Federal Appeals Court Rules Gender Dysphoria is a Disability for the First Time: 4 Accommodation Steps for Employers

Insights
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For the first time, a federal appeals court has joined a growing number of district courts and ruled that gender dysphoria – a medical condition where an "incongruence between their gender identity and assigned sex" results in "clinically significant distress" – can be a disability under federal disability discrimination law. The most significant implication for employers covered by this ruling is that you may need to provide reasonable accommodations for gender dysphoria under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. While the decision only directly covers those employers with operations in the Fourth Circuit Court of Appeals (Virginia, North Carolina, South Carolina, Maryland, and West Virginia), various district courts across the country have already reached similar conclusions, with more expected to follow. What do you need to know about the August 16 ruling in *Williams v. Kincaid* to comply with the law and provide a welcoming work environment to all your employees and applicants?

What Exactly Did the Court Say? And What Did the Court *Not* Say?

As we discussed last year, the ADA poses unique challenges to employers – not only because it prohibits discrimination but also because it requires you to reasonably accommodate employees with disabilities. This may explain why the number of EEOC Charges containing disability claims has increased every year since 2008. Meanwhile, the ADA continues to expand to cover new conditions as they arise and are recognized by the medical community. The latest area of ADA expansion is gender dysphoria, as evidenced by the recent decision by the Fourth Circuit.

In rendering its opinion, the appeals court overruled the lower court's holding that an individual with gender dysphoria could never state a claim for relief under the ADA. The lower court noted that the ADA excludes "gender identity disorders" from its coverage in rejecting a disability discrimination claim filed by a transgender woman alleging mistreatment while incarcerated.

But the appeals court held that while an individual with a gender identity that differs from the sex assigned at birth may not have been covered under the ADA in 1990, the medical community ceased recognizing "gender identity disorder" as a diagnosis in 2013. In fact, the phrase was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM). The DSM-V does, however, include "gender dysphoria," which occurs when clinically significant distress is felt by the person who experiences incongruence between gender identity and assigned sex.

But the Fourth Circuit specifically rejected the idea that all individuals who experience differences between their gender identity and assigned sex are automatically disabled under the ADA. Rather, only those individuals who experience clinically significant distress because of the incongruity have an impairment that may substantially limit a major life activity.

Nevertheless, even if a transgender employee does not experience clinically significant distress arising from the incongruence and therefore does not have an actual disability protected under the ADA, Title VII prohibits employers from discriminating against such an employee pursuant to the Supreme Court's 2022 ruling in *Bostock v. Clayton County*. This is an area that may be missed by unsuspecting employers as it was not addressed by the Fourth Circuit – but certainly could be a significant area of liability as further court cases expand on this ruling.

What Should Employers Do? And What Should You *Not* Do?

In light of this ruling, employers in the Fourth Circuit (Virginia, North Carolina, South Carolina, Maryland, and West Virginia) should follow these four recommendations – and employers in other areas should consider adopting them as well.

1. First and foremost, **do not treat gender dysphoria any differently** than other conditions under the ADA. Your supervisors and managers should not automatically assume a transgender employee has gender dysphoria – and should not assume that any mental distress the employee experiences is caused by their transgenderism. Assuming a transgender employee has gender dysphoria can result in an perceived as disability claim under the ADA and possibly a disability harassment claim – as well as a harassment claim under Title VII.
2. Except in the limited circumstance discussed below, **do not ask transgender applicants or employees about any medications they take or medical procedures they have had** related to their transgenderism. Similarly, don't ask whether they plan to pursue any such medication or procedures, or make a straight-up inquiry whether they have gender dysphoria.
3. **Train your supervisors and managers** to recognize the significance of these issues – and to refer transgender employees to human resources if they request an accommodation. This will allow your company to engage in an interactive process to determine whether the employee has a disability, and if so, identify any necessary reasonable accommodations.
4. Keep in mind the types of **accommodations that employees with gender dysphoria are most likely to request:**

    - Leave of absence related to treatment;
    - Time off for medical appointments;
    - Requesting that managers and coworkers use pronouns reflecting gender identity; and
    - Use of bathroom of gender identity.

Conclusion

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Like other disabilities that are not visually apparent, gender dysphoria may present employers with a series of complicated decisions, which will require simultaneous consideration of an employer's obligations under multiple statutes. Employers should take proactive steps to prepare for what is likely to be yet another increase in claims under the ADA.

We will continue to monitor developments, including the rulings in these competing cases, along with any additional guidance from the EEOC. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions about how to ensure your reasonable accommodation policies comply with the ADA and other applicable laws, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodation Practice Group.

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