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Diversity

Transgender Issues in the Workplace

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Sexually ambiguous people drive us crazy. We need to know whether someone is a man or a woman, because without that knowledge, we're at a loss as to how to approach them, think about them, talk to them. Nowhere does this discomfort provoke quite the level of melodrama as in the workplace, where disparate people who come together into an ad-hoc community must find ways to understand and tolerate one another's idiosyncrasies. When a co-worker's transgender status is one of those idiosyncrasies, it challenges employee comfort levels, sometimes to the point that legal problems arise—usually around basic issues like bathrooms and clothing.

What are employers' legal obligations with regard to transgender individuals in the workplace? Conversely, what kinds of legal protections are available to transgender employees? As with any cutting-edge issue fairly new to the courts and state legislatures, there's little uniformity in either statutory or decisional authority. Despite that lack of consistency, however, most employers want to avoid litigation, promote tolerance and minimize workplace strife so that everyone involved, transgender employees and their co-workers, can do their jobs.

Here are some stories that illustrate the variation among court decisions and statutory law, both state and federal, on the legal protections of transgender folk in the workplace. As with all stories, the endings aren't always happy, but an abundance of advice from experts on transgender law and practices can go far to ease the discomfort that arises when employees' appearances don't match their genitals.

Definition. In this story, the term "transgender" will use the broad definition of the San Francisco-based Transgender Law and Policy Institute, which encompasses anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity. This category includes transvestites and androgynes as well as transsexual people who have undergone sex-change surgery and those who have not.

Potty issues

When a transsexual person uses a bathroom that appears to be inappropriate to that person's presented sex, it can make co-workers very uncomfortable. That's what happened to Carla Cruzan, a Minneapolis school teacher who sued the school system because Debra Davis, a male-to-female transgendered coworker who began life as David Nielsen, was allowed to use the women's faculty restroom. Cruzan was upset enough about it to sue the school district for maintaining a sexually hostile work environment. But a federal court noted that, in order to win on that claim, Cruzan would have to show that the school was permeated with discriminatory intimidation, ridicule, and insult. The district's decision to allow Davis to use the women's restroom simply did not rise to that level. The court also noted that Cruzan had several other restrooms available to her, other than the one used by the transgendered co-worker. Cruzan lost her case. *Cruzan v. Special School District No. 1*, US Court of Appeals for the Eighth Circuit, No. 01-3417, 6/20/02.

Personal appearance and attire

Sometimes management is uncomfortable with the appearance of an employee who is undergoing a gender transformation. In the story that follows, the employee apparently surprised management with the transformation rather than notifying them ahead of time and working with them. A more collaborative approach would have avoided the expense and productivity loss of taking a case through the court system.

Robert Lie, a male-to-female transsexual, had worked as an editorial assistant for Sky Publishing of Massachusetts for four years when he began psychotherapy for a gender identity disorder, taking hormones, and wearing women's clothing to work. Management, citing reasonable business policy, asked Lie to go back to his original appearance. Lie, citing the diagnosis of gender identity disorder, said he intended to continue to dress as a woman, and was later fired. He sued Sky for sex and disability discrimination under Massachusetts law. A state court decided both claims in Lie's favor. On the sex claim, the court interpreted the prohibition on sex bias in Massachusetts law to encompass a ban on gender stereotyping. On her disability discrimination claim, the court agreed that she had made out good case because gender identity disorder is an impairment that substantially limited life activities and caused a need for ongoing medical care. *Lie v. Sky Publishing Corporation*, Superior Court of Massachusetts, No. 013117J (10/7/02).

Cross-dressing

Lie involved an employer who wasn't comfortable with an employee's attire at work. But how far can an employer go to proscribe cross-dressing *outside* work? In one well-publicized case, an employee lost his claim that his employer discriminated on the basis of sex when it fired him for cross-dressing outside work.

Peter Oiler was a truck driver for grocery chain Winn-Dixie, delivering groceries to stores in Louisiana and Mississippi. He was a married, heterosexual man who, from one to three times a month, would wear a wig, makeup, and women's clothes, adopt the name "Donna," and visit restaurants, night clubs, and shopping malls. When Winn-Dixie found out about these activities, management feared that if customers recognized Oiler in his "Donna" persona, they might disapprove and take their grocery business elsewhere. As a result, Oiler was fired. He sued Winn-Dixie under Title VII of the Civil Rights Act of 1964, the chief federal law barring sex discrimination on the job, claiming that Title VII prohibits employment discrimination on the basis of sexual stereotyping, and that his termination for his off-duty crossdressing was a form of such stereotyping. In response, Winn Dixie claimed that Oiler's activities as a male who publicly pretended to be a female did not fall within Title VII's protection. The United States District Court for the Eastern District of Louisiana agreed with Winn-Dixie, ruling that Title VII's legal ban on sex discrimination refers only to biological sex, not transsexualism. (*Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ.A. 00-3114, 9/16/02).

Failure to act sufficiently "feminine"

Ann Hopkins, a senior manager in the Washington, D.C. office of national accounting firm Price Waterhouse, was eligible for senior partner status in 1982, the only woman in her class of 88 candidates. When she was turned down, senior partner Thomas Beyer advised her that, to improve her chances the next time, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Hopkins also learned that some of the partners thought that she was brusque, abrasive, harsh, and overly aggressive. She sued the company for sex discrimination under Title VII and her case went to the United States Supreme Court, which ruled that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. The decision does not specifically protect transgender individuals as such, but it may protect them from behavior-based discrimination. *Price Waterhouse v. Hopkins*, No. 87-1167, 5/1/89.

Statutory protections

Federal law.

- **ADA.** The Americans with Disabilities Act, 42 U.S.C 1201 et seq., specifically excludes from legal protection "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders." 42 U.S.C.A. §12211(b)(1).
- **Title VII of the Civil Rights Act of 1964** 42 U.S.C. 2000e et seq., covers discrimination based on sex, but many federal courts have refused to extend this

protection to discrimination based on sexual identity, including the Seventh Circuit in *Ulane v. Eastern Airlines* (1984), No 84-1431, 8/29/85, the Ninth Circuit in *Holloway v. Arthur Anderson* No 76-2248, 12/23/77, (1977), and the Eighth Circuit in *Sommers v. Budget Marketing*, No. 81-1754, 1/8/82.(1982).

Nevertheless, despite those cases, another line of decisional authority under Title VII, starting with the Supreme Court decision in *Price Waterhouse*, has extended its ban on sex discrimination to protect individuals who do not act stereotypically masculine or feminine.

- **Occupational Safety and Health Act.** Regulations under the Occupational Safety and Health Act require employers to provide restrooms for all employees, 29 CFR ' 1910.141(c)(1)(i) (2002).

State statutory law.

Four states have specifically amended their job discrimination laws to encompass employment discrimination based on gender identity or expression.

- **Minnesota**, Minn. Stat. §363.01, subd. 45
- **Rhode Island**, R.I. Gen. Laws § 28-5-51
- **New Mexico**, N.M. Stat. Ann. § 28-1-7 (A)
- **California** Chapter 164 of the Laws of 2003, effective 1/1/04.

Decisional authority under state law. Some states have interpreted their state law bans on sex discrimination and/or physical disability discrimination to protect transgender people and those who have been diagnosed with gender dysphoria. See, for example, *Enriquez v. West Jersey Health Systems*, Superior Court of New Jersey, Appellate Division, No. A-2017-99T5, (7/3/01.)

Best practices.

HR Wire talked to three experts on transgender issues in the workplace, Janis Walworth, Phyllis Randolph Frye, and Mary Ann Horton, for their recommendations.

- **Top-down advocacy.** Frye, an attorney and transgender advocate practicing in Houston, Texas, recommends the Branch Rickey approach, named after Branch Rickey, the owner of the Brooklyn Dodgers at the time the team was integrated by its first person of color, Jackie Robinson. Based on Rickey's example, Frye explains, top management should make it understood throughout all levels of the company, but especially by middle and lower management, that the transgendered employee will continue to work while transitioning or will be hired to work after transition, and make it clear that disruptions from co-workers and immediate supervising managers will not be tolerated.
- **Transition team.** "Make the process happen to address all concerns," says Janis Walworth, Director of Gender Sanity, a consulting and training resource for management and for transgender employees. "If an employee comes to HR about

wanting to change sex, HR should set up a transition team consisting of an HR person, a top manager, an EAP person, a union representative, and the transitioning employee." The team should

- **Brainstorm the timing of the change** from both the employee's and the company's point of view
- **Anticipate issues that will arise** around, for example, restroom use. "The preferred recommendation is to use the restroom corresponding to the gender being presented," says Horton, Chair of Transgender at Work, a Columbus, Ohio-based transgender education and counseling group." For example, on the first day of presenting as a woman, the employee should use the women's restroom. If someone objects, that person should be reminded that this valued employee has the same rights to the restroom as all other employees."

"Have a sane restroom policy—no more than one floor of travel," counsels Frye.

- **Communicate with and train co-workers.** "Just as important as counseling the transitioning employee is attending to the needs of co-workers," Walworth points out. "Most co-workers want to be supportive, but they may have reactions based on misconceptions because most people have limited perceptions of what their coworker is going to look like. People rarely see responsible working transsexuals. They may expect them to be flamboyant, like people in the entertainment industry, or expect them to look and act like sex workers. HR needs to educate people about the nature of transsexualism, and what to expect from a transsexual colleague, and to make co-workers more comfortable with the idea."

- **Decide on confidentiality issues** such as who will be told what, and when, and how much

- **Housekeeping** "Management should also remember such details as a new name tag for the person's door, desk, or cubicle, updating any organizational charts or mailing lists, and changing information in the HR database," says Horton.

The business case for best practices: "Being transsexual has nothing to do with a person's ability to perform his or her job," Walworth points out. "It's in a company's best interest to try to retain a talented employee whether or not he or she is transsexual. In a highly competitive business environment, companies cannot afford to throw away some of their best workers."

"More companies are also finding that TG employees often exhibit more loyalty because they are so relieved to keep or get a job," adds Frye.

For further information:

- Transgender Law and Policy Institute, <http://www.transgenderlaw.org>
- The transgender civil rights project of the national gay and lesbian task force: <http://www.nglftf.org/statelocal/transgender.htm>
- Transgender at work, www.tgender.net/taw, which provides resources for innovative employers who want to set their company employment policies to help their transgendered employees to be at their most productive

- The International Foundation for Gender Education, <http://www.ifge.org>, which has a book store with dozens of books on the subject