The magazine from
NEW JERSEY LAWYER
www.njlnews.com
EMPLOYMENT LAW Volume 16, Number 13 March 26, 2007

LAD expansion: Gender identity and gender expression

By Tricia B. O'Reilly and M. Trevor Lyons

Recently the public's attention has been intently focused on the New Jersey Supreme Court's landmark decision in *Lewis v. Harris*, 188 N.J. 415 (2006), which extended the equal protection guarantees of the state constitution to same-sex couples, and the legislature's response in subsequently passing sweeping civil union legislation. With much less fanfare, on Dec. 20, 2006, New Jersey's legislature also separately amended the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 *et seq.*, to define "gender identity or expression" as a protected characteristic. Doing so, New Jersey joined California, Illinois, Maine, Minnesota, New Mexico and Rhode Island in protecting transgender employees from employment discrimination. Indiana and Kentucky have executive orders prohibiting such discrimination against state employees. In addition, several prominent cities including Denver, New York, Atlanta, Boston, Baltimore, Philadelphia, Dallas, Austin and Seattle offer similar protection.

Specifically, LAD, which already prohibits discrimination because of race, creed, color, national origin, nationality, ancestry, age, marital status, domestic partnership status, affectional or sexual orientation, genetic information, sex, disability or atypical hereditary cellular or blood trait and service in the Armed Forces has now been extended to expressly prohibit discrimination against people who identify, in whole or part, with a sex that it is opposite that of their birth, or to individuals who favor androgyny. These recent amendments to New Jersey's LAD contain certain provisions that may result in a conflict between transgender employees' LAD rights and the personal privacy rights of other employees. Regardless of this potential conflict, employers likely already updating personnel policies, postings, handbook provisions and training programs to comply with New Jersey's new civil union legislation, should also include "gender identity and expression" as a protected characteristic in any such polices and procedures.

I. New legislation

Effective 180 days after its enactment, or on June 17, 2007, the new law makes it an unlawful employment practice to discriminate or take an adverse employment action against an employee because of their gender identity or expression. The legislation defines "gender identity or expression" as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." It further clarifies that this definition expressly includes "transgender status." It is important to note that prior to Dec. 20, 2006, New Jersey's LAD already protected against discrimination because of "sexual orientation," or due to an individual's attraction to others. Accordingly, the term "gender identity or expression" refers to something other than a person's attraction to a particular sex or to both sexes.

Rather, the new legislation seeks to protect an individual's own sexual identity and/or his or her outward expression of his or her sexual identity.

The categories of persons protected by the new legislation are transgender individuals, which include transsexuals (people who strongly identify with being a member of the opposite biological sex and may seek to live as a member of that sex by undergoing surgery and/or therapies, including hormonal therapy, to obtain the desired physical appearance), transvestites (people who adopt the dress and often the behavior typical of the opposite sex but, unlike transsexuals, do not wish to change sexes) and those who favor androgyny (people who identify as neither specifically masculine nor specifically feminine).

Of particular importance to New Jersey's employers, the new law also includes provisions relating to employer dress standards and to places of public accommodation. As to dress standards, while the new legislation permits an employer to require its employees "to adhere to reasonable workplace appearance, grooming and dress standards," an employer must still permit its employees "to appear, groom and dress consistent with [their] gender identity or expression." Accordingly, if a transgender individual appears in the workplace in dress appropriate for his or her gender identity, an employer may potentially be held to have violated the LAD for taking any subsequent adverse employment action against that individual, and/or for requiring him or her to assume dress consistent with their "assigned" gender at birth.

As to places of public accommodation, the new legislation requires employers permit transgender individuals to be admitted to such places "based upon their gender identity or expression." One of the more significant implications of this amendment relates to use of single-sex facilities such as restrooms, shower facilities and locker rooms in the workplace. A reasonable interpretation of the new legislation may require employers to permit a transgender individual to use such single-sex facilities consistent with their gender identity or expression rather than their assigned gender at birth.

Accordingly, this new provision in the LAD creates a possible conflict between a transgender employee's LAD rights and the personal privacy rights of other employees, who may object to having to share such facilities with individuals of the opposite sex despite their outward manifestation of gender. Several cases across the nation have already addressed this issue and have generally found for employers who object to such use based on the protestations of other workers that their personal privacy interests are being compromised.

The Minnesota Supreme Court faced this very issue in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). Specifically, similar to New Jersey's new LAD, Minnesota's Human Rights Act protects against discrimination based upon "sexual orientation." Sexual orientation, however, is defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological male or femaleness." Thus transgender individuals are a protected class under the Minnesota statute. In *Goins*, a transgender employee in the process of converting from a biological male to a female, but still possessing male genitalia, sued stating that this statutory language required his employer to allow him to use a bathroom consistent with his self-image of gender — the female bathroom. His employer had required the employee use the male bathroom after complaints were received from several female employees.

The Supreme Court of Minnesota rejected the plaintiff's argument, stating the statutory language did not require or prohibit an employer's discretion to designate restrooms according to biological gender; the statute required only that the employer provide an adequate and sanitary restroom to transgender persons.

Similarly, while ultimately decided on different grounds, in *Etitsy v. Utah Transit Authority*, 2005 WL 1505610 (D. Utah, June 2005), the District Court of Utah identified some of the competing interests at stake:

> "Defendant also points out, and the Court agrees, that no study is necessary to conclude that many women would be upset, embarrassed, and even concerned for their safety if a man used the public restroom designated exclusively for women. Concerns about privacy, safety and propriety are the reasons that gender specific restrooms are universally accepted in our society."

Ultimately, the court in *Etitsy* found the employer imposed a biological sex-only bathroom policy because of fears of potential liability to female employees, and not because of bias against transsexuals in violation of Title VII of the Civil Rights of 1964.

Also interesting is *Cruzan v. Minneapolis Public School System*, 165 F. Supp. 2d 964 (D. Minn. 2001), *aff'd*, 294 F.3d 981 (8th Cir. 2002). In that case a school system was sued for religious discrimination by a woman after it permitted a transgender individual to use the woman's faculty bathroom, and the plaintiff encountered the transgender individual in the bathroom. The woman claimed it violated her religious beliefs to share bathroom facilities with members of the opposite sex, and she subsequently brought suit under Title VII and the Minnesota's Human Rights Act against the school system. Her case was summarily dismissed primarily because she could not show an adverse employment action resulting from the school system's decision to permit a transgender individual to use a female bathroom. Specifically, the court found the employer's actions did not affect either her title, salary or benefits.

New Jersey's LAD, however, expressly prohibits public accommodation discrimination on the basis of creed. Accordingly, a claim similar to that asserted in *Cruzan* could potentially be actionable under LAD, if an individual could show she was not being provided with an adequate restroom by her employer that complied with her religious beliefs.

Therefore, while the reach and application of the new legislation is uncertain, what does seem clear is that it is only a matter of time until New Jersey courts will be called upon to resolve these types of issues and balance these competing interests.

II. *Enriquez v. West Jersey Health Systems*

The December 2006 LAD amendments essentially codify *Enriquez v. West Jersey Health Systems*, 342 N.J.Super. 501 (App. Div. 2001), *cert. denied*, 170 N.J. 211 (2001). In *Enriquez*, a doctor was in the process of changing from a male to a female via hormone therapy and surgery. The employer refused to renew the doctor's

employment contract because of the various changes the doctor was undergoing. The doctor sued under LAD, but on summary judgment the motion judge dismissed, finding the plaintiff had not asserted sexual orientation discrimination and that the legislature had not provided a remedy for persons who elected to change their sexual identity.

The Appellate Division initially agreed the plaintiff had not asserted sexual orientation discrimination, but reversed, finding:

> "It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman."

The Appellate Division also determined that gender dysphoria or transsexualism — defined generally as a psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex and seeks medical treatment including hormonal therapy and surgery to bring about permanent sex change — could be considered a disability protected by the LAD.

The 2006 amendments, however, go substantially further than the holding in *Enriquez*. Specifically, while the Appellate Division was willing to consider discrimination against an individual converting to another gender to be a form of sex or potentially disability discrimination, the new legislation makes "gender identity or expression" its own protected category. Accordingly, while postings and policies prohibiting sex discrimination on the basis of gender should still serve as sufficient notice to an employer's workforce that transgender discrimination is prohibited, the most prudent course of action is to revise such postings and policies to expressly include "gender identity or expression" as a protected category of employees. In addition, the new legislation's specific provisions relating to dress code enforcement and public accommodations, including same-sex facilities, are much more narrowly tailored than the holding in *Enriquez*.

III. Title VII and federal case law

Title VII does not contain express language barring discrimination based upon an individual's expression of gender, and the federal courts have traditionally held that discrimination on the basis of gender dysphoria is not sex discrimination. Nonetheless, a few federal courts have begun to permit such claims on the basis that perceived gender identity is stereotype discrimination prohibited by the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse,* the U.S. Supreme Court held that harassment directed at a person because that person does not conform to traditional sex stereotypes is generally covered by Title VII.

For example, in *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), the U.S. Court of Appeals for the Sixth Circuit ruled that a preoperative male-to-female transsexual could bring a claim of sex discrimination and sex stereotyping under Title VII of the Civil Rights Act of 1964. Thus, the Sixth Circuit became the first court in the country to rule that Title VII protects transgender people in that it covers discrimination based both on biological sex and socially prescribed expectations based on gender. Relying on *Price Waterhouse*, the Sixth Circuit ruled that even discrimination based on a person's gender identity was enough to permit him or her to use Title VII to challenge the discrimination.

In the Third Circuit, no case has followed the broad holding in *Smith*. In *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3rd Cir. 2001), however, Judge Maryanne Trump Barry opined, albeit in *dicta*, that a claim that a plaintiff was "harassed because he failed to comply with societal stereotypes of how men ought to appear or behave…" might be actionable sex discrimination. Nonetheless, the actual holding in that case dismissed a homosexual man's discrimination claim because he alleged sexual orientation discrimination — something not covered by Title VII's express terms.

IV. Conclusion

In light of the recent amendment to New Jersey's LAD, employers conducting business or employing individuals in New Jersey should:

- Amend their policies, postings, employee handbook provisions and training programs regarding discrimination and harassment to include "gender identity or expression" as a protected category. In addition, annual EEO, anti-discrimination and harassment training for 2007 should highlight this change in the law and its potential ramifications. This update is particularly important for human resource and supervisory personnel;
- Review dress code policies and same-sex facility use policies in the workplace to ensure compliance with the new law, the expanded EEO, anti-discrimination and harassment training to discuss these issues as potential hot spots for conflict in the workplace. The identification of these issues as potential hot spots is particularly important for human resource and supervisory personnel; and
- Consult with counsel before making any decision aimed at balancing a transgender employee's LAD rights and the personal privacy rights of other employees.

The 2006 gender identity and expression amendments to the LAD will likely have strong implications for New Jersey employers. Over the coming months and years, employers and their legal counsel should pay close attention to judicial decisions interpreting and applying the new legislation, which undoubtedly will require a balancing of competing interests in New Jersey's workforce.

Tricia B. O'Reilly is a partner at Connell Foley in Roseland and New York City, and is a member of its Labor and Employment Law and Litigation practice groups. Associate M. Trevor Lyons practices in the firm's Labor and Employment Law Group on behalf of management.