NEW CHALLENGES AND NEW OPPORTUNITIES: Respecting Sexual and Gender Diversity in the Workplace

Best Practices and Risk Avoidance

NCADA
Winter Workshop 2017

Presented by: Edward S. Schenk III

WILLIAMS MULLEN

RESPECTING A SEXUALLY DIVERSE WORKPLACE

Presentation Outline

► Updated Vocabulary: “Transgender,” “Transition Plan,” “Gender Identity,” etc.

► Laws Governing LGBTQ Rights and Protections and Government Enforcement (EEOC)

► Practical Issues: Updating Policies & Other Common Questions

► The Role of HR and Management: Gender Transitioning

RESPECTING A SEXUALLY DIVERSE WORKPLACE

Popular Culture and Media Perceptions

“Given the swift political advances of the transgender movement, paired with its new pop-culture visibility, you’d be forgiven for believing that to be gender-nonconforming today is to be accepted, celebrated, even trendy.”


— Public and Media Perceptions and Portrayals versus everyday realities for transgender individuals?
RESPECTING A SEXUALLY DIVERSE WORKPLACE

Public Portrayals vs. Private Realities
- Transgender community remains vulnerable;
- Underrepresented;
- Violent crimes;
- Suicide, psychological complications and self-harm;
- Dominant public narratives misrepresent difficulties;
- Mainstream shielded from the realities of everyday transgender life;
- Ripe for misconceptions, misunderstandings and discrimination.


KEY DEFINITIONS – FROM THE HUMAN RIGHTS CAMPAIGN

Sexual Orientation: An inherent or immutable enduring emotional, romantic or sexual attraction to other people.
- Addresses whether someone is attracted to or romantically interested in members of the same-sex, opposite sex, both sexes, etc. (i.e., gay, lesbian, bisexual).

Gender Identity: One's internal concept of self as male, female, a blend of both or neither – How individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.

Sex vs. Gender:
- Sex relates to whether one is male or female (biological and physiological).
  - Commonly described as sex at birth
- Gender relates to concepts of masculinity or femininity (behaviors, traits, gender roles, etc.)
  - "Masculine" female / "effeminate" male

Gender Expression: External manifestation of one's gender identity
- Can be expressed through behavior, clothing, grooming/haircut, voice, etc.
- May or may not conform to socially defined behaviors and characteristics typically associated with being either male or female
KEY DEFINITIONS – FROM THE HUMAN RIGHTS CAMPAIGN

> Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.
  - Being transgender does not imply any specific sexual orientation.
  - Transgender people may identify as straight, gay, lesbian, bisexual, etc. Avoid assumptions of sexual orientation based on gender expression.
  - Transgender can include transsexuals*, cross-dressers (some), androgynous, hermaphrodite (intersexed) and other gender non-conformers.
    - Older term originating in medical and psychological communities – not preferred by many.

KEY DEFINITIONS – FROM THE HUMAN RIGHTS CAMPAIGN

> Gender Transition
  - The process by which some people strive to more closely align their internal gender identity with its outward appearance or expression.
  - Some people socially transition - they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Can begin with telling family or co-workers.
  - Others undergo physical transition in which they modify their bodies through medical intervention – surgical gender reassignment, plastic surgery, hormone therapy, etc.
  - No set “timeline” for completion.

KEY DEFINITIONS – FROM THE HUMAN RIGHTS CAMPAIGN

> Other Terms and Phrases
  - Ally: friends and advocates for LGBTQ community
  - FTM / MTF: female to male transition and vice versa
  - Cisgender: not transgender – gender conformer
  - Questioning: exploring, discovering or examining sexual orientation, gender identity, gender expression, etc.
LEGAL CONCEPTS – DISCRIMINATION

> Sexual Orientation Discrimination
– Sexual orientation discrimination in the workplace occurs when:
  • an employee is subjected to negative employment action, harassment, or denial of certain benefits;
  • because of his or her sexual orientation (actual or perceived) or
  • because of the sexual orientation of someone they are close to or associated with.
– Where do the courts stand? More later...

LEGAL CONCEPTS – DISCRIMINATION

> Sexual Orientation Discrimination
– Discrimination can be failure to hire, failure to promote, termination, hostile work environment, etc.
  • Any negative consequence or negative alteration of the working conditions that is “because of” sexual orientation.
– Causal connection – “because of” (direct or circumstantial)
  • “Smoking gun” or
  • Subtle (requiring linkages and inferences)

LEGAL CONCEPTS – DISCRIMINATION

> Gender Identity Discrimination (same in concept)
– Discrimination “because of” gender identity
> Examples include:
  – Terminating a transgender employee after learning of the identity or transition plan;
  – Denying a transgender employee access to workplace facilities available to other employees;
  – Demanding “proof” of gender/sex reassignment;
  – Requiring a transgender employee to use a restroom not consistent with the employee’s gender identity;
  – Harassing a transgender employee; or
  – Permitting and/or refusing to investigate claims of harassment by coworkers and supervisors.
NORTH CAROLINA LAW

> North Carolina’s Position
  – House Bill 2 and multiple lawsuits filed by Dept. of Justice, the State and others impacted these issues in 2016.

> Charlotte City Ordinance: Passed February 22, 2016, and added sexual orientation, gender identity and marital status as attributes protected from discrimination when it comes to public accommodations including restaurants, retail stores and other places of public access.
  – Required places of “public accommodation” to allow people to choose restrooms corresponding to the gender with which they identify
  – Repealed on December 19, 2016

NC HOUSE BILL 2

> “Public Facilities Privacy & Security Act” or “HB2”
  – Passed March 23, 2016
  – Three notable issues addressed by the law (CliffsNotes version):
    • Number 1: Effectively nullified the Charlotte Ordinance
    • Number 2: Elimination of right to lawsuit based on a long-standing North Carolina equal protection law (*this was reinstated effective July 1, 2016)
    • Number 3: Regulation of bathroom use in schools and public agencies based on biological sex at birth

NC HOUSE BILL 2

> Impact on Private Employers?
  – Remain free to regulate their own employees
  – Can create internal policies that allow greater LGBTQ protections than state law
  – Private entities, even those who operate places of public accommodation, can implement policies independent of the regulations applied to public schools and agencies
  – Cannot be compelled by local ordinance to implement transgender bathroom access
LEGAL RESPONSES TO HB2

> Carcano v. McCrory (ACLU & others) (*pending*)
> McCrory v. USA
>  Law calls DOJ's position a “baseless and blatant overreach” and accuses the federal government of attempting to rewrite a federal law originally designed to protect women (*voluntarily dismissed September, 2016*)
> USA v. North Carolina
>  Alights HB2 “constitutes a pattern or practice of employment discrimination on the basis of sex” in violation of Title VII and several other federal laws (*pending*)

Litigation and Debate Over Impact on Business/Economy Likely to Continue

---

TITLE VII OF CIVIL RIGHTS ACT OF 1964

> Major federal law that prohibits discrimination in the workplace “because of” race, color, national origin, religion or “sex.”
>  Legislation to amend Title VII to prohibit employment discrimination based on sexual orientation and gender identity has been introduced and passed in House and the Senate but never both and never made it to President.
>  Court decisions and EEOC has interpreted “because of sex” over the years in ways that have been used in support of discrimination claims based on gender identity and sexual orientation.
>  Curious origin of the term “sex” in the law – Democratic Chair of Rules Committee’s single word amendment – a failed “poison pill”

---

TITLE VII: THE EXPANSION OF “SEX-BASED” DISCRIMINATION

> Price Waterhouse v. Hopkins (U.S. 1989) - Sex Stereotypes
>  Hopkins was a female senior manager who was denied partnership because she exhibited traditionally masculine traits.
>  “take a course at charm school”
>  “walk more femininely, talk more femininely, wear makeup, have her hair styled, and wear jewelry”
>  SCOTUS found this violated Title VII. Sexual discrimination includes disparate treatment of men and women resulting from sex stereotypes. This is sex discrimination.
**TITLE VII: GENDER STEREOTYPING**

> Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997)
  
  - Relies on Price Waterhouse – Title VII violation for treating an employee adversely because his or her appearance or conduct “does not conform to stereotypical gender roles.”
  - A man who is harassed because “his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave is harassed ‘because of’ his sex.”
  - No discussion of his sexual orientation.

**Title VII: Sexual Orientation Protection?**

Recent cases addressing sexual orientation under Title VII

> Hively v. Ivy Tech Community College (7th Cir.)
  
  - Plaintiff is a lesbian part-time math teacher
  - Plaintiff claimed the school did not consider her for promotion and ultimately terminated her employment because of her sexual orientation
  - District Court & 7th Circuit: Title VII does not protect individuals on basis of sexual orientation (relied upon/bound by prior precedent)
  - 7th Circuit heard arguments en banc on November 30, 2016
  
  “You can’t discriminate against a woman because she drives a Harley, or has Chicago Bears tickets . . . But you can fire her because she is attracted to other women…?”
  
  - En Banc oral argument, Counsel for Plaintiff

**TITLE VII - TRANSGENDER PROTECTION?**

Extending concept of sex stereotyping .... Is transgender discrimination a form of sex stereotyping (i.e. discrimination for gender nonconformity – the same as Price-Waterhouse)?

> Smith v. City of Salem
  
  - Employee discussed his “gender identity disorder”* with supervisor. Supervisor told the head of the department. Employee was fired.
  - Court relied on Price Waterhouse and found there was no reason to distinguish a case involving a transgendered individual — It was sex stereotyping and therefore illegal under Title VII.

> Barnes v. Cincinnati
  
  - Plaintiff was a male while on-duty but lived as a woman off-duty. Alleged discriminatory demotion.
  - Sex stereotyping based on a person’s gender non-conforming behavior violates Title VII.

*No longer considered an appropriate term, but this is how the employee self-identified
**TITLE VII - TRANSGENDER PROTECTION?**

> - Employee was transgender male. Employer said employee could continue working at company as long as he signed a statement agreement to act and be treated as female. Employee refused and was terminated.
> - Arbitrator relied on Price Waterhouse and held that employee had met the “because of sex” standard in his claim for sex discrimination under Title VII.
> - Awarded $43,162 in economic damages and $10,000 in emotional distress damages.

---

**Supreme Court To Decide Transgender Protection?**

> Gloucester Cnty. Sch. Bd. V. G.G.
> - 17-year-old transgender boy from Virginia prevented from using the men’s bathroom as a result of a school board policy. District court dismissed lawsuit.
> - Fourth Circuit reversed district court – Student allowed to use restroom of choice.
> - Title IX: protects everyone from being “excluded from participation in” or “denied the benefits of” any education program or activity “on the basis of sex.” (Chevron deference to DoE opinion letter finding Title IX protection to transgender students)
> - SCOTUS – stayed mandate of Fourth Circuit, pending writ of certiorari. (Note: Stay suggests decision on merits? 4 justice requirement for the stay is same for writ of cert.).

---

**EEOC’S POSITION**

> Equal Employment Opportunity Commission (“EEOC”)

> Sexual orientation and gender identity is ALREADY covered by Title VII and no amendment needed – included in definition of “sex.”

> 2013-2016 Strategic Enforcement Plan identifies “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”
> - Discriminatory treatment is motivated by stereotype that men should be attracted to/marry women and vice versa.
EEOC’S POSITION

> EEOC Fact Sheet on Transgender Rights - May 2, 2016
- Reiterates protections for transgender employees
- Clarifies that “contrary state laws” do not excuse Title VII compliance (i.e., HB2)
- Protections address conduct in the workplace, not personal beliefs.

"Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination."

EEOC TRANSGENDER LAWSUITS

> EEOC v. Deluxe Financial Services Corp. (Minn. 2015)
- Male employee announced intention to present at work as female. Legally changed name
- Requested that name be changed with HR, sex designation be changed, and have permission to use female restroom
- HR refused to change records/designation until surgery completed. Denied restroom request
- Supervisor asked invasive questions about surgery
- EEOC brought hostile work environment and disparate treatment claims under Title VII
- January 2016 settlement: ER paid $115,000 and agreed to change its policies, issue letter of apology, provide reference letters and national health benefits plan will not include exclusions for otherwise medically necessary healthcare based on transgender status

EEOC SEXUAL ORIENTATION LAWSUITS

> EEOC has filed several lawsuits on sexual orientation discrimination – Three examples from 2016

EEOC v. Scott Medical Health Ctr. (W.D.Pa.)
- Gay male subjected to gay epithets and sexual harassment. Complaints to employer went unanswered.
- Court found that sexual orientation discrimination is a type of discrimination "because of sex"
- "That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor’s view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate."
EEOC SEXUAL ORIENTATION LAWSUITS

EEOC v. Bojangles Restaurants, Inc. (E.D.N.C.)
- Transgender woman subjected to comments about effeminate mannerisms, including gait, speech, and posture. Was told she had to change the way she acted.
- Still pending.

EEOC v. Pallet Companies
- Lesbian female repeatedly harassed by supervisor. Comments included: “I want to turn you back into a woman,” “you should wear a dress.”
- Settled June 28, 2016 for $202,200 in damages plus mandatory training and policy change.

PRACTICAL ISSUES - POLICIES

> Examine and Reconsider HR and Personnel Policies – Get Ahead of the Curve
  – EEO Statements: Consider acknowledging protection and non-discrimination based on sexual orientation, gender identity and gender expression among other traditional classes
  – Management Philosophy: Encourage free and direct communication with management to promote openness and fairness
  – Anti-Harassment Policies: Considering specifically covering harassment based on sexual orientation and gender-specific traits

> Other Personnel and HR Policies – Dress and Appearance
  – Policies that require professionally appropriate attire in the office or unit in which an employee works are gender-neutral = legal
    - “Professional” ≠ “Gender Stereotypical”
  – Dress policies should be: (1) reasonable; (2) non-stereotypical; and (3) serve a legitimate business purpose, subject to reasonable accommodation.
PRACTICAL ISSUES - POLICIES

> Personnel and HR Policies – Name Changes & Paperwork

  - Name Change is **NOT** a Gender Issue
    - Handled the same was as legal name change for marriage, nickname requests, etc.
  - IRS requires W-2 to match SS Card (must have a legal name change first)
    - Until then, notify payroll and others internally of the new "commonly used name" (if desired by EE)
  - Benefits documents must reflect "legal name" (await the change)
    - Attach notes to I-9 and other documents
    - Update when legal change is complete
  - Same treatment of anyone else requesting a name change

---

PRACTICAL ISSUES - POLICIES

> Personnel and HR Policies – Restroom, locker rooms, etc.

  - Single most sensitive issue.
  - Safety concerns? For who? OSHA addresses the issue.
    - Restroom avoidance based on anxiety is a safety concern – OSHA follows EEOC.
  - Co-worker apprehension outweighed by risk of discrimination.
  - Communication and training are critical. Address through education and training.

---

PRACTICAL ISSUES - POLICIES

> Facilities Access: Restrooms, locker rooms, etc.

  - **Option 1**: Absolute freedom to use facility consistent with gender identity (the only way to comply with EEOC’s position – Best Practice and Majority Trend)
  - **Option 2**: Multi-occupant, all gender-neutral facilities that are retrofitted for enhanced privacy? (impractical)
  - **Option 3**: Single-occupant, gender neutral facility?
    - OK for uncomfortable co-workers
    - OK for free and voluntary choice of transgender EE
THE ROLE OF HR – TRANSITIONING

> Planning and Facilitating a Gender Transition

> Interactive Engagement Plan – Basic Components
  > Initial Employee Meeting
  > Initial Management Meeting
  > Joint Meetings with Employee and Supervisors
  > Inform, Educate and Answer Co-Workers
  > Enlist a Senior Leader to Fully Support the Plan

> Education is Most Important – Middle Managers
  > Best Resource versus Biggest Liability?

RESOURCES FOR EMPLOYERS

> No “One Size Fits All” Solution
  > Human Rights Campaign (HRC): “Transgender Inclusion in the Workplace” and other publications (www.hrc.org)
  > WPATH Guidelines address medical and health issues (www.wpath.org)
  > The Transgender Law Center (www.transgenderlawcenter.org)
  > EEOC Fact Sheets (LGBT Rights and Restroom Access):
    > https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
    > https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm

As part of Williams Mullen’s Labor & Employment team, Edward, Mike, and Allison’s combined experience includes comprehensive employment and employee benefits litigation and client counseling for public and private companies, non-profit organizations and religious-affiliated organizations.

EMPLOYMENT LITIGATION DEFENSE AND AUDITS
  > Defense of employment discrimination litigation matters
  > Harassment avoidance and claim defense litigation
  > Actions to enforce restrictive covenants, such as non-compete and non-disclosure agreements
  > Litigation on breach of executive employment agreements
  > Federal contract compliance and OFCCP and DOL audit management

EMPLOYMENT COUNSELING
  > Human Resources advice in terminations, reductions in force, disciplinary actions
  > Employee Handbook and policy development
  > Advisor on ADA and FMLA leave time management
  > Diversity and Affirmative Action Plan advice and planning
  > Employment contract drafting, including restrictive covenants, executive employment agreements and severance agreements

ERISA LITIGATION
  > Defense of denial of disability, life insurance and health insurance claims

CORPORATE TRAINING
  > Onsite management and staff training on:
    > EEO and Sexual harassment laws
    > Wage and hour laws
    > Family Medical Leave Act
    > Affirmative Action Planning and compliance with OFCCP regulations
    > Related federal contractor compliance regulations under SCA and DBA
    > Union avoidance strategies
    > Americans with Disabilities Act
**DISCLAIMER**

> Please note: *This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel. Also, except as specifically stated, no presenting attorney is certified (including as a specialist or expert) by any professional or government authority.*