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New Jersey Joins A Growing Number Of Jurisdictions In Expressly Prohibiting Discrimination On The Basis Of Gender Identity Or Expression – Part I

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While national attention has been focused on the debate relating to civil rights for gay and lesbian individuals, the fact that an increasing number of jurisdictions are providing anti-discrimination protection to transgender persons throughout the United States has received much less exposure. For example, California, Illinois, Maine, Minnesota, New Mexico, Rhode Island, Washington and the District of Columbia already have statutes expressly protecting transgender employees from employment discrimination, and Indiana and Kentucky have Executive Orders prohibiting such discrimination against state employees. In addition, more than sixty local jurisdictions and several prominent cities including Denver, New York, Atlanta, Boston, Baltimore, Philadelphia, Dallas, Austin and Seattle offer similar protection.[1] Effective June 17, 2007, New Jersey joined the list of jurisdictions offering such protection to transgender individuals. Specifically, New Jersey's Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq*., 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, was recently amended to define "gender identity or expression" as a protected characteristic. As has already been the case in other jurisdictions, the 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 and other rights of their coworkers.

I. New Jersey's New Legislation

Effective June 17, 2007, the recent New Jersey legislation makes it an unlawful employment practice to discriminate or take an adverse employment action against an employee because of his or her gender identity or expression. The new 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." The new legislation further clarifies that this definition expressly includes "transgender status."

"Gender identity or expression" is something different than "sexual orientation" – a person's attraction to a particular sex – which was already a protected characteristic under New Jersey's LAD. The revised legislation, however, 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).

The new legislation 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 violate the LAD by taking any subsequent adverse employment action against that individual because of his or her dress, and/or for requiring him or her to dress consistent with their "assigned" gender at birth.[2]

As to places of public accommodation, the new legislation requires that 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 his or her gender identity or expression rather than his or her assigned gender at birth. It is this particular provision which gives rise to the most likely area of conflict between the competing LAD rights of a transgender employee and the privacy and other rights of his or her coworkers.

II. New Jersey Case Law

The December 2006 amendments to the LAD codified the holding in *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 that the doctor was undergoing. The doctor sued under the LAD, but on summary judgment the motion judge dismissed finding that 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. New Jersey's Appellate Division initially agreed that the plaintiff had not asserted sexual orientation discrimination, but nonetheless 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.[3]

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 to the LAD, however, go substantially farther 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, employers should revise their 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 of the Civil Rights Act of 1964 ("Title VII") is a federal statute prohibiting, among other things, employment discrimination based on race, color, religion, sex, or national origin. Title VII, however, does not contain express language barring discrimination based upon an individual's expression of gender. Moreover, the federal courts, most notably in *Ulane v. E. Airlines, Inc*., 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985), have traditionally held that discrimination on the basis of gender dysophoria is not sex discrimination.[4] Nonetheless, a few federal courts have begun to recognize 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 v. Hopkins*, the U.S. Supreme Court held that harassment directed at a person because that person does not conform to traditional sex stereotypes is prohibited by Title VII.

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. With that ruling, the Sixth Circuit became the first appellate court in the country to rule that Title VII protects transgender individuals in that it covers discrimination based both on biological sex and socially prescribed expectations based on gender. Relying upon *Price Waterhouse v. Hopkins*, the Sixth Circuit said that discrimination based on a person's gender identity was enough to permit him or her to use Title VII to challenge the discrimination. The Court stated:

> Sex stereotyping based upon a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.[5]

Similarly, in *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) and *Myers v. Cuyahago County, Ohio*, No. 05-3370, 2006 WL 1479081, at *6, (6th Cir., May 31, 2006), the Sixth Circuit reaffirmed its holding in *City of Salem*, finding that transsexuals alleging discrimination because of their failure to conform to male stereotypes could maintain Title VII claims.[6]

Recently, the District of Columbia in *Shroer v. Billington*, 424 F.Supp.2d 203 (D.D.C. 2006), also extended Title VII coverage to transsexuals, but notably did not rely upon a *Price Waterhouse* analysis to do so. Specifically, Judge James Robertson, U.S.D.J. found that the plaintiff in that case had offered insufficient evidence to be able to assert a claim for discriminatory gender stereotyping. Instead, Judge Robertson found transsexuals to be a protected class under the express terms of Title VII, stating that it is evident that they are discriminated against because of their "sex." In so holding, Judge Robertson expressly rejected the long line of cases concluding that Congress would have expressly covered transsexuals in Title VII's definition of "sex" if it had wanted to provide legal protection to such individuals. Judge Robertson initially noted that the seminal case excluding transsexuals from Title VII coverage, *Ulane,* was decided before the Supreme Court's decision in *Price Waterhouse*, and therefore he simply dismissed the line of cases following *Ulane* as antiquated precedent, not in keeping with modern jurisprudence. He further noted that *Ulane's* rationale was contrary to several recent Supreme Court cases, including *Oncale v. Sundower Offshore Services, Inc*., 523 U.S.75, 118 S.Ct. 998, 140 L.Ed 201 (1998), which found same sex harassment to be actionable conduct under Title VII.[7]

In the Third Circuit, no reported case has followed the Sixth Circuit's broad holding in *City of Salem* or its progeny. A 2006 unreported decision out of the Western District of Pennsylvania, *Mitchell v. Axcan Scandipharm Inc*., No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa., Feb. 17, 2006), however, expressly adopted the rationale employed by the Sixth Circuit, and permitted a transgender employee to proceed with a wrongful termination claim under Title VII based upon sexual stereotyping. Notably, Judge Gary L. Lancaster, U.S.D.J.'s decision in *Mitchell* relied heavily upon *Bibby* v. *Philadelphia Coca-Cola Bottling Co*., 260 F.3d 257, 264 (3rd Cir. 2001), an earlier Third Circuit decision. In *Bibby*, Judge Maryanne Trump Barry, U.S.A.J. 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 holding in that case actually dismissed a homosexual man's discrimination claim because he alleged sexual orientation discrimination, which is not covered by Title VII's express terms.[8]

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New Jersey Joins A Growing Number Of Jurisdictions In Expressly Prohibiting Discrimination On The Basis Of Gender Identity Or Expression – Part II

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Part I of this article, appearing in the July issue of The Metropolitan Corporate Counsel, *discussed recent amendments to New Jersey legislation and New Jersey case law as well as Title VII and federal case law on the subject of sexual discrimination.*

IV. Restrooms, Locker Rooms And Shower Facilities.

The extension of anti-discrimination laws to cover transgender individuals creates a unique set of issues that the courts will have to resolve in the near future.[1] For instance, transgender restroom, locker room and shower facility use may raise concerns among a transgender employee's co-workers. Generally, courts addressing this issue have rejected the notion that an employer is required to permit transgender employees to use opposite sex facilities. In fact, several cases throughout the nation have already dealt with this issue, and have generally found for employers who object to such use based upon the protestations of other workers that their personal privacy interests were being compromised.

The Minnesota Supreme Court faced this very issue in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). Similar to New Jersey's amended LAD, Minnesota's Human Rights Act protects against discrimination based upon "sexual orientation." Sexual orientation 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 or the female bathroom. His employer had required the employee to use the male bathroom after complaints were received from several female employees. The Supreme Court of Minnesota rejected the plaintiff's argument stating that the statutory language did not require or prohibit an employer's discretion to designate restrooms according to biological gender, and that the statute required only that the employer provide an adequate and sanitary restroom to transgender persons.

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Similarly, while the case was ultimately decided on different grounds, in *Etitsy v. Utah Transit Authority*, 2005 WL 1505610 (D. Utah, June 25, 2005), the District Court for the District 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.[2]

Ultimately, the Court in *Etitsy* found that the employer imposed a biological sex only bathroom policy because of fears of potential liability to female employees for sexual harassment and privacy issues, and not because of bias against transsexuals in violation of Title VII of the Civil Rights of 1964.

Similarly, in *Johnson v. Fresh Mark, Inc*., 337 F.Supp.2d 996 (N.D. Ohio 2003), *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2004), the employer hired a preoperative transsexual assuming that he was a female. Coworkers subsequently complained, however, that he was using both the male and female bathrooms. The employer asked the employee for medical clarification of which bathroom was appropriate for him to use. When medical clarification was not provided, the employer asked the employee to use a restroom consistent with the employee's driver license, and that action was upheld by the District Court as non-discriminatory. Likewise, in *Hispanic Aids Forum v. Estate of Joseph Bruno*,16 A.D.3d 294, 792 N.Y.S.2d 43 (App. Div. 1st Dep't 2005), a landlord refused to lease space to a Latino advocacy group because of complaints by other tenants that the transgender individuals who patronized the Forum were using public bathrooms based upon their expressed sexual identity and not their biological sex. Expressly referring to *Goins*, the Court held that requiring individuals to use gender-specific restrooms based upon biological sex rather than biological self-image is not discriminatory, and therefore did not violate the New York State or New York City Human Rights Law.

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 that it violated her religious beliefs to have 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 that the employer's actions did not affect 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 the LAD, if an individual could show that 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 certain 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.

V. Implications And Recommendations

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

1. 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 Equal Employment Opportunity ("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;

2. Consider adopting gender transitioning guidelines to provide information and guidance to employees, managers and human resources personnel who will be working together to ensure that the transitioning employee understands, and is comfortable with, the transitioning process in the workplace. A helpful resource on this subject is the Human Rights Campaign's "Workplace Gender Transition Guidelines For Transgender Employees, Managers and Human Resource Professionals."[3] Any such guidelines should outline a specific procedure for addressing the transitioning employee's needs, addressing inquiries and communications from coworkers, and providing leave for medical procedures. Important considerations in drafting any such guidelines include respecting the transitioning employee's right to privacy, and treating his or her request for medical leave and accommodation consistent with the treatment of other medical conditions;

3. To the extent feasible, favor single-stall unisex bathrooms going forward. Additionally, if resources permit, best practices would include also favoring individual showers and changing areas that provide privacy to each worker when changing;

4. Review dress code policies and same-sex facility use policies in the workplace to ensure compliance with the new law, and expand 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

5. Consult with counsel before making any decision aimed at balancing a transgender employee's LAD rights and the personal privacy rights of other employees.

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.

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[1] *Part I of this Article stated that the new legislation further clarifies that the definition of gender identity or expression "expressly includes 'transgender status.'" The "transgender" terminology was contained in the pre-filed bill, but was removed from P.L. 2006, c. 100, by floor amendment on December 14, 2006. The removal of this terminology did not impact the scope of the protection afforded by the amendment.*

[2] *Etitsy,* 2005 WL 1505610 at *5.

[3] *A copy can be obtained at http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/Transgender_Issues/WorkplaceGenderTransitionGuidelines-May2006.pdf.*

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