



HEATHER TABERY | Employment Law

Supporting Transgender Employees

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The word transgender has been embroiled in controversy. When Bruce Jenner openly transitioned to Caitlyn Jenner, the public fervently debated whether or not she deserved the Arthur Ashe Courage Award at the 2015 ESPYs. Restroom hysteria erupted in 2016 when people argued over which bathroom a transgender individual should use.

President Obama established framework that allowed transgender individuals to serve openly in the military, authorized the use of Departments of Defense and Homeland Security’s resources to fund sex-reassignment surgical procedures and permitting accession of such individuals after July 1, 2017.

An August 25, 2017 memorandum issued by President Trump directed a return to a policy prohibiting openly transgender individuals from accession into the military and authorizing the discharge of such individuals. It halted the use of resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

An Attorney General Jeff Sessions issued memorandum said, “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status,” in October 2017.

Scarlett Johansson recently declined to play a transgender man after transgender actors and actresses openly criticized casting a cisgender actress to play the role of a transgender man.

In light of controversial topics surrounding people who identify as transgender, companies should have a plan in place protecting transgender employees, and in the event em-

ployees choose to transition to their identified sex. Being mindful of the law when developing policies will protect the company.

THE LAW

Title VII of the Civil Rights Act of 1964 lists protected classes as race, color, religion, sex and national origin, and prohibits employment discrimination based on these protected classes. Although sexual orientation or gender identity is not explicitly included, the EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.

A 2018 case rejected the 2017 memorandums and afforded new protections to transgender employees. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, a funeral home fired its employee after she informed the owner that she wanted to dress as a woman at work because she intended to transition from male to female. The District Court granted summary judgment in favor of the employer on claims of unlawful-termination and discriminatory-clothing-allowance.

On appeal, the funeral home asserted that enforcement of Title VII in this case would constitute an unjustified substantial burden upon the majority owner’s sincerely held religious beliefs. The court disagreed, holding that job discrimination on the basis of transgender status was inherently sex discrimination and that the employer could not claim an exemption from the law because of his religious beliefs.

The Minnesota Human Rights Act explicitly prohibits employment discrimination based on sexual orientation. Its definition of sexual orientation includes “...having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness...”

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It is imperative that Minnesota companies have policies in place that address issues specific to transgender employees.

POLICY

Every transgender individual is unique. Current company policies may not explicitly reference sexual orientation and gender identity or provide guidance regarding the gender transition of an employee. It is a good idea to review your company's policies and update them to include these topics to protect your company, and your employees.

Hiring. In *Macy v. Eric Holder*, a detective and transgender woman applied to a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives while still presenting as a man. She had not yet transitioned to female. During the interview with the Director she was told that she would have the job as long as no issues arose during the background check.

During the background check, she informed the employer that she was transitioning from male to female. Ten days later, she was told the position was no longer available. The Commission found her complaint of discrimination based on gender identity, change of sex, and/or transgender status cognizable under Title VII affirming protections for transgender employees.

In *Price Waterhouse v. Hopkins*, the Supreme Court recognized that Title VII's prohibition of discrimination "because of ... sex" means "that gender must be irrelevant to employment decisions." The EEOC views failure to hire an applicant because they are transgender as unlawful sex discrimination. Hiring policies should maintain that the company does not discriminate based on sexual orientation or gender identity.

Employee Gender Transition. In *EEOC v.*

Deluxe Financial Services, Inc., a transgender woman won a substantial settlement against her employer because the employer failed to support her during transition. She presented as male when she was initially hired by Deluxe, a corporation based in Shoreview, MN. After she told her supervisor that she was transgender and began to present herself as a woman at work, Deluxe refused to let her use the women's restroom and supervisors intentionally used the wrong gender pronouns to refer to her.

The settlement required Deluxe to: (1) pay \$115,000.00; (2) revise its policies; (3) provide additional annual training for all employees; and (4) to provide annual reports to the EEOC regarding implementation.

The EEOC maintains that the conduct violates Title VII. How an employee chooses to manage their transition at work is a personal decision. HR and Management are responsible for helping with the transition. A prudent company creates proactive policies that are friendly to transgender employees to not risk being subjected to large monetary settlements and extensive oversight by the EEOC.

CONCLUSION

Now is the perfect time to review your company's policies to ensure that your company is protected from potential litigation. Planning ahead protects your company and your employees. Don't be the next controversial transgender headline.

HEATHER TABERY IS AN ASSOCIATE ATTORNEY AT ENGELMEIER & UMANAH, PA. ENGELMEIER & UMANAH PA REVIEWS EXISTING POLICIES TO FIND SECTIONS THAT CAN BE IMPROVED UPON, HELP CREATE GENDER TRANSITION PLANS AND GUIDELINES, AND PROVIDE TRAINING TO YOUR EMPLOYEES.

