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Transgender Complaints on the Rise: What Should Employers Do?

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The President, the EEOC and the Justice Department have announced that gender identity discrimination is prohibited sex discrimination under Title VII. Since these declarations, the number of lawsuits alleging gender identity discrimination continues to rise.

In a 2011 survey, the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that 90 percent of respondents, who were transgender, reported experiencing "harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it" and 26 percent reported that they had lost a job because they were transgender or gender non-conforming. Although efforts are at a standstill to enact federal legislation, the Employment Non-Discrimination Act (ENDA), that would specifically prohibit workplace discrimination based on gender identity and sexual orientation, last summer President Obama issued an Executive Order that made it illegal for federal contractors to discriminate against employees because of their gender identity or sexual orientation. Soon after, on September 25, 2014, the EEOC filed, for the first time in the agency's history, two separate lawsuits alleging sex discrimination under Title VII against transgender individuals. Then in December 2014, Attorney General Holder wrote in a memorandum to the U.S. Attorneys and Heads of Department Components that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status."

Robert E. Weisberg, regional attorney for the EEOC's Miami District Office, stated that "[w]ith workplace discrimination against transgender individuals reported at the levels [reflected in the 2011 Survey], the EEOC stands ready to enforce the rights of transgender employees secured by Title VII." Indeed, the EEOC issued a ruling on April 1, 2015, holding that common problems in the workplace such as bathroom restrictions and supervisors not respecting name changes can violate Title VII. In that case, the EEOC decided that a transgender woman, Tamara Lusardi, "was subjected to disparate treatment on the basis of sex" while working as a civilian employee at the Army's Aviation and Missile Research Development and Engineering Center in Huntsville, Alabama, when she was forced to use a singular-user bathroom and not allowed to use the women's restroom, when she was confronted by a supervisor when she did use the women's restroom, and when a supervisor repeatedly, and in front of other employees, referred to her by her former male name and with male pronouns. The EEOC also found the Army had harassed and subjected Lusardi to a hostile work environment on the basis of sex due to the bathroom restrictions and by allowing the "misgendering" to continue well after the supervisor knew her gender identity was female. The EEOC's decision is binding on federal agencies and departments, but it is not binding on courts. Nonetheless, such decisions can be persuasive authority for courts, and the decisions are certainly instructive for employers.

The EEOC's position is instructive because more transgender employees are filing lawsuits alleging gender identity discrimination. For example, Forever 21 was sued in April 2015 by a transgender employee, Alexia Daskalakis, who claims that after she informed her manager that she was transitioning from male to female, her manager told her that she was a "hot mess," "disgusting," looked "offensive," and that "in [the manager's] eyes and in Company's eyes, [she was] still a male." The manager allegedly told her she was still a male until she changed her birth certificate, and that she "used to be a hard worker when she was a guy, but not anymore." She contends the company did nothing when she complained. Similarly, on May 10, 2015, Barnes &

Noble was sued by an employee, Victoria Ramirez, who claims that once she informed her manager that she was transitioning from male to female, she was berated about her long hair, makeup and nail polish (saying her appearance was inappropriate for a "family store" and she should "think of the children") and she was not allowed to wear women's clothing, discuss her transition, use female pronouns or use the women's bathroom. Moreover, Saks & Company settled a lawsuit earlier this year with allegations that a manager suggested a transgender woman make her appearance more masculine, forced her to use the male bathroom and told her to "separate her home life from her work life."

These cases show that an employer's inclusion and diversity policies, training on diversity and discrimination, and efforts to ensure that all of its employees, particularly management, do not discriminate against transgender or transitioning employees are increasingly important. To reduce the risk of gender identity discrimination and liability for such activity, employers should do the following:

1. Train employees on avoiding discrimination and clearly communicate that "gender identity" and gender stereotyping discrimination are also not tolerated.
2. If they do not already have them in place, create policies that prohibit discrimination based on gender identity or otherwise modify their current policies to include it.
3. Keep up with local laws on this topic. Although ENDA has not been enacted, at least 18 states and the District of Columbia have anti-discrimination statutes that prohibit gender identity discrimination according to the ACLU. Employers should be aware of state laws and what states require in terms of accommodating transgender employees.
4. Inform employees that upper echelons of management take gender identity issues seriously. Such communication can greatly influence the tone of the entire workplace and be instructive for all levels of management.