed. Lastly, employers should be counseled to immediately consult with an attorney who specializes in employment law as soon as the issue is raised in the workplace.

—By Susan D. Koval, Nemeth Law PC

Susan Koval is a partner in Nemeth Law's Detroit office. Koval served as a special facilitator for the U.S. Equal Employment Opportunity Commission's mediation program.

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