TRANSGENDER AND CONSCIENTIOUS OBJECTOR ISSUES IN THE WORKPLACE

Answers to Common Questions

Michael C. Terrell
mterrell@taftlaw.com
317-713-3590

Transgender Issues in the Workplace
What is Transgender?

• Transgender is an “umbrella” term that refers to many types of individuals, including transsexuals, cross-dressers, and other gender non-conforming individuals perceived to be gender atypical.

• In broadest sense, “transgender” encompasses anyone whose identity or behavior falls outside stereotypical gender expectations.

Gender Transition

• Gender transition is the process by which transgender people move towards living in the gender with which they identify.

• Some have medical treatment, most do not.

• Identification documents are not always changed.
Gender Transition

- Gender transition at work happens in different ways.
- Some begin by telling one’s supervisor first and develop a timeline.
- Others start presenting in a more masculine or feminine way and coworkers notice.

Until transgender person begins working in his/her new gender role, person should be considered a member of his/her original sex.

Once employee begins to present himself/herself in new gender role, employee should be considered a member of new gender.
Gender Transition Versus Sexual Orientation

- Sexual orientation refers to relative genders of an individual’s partners (i.e., heterosexual, gay, lesbian or bisexual).
- Transgender people can have any sexual orientation.
- Transgender is not a sexual orientation, it is a gender identity.

Relevant Discrimination Laws

- 18 states and the District of Columbia have laws that prohibit discrimination against transgender people.
- At least 200 cities and towns have banned gender identity discrimination, including Indianapolis and Bloomington, Indiana.
Relevant Discrimination Laws

• Although there are no federal laws protecting transgender individuals, EEOC takes position that discrimination because a person is transgender is gender discrimination.

• Therefore, EEOC will accept and investigate claims of discrimination based upon transgender status (or because of gender identity or a gender transition).

Non-Discrimination Policy

• It is imperative that employers create a transgender non-discrimination policy.
  – Comply with current law.
  – Recruitment/retention of trained workers.
  – An environment of fairness equals good morale.
  – Improves productivity of employees.
Key Transgender Issues

1. Restrooms
2. Harassment and Hostile Environment
3. Male/Female Boxes, Identification Cards, Background/Credit Checks, and Security Checks
4. Dress Standards

Guiding Principles

• Recognize self-identity, regardless of surgery and documentation.
• Understand and apply the concept of reasonable accommodation.
• Biases of customers or coworkers are not a valid reason for discrimination.
Restrooms

• Some states and municipalities have specific laws regarding restroom usage (e.g., New York City requires an employer to permit a transgender employee to use the restroom in accordance with his or her gender identity.)

• EEOC has found that transgender employees must be allowed to use restroom in accordance with his or her gender identity.

Restrooms

• OSHA prohibits employers from placing “unreasonable restrictions” on access to restrooms.

• As last resort, possible “middle ground” may be for transgender employee to use single-occupancy unisex restroom.
Restrooms

- An employer may make a reasonable inquiry into an employee’s gender only to determine the appropriate restroom rather than an invasive and overbroad investigation.
- EEOC recently issued guidance that it is unlawful for employer to inquire into surgeries or medical procedures as a pre-condition to restroom usage.

 Discrimination/Harassment

- 90% of transgender workers report some form of harassment or mistreatment.
- 15 to 43% of gay/transgender workers have experienced some form of discrimination.
- 8 to 17% of gay/transgender workers report being passed over or fired because of their sexual orientation or gender identity.
- 7 to 41% of gay/transgender workers report being verbally or physically abused.
Discrimination/Harassment

• Factors contributing to a hostile environment for a transgender person:
  – Refusal to use correct pronouns.
  – Refusal to use person’s preferred name.
  – Asking inappropriate personal questions.
  – Discussing personal business regarding transgender employees behind their backs, including intentionally “outing” a person.

Discrimination/Harassment

• Integrating transgender workers into the workplace is good for business.
  – Attracts and retains people most qualified for particular jobs.
  – Inclusiveness means an employer can draw from a broad range of talented people.
**Male/Female ID Boxes**

- This can come up in many different ways:
  - Check-off box for male or female on a job application form.
  - Filling out an I-9 form.
  - Entering a secure building, a person is asked for identification.
  - A background check reveals the person’s old name or gender.

**Solutions:**
- Do not discriminate when transgender status is discovered.
- Make allowances for people who earnestly fill out forms or give information that matches their gender identity.
Dress Standards

• Employers have a right to establish employee dress and grooming guidelines during work hours if they are reasonable and serve a legitimate business purpose.
• Such purposes include:
  – Maintaining a certain image with customers and competitors.
  – Safety (e.g., safety shoes, goggles or gloves).

Dress Standards

• Dress codes should avoid gender stereotypes.
• Employers can legally implement gender-specific dress codes as long as they are not arbitrarily enforced and do not favor or affect one gender over another.
Conscientious Objectors in the Workplace

Overview

• Steps an employer should take to address an employee who refuses to perform general work-related duties due to personal beliefs.

• Discussion will include:
  – Title VII protection and accommodating religious beliefs;
  – Supreme Court opinions; and
  – Examples of “reasonable accommodations”
Types of Conscientious Objectors

- Kim Davis refusing to issue marriage licenses.
- Pharmacists refusing to prescribe birth control pills.
- Doctors refusing to provide medical treatment to same-sex couples.

Title VII: What is Protected?

- Employees have right to request a reasonable accommodation for religious beliefs.
- Political beliefs are not protected pursuant to Title VII.
Definition of Religious Belief

• Title VII definition of religion:
  “The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

Reasonable Accommodation

• An employer must provide reasonable accommodation for an employee’s religious beliefs.
• Accommodation does not necessarily have to be the accommodation employee requests.
• If multiple accommodations exist, employer should offer alternative which least disadvantages employee with respect to his/her employment opportunities.
Examples of Reasonable Accommodations

- Flexible scheduling and leave policies
- Lateral transfers and voluntary demotions
- Modifying dress code or grooming standards

Examples that *MAY* Require Reasonable Accommodations

- Wearing religious head coverings
- Refusing to wear certain clothes
- Wearing certain hairstyles or facial hair
- Taking prayer breaks
- Refusing to work on the Sabbath
- Requiring time off to observe religious holidays
- Refusing to participate in office celebrations
Undue Hardship

- Would employer incur more than minor costs?
- Would accommodation violate terms of collective bargaining agreement?
- Would accommodation jeopardize customer relations, disrupt business operations, or require work to be shifted to other employees?
- Would accommodation require employer to violate state law or the rights of employees?

Noteworthy Cases

- *EEOC v. Abercrombie & Fitch*
- *Vandersand v. Wal-Mart*
- *Miller v. Davis*
Abercrombie & Fitch
Reasonable Accommodation

• Prior to Abercrombie, elements of religious discrimination case:
  – Observance or practice conflicting with an employment requirement is religious in nature,
  – Employer is aware of employee’s religious observance or practice, and
  – Religious observance or practice was basis for adverse employment action.

Abercrombie & Fitch
Reasonable Accommodation

• Abercrombie & Fitch has a “Look Policy” prohibiting caps.
• Applicant is a practicing Muslim who, consistent with her understanding of her religion’s requirements, wears a headscarf.
• Applicant is denied position because her headscarf violated Abercrombie’s Look Policy.
Abercrombie & Fitch
Reasonable Accommodation

- Court held applicant need show only that need for an accommodation was a **motivating factor** in the employer’s decision, **not that the employer had knowledge of need**.
- Employer may not make applicant’s religious practice a factor in employment decisions.
- Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Vandersand v. Wal-Mart

- Pharmacist at Wal-Mart refused to dispense “the morning-after pill.”
- Pharmacist alleged religious discrimination when placed on unpaid leave.
- Wal-Mart argued that it was an undue hardship because allowing employee not to dispense would violate state law and would require other employees to perform duties.
**Miller v. Davis**

- Davis is an elected official, not an employee.
- Two same-sex couples sought a marriage license in Rowan County Kentucky.
- Davis claimed that issuing marriage license ran contrary to her Apostolic Christian faith.
**Miller v. Davis: Background**

- Four deputy clerks shared her religious objection to same-sex marriage.
- One clerk was undecided.
- One deputy clerk was willing to issue the licenses, but Davis would not allow it because her name and title appeared twice on the licenses.

**Miller v. Davis: Governor**

- Kentucky Governor issued directive announcing that Kentucky would recognize all same-sex marriages as valid.
- In addressing religious beliefs expressed by some clerks, Governor stated that:
  - They could continue to have their own personal beliefs; and
  - Resign if they were unable to fulfill their duties prescribed by law.
**Miller v. Davis: Ruling**

- Court found as follows:
  - “No marriage licenses” policy discouraged Rowan County residents from exercising their right to marry.
  - Davis had potentially violated the protection clause by openly adopting a religious convictions at the expense of others.
  - Davis infringed upon plaintiffs’ rights without serving a compelling state interest.

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**Questions?**