

# Transgender Discrimination And The Law

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## ABSTRACT

*An emerging area of law is developing regarding sex/gender identity discrimination, also referred to as transgender discrimination, as distinguished from discrimination based on sexual orientation. A transgendered individual is defined as “a person who has a gender-identity disorder which is a persistent discomfort about one’s assigned sex or a sense of belonging to the other sex.” While Title VII of the Civil Rights Act of 1964 or its amendments do not provide protection from discrimination for individuals based on sexual orientation, transgender, or transvestites, there are a growing number of state, cities, and counties with transgender explicit non-discrimination laws. In addition to the above private employers, colleges and universities and collective bargaining agreements prohibit discrimination against transgendered people. While Title VII does not protect transgendered people, some federal courts have broadly interpreted Title VII’s prohibition against sex discrimination as including transgendered people on the basis of the concept of “sex stereotyping” as a form of sex discrimination protected by Title VII. Additionally, the state courts of Massachusetts and New Jersey have held that transsexual people are protected under state disability laws. Human Resource Managers need to be sensitive to issues that can arise as a result of an employee making a sex change transition with respect to the following: 1) bathroom and dressing room usage; 2) dress codes; 3) identification and records changes; and (4) health benefits. Additionally, the transgendered employee, supervisory management and coworkers each have responsibilities to see that the transgendered transition is done respecting the rights of all concerned. As to the future, legal status of transgendered employees, transgender advocates should seek to change the existing laws; and if the existing law has sexual orientation protection, these laws should be written in such a way as to expressly include transgendered individuals. Additionally, transgender advocates should seek the voluntary cooperation of employers.*

**Keywords:** sex gender discrimination, transgendered, transvestites

## INTRODUCTION

An emerging area of the law of employment discrimination is developing with respect to employer discrimination based on transgender status. As distinguished from employment discrimination based on sexual orientation which is the physical attraction to a person of the same sex as yourself, JoAnna McNamara has defined transgendered individuals as *a person who has gender/identity disorder which is persistent discomfort about one’s assigned sex or of a sense of belonging to the other sex.*<sup>1</sup> Medically the term is generally considered to be a condition where physiologically normal individuals experience discontent being of a sex to which they were born and have a compelling desire to live as a person of the opposite sex. The discomfort is usually accompanied by a desire to utilize hormone surgical and civil procedures to live the sex role opposite to which they were born. They are persons whose anatomic sex at birth differs from their psychological sexual identity. A transsexual is not a homosexual in the true sense as the latter seek sexual gratification from members of their own sex as members of that sex, whereas transsexuals’ erotic attraction are generally with persons of the their own anatomic sex, but viewing themselves as members of the opposite desired sex. Not to be confused with transsexuals are transvestites, who are persons content with their own sex and are heterosexual, but dress as members of the opposite sex for sexual arousal.<sup>2</sup>

It has been reported that “an estimated 2 to 5% of the population are transgender (i.e. experience some degree of gender dysphoria). The number of people who identify as transsexual and undergo sex-reassignment is

smaller. Recent statistics from the Netherlands indicate that about 1 in 12,000 natal males undergo sex-reassignment and about 1 in 34,000 natal females. Over time the gap in reported numbers of male to female and female to male transsexuals is closing.<sup>3</sup>

While Title VII and its subsequent amendments do not provide protection from discrimination for individuals based on sexual orientation, transgender, or transvestites, there are a growing number of states, cities, and counties with transgender explicit non-discrimination laws. Thirteen states plus the District of Columbia and 91 cities and counties offer protection.<sup>4</sup>

In addition to the above private employers, colleges and universities and collective bargaining agreements prohibit discrimination against transgendered individuals. While Title VII does not protect transgendered people, some federal courts have broadly interpreted Title VII's prohibition against discrimination as including transgendered individuals.

California, Colorado, D.C., Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington) The total number of people protected by these laws is 104, 118, 084.

### **TRANSGENDERED INDIVIDUALS HELD WITHIN AMBIT OF SEX DISCRIMINATION LAWS SEX STEREOTYPING – SEX-EQUALS GENDER**

The ruling of the Sixth circuit in Smith vs. City of Salem<sup>5</sup> was a landmark decision because the court ruled that transgendered individuals are covered under Title VII's prohibition against sex discrimination using the analysis of the Supreme Court in Price Waterhouse vs. Hopkins<sup>6</sup> which held that sex stereotyping is a form of sex discrimination under Title VII. Until 2001, when Doe vs. United Financial<sup>7</sup> was decided the federal courts had consistently ruled that discrimination because of changing sex is not discrimination based on sex. In 2004, the Sixth Circuit Court of Appeals was the first federal appeals court to rule in favor of a transgendered plaintiff in Smith vs. City of Salem<sup>8</sup> and then again in Barnes vs. Cincinnati<sup>9</sup>.

Another recently decided case on the federal level is Schroer vs. James H. Billington.<sup>10</sup> The United States District Court for the District of Columbia upheld the plaintiff's claim of sex discrimination by the Library of Congress Judge Robertson held in that case that employment discrimination because of gender identity is sex discrimination in employment as prohibited by Title VII. One scholar on the subject has analyzed some legal dilemmas on the subject in the following terms:

*Now just wait a minute. Hold the phone. I hear all of the academic gender theorist groaning, but sex and gender are different! Sex is between the legs and gender is between the ears! Well, maybe so, but the fact that the two have differences doesn't mean that "sex discrimination" therefore doesn't cover "gender discrimination!" From a legal point of view, it would be discrimination, it is okay to boot Diane Schroer out the door because they discriminated against her gender, and not her sex. The academic notion that gender identity can be understood separately from sexual anatomy does not mean that "sex discrimination" is limited to sexual anatomy. In fact, that what the Price-Waterhouse decision was all about – sex discrimination does not end at the belt buckle.<sup>11</sup>*

In addition to holding that transgender employees are protected under a sex equals gender analysis and that they are protected based on the protected class of sex, Judge Roberston also found in favor of Schroer on the basis of "sex stereotyping", which the Supreme Court had held in Hopkins vs. Price Waterhouse<sup>12</sup> as sex discrimination under Title VII.

One scholar assessing the impact of the Schroer decision on transgendered employees has asserted that:

*This decision only directly affects transgendered employees working in the District of Columbia. Much more important for transgendered employees are the explicit state laws and court rulings prohibiting gender discrimination in more than 20 states and about 100 cities. However, the D.C. circuit courts are considered quite influential among federal courts. The fact that this court is now joining the Sixth Circuit (the federal appeals court covering Ohio, Kentucky and Tennessee) in favor of transgender employees, and that other circuits have given*

indications that they could rule similarly, including the First, Second, Third, and Ninth Circuits means that future complaints of discrimination could get a favorable hearing in the federal courts. In addition, it means that there is a major split in the federal circuits. A split in the circuits is often a precursor to a Supreme Court hearing.<sup>13</sup>

## **TRANSGENDERED INDIVIDUALS PROTECTED UNDER DISABILITY LAWS**

Three states Massachusetts, New York and New Jersey have interpreted state discrimination laws to include transgendered individuals. In the case of Enriquez vs. West Jersey Health Systems<sup>14</sup>, the plaintiff, Carla Enriquez, alleged that her employer, West Jersey Health Systems, fired her from the position of medical director of an outpatient treatment facility after she began taking steps to transition from male to female. Ms. Enriquez is a transgendered woman who was diagnosed with gender identity disorder in June 1997.

Ms. Enriquez was hired by West Jersey Health Systems in November 1995. According to the New Jersey Appeals Court, she began her external transformation in September 1996 and was shortly thereafter confronted by senior level employees regarding their dissatisfaction with that process. In July 1997, she was notified by her employer that her contract was terminated effective in 90 days. In October 1997, she was given a termination letter, told not to return and her meetings with patients were cancelled for the next three months.

Based on the employer's action, Ms. Enriquez filed a discrimination claim under the New Jersey Law Against Discrimination (L.A.D.) alleging that the termination was based on her sex and disability, among other claims. A trial court dismissed her claim saying that transsexualism was not a recognized disability and that transgendered people are excluded under the state's non-discrimination law.

The appeals court disagreed and reinstated her claims and held in favor of the plaintiff's claim for handicap discrimination, reversed the dismissal of plaintiff's claim and concluded that gender dysphoria can be a handicap under the L.A.D. law.<sup>15</sup>

In holding that gender dysphoria is a recognized disability under New Jersey's Law Against Discrimination (L.A.D.) the court stated:

*In this case we are not dealing with any physical disability, infirmity, malfunction or disfigurement which is caused by bodily injury, birth defect or illness. We are dealing with the portion of the statute which provides that a person can be handicapped if they suffer from 'a mental psychological or developmental disability resulting from anatomical, psychological, or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable medically or psychologically by accepted clinical or laboratory diagnostic techniques.*

*Therefore in this case, the plaintiff asks us to determine whether gender dysphoria is a handicap and is protected by the L.A.D. because it is "a mental, psychological or developmental disability resulting from psychological, developmental or neurological conditions which is demonstrable, medically or psychologically by accepted clinical or laboratory diagnostic techniques."<sup>16</sup>*

*In holding that gender dysphoria is a disability under New Jersey's L.A.D. law, the court also held: In addition, we to recognize that as part of her treatment protocol, plaintiff underwent sexual reassignment surgery, a process that most persons would not undertake unless necessary to eliminate great stress or extreme discomfort. Solely from the circumstances of the plaintiff's course of treatment we can infer sufficient impairment of plaintiff's emotional and mental wellbeing to constitute a disability under the L.A.D. Plaintiff's proofs were adequate to at least raise a fact factual issue for summary judgment purposes establishing that her condition was a disability under L.A.D. (Brill vs. Guardian Ins. Co of Am: *Supra*, 142 N.J. 520, 540 (1995)).<sup>17</sup>*

## **HUMAN RESOURCE MANAGEMENT PERSPECTIVES**

Given the fact that there has been increased legal protection offered to transgendered individuals particularly on the state and local level employers should be sensitive to a number of issues that could be the basis of

litigation and also how employers can address issues that arise during and after the transgender transition takes place, both for the transgendered individual, the organization and co-workers.

The most significant issues that employers should address are (1) bathroom usage and dressing rooms; (2) dress codes; (3) identification and records changes; and (4) health benefits.

1. Bathrooms and dressing rooms: If a transgendered employee has begun coming to work in the new role, he or she should use the restrooms designated for the new gender – women’s room for male to female transsexuals and men’s rooms for female to male transsexuals.

The use of a male restroom by a female to male employee should not be dependent on genital surgery but should reflect the individual’s gender presentation.<sup>18</sup>

2. Dress Codes: Since the gender transition process requires the violation of gender-normative dress codes, the issue arises as to the degree to which the employer can regulate a transgendered individual employee’s attire.

Courts have upheld an employers’ right to regulate employee dress and grooming so it is clear that employers can regulate a transgendered employee’s attire. With respect to transgendered employees, the employer can first develop gender neutral dress codes. Jillian T. Weiss has identified the following gender neutral codes. Employees are to (1) dress neatly, (2) have clean fingernails, (3) not wear sandals, (4) not wear fragrances, and (5) not wear jewelry on their faces, except for earrings.<sup>19</sup>

With respect to transgendered employees, the employer should establish for the transgendered employee and apply the same dress code that it would have for other employees of the same sex. Thus, if normal business attire is required, the rule should apply in the same fashion to transgendered employees in his/her new sex presentation as to non-transgendered employees.

3. Identification and Records Changes: The HRM department should be aware that court ordered name changes and other court recognition of a change in an individual’s identity is time consuming and complex, thus the HRM department should not await a court ordered name change, but include the individual’s name change in such databases as PeopleSoft. Additionally, from the employer’s perspective, legally a person has a right to use any name without a court order as long as they do not do so for purposes of fraud.<sup>20</sup>
4. Health Benefits: While a number of companies have included “gender identity” as a protected category, many health insurance plans exclude “transsexuals” from insurance contracts. The exclusion was for three reasons: (1) the experimental nature of medical treatments, (2) the lack of evidence of medical necessity, and (3) the onerous costs.<sup>21</sup>

### **CORPORATE GENDER TRANSITION POLICIES**

Janis Walworth identifying how companies have dealt with transitioning workers has identified some general guidelines for the effective transitioning of transgendered employees in the following terms:

*Because each workplace is different, the strategies that have been successful in one venue may not apply in another. A few generalizations may be made. Smooth transitions are marked by clear support from a management, open communication between transsexual employees and company representatives, and insistence that transsexual employees be treated with respect, the greatest success is attained when management emphasizes the importance of team work, the positive value of a diverse workforce and the need to accomplish assigned tasks. Difficulties have resulted when transsexuals have begun transitioning without discussing their situation with management, when employees have been discriminated against or fired for being transsexual or when harassment and hostility toward transsexual workers have been permitted.<sup>22</sup>*

Jillian T. Weiss has identified the responsibilities of the employee, supervisory management and co-workers in the transition process and has identified effective means to implement the gender transition process.

### **The Employee Transition**

1. Follow the gender transition plan without deviation. If changes are required, follow the procedures for amendments contained in the plan.
2. Respond appropriately to co-workers who make mistakes in references to names or pronoun of the new gender, or who ask inappropriate questions or make inappropriate comments, particularly during the initial phases of the gender transition plan.
3. Avoid making inappropriate disclosures of private medical or surgical information in the workplace.
4. Immediately report discrimination or harassing conduct to the responsible management official.<sup>23</sup>

### **Supervisory Management**

1. If supervisory management receives notice from an employee of his or her plans for gender transition, notify the local Diversity Manager if not already notified.
2. Follow the gender transition plan without deviation. If changes are required, follow the procedure for amendments contained in the plan.
3. Model appropriate norms of conduct by treating the employee with respect, using correct references to name or pronoun of the new gender, refraining from asking inappropriate questions or making inappropriate comments, and respecting employee confidentiality.
4. Cooperate in the investigation of discriminatory or harassing conduct and any employee guidance or corrective action.<sup>24</sup>

### **Co-Workers**

1. Treat the employee in transition with respect, using correct references to name or pronoun of the new gender, refraining from asking inappropriate questions or making inappropriate comments, and respecting the employee's confidentiality.
2. Particularly at the beginning of gender transition, it is normal for co-workers to make some mistakes regarding these matters. Do not take offense at respectful corrections offered by the employee in transition. Requests for guidance may also be made to the appropriate management official.
3. Do not approach the employee in transition to address complaints. Complaints should be made to the appropriate management official.<sup>25</sup>

## **FUTURE DEVELOPMENTS IN THE LEGAL STATUS OF TRANSSEXUALS**

JoAnna McNamara, in addressing the future legal status of transsexuals, has identified several issues. For groups seeking legal protection for transsexuals, she observes:

*There are two long-term strategies available for the transsexual. One is to seek to overturn, on constitutional grounds, the laws that specifically exclude him/her from coverage. The other is to seek to have laws passed to explicitly protect the transsexual. Currently, the transsexual community is following the second course and in the end, that may be the more rewarding avenue.*<sup>26</sup>

One problem the transgender community is going to have to address is the fact that even in states and localities where individuals are protected from employment discrimination based on sexual orientation, these laws do not include specific protection for transsexuals.

JoAnna McNamara illustrates how the state of Minnesota has included wording in its non-discrimination statute to include transsexuals. Subdivision 45 of that statute defines sexual orientation in the following terms:

[“Sexual orientation” means having or being perceived as having an emotional, physical or sexual attachment to another person without regard to the sex of that person or having an orientation for such attachment, or having or being perceived as having a self image or identity not traditionally associated with one biological maleness or femaleness. “Sexual orientation” does not include physical or sexual attachment to children by an adult.<sup>27</sup> As to the prospects for the future of legal protection for transsexuals, McNamara has concluded that:

*The courts have not been good avenues for transsexuals to seek relief from when they have been fired for being a transsexual. The current federal laws and most state laws are too restrictive for transsexuals to use to protect their jobs. A transsexual’s true best hopes are to try to obtain their employer’s voluntary cooperation and to get the laws changed to specifically include transsexuals.*<sup>28</sup>

## AUTHOR INFORMATION

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Dr. Trotter’s research interest include various facets of employment law and labor relations. In addition to teaching and research, Dr. Trotter is a Labor Arbitrator who has arbitrated extensively in the private and the public sectors on a wide range of issues.

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<sup>1</sup> “Employment Discrimination and the Transsexual”, JoAnna McNamara, <http://www.willamette.edu/~rrunkel/gwr/mcnamara>, p.1

<sup>2</sup> *Maffer v. Kolaeton Industry, Inc.* Nos. 124783194, 95-178, 1995 WL 168807, at 3 (N.Y. Sup. March 14, 1995) quoting “Relief” for Transsexuals, 4 *Yale Law and Policy Review* 125 (1985); “The Law of Transsexualism” 4 *Conn L.R.* 288 (1975); Transsexuals in Limbo, 31 *Maryland L.R.* 236 (1971)

<sup>3</sup> *Transgender Issues: A Fact Sheet*, p.1

<sup>4</sup> *Ibid.* p.1

<sup>5</sup> 378 F. 3d566 6<sup>th</sup> Cir. (2004)

<sup>6</sup> 490 U.S. 228 (1989)

<sup>7</sup> Case No. 1:10 CV1112 (N.D Ohio 2001)

<sup>8</sup> *Ibid* at 5

<sup>9</sup> 401F 3d 729 (2005) Civil Action No. 05-1090)

<sup>10</sup> August 29, 2008 U.S. District Court – District of Columbia

<sup>11</sup> Jillian T. Weiss, *Schroer vs. Billington* “What Does It Means for Transgender Employees?” p.5, the Bilerico Project, [http://www.bilerico.com/2008/09/schroer\\_v\\_billington\\_what\\_does\\_it\\_mean\\_f.php](http://www.bilerico.com/2008/09/schroer_v_billington_what_does_it_mean_f.php)

<sup>12</sup> 490 U.S. 228, 109 S.C. 1775 (1989)

<sup>13</sup> *Ibid.* at 11 p.6

<sup>14</sup> 342 N.J. Super.501 <http://lawlibrary.rutgers.edu/decisions/appellate/a2017-99.opw.html>

<sup>15</sup> New Jersey Appeals Court Finds Transgendered Doctor Covered by State Non-Discrimination Law, *Transgender Law and Policy Institute* <http://www.transgenderlaw.org/mdcaselaw/enriquez070601.htm>

<sup>16</sup> *Ibid* at 14 p.7

<sup>17</sup> *Ibid* at 14 p.9

<sup>18</sup> Janis Walworth, *Transsexual Workers: An Employer’s Guide*, Center for Gender Sanity Bellingham, Washington, pp. 82-84

<sup>19</sup> Jillian T. Weiss, *Transgender Workplace Diversity*, Book Surge Publishing, North Charleston, South Carolina, 2007, p. 39.

<sup>20</sup> *Ibid* at p.40

<sup>21</sup> *Ibid* at p.44

<sup>22</sup> Walworth *Ibid* at 18 p.68

<sup>23</sup> Weiss, *Ibid* at 19 p.53

<sup>24</sup> *Ibid* pp 53-54

<sup>25</sup> *Ibid* p.54

<sup>26</sup> McNamara, *Ibid* p.3

<sup>27</sup> *Ibid* p.22

<sup>28</sup> *Ibid* at 26 p.22