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The Employer's “Must Know” Employment Law Webinar Series

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The Emerging Law Surrounding Transgendered Persons and Issues Involving Sexual Identity:

*Today's Guidance and Tomorrow's
Anticipated Legislation, Including
Discussion of State Regulations*

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Let's Start with the Definitions

- “Sex” = one’s biological sex; whether the person was *born* a male or female
- “Gender” = a person’s sexual identity as a social or cultural construct, as evidenced by behavior and mode of dress
 - i.e., *society’s* views on how men/women should dress and act.

Definitions

- “Gender identity” means one’s own gender identification, which may be the same or opposite of biological fact
- A person born a girl may feel and act as a boy
- “Transgendered” = people who live, or wish to begin living, in the gender role associated with the other sex from the one in which they were born
- May involve surgery after a period of acclimation

Definitions

“Gender identity discrimination” means treating someone differently (segregating them, denying them benefits) based on the fact that the person identifies with a gender that is different than their biological gender

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Evolution of the Law

- The courts have long recognized protection for persons who do not conform to standard gender stereotypes
- Amendment of Title VII and other laws may not be necessary
- Let's look at the laws, definitions and evolution to understand your rights and obligations

What is the Law?

- No federal laws specifically address transgender issues for employees outside of governmental contract environments or otherwise in context of relationship with federal government
- Title VII of the Civil Rights Act has been broadly interpreted in the last twenty years to provide for a new generation of claims for persons who are harassed or discriminated against based on non-conforming gender behaviors

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What is the Law?

- The Employment Non-Discrimination Act (ENDA) has not been passed by the US Congress. If passed, it will prohibit discrimination on the basis of sexual orientation and gender identity
- Some states have laws prohibiting discrimination against individuals based on gender identity

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What is the Law?

- Sixteen states and the District of Columbia and 143 cities and counties (CA, CO, CT, DC, HI, IA, IL, MA, ME, MN, NJ, NM, NV, OR, RI, VT, and WA)
- Some county or city ordinances prohibit discrimination on the basis of gender identity

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State and Local Laws

- Other states, by executive order, have transgender-inclusive discrimination prohibitions for state employees, including, KS, IN, KY, MD, MI, NY, OH, and PA
- Some US jurisdictions have specific rules regarding restrooms and gender-specific facilities: CO, IA, WA, DC, and a variety of cities and municipalities, including San Francisco

State and Local Laws

- Many major cities and metropolitan areas protect gender identity and expression, including Atlanta, Austin, Baltimore, Boston, Buffalo, Chicago, Dallas, Denver, Detroit, Indianapolis, Los Angeles, Miami Beach, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, San Diego, and San Francisco

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Discussion of Gender Stereotyping Cases



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Discrimination Based on Gender Identity



- Traditional view: discrimination based on gender identity is not covered by the sex discrimination prohibition of Title VII
- *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), the court held that “sex” under Title VII meant “biological sex” and not “sexual identity”

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Gender Stereotyping Claims



These are claims based on insults, comments and taunting of employees based on other employees' perception that they are behaving in a way that is too masculine or too feminine

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Gender Stereotyping Claims



“Sissy,” “wimp” and “girly-man” have become the hot-button slurs of this new generation of harassment suits

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Gender-Based Discrimination



Price Waterhouse v. Hopkins
(U.S. 1989)

A female employee was denied partnership in an accounting firm, despite the fact that she was a high performer. Partners in the firm had instructed her to act more femininely to be considered for partnership in the future

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Gender-Based Discrimination



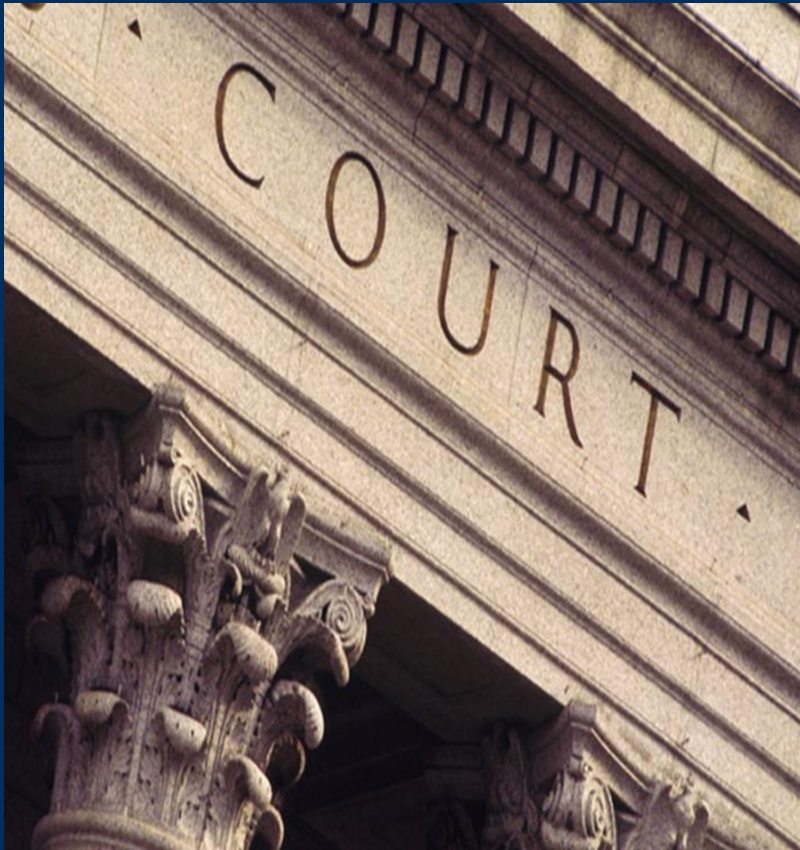
Price Waterhouse v. Hopkins
(U.S. 1989)

Court held it was a violation of Title VII to deny a woman partnership based on her failure to conform to gender stereotype (*i.e.*, Other people cannot impose their gender views)

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Gender-Based Discrimination



*Nichols v. Azteca
Restaurant Enterprises, Inc.*
(9th Cir. 2001)

Male employee can sue for harassment by male co-workers based on his failure to conform to a masculine stereotype

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Evolution of Gender Identity Claims

- But, as with other laws, the courts began to interpret Title VII expansively to include claims against transgendered individuals
- In *Smith v. City of Salem* (6th Cir. 2004), a transsexual fire department lieutenant claimed he was fired from his position because he began dressing like a woman

Smith v. City of Salem (6th Cir. 2004)



“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex...”

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Smith v. City of Salem (6th Cir. 2004)



... it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex”

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Other Gender Stereotyping Cases

- *Barnes v. City of Cincinnati* (6th Cir. 2005) (issues of transsexualism fall within the definition of sex discrimination, because ultimate issue is gender non-conformity)

Other Gender Stereotyping Cases

- *Etsitty v. Utah Transit Authority* (D. Utah 2005) (but contrast a male bus driver who was terminated when he began presenting at work as a female, but was told when sexual reassignment surgery and process were complete, he could apply for reinstatement. Under these circumstances, the Court found no Title VII violation because the employer did not require conformity to a particular gender stereotype)

Other Gender Stereotyping Cases

- *Cruzan v. Special School District No. 1* (8th Cir. 2002)
(a female employee sued her employer over its decision to allow a transsexual co-worker to use the female restroom, claiming creation of a hostile work environment. The Court rejected the privacy notions and religious concerns, finding there was an alternative restroom for the offended plaintiff)



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Other Gender Stereotyping Cases

- *Ianetta v. Putnam Investments* (D. Mass. 2001) (plaintiff stated a case for sex discrimination involving sexual orientation because discrimination was attributed to his failure to meet a male gender stereotype preferred by the employer)

Other Gender Stereotyping Cases

- *Tronetti v. TLC Healthnet* (W.D.N.Y. 2003) (denying a motion to dismiss where transsexual filed Title VII claim, with Court noting that transsexuals “are not gender-less, they are either male or female and are thus protected under Title VII to the extent they are discriminated against on the basis of sex”)

Other Gender Stereotyping Cases

- *Mitchell v. Axcan* (W.D. Penn. 2006) (motion to dismiss denied where transgendered individual contended Title VII violation occurred because harassment was due to failure to conform to gender-stereotypes)

Other Gender Stereotyping Cases

- *Lopez v. River Oaks Imaging* (S.D. Tex. 2008) (holding that transgendered persons were not covered by Title VII *per se*, but protected to the extent they fail to conform to traditional gender stereotypes)

Other Gender Stereotyping Cases

- *Creed v. Family Express* (N.D. Ind. 2007) (permitting case of transgendered person who sued for sex discrimination under Title VII as the claim was found to involve the employee's appearance or conduct and the employer's stereotypical perceptions)

Other Gender Stereotyping Cases

- *Michaels v. Akal Security* (D. Colo. 2010)
(transgendered person stated viable claim of gender discrimination under Title VII because the issue was her failure to look like a man)

Other Gender Stereotyping Cases

- *Glenn v. Brumby* (11th Cir. 2011) (motion for summary judgment denied in sex discrimination claim under Title VII because sexual stereotypes involved).

Other Gender Stereotyping Cases

- *Kastl v. Maricopa County Community College* (9th Cir. 2009) (finding it is unlawful to discriminate against transgendered persons because they do not behave in accordance with employer's expectations for men and women; with issue focused on use of restroom prior to completion of sex reassignment surgery)

EEOC's Recent Actions

- On September 25, 2014, the EEOC filed its first lawsuits against private employers alleging discrimination against transgender individuals
- One of those cases was filed in federal court in Florida (Lakeland Eye Clinic) for allegedly firing its director of hearing services after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female

What are We Seeing?

Examples of issues that have come up:

- Persons who want to use the restroom of the gender with which they identify
- Persons who want to dress in the gender with which they identify
- Persons going through chemical and/or surgical procedures to change gender
- Persons who want to be called by the name or pronoun of their self-identification
- Persons who want to compete or participate in events that are associated with the gender with which they identify

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Competing Issues

- An accommodated employee may be subject to bullying, hazing, harassment, or isolation at work, requiring the intervention of the employer
- Others might object to the presence of the transgender employee, requiring intervention of the employer
- There may be religious or privacy objections which require the intervention of the employer

Potential Issues to Consider

- Restrooms, restrooms, restrooms
- Customer or client concerns
- Co-worker concerns, including alleged privacy and religious objections

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Final Questions?

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