

TOPIC:

GENDER IDENTITY AND EXPRESSION ISSUES AT COLLEGES AND UNIVERSITIES

INTRODUCTION:

The term, “transgender,” refers to a person whose “gender identity or gender presentation falls outside of stereotypical gender norms.”^[1] As a result of their gender identity or expression^[2], transgendered persons may face varying degrees of discrimination in employment and other environments. For many years, federal and state courts routinely held that sex discrimination laws did not protect transgendered persons. More recently, some courts have recognized employment discrimination claims where the purported adverse action took place as a result of sexual stereotyping connected with a person’s gender identity or expression. Some colleges and universities^[3] also have been addressing gender identity and expression issues through voluntarily adopted policies. This NACUANOTE discusses these recent developments, identifies issues likely to arise on campus in the employment and student affairs contexts, and provides practical tips and resources for counsel who wish to advise clients regarding this evolving area of law.

DISCUSSION:

I. Applicable Statutes and Case Law

Sex Discrimination

Title VII

[Title VII of the Civil Rights Act of 1964](#) protects employees from discrimination on the basis of sex^[4]. In the 1970s, courts began to address the nature and extent of that protection as it related to gender identity or expression. At that time, federal courts focused on the plaintiff’s status as a transsexual^[5], and consistently ruled that discrimination against transsexuals did not constitute “sex discrimination” under Title VII^[6].

Development of Title VII Sexual Stereotyping Rationale

In [Price Waterhouse v. Hopkins](#)^[7], the United States Supreme Court held that discriminatory conduct directed toward the plaintiff (a non-transsexual woman) based on sexual stereotyping, such as conclusions that the plaintiff’s mannerisms and dress were “macho” and not sufficiently “feminine,” constituted discrimination on the basis of her sex and therefore violated Title VII^[8].

Title VII Protection

The Sixth Circuit Court of Appeals has since applied the [Price Waterhouse](#) rationale to extend protection to transgendered persons^[9]. In [Smith v. City of Salem, 378 F.3d 566 \(6th Cir. 2004\)](#)^[10], the Sixth Circuit considered whether Title VII prohibited discrimination against a firefighter who was biologically and by birth a male, but who began expressing a feminine appearance at work. The court held that Smith was discriminated against on the basis of his sex (male), because his gender-related expression failed to conform to his employer’s stereotypical assumptions about masculinity. In so holding, the court determined that the Title VII protection against sexual stereotyping afforded under [Price Waterhouse](#) was not conditional nor did it exclude coverage for non-sex-stereotypical behavior merely because the plaintiff is transsexual. The court found that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination,

irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.” Thus, discrimination based on a person’s gender expression was enough to permit the plaintiff to use Title VII to challenge the discrimination [11]. The Sixth Circuit applied the same rationale in [Barnes v. City of Cincinnati](#), 401 F.3d 729 (6th Cir. 2005) [12], another Title VII case involving a transsexual police officer. Other federal courts may construe Title VII similarly, particularly in circuits where the Court of Appeals has already held or implied that the [Price Waterhouse](#) rationale protects transgendered persons in non-employment contexts [13].

State Law-Based Discrimination Claims

State and federal courts applying state law have reached various conclusions as to whether transgendered individuals are protected by state anti-discrimination statutes. Some courts have followed the restrictive rationale found in [Ulane v. Eastern Airlines, Inc.](#) and [Holloway v. Arthur Andersen & Co.](#), both before and after [Price Waterhouse](#) [14]. Other relatively more recent state court decisions, however, have rejected the restrictive approach, and extended protection to transgendered individuals based on the [Price Waterhouse](#) rationale and/or state courts’ prerogative to interpret state anti-discrimination provisions without deference to federal law [15]. Moreover, some state administrative agencies have extended protection based on similar rationales [16].

In addition to the recent cases just described, related legislative developments are occurring in various jurisdictions at the state and local level [17].

Sexual Orientation

Title VII Does Not Protect Sexual Orientation

While federal courts are increasingly willing to apply the [Price Waterhouse](#) rationale to sex discrimination claims based on sexual stereotyping of transsexual individuals, they typically have noted that gender identity and/or expression are distinct from sexual orientation. As a result of this distinction, these courts have stated that the Title VII protection afforded under the “sexual stereotyping” rationale does not extend protection to individuals discriminated against because of their sexual orientation – a form of discrimination that remains outside the settled scope of federal sex discrimination laws [18].

Disability Claims

The Americans With Disabilities Act and the Rehabilitation Act Do Not Protect Transsexualism

As a matter of federal law, the [Americans with Disabilities Act \(“ADA”\)](#) and the [Rehabilitation Act of 1973](#) expressly exclude “transsexualism” and “gender identity disorders not resulting from physical impairments.” [19] This is so even though transsexualism is characterized as a psychiatric disorder in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV-TR”) under the category of a “gender identity disorder.” [20]

State courts reach various conclusions on the availability of disability discrimination law protection, depending on the statutory language at issue and the willingness of judges to draw inferences in the absence of clear directives [21].

II. Gender Identity and Expression Issues on Campus

While federal and state discrimination case law has focused predominantly on gender identity and expression issues in the employment context, gender identity and expression discrimination claims may arise in health care, housing, educational services and related programs, and other venues. In fact, some universities are addressing student requests for services and accommodations in addition to those advanced by employees. As just noted, the Sixth Circuit has held that the [Price Waterhouse](#) rationale protects transgendered persons in contexts additional to employment. As a result, it is possible that a variant of [Price Waterhouse](#) protection will be found under the rubric of Title IX [22].

Whether as a matter of perceived legal obligation, or simply of institutional policy, some colleges and

universities may wish to address the concerns of transgendered employees and students. If so, based on recent cases dealing with non-university settings, areas in which gender identity and expression-related issues predictably will arise at universities are identified below.

- Recordkeeping
Employees and students are asked on various forms to identify their “sex,” and most forms offer two options from which to choose. An institution may wish to consider asking employees and students to self-identify their gender and leave a blank space after the question. In addition, transgender persons may adopt a name different than their birth names, and their current gender identity/expression may not correspond to a birth name. Universities therefore may wish to consider under what conditions institutional records and documents will (and can legally) be changed to reflect an individual’s (new) gender identity.
- Health Insurance
Private insurance plans typically exclude coverage for surgical and/or medical treatment related to transgendering. There are increasingly numerous judicial and administrative agency rulings (discussion of which is beyond the scope of this Note) addressing whether transsexual employees are entitled to specific treatment under private employer, and state or federal, health benefits plans [23]. Counsel should consider how these issues may affect their institutions in light of applicable plan language, any judicial or agency decisions in their jurisdiction, and voluntarily adopted institutional policies that might entitle employees or students to benefits coverage regardless of the availability of insurance.
- Restrooms
Transgender employees and students may be subject to harassment or violence when using restrooms that conform to their gender identity or its expression but not to their biological state. Similarly, non-transgender employees and students may experience discomfort sharing such facilities with transgender individuals. Institutions thus may wish to consider designating certain restrooms gender-neutral or single-occupancy. Creating gender-neutral or single occupancy restrooms may benefit not only the transgender community on campus but families with small children and persons requiring the services of a caretaker as well.
- Residence Halls
When placing students in residence halls—in particular with roommates—almost all universities make assignments based in part on the student’s sex. This approach may not be appropriate in situations involving transgender students. Institutions therefore may wish to address such issues, for example, by creating gender-neutral or all-gender residence halls or floors offering housing to persons of any gender. Institutions also may want to consider creating designated residence hall floors involving transgender students that maintain gender-neutral bathrooms and mixed-gender rooms. Additionally, an institution may want to use single-occupancy rooms to house transgender students.
- Locker Rooms
Locker rooms may present intimidating situations for transgender persons who fear being exposed as transgender when changing in front of others. Institutions may wish to create private, unisex or “family” locker rooms or sections of locker room areas, including private showering facilities, to address such issues.

III. Gender Identity and Institutional Discrimination Policies

Research on institutional policies shows that some universities, either voluntarily or as a result of state or local legislative developments, are adding gender identity or expression (or similar classifications) to non-discrimination policy statements [24].

When applying current policies or considering policy amendments:

- Counsel should assist campus administrators in identifying any potential exposure for sex discrimination claims involving gender identity or expression in view of the judicial developments noted above. Specifically, counsel should consult their own state and local discrimination statutes and ordinances to determine if they specifically include gender identity as a prohibited basis of discrimination, or if gender identity is likely to be interpreted as a prohibited form of sex discrimination under precedent in their federal and state jurisdictions.
- Counsel should assist campus administrators in determining whether institutional equal opportunity and other non-discrimination policy statements already provide protection to transgendered individuals, or whether they should be expressly amended to protect against discrimination on the basis of gender identity or expression [25]. In addition, counsel should assist administrators in determining the legal obligations associated with such action.
- Institutions may wish to augment existing anti-discrimination and diversity training offered to employees and students with education and training regarding issues of gender identity or expression.

Absent a finding by counsel of a clear legal obligation of non-discrimination with respect to transgendered individuals, formulation of institutional policy in this area will involve careful consideration of many factors, including fairness to transgendered students and employees, due respect for the opinions of all members of the college community, of alumni and of others with an interest in the affairs of the institutions. Counsel can help administrators in determining what, if any, policy changes in this area will best serve the interests of their institution.

CONCLUSION:

There is some case law supporting the prohibition of discrimination on the basis of gender identity or expression under laws that prohibit sex discrimination. Counsel and the institutions they represent should be aware of this case law and weigh its potential impact for their institution. Issues of gender identity and expression are ripe for discussion on some college and university campuses. While there are courts that have determined that discrimination on the basis of gender identity and expression may be prohibited under laws prohibiting sex discrimination, there are also courts that disagree with those determinations or have not yet addressed the issues. University counsel are in a critical position to advise college and university administrators of these evolving legal developments. Counsel should apprise administrators of the development of the law in their locale and what possible issues may arise at their institutions.

FOOTNOTES

RESOURCES FOR COUNSEL:

NACUA Resources:

- [Advancements in State and Federal Law Regarding Transgender Employees](#) and attachment: [Board of Education Administrative Regulation: Non-Discrimination for Students and Employees](#), March 2005, Shannon Minter
- [Recent Developments in Sexual Harassment Law](#), March 19-21, 2003, Elsa Kircher Cole and Thomas P. Hustoles

Statutes:

- [Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. \(2003\)](#)

- [42 U.S.C. § 1983 \(2005\)](#)
- [Americans with Disabilities Act, 42 U.S.C. § 12101 \(2003\)](#)
- [Rehabilitation Act of 1973, 29 U.S.C. § 705 \(20\)\(F\)\(i\) \(2003\)](#)
- [Rhode Island General Laws § 28-5-6\(10\) \(2004\)](#)

Court Decisions:

- [Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 \(1989\)](#)
- [Dawson v. Bumble and Bumble, 398 F.3d 211, 217-18 \(2d Cir. 2005\)](#)
- [Barnes v. City of Cincinnati, 401 F.3d 729 \(6th Cir. 2005\)](#)
- [Smith v. City of Salem, 378 F.3d 566 \(6th Cir. 2004\)](#)
- [Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215-16 \(1st Cir. 2000\)](#)
- [Simonton v. Runyon, 232 F.3d 33, 38 \(2d Cir. 2000\)](#)
- [Schwenk v. Hartford, 204 F.3d 1187, 1202 \(9th Cir. 2000\)](#)
- [Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 \(1st Cir. 1999\)](#)
- [Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 \(7th Cir. 1984\)](#)
- Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982)
- Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977)
- Underwood v. Archer Management Services, Inc., 857 F. Supp. 96, 98 (D.D.C. 1994)
- Oiler v. Winn-Dixie Louisiana, Inc. No. Civ. A. 00-3114, 2002 U.S. Dist. LEXIS 17417, 2002 WL 31098541, at *8 (E.D. La. Sept. 16, 2002)
- Trigg v. New York City Transit Auth., No. 99 Civ. 4730, 2001 U.S. Dist. LEXIS 10825, 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001)
- Rentos v. OCE-Office Systems, 1996 U.S. Dist. LEXIS 19060 at *25 (S.D.N.Y. 1996)
- Dobre v. National R.R. Passenger Corp., 850 F. Supp. 284, 288 (E.D.Pa. 1993)
- Conway v. City of Hartford, 1997 Conn. Super. LEXIS 282,*19 (Conn. Super. 1997)
- [RGIS Inventory Specialist v. Hawaii Civil Rights Commission, 104 Haw. 158 \(2004\)](#)
- Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470, 474 (Iowa 1983)
- Lie v. Sky Pub. Corp., 2002 WL 31492397 (Mass. Super. 2002)
- [Enriquez v. West Jersey Health Systems, 777 A.2d 365, 373 \(N.J. Super. 2001\)](#)

- [Maffei v. Kolaeton Industry, Inc., 164 Misc.2d 547, 555, 626 N.Y.S. 391, 396 \(N.Y. Sup.Ct. 1995\)](#)
- Holt v. Northwest Pa. Training P'ship Consortium, Inc., 694 A.2d 1134, 1139 (Pa. Commw. Ct. 1997)
- Barretto-Neto v. Town of Hardwick, Determination of Vermont Attorney General's Office, No. 03-10104-cr (Nov. 9, 2003)

Administrative Decisions:

- Declaratory Order of Hawai'i Civil Rights Commission, D.R. No. 02-0015
- [Declaratory Ruling on behalf of John/Jane Doe, Connecticut Commission on Human Rights and Opportunities \(Nov. 9, 2000\)](#)

Additional Resources

AUTHORS:

[Francine Tilewick Bazluke](#)

[Jeffrey J. Nolan](#)

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