National Law Journal

July 22, 2013

Courts Now Are Respecting Transgender Rights

Federal legislation lags, but cities and states and the EEOC are demanding accommodations.

by Roland Juarez and J. T. Williams

First Lady Michelle Obama in June got a taste of the urgency felt by those seeking workplace protections for lesbian, gay, bisexual and transgender employees. While speaking during a fundraiser, she was confronted by Ellen Sturtz, a protester later identified as a member of the organization GetEQUAL. Sturtz, who was angry at the lack of progress in enacting federal protections for LGBT employees, explained, "I don't have time to wait another generation for equality.…I could no longer remain silent." Along with the First Lady, people across America are becoming increasingly aware of the issues that sexual-orientation and gender-identity protections raise.

On June 17, a Colorado agency ruled that a public school could not prohibit a transgender child from using the girls' restroom, and the Maine Supreme Judicial Court is considering a case that raises the same issue. As transgender people gain more visibility and protection in society, employers will face accommodation demands from transgender employees in the workplace. For employers, these issues are complex and riddled with legal and political land mines.

Transgender employees are not explicitly protected from discrimination by federal law. Bills that would extend federal protection to gender identity have been introduced in Congress on several occasions, but all have failed. The EEOC did recently hold in Macy v. Holder, No. 0120120821, 2012 WL 1435995 (EEOC April 20, 2012), that complaints of discrimination based on gender identity, change of sex and transgender status are cognizable under Title VII of the Civil Rights Act of 1964. "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort," the EEOC concluded. We can expect more litigation on this interpretation at the federal level.

Cities and states have been more willing to act. At this time, 17 states expressly include gender identity or expression in their employment nondiscrimination statutes, and at least 150 cities have enacted similar ordinances. Employers increasingly have responded to these laws by including transgender protections in their handbooks, many of which companies use on a national basis.

Given that the law and society seem to be trending toward protection for transgender people, it would be prudent for employers to develop guidelines and procedures for transgender employees.

The gender-transition process poses unique challenges in the workplace, as the transitioning employee begins to dress, present and, perhaps most importantly, expect to be treated as a different sex. This may mean that employees who have worked with Jane for many years now have to adjust to working with Bob. A poorly handled transition — for instance in which employees refuse to stop saying "Jane" and "she" — could easily result in low morale, a divided work force, and perhaps even a hostile work environment claim.

Open and Continuous Dialog

Instead, an employer should allow the transition to be an interactive process. This could involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for the transitioning employee. There should always be an open and continuous dialogue with the transitioning employee and the other employees in the workplace as well, so the employer can set clear expectations regarding how the transition will occur and the steps that need to take place — e.g., notification to clients, co-workers and others. It is especially critical for the employer to be seen as fully supportive of the transition and the new gender. In fact, one transgender advocacy group has noted that when human resources and/or management takes the lead in explaining the details of the transition as a matter of policy and to protect the company from potential liability, most employees just get on with their jobs and there are no problems.

One of the most difficult issues transgender employees raise arises in a seemingly unlikely place: the restroom. Which restroom is the proper one to use? Should the decision be based on biological sex, current sex, transitioning sex, or something else altogether? A transgender employee who started as one gender in the workplace and then transitions to another especially will be in a quandary.

Although there has been recent media attention to the cases involving restrooms for transgender children at school, there is very little case law or guidance from the courts for employers. One key case is Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981 (8th Cir. 2002), in which the court granted summary judgment against the plaintiff who was cisgender — a term for gender identity in which self-perception matches sex assignment at birth — and who alleged religious discrimination and a hostile workplace because her employer was allowing a transgender woman to use the women's restroom. The court noted that the plaintiff was not denied use of a restroom because she had convenient access to numerous other women's restrooms besides the faculty restroom at issue, and indeed had been using the other restrooms regularly. Transgender advocacy groups frequently cite this case to argue that accommodations should focus not on the transgender employee but rather on those employees who are uncomfortable with the transition process.

Employers are, therefore, left to grapple with this difficult issue with little legal guidance. When the restroom issue arises in the public context, the principle of least surprise is often invoked — a person should use whichever restroom best matches his or her appearance and presentation. This principle may not be as useful in the workplace, though, as co-workers already know what sex the employee is or was.

A recently updated manual from the National Lawyers Guild San Francisco Bay Area Chapter called Know Your Rights Manual for the Transgender Community: Employment recommends that restroom use should be based on gender identity rather than "biological" gender unless state law requires otherwise. Basing restroom policies on genitalia is especially problematic because employers generally have no need or right to know about the state of an employee's genitalia.

The same would be true regarding gender-reassignment surgery, and it has been estimated that only about 15 percent of transsexuals actually have reassignment surgery. It should also be noted that some states will not change the gender designation on state-issued ID unless surgical reassignment has been performed.

One possible solution would be to provide some restrooms that are designated for family or unisex, especially single-occupancy, gender-neutral restrooms. In fact, some jurisdictions have begun to regulate single-occupancy restrooms; for instance, the District of Columbia now requires that publicly accessible single-occupancy restrooms be gender neutral. Or if an employer lacks single-occupancy restrooms, enhanced privacy features in multiple-occupant, gender-segregated restrooms can be effective. Some examples would include installing flaps on the outer edge of stall doors to cover the gap between the door and the stall wall, extending stall doors and walls from floor to ceiling, and extending privacy dividers between urinals further out from the wall and to a higher level.

Yellow Sticky Note

Another possibility that some employers have used is to have the transgender employee place something on the restroom door — a yellow sticky note or restroom-in-use sign, for example — when the employee is using the restroom. It should be noted that while this might provide a practical solution, many transgender advocacy groups consider this approach stigmatizing. These groups also generally oppose requiring a transgender employee to use a separate designated restroom, arguing that the alternative facilities should be offered instead to those employees who are uncomfortable with using the restroom at the same time as a transgender employee.

It is not clear how the courts would view an employer instructing a transgender employee to use only alternative facilities. This will almost certainly be a fact-based determination and would largely depend on the convenience of the other facilities as well as the jurisdiction. On the other hand, although we have not seen this expressly discussed in the literature, we would expect that an employer could require a transgender employee to make a decision as to which gender restroom he or she intended to use.

The law and literature seem to be moving toward increased protection for transgender employees in the workplace, and we fully expect that trend to continue and to intensify. Accordingly, it will be even more important for employers to consider and develop policies and procedures to ensure that transgender employees will be treated appropriately when those circumstances arise.

Roland Juarez is a partner in Hunton & Williams' Los Angeles office, where he focuses on labor and employment law. J. T. Williams is an associate.