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Transgender Discrimination and the Equal Opportunity Workplace

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Although most companies have workplace policies prohibiting discrimination and harassment based on an employee's sex, race, religion and other characteristics, many companies have not yet added gender identity to the list of protected categories. This lack of protection has real consequences for transgender individuals. As many as 43 percent of gay employees report having experienced some form of discrimination at work. That number rises to more than 80 percent for transgender employees.

To date, there is no federal law that prohibits employers from discriminating against transgender individuals as a protected category. State and local laws have filled in this gap to a certain extent — 18 states and the District of Columbia expressly ban discrimination based on gender identity, as do multiple cities and counties across the country. In July 2014, President Obama signed an Executive Order prohibiting discrimination against gay and transgender workers in the federal government and its contracting agencies. The Equal Employment Opportunity Commission also has made the protection of transgender individuals a priority. In 2012, it ruled that discriminating against transgender employees constitutes sex discrimination in violation of Title VII, and, in September 2014, it filed separate suits against two employers for allegedly terminating transgender employees because of their sex.

Title VII and Discrimination Against Transsexual Individuals

Title VII of the Civil Rights Act prohibits employers from discriminating against individuals "because of such individual's . . . sex." While transsexualism is not a protected category under this statute, some courts have extended Title VII's protection against sex discrimination to protect transsexual individuals from impermissible sex stereotyping.

The theory that sex discrimination encompasses discrimination based on sex stereotyping originated with the U.S. Supreme Court in the 1989 case *Price Waterhouse v. Hopkins*, which did not involve a transgender individual. There, the Court found that Price Waterhouse discriminated against a female accountant who was not promoted because her demeanor did not match her employer's idea of what a woman should look like. The company had told the employee that she would improve her chances of partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry."

After *Price Waterhouse*, some courts have extended this analysis to protect transsexual individuals from discrimination. In 2004, for example, the U.S. Court of Appeals for the Sixth Circuit stated that "[s]ex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination." Two years later, the U.S. District Court for the District of Columbia concluded that an employer's actions in refusing to hire a transsexual applicant were both a form of prohibited sex stereotyping and also discrimination "because of sex." The court noted that "direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a

characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII." Rejecting the notion that discrimination "because of sex" only applies to traditional notions of men and women, however, the court stated that the employer's refusal to hire the applicant "after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of . . . sex.'"

In April 2014, the U.S. District Court for the District of Maryland took the analysis even further, stating "In light of *Price Waterhouse*, it is unclear what, if any, significance to ascribe to the conclusion that transsexuals are not protected under Title VII as transsexuals. Indeed, it would seem that any discrimination against transsexuals . . . individuals who, by definition, do not conform to gender stereotypes — is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*."

Not every court has found that discrimination against transsexual individuals is a form of impermissible sex stereotyping. In November 2014, the U.S. District Court for the Western District of Texas granted a defendant's motion for summary judgment, dismissing the plaintiff's discrimination claims. The plaintiff was a truck-driving instructor who was subjected to negative comments because of her status as a transgender individual. Citing mostly to cases that predated *Price Waterhouse*, the court stated that "courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because of the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity."

Best Practices

As the law continues to evolve, employers should be proactive in thinking about how to address transgender issues. As of 2013, more than half of *Fortune 500* companies have included gender identity in their equal employment opportunity policies. Putting these policies into practice can be complex, giving rise to questions regarding use of restrooms, pronoun usage and enforcement of uniform policies. Employers that think through these issues now will be better equipped to address circumstances as they arise so that they can treat employees with the sensitivity and professionalism they deserve. This will enable employers not only to lessen the risk and expense of legal action, but also to position themselves as diversity leaders to attract and retain top talent.