

**GENDER IDENTITY ISSUES:
TRANSGENDER, TRANSSEXUAL,
AND
TRANSITIONING EMPLOYEES**

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I. INTRODUCTION

A. Gender Identity As A Spectrum

Gender identity issues arise more and more frequently today on campuses in both the student and employment arenas. In the employment context, gender identity generally first comes into play as institutions determine whether discrimination policy expansion is warranted, necessary, or perhaps even mandated by state or local laws.

What is generally less understood, even by those who have decided upon or have given advice about such policy expansions, for example, is the very nature of gender identity, and what is encompassed in that term. What is often viewed as a narrow category – just one possible protected basis among a host of others – is really a broad spectrum.

Consider the following possibilities across that gender-identity spectrum:

On one end of the spectrum, there are *career choices* that counter stereotypical gender assumptions, such as males in clerical or care-giving jobs or females in roadway construction or heavy machine operator positions. Next, consider *manners of expression* that contrast with traditional notions of masculinity and femininity, such as women with deep voices and abrupt or abrasive communication styles, or men with high-pitched voices or delicate hand gestures. Those manners of expression also include how we walk, how we sit, and even where we cross our legs.

Moving further along that spectrum, *physical appearance and grooming* can again challenge those same traditional notions, such as males with long hair or females with cropped haircuts, or men with waxed eyebrows and polished nails or women with bushy eyebrows and unshaved underarms. Then, consider women fully tattooed or men wearing makeup or false eyelashes. And next, give some thought to *apparel choices* that also counter the cultural stereotypes, such as women binding their breasts or wearing jackets with ties, or men wearing earrings and necklaces, carrying purses, or cross-dressing in female clothing.

Past the career, apparel, and grooming choices, consider *name changes*, as well as *living in one gender part of the time and another gender for the remainder*. Next consider *living a life fully in the gender opposite from birth sex*, or choosing to make *physical body alterations*, from

hormone treatment to outright surgical changes.

All of these examples – from the subtleties in individual expression noted above to the complexities involved in transsexualism – have a place on the gender identity spectrum. And because the workplace will encompass far more than the traditional notions of gender, far more distinctions than simply male or female, the challenge in the employment law context is predicting precisely what on that spectrum may find protection in the law. That said, grasping the difference between biological sex, gender identity, gender expression, and sexual orientation will, at the very least, better inform our campus decision-making and institutional advising.

B. Gender Identity Is Not Sexual Orientation

There exists a great deal of confusion about the difference between sexual orientation and gender identity. Sexual orientation, as defined below in Section II(A), refers to an individual's physical and emotional attraction to the same and/or opposite gender, such as bisexual, homosexual, or heterosexual. Unlike sexual orientation, which refers to *who we love (or are attracted to)*, gender identity refers to *who we are*.

“One reason that confusion [between sexual orientation and gender identity] persists is that most education about sexuality and identity issues has been done around sexual orientation.”¹ A common misperception is that transgendered individuals are gay or lesbian because of how they look (often like a feminine male or a masculine female), which are clear gender stereotypes of gay men and lesbians.² This confusion is likely to become less of a problem as more transgender individuals are willing to openly discuss their gender identities.³

C. Gender Identity Issues To Be Addressed

This paper explores the gender identity spectrum, takes a look at the legal landscape of protection for transgender employees, and addresses some of the practical implications involved with transgender employees working in the field of higher education.

II. WHAT DOES “TRANSGENDER” MEAN?

Transgender (or *trans*, as some prefer to say) is an umbrella term that is used to describe a broad range of individuals who experience and who may express their gender differently from what most people would expect. It includes those who may express a gender that is different from what is listed on their birth certificates and those who physically change their biological

¹ Human Rights Campaign, *Coming Out, What Does ‘Transgender’ Mean?*, *Sexual Orientation and Gender Identity*, available at http://www.hrc.org/Template.cfm?Section=Coming_Out_as_Transgender&Template=/ContentManagement/ContentDisplay.cfm&ContentID=21868 (last visited Mar. 14, 2006).

² See Gender Education & Advocacy, Inc., *Guide to Using the Gender Variance Model*, available at <http://gender.org/resources/dge/gea02007.pdf> (2001).

³ Human Rights Campaign, *supra*, note 1.

sex. As a broad term, it includes those who are transsexuals, transitioning, cross-dressers, or are otherwise gender non-conforming.⁴

In essence, *transgender* is just part of the broad gender identity spectrum.

A. The Gender Identity Spectrum

1. Vocabulary

The gender identity spectrum is, by its very nature, not easy to define in black and white terms. Its vocabulary is not standardized, and there may be numerous interpretations of any given term. The transgender vocabulary is, however, useful to fully understand the magnitude of the spectrum. Below is a selection of some of the more frequently used terms:⁵

- ♦ ***Gender Identity*** is our innate and deeply felt psychological identification of being a man or a woman. It's our sense of our own gender. This may or may not correspond to our bodies or the sex assigned to us at birth (*e.g.*, what's listed on our birth certificates).
- ♦ ***Gender Expression*** refers to all our external characteristics and behaviors that are socially defined as either masculine or feminine. It includes our appearance and how we present ourselves, such as how we dress, our mannerisms, our speech patterns, our hairstyles, and our social interactions.
- ♦ ***Transgender(ed)*** as an umbrella term, is a term preferred by some in the community. It refers to the entire community of those of us who have *gender identities*, *gender expressions*, or *gender behaviors* that fall outside of society's stereotypical gender norms. This includes the entire range of individuals who transcend the conventional definitions of "man" and "woman." Frequently, *transgender* is mistakenly understood to mean *transsexual*. Terminology that falls under *transgender* includes *cross-dresser*, *transitioning*, and *transsexual*.
- ♦ ***Cross-dresser*** refers to those of us who dress in clothing traditionally associated with members of the other sex. Most *cross-dressers* conduct their cross-dressing on a part-time basis. Unlike *transsexuals*, most *cross-dressers* typically do not wish to change their physical characteristics or gender expression permanently. (This term is preferred to the term *transvestite*, considered by many today to be pejorative.)

⁴ See Human Rights Campaign Foundation, *Transgender Americans: A Handbook for Understanding*, available at http://www.hrc.org/Template.cfm?Section=About_HRC&CONTENTID=29235&TEMPLATE=/ContentManagement/ContentDisplay.cfm (2005).

⁵ The definitions set forth here are based upon a compilation of the following valuable sources: *Id.*; Human Rights Campaign Foundation, *Transgender Issues in the Workplace – A Tool For Managers*, available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> (2004); Gender Education & Advocacy, Inc., *Guide to Using the Gender Variance Model*, available at <http://gender.org/resources/dge/gea02007.pdf> (2001); Transgender At Work, Definitions, Transgender Interest Group, *Basic Transgender Definitions*, available at <http://www.tgender.net/taw/defn.html> (last visited Mar. 14, 2006).

- ♦ **Transitioning** is the process through which an individual modifies his or her manner of expression and possibly his or her physical characteristics, in accordance with internal *gender identity*, to satisfy standards for membership in a gender other than the one assigned at birth. Some of us *transition* by living “in role” as a member of the opposite gender and some of us continue the *transition* by undergoing medical treatment to physically alter our bodies.
- ♦ **Transsexual** refers to those of us who desire to live as the opposite sex from our birth sex permanently. *Transsexual* individuals strongly dis-identify with their birth sex and often seek to change their physical characteristics and manner of expression to satisfy the standards for membership in another gender. This may or may not include hormone therapy and eventual **sex reassignment surgery** (sometimes called *gender confirmation surgery*). Those of us who are *transsexual* may be referred to as pre-operative (“pre-op”), post-operative (“post-op”) or non-operative (“non-op”).⁶
- ♦ **Intersexed** refers to those of us who are born with anatomy or physiology that differs from our cultural ideals of what is male and what is female, or that is not considered standard for either a male or a female. This term is preferred to the outmoded term, *hermaphrodite*.
- ♦ **Bi-gender** refers to those of us who feel that we have both a male and a female side to our personalities. *Bi-gendered* individuals often spend significant time in each role, with separate names, social circles, and gender identities.
- ♦ **Gender-bender** refers to those of us who present elements of both masculinity and femininity in appearance without trying to pass as the opposite sex.
- ♦ **Gender Identity Disorder/Gender Dysphoria** are terms for a psychological diagnosis recognized by the American Psychiatric Association, of severe distress and discomfort caused by the conflict between one’s *gender identity* and one’s sex at birth. (Not all *transsexual* people experience gender dysphoria or get diagnosed with *gender identity disorder*.)
- ♦ **Sexual Orientation**, which is not the same as our *gender identity*, refers to our physical and our emotional attraction to the same and/or the opposite gender. Examples include homosexual, bisexual, heterosexual, and asexual. *Transgender* is not seen as a *sexual orientation*. (While *gender identity* is who you are, *sexual orientation* is who you love or are attracted to.)
- ♦ **Benjamin Scale** is the scale published by Dr. Harry Benjamin in 1966 that categorized those with *gender identity* issues into several types. The scale measures how transgendered an individual is from 0 (low) to 6 (high).

⁶ See Transsexual Road Map, *The uses and limitations of transsexual categories*, available at <http://tsroadmap.com/mental/categories.html> (last updated August 27, 2005). It is noted, however, that some find categorization by surgical status to be troubling because it implies that sexuality is the most important categorization tool, giving the impression that sex is more important for transsexuals than for non-transsexuals.

B. The Transitioning Process

1. Generally

As mentioned earlier, transitioning is the process of modifying manner of expression and even perhaps physical characteristics in accordance with internal gender identity. It is the time period as well as the process. Sexual reassignment surgery or hormone therapy are not required, though many undergoing transition do choose those options.

Generally, the transitioning process includes standards of care involving the following seven steps:⁷

- ♦ Initial psychological testing;
- ♦ Ongoing psychiatric monitoring and counseling to assess extent of condition;
- ♦ Health evaluation for hormone therapy;
- ♦ Administration of hormones that are commonly attributed to individual's new gender;
- ♦ Continued monitoring to assess reaction to physical changes;
- ♦ Trial living period of at least one year to assess comfort level in new gender; and
- ♦ If transitioning individual so decides, continued administration of hormone therapy and possible surgical reconstruction.

2. In the Workplace

In the workplace, most transsexuals will approach management about their transition during their trial living period in their reassigned gender, a time period referred to as the *real life experience*. Employers, at this point, may be presented with a transsexual transition letter from the employee. Once this step has occurred, transitioning is far more likely to be successful, for both the employer and the employee, if the employee can maintain a stable income and position during the transition and if he or she has a supportive and understanding work environment.

Not surprisingly, numerous issues may arise at work for employees who transition. Some are quite obvious. Which bathroom should the employee use? What pronouns should be used? From personnel record changes to bathroom access to dress codes to co-worker and supervisor understanding to benefits, the issues may be viewed more as problems than need be. For many employers, this is simply because they have yet to encounter this type of situation. By developing workplace strategies, employers can assist – rather than impede – the process.

A key component of that assistance is for employers to develop written guidelines – whether in the form of an adopted policy or an institutional procedure or protocol – to cover the

⁷ Human Rights Campaign Foundation, *Transgender Issues in the Workplace – A Tool for Managers*, *supra*, note 5 at 7.

process for transitioning employees. These guidelines ought to make it clear to transitioning employees, as well as to their supervisors and staff, who is responsible when issues arise.⁸ Whether an employee's transition is "quick start," *e.g.*, where the employee's co-workers are notified on Friday of the upcoming transition and the employee comes to work on Monday in the new role, or gradual, *e.g.*, where the plan is disseminated to co-workers but the employee waits a period of time before coming into work in the new role, an employer's guidelines will help ensure success from both the employer's and the employee's perspectives.⁹

See Section IV(A), below, for specific details recommended for higher education employers to consider as they develop written guidelines to assist their transitioning employees.

C. Statistics on Transgender

1. Societal and Workplace Statistics

The Human Rights Campaign's *Transgender Americans: A Handbook for Understanding*¹⁰ states that "[v]ery little statistical data exists on the American transgender population. Most of the available figures are drawn from other countries."¹¹ Data from other countries suggest that, roughly, one out of every 30,000 adult males and one out of every 100,000 adult females seek sex reassignment surgery.¹² But because these figures address only one facet of the gender identity spectrum – those who desire to or have had surgery – they clearly do not present a complete picture of the prevalence of transgendered individuals living in the United States. Similarly, accurate statistics of transgendered individuals in the workplace are equally difficult to ascertain.

2. Select Examples of the Transgendered in the Culture

a. *Boys Don't Cry*, a 1999 movie based on the tragic story of the life of Brandon Teena (born Teena Brandon), a young transgendered male in a small Nebraska town who faced humiliation, rape, and murder once his friends discovered he was actually born a female.¹³

b. *Transamerica*, a 2005 movie that reportedly humanizes the transgender experience about a pre-operative male-to-female transsexual, Bree, who takes an unexpected journey when she learns that she had previously fathered a son.¹⁴

c. *Self-Made Man: One Woman's Journey into Manhood and Back Again*, a 2006 book by Norah Vincent, detailing the author's 18-month "undercover" investigation spent living life as a male, Ned.¹⁵

⁸ *Id.* at 15.

⁹ *Id.* at 16.

¹⁰ Human Rights Campaign Foundation, *supra*, note 4 at 9.

¹¹ *Id.*

¹² *Id.*

¹³ *BOYS DON'T CRY* (Fox Searchlight Pictures 1999).

¹⁴ *TRANSAMERICA* (Weinstein Company 2005).

¹⁵ Norah Vincent, *Self-Made Man: One Woman's Journey into Manhood and Back Again* (Viking 2006).

d. “The L Word,” a cable series that first aired in January 2004, now in its third season, following the lives and relationships of a close-knit group of lesbians who live in Los Angeles, and also featuring a female-to-male transgender character.¹⁶

e. “Soldier’s Girl,” a 2003 cable television movie, based on the true story of a young soldier who was beaten to death because he fell in love with a transgendered nightclub performer, Calpernia Addams.¹⁷

f. “TransGeneration,” a 2005 cable television eight-part documentary series that delves into the daily lives of four transgender college students at campuses across America, following these students over the course of one school year as they manage the challenges of academia and gender transition.¹⁸

g. “Normal,” a 2003 television movie of the story of a seemingly “normal” Midwestern factory worker, Roy Applewood, who stuns his wife, his children, and his community by revealing he wants to have a sex change operation, and who faces ostracism from his community and ridicule at his work.¹⁹

III. THE LEGAL LANDSCAPE OF THE GENDER IDENTITY SPECTRUM – WHAT PROTECTIONS EXIST FOR “TRANSGENDERED” EMPLOYEES?

A. Protections under Discrimination Laws

1. Federal Law

Discrimination in employment based on sex is prohibited under federal law by Title VII of the Civil Rights Act.²⁰ Title VII contains no express prohibition against discrimination based on gender identity or transgender status. Nonetheless, federal courts interpreting Title VII have issued a wide range of opinions as to whether the term “sex” can be interpreted to provide some degree of protection against gender identity or transgender/transsexual status discrimination in the employment context.

The United States Supreme Court’s decision in *Price Waterhouse v. Hopkins*²¹ is widely viewed as the watershed opinion for employees pursuing discrimination theories based on gender non-conformity. In *Price Waterhouse*, the Court expanded the definition of “sex” under Title VII to include socially expected gender stereotypes. Plaintiff Ann Hopkins, a heterosexual woman, was a senior manager at an accounting firm who was denied partnership because her employer felt that she should “walk more femininely, talk more femininely, dress more

¹⁶ *The L Word* (Showtime), available at <http://www.sho.com/site/lword/home.do>.

¹⁷ *Soldier’s Girl* (Showtime 2003).

¹⁸ *TransGeneration* (World of Wonder 2003).

¹⁹ *Normal* (HBO 2003).

²⁰ 42 U.S.C. § 2000e, *et seq.*

²¹ 490 U.S. 228 (1989).

femininely, wear make-up, her hair styled, and wear jewelry.”²² Six members of the Court held that this type of sexual stereotyping is discrimination based on gender, which it determined Congress intended to include in the definition of “sex.”²³ The Court said that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”²⁴

Some federal courts have limited the holding in *Price Waterhouse* to sexual stereotyping only, finding that transgender or transsexual individuals are not protected as a class under Title VII.²⁵ As a result, a transgender employee who characterizes his or her claim as one of discrimination based on gender stereotyping may be successful, whereas an employee who characterizes his or her claim as transgender or transsexual discrimination may not.²⁶ Thus, although the same conduct may be at issue in both cases, the employee’s ability to characterize that conduct to fit within the gender-based reasoning of *Price Waterhouse* is often predictive of his or her success.

In 2004, for the first time, a federal court rejected this type of reasoning as a distinction without a difference. In *Smith v. City of Salem, Ohio*,²⁷ a biologically male firefighter for the City of Salem, Ohio was diagnosed with Gender Identity Disorder (“GID”), which the Court noted is a disorder recognized by the American Psychiatric Association.²⁸ When he began expressing his female gender identification on a regular basis, including at work, he was criticized for not being “masculine enough.”²⁹ The plaintiff alleged that his employer then hatched a scheme to terminate him because of his transsexualism.³⁰ When he was later suspended improperly, he sued his employer for sex discrimination under Title VII.³¹

In rejecting the “sexual stereotyping” versus “transsexual status” distinction of other courts, the *Smith* Court reasoned:

[D]iscrimination against a plaintiff who is a transsexual – and therefore fails to act like and/or identify with the gender norms

²² *Id.* at 235.

²³ *Id.* at 250.

²⁴ *Id.* at 251.

²⁵ See, e.g., *Oiler v. Winn Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002) (rejecting Title VII plaintiff’s *Price Waterhouse* argument, finding that plaintiff, a biological male, was not fired because he did not conform to a gender stereotype, but rather was fired for “disguising himself as a woman.”)

²⁶ Cf. *Wood v. C.G. Studios*, 660 F. Supp. 176, 178 (E.D. Pa. 1987) (holding that Title VII does not extend to transsexuals) to *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (discussing Title VII in dicta in a case brought by a transgender prisoner under the Gender Motivated Violence Act, noting that Title VII would protect plaintiff in employment context because sexual stereotyping prohibited under Title VII). There are numerous federal court cases in which plaintiffs have successfully argued that sexual stereotyping is a prohibited form of sex discrimination. See *Federal Cases Recognizing that Discrimination on the Basis of Gender Non-conformity and/or Transgender Status is a Form of Discrimination on the Basis of Sex*, National Center for Lesbian Rights, available at <http://www.nclrights.org/publications/nonconform0904.htm> (September 10, 2004).

²⁷ 369 F.3d 912 (2004).

²⁸ *Id.* at 914.

²⁹ *Id.* at 915.

³⁰ *Id.*

³¹ *Id.* at 915-16.

associated with his or her sex – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on 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 Even if Smith had alleged discrimination *based only on his self-identification as a transsexual* – as opposed to his specific appearance and behavior – this claim too is actionable pursuant to Title VII Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sexual stereotyping.³²

Some commentators have suggested that the lack of uniformity in Title VII cases is demonstrative of the “classification” issues that transgender people face.³³ Title VII, and the law generally, is constructed to deal only with the binary categories of male and female, while transgender people, by definition, have a more fluid conception of sex and gender.³⁴ The more that an employee’s claim falls within the traditional constructs of this binary categorization, the more likely the employee’s claim is to succeed, and the converse seems to be true as well.³⁵ In other words, a male-to-female transsexual is more likely to succeed by arguing that she was discriminated against for not being “masculine” enough – and therefore not conforming to a binary gender norm – than by arguing that she was discriminated against because she is transsexual. The *Smith* decision seems to signal an end to this arguably artificial dichotomy, however, which will likely provide transgender employees with more legal recourse against their employers under Title VII.

2. Express State Statutory Protections for the Transgendered

According to the Transgender Law and Policy Institute, which tracks state and local legislation that prohibits discrimination based on gender identity and expression, at least eight states have express statutory provisions that prohibit gender identity-based discrimination: California, Hawaii,³⁶ Illinois, Maine, Minnesota, New Mexico, Rhode Island and Washington,

³² *Id.* at 921-22 (emphasis added).

³³ See Carolyn Coffrey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and the Legislatures*, 7 N.Y. CITY L. REV. 161, 167-168, Spring 2004.

³⁴ *Id.*

³⁵ See Andrea Gehman and Veronica D. Gray, *Sixth Annual Review of Gender and Sexuality Law: IV. Employment Law Chapter: Sexuality and Transgender Issues in Employment*, 6 GEO. J. GENDER & L. 575, 586-587, 2005.

³⁶ Hawaii’s discrimination law only prohibits discrimination on the basis of gender identity or expression in real property transactions, not in employment. *Cf.* HAW. REV. STAT. §515-3 to HAW. REV. STAT. §378-2. The Supreme Court of Hawaii rejected on technical grounds the Hawaii Human Rights Commission’s attempt to extend the application of the real property statute to the employment context. *RGIS Inventory Specialist v. Hawaii Civil Rights Comm.*, 104 Hawaii 158, 86 P.3d 449 (2004).

and also the District of Columbia.³⁷

The method for prohibiting gender identity discrimination by statute varies from state to state. Only Hawaii, New Mexico, Rhode Island and the District of Columbia include gender identity as a separately protected category.³⁸ Other states, such as California, include “gender” as part of the definition of “sex” in their employment discrimination statutes.³⁹ Under the California statute, the term “gender” incorporates the meaning of the term from California’s hate crimes law.⁴⁰ Under that definition, “gender” means “the employee’s or applicant’s actual sex or the employer’s perception of the employee’s or applicant’s sex and includes the employer’s perception of the employee’s or applicant’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee’s or applicant’s sex at birth.” The legislative history of AB 196, the 2004 California bill that enacted this statutory change, explains that it was intended to “benefit any person who does not possess traits or project conduct stereotypically associated with his or her sex.”⁴¹ California’s statute, therefore, codifies under state law the Supreme Court’s holding in *Price Waterhouse*. California further expressly requires employers to allow employees to “appear or dress consistently with the employee’s gender identity.”⁴²

Other states, such as Illinois, prohibit discrimination based on sexual orientation and include “gender identity” in the definition of sexual orientation.⁴³ Illinois amended its Human Rights Act in 2005, effective January 1, 2006, to add this gender identity-inclusive protection.

3. State Case Law

In states in which there is no express statutory basis for protecting transgender employees under discrimination statutes, some state court and administrative agency decisions have interpreted those laws to include such protections. Connecticut, Massachusetts, New Jersey and New York, for example, all have some judicial or administrative findings that transgender plaintiffs have causes of action under the respective state discrimination laws.⁴⁴

Before the enactment of AB 196 in California, the Ninth Circuit opined that a transgender

³⁷ See *Scope of Explicitly Transgender-Inclusive Antidiscrimination Laws*, Joint Project of the Transgender Law and Policy Institute and the National Gay and Lesbian Task Force, available at <http://www.transgenderlaw.org/ndlaws/nglftlpichart.pdf> (last updated in January 2006).

³⁸ See HAW. REV. STAT. §515-3; N.M. STAT. ANN. §28-1-7; R.I. GEN. LAWS §§28-5-3, 28-5-7; D.C. CODE § 2-1401.02.

³⁹ See CAL. GOV’T CODE §12926(p).

⁴⁰ *Id.*, incorporating California Penal Code section 422.56.

⁴¹ See Senate Judiciary Committee, 2003-2004 Regular Session, Committee Analysis of AB 196 (June 19, 2003).

⁴² CAL. GOV’T CODE § 12949.

⁴³ 775 ILL. COMP. STAT. 1-101, 1-103.

⁴⁴ See *Declaratory Ruling on Behalf of John/Jane Doe*, (Conn. Human Rights Comm’n 2000); *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002); *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 77 A.2d 365 (N.J. Super.), *cert. denied*, 170 N.J. 211, 785, A.2d 439 (N.J. 2001); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996).

person would be protected under Title VII's sex discrimination language.⁴⁵ Because California courts have long held that California's employment discrimination statute, the Fair Employment and Housing Act, must be interpreted consistently with Title VII unless Title VII offers less protection, many commentators believed that a California court interpreting the issue would necessarily find that the FEHA protected transgender employees, even before the enactment of AB 196.⁴⁶ Accordingly, even in states that do not have express statutory protections, to the extent that their state courts follow federal court holdings under Title VII in the absence of their own precedent, transgender employees may be protected at least as much as they are under Title VII.

B. Disability Laws Prohibiting Discrimination Based on Gender Identity Disorders

1. Federal Law

The Americans with Disabilities Act ("ADA") is the federal law that prohibits employers from discriminating against employees based on their disabilities. The American Psychiatric Association includes "gender dysphoria" in its list of mental disorders,⁴⁷ which would normally be sufficient to be considered a "mental impairment" under the Act. The ADA expressly excludes transvestism, transsexualism and gender identity conditions from the protections of the Act, however, lumping gender identity disorders in with sexual deviance, such as "pedophilia, exhibitionism and voyeurism."⁴⁸ Given the clear exclusionary language of the statute, therefore, litigation under the ADA has not appeared to have been seriously contemplated by transgender employees.

2. State Law

Several states have recognized protections for transgender employees under state disability discrimination statutes, including New Jersey, New Hampshire, Massachusetts and Washington, at least at the administrative agency level.⁴⁹ Many others, however, expressly exempt gender identity disorder as a disability, including Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas and Virginia.⁵⁰

⁴⁵ See *Schwenk v. Hartford*, *supra*, 204 F.3d at 1202 (discussing Title VII in dicta in a case brought by a transgender prisoner under the Gender Motivated Violence Act).

⁴⁶ See *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467 (1992); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590 (1989). For commentary, see, e.g., Harris, Sheryl, *Employment Discrimination Protections for Transgender People in California*, The Legal Aid Society – Employment Law Center, available at <http://www.transgenderlaw.org/resources/caoverview.htm> (2002).

⁴⁷ See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders III (1974).

⁴⁸ 42 U.S.C. § 12211.

⁴⁹ *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 77 A.2d 365 (N.J. Super.), *cert. denied*, 170 N.J. 211, 785, A.2d 439 (N.J. 2001); *Jette v. Honey Farms Mini Market*, 2001 WL 1602799 (Mass. Comm'n Against Discrimination 2001); *Doe v. Boeing Co.*, 846 P.2d 531, 536 (Wash. 1993); *Jane Doe v. Electro-Craft Corp.*, No. 87-B-132 (N.H. Sup. Ct. 1988).

⁵⁰ See Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, available at <http://www.transgenderlaw.org/resources/translaw.htm> (October 2003).

C. Local Ordinances Protecting the Transgendered

A plethora of local ordinances prohibit discrimination against the transgendered.⁵¹ Thus, even if there is no express state statutory protection or any state case law, there may be a local ordinance that protects employees.

D. Employer Policies that Prohibit Gender-based Discrimination

The Transgender Law and Policy Institute maintains a database of colleges, universities and employers that have non-discrimination policies based on gender identity and/or expression.⁵² As of May 2004, thirty-five of the Fortune 500 had written non-discrimination policies that included gender identity and/or expression, as did fifty-six other employers and twelve colleges and universities.⁵³ There is a general trend in corporate America to increase corporate diversity practices, which is seen as a way to maintain competitiveness, increase employee morale and decrease employee-based litigation.⁵⁴

IV. TRANSGENDER ISSUES IN THE HIGHER EDUCATION WORKPLACE – WHAT PRACTICAL CONSIDERATIONS SHOULD EMPLOYERS KEEP IN MIND?

Developing and adopting policies, procedures, or protocols (or adapting those already in place) to consistently represent the institutional position on transgender matters will better delineate, for both management and employees, the practical side of the equation. What follows below are some of those practical considerations that may prove useful in the continuing dialogue of transgender issues.⁵⁵

A. Developing and Implementing a Written Transition Process or Protocol

Guidelines that set out the institutional process for transitioning employees are extremely helpful and, at a minimum, should identify who is responsible if issues arise in this context. *Transgender Issues in the Workplace: A Tool for Managers*⁵⁶ recommends that, in addition, transition process guidelines should satisfy the following elements:

- ♦ Identify the primary point of contact in the institution who is responsible for helping the transitioning employee manage the workplace transition;

⁵¹ See *Scope of Explicitly Transgender-Inclusive Antidiscrimination Laws*, Joint Project of the Transgender Law and Policy Institute and the National Gay and Lesbian Task Force, available at <http://www.transgenderlaw.org/ndlaws/ngltftlpichart.pdf> (last updated in January 2006).

⁵² Available at <http://www.transgenderlaw.org/employer/index.htm> and <http://www.transgenderlaw.org/college/index.htm> (both last visited March 14, 2006).

⁵³ See Human Rights Campaign Foundation, *Transgender Issues in the Workplace – A Tool For Managers*, *supra*, note 5.

⁵⁴ *Id.*

⁵⁵ This paper addresses workplace issues but does not explore campus and student issues outside of the employment context, such as residence halls, classrooms, etc. For information addressing those issues, see Transgender Law & Policy Institute, *Best Practices for Transgender Students, Ways that Colleges and Universities Meet the Needs of Transgender Students*, <http://www.transgenderlaw.org/college/guidelines.htm> (2005).

⁵⁶ Pp. 15-16.

- ♦ Set out the general schedule for implementing transition-related workplace changes, such as administrative record changes, name changes, etc.;
- ♦ State what the transitioning employee can expect from his or her supervisors and other members of management;
- ♦ State management's expectations of staff, of the transitioning employee, and any employee resource groups, if applicable, in facilitating successful transitions; and
- ♦ Be flexible enough to tailor to the needs of individual transitioning employees, but specific enough to give the necessary framework to managers and supervisors to eliminate confusion.

Additionally, institutions may want to consider developing guidelines that also serve to provide some measure of accountability, list consequences for noncompliance, and require a follow-up component to ensure that transitions proceed smoothly.⁵⁷

B. Adding Gender Identity and Gender Expression to Policies Prohibiting Discrimination (If Not Already Present)

The trend at colleges and universities is to add protections for gender identity and gender expression to institutional policies prohibiting discrimination. Such decisions ought to be dependent upon or influenced by such factors as state or local law or the institution's political climate. It is interesting to note a minor point of semantics here, when examining how that additional protection is provided. Some institutions protect each as a separate category – gender identity *and* gender expression – while some define gender identity to *include* gender expression. There are also those institutions that have discrimination protection based on sexual orientation, and they use sexual orientation as the broad term to encompass gender identity or gender expression. In other words, gender identity discrimination is protected under the sexual orientation umbrella. Defining gender identity or expression under sexual orientation can be viewed by some in the transgender community as either 1) an indication of the institution's misunderstanding of the difference between sexual orientation and gender identity or 2) as an indication of the institution's desire to either limit the protection afforded to its transgender employees in jurisdictions where sexual orientation is *not* protected, or to expand that protection to its transgender employees in jurisdictions where sexual orientation *is* otherwise protected by law.

The following practical considerations may be useful primarily for institutions seeking to expand (or having just expanded) their policy coverage to include gender identity and gender expression:

- ♦ Do not overlook adding gender identity and gender expression to any separate

⁵⁷ See also, Mary Ann Horton, *Checklist for Transitioning in the Workplace*, Transgender At Work, available at <http://www.tgender.net/taw/tggl/checklist.html> (2001), that outlines in great detail the steps involved in an on-the-job transition, including steps for advance preparation, the day of the announcement, after the announcement, and the day of transition.

policies that may already be in place prohibiting harassment and retaliation.

- ♦ Determine whether the institution should add two additional categories of protection – identity *and* expression – or if it will define expression under identity.
- ♦ If considering defining gender identity and expression under the umbrella of the sexual orientation term, understand the difference and any possible consequences that such a decision may have.
- ♦ As always, work in conjunction with necessary stakeholders as generally required by the institution's procedures for policy additions.
- ♦ Consider accompanying the policy expansion with a presidential statement, directive, or announcement. Additionally, consider whether issuing a press release to make the announcement would be beneficial, especially in light of the institution's diversity initiatives.
- ♦ Consider partnership with other trans groups on campus, even if not specifically employment-related, in disseminating news of a policy change.
- ♦ Ensure that the institutional web presence contains the latest policy updates.
- ♦ Ensure that all other university pronouncements, declarations, publications, and even EEO notations and taglines are updated institution-wide (electronically and hard copy) to include the policy change. Additionally, do not overlook non-employment related materials, such as course catalogues, student handbooks, and even admission applications.
- ♦ Determine whether local ordinances and state law address these issues and, if so, how such authority would impact the institution's practices or policies in this regard.

C. Protecting Confidentiality in the Work Setting

Though many individuals who identify as transgender or are transitioning are willing to speak openly about their situations, institutions are well-advised to treat the transgender status of every employee as a confidential, private matter. Personal and intimate details of an individual's gender status do not need to be disclosed. Toward this end, institutions should consider:

- ♦ Appropriately training Human Resources staff to maintain this confidentiality.
- ♦ Appropriately training supervisors and others in management in each case of a transitioning employee about this confidentiality protection, and reminding them that it is up to each employee to decide what to disclose and to whom.
- ♦ Whether a policy statement or a protocol on this confidentiality provision is needed.

D. Providing and Ensuring Necessary Training and Education

Training and education are critical components of all successful workplaces. Adding gender identity and transgender training into the employment-related educational program ought to be a consideration for higher education institutions. The following points are useful reminders if gender identity and gender expression are added to an institution's protected bases:

- ♦ Ensure that the topic of gender identity and gender expression discrimination is also included as a component of the institution's offered trainings and workshops. Make sure that existing anti-harassment and non-retaliation training includes gender identity and expression, *e.g.*, add specific scenarios or case examples to interactive training sessions.
- ♦ Include gender identity and gender expression in any online training the institution offers or provides on the topic of discrimination. Consider whether updating orientation materials or videos would also be necessary. If the institution contracts with any outside vendors to provide online or other harassment or discrimination training, ensure that those programs are modified to include gender identity and expression as well.
- ♦ Provide gender identity and gender expression training and transitioning sensitivity training to specific work settings with a transitioning employee. Consider providing such training to other areas on campus as, for example, part of an awareness campaign, perhaps in conjunction with ally groups or campus diversity initiatives.
- ♦ Ensure that campus Equal Opportunity and/or Equity Offices receive the necessary sensitivity training and understand the full scope of trans-related issues.
- ♦ Ensure that campus Human Resources personnel receive the necessary sensitivity training and understand the full scope of trans-related issues.
- ♦ Ensure that campus Equal Opportunity and/or Equity Offices have the appropriate mechanisms in place to fully investigate cases of discrimination, harassment, and retaliation on the basis of gender identity or expression, *i.e.*, updating intake forms and securing sufficient training for investigators.
- ♦ Consider designating an institutional office (or individual person or title) to handle and manage concerns affecting transgender employees that may not rise to the level of discrimination. As an example, a simple matter of pronoun usage may need to be addressed. Since transitioning employees should be referred to with the pronouns they prefer, a sensitivity training session may be in order, and this designated office or individual could arrange for such a session to take place.

E. Dress Codes

Higher education institutions may have certain departments, divisions, shops, or other groups of employees that have dress code requirements. Such institutions are able, of course, to

set dress and grooming codes as long as there is a legitimate business justification. If those dress codes, however, are different for men and women, an institution may wish to review and modify them (if necessary) to avoid any sexual stereotyping. In the context of transgender employees, all employers should be consistent in their enforcement of any dress codes.⁵⁸ Accordingly, institutions may wish to consider:

- ♦ Drafting gender-neutral codes that require work attire to be professionally appropriate commensurate with the specific work department (rather than men to wear suits or ties, and women to wear skirts, dresses, stockings).
- ♦ Ensuring that the dress codes are enforced consistently, while also employing language in the policies that allow enough flexibility to accommodate transition from one gender to another.
- ♦ If necessary, updating manuals, brochures, orientation materials, videos, or any other such materials to incorporate new dress codes.

It is not uncommon for employers to ask transitioning employees, who are generally advised by medical professionals to dress for one year in the gender they are transitioning to, to present themselves consistently as that gender throughout the transition period.⁵⁹ An issue may arise, however, for individuals who are not transitioning but instead simply cross-dress.

Generally speaking, most cross-dressing occurs on an employee's personal time.⁶⁰ But what if an employee's after-hours or off-duty cross-dressing finds its way into the workplace when a co-worker, having seen the employee cross-dressed off-duty, announces it? An institution may wish to consider:

- ♦ Working with Human Resources personnel to ensure that they apply a consistent approach in advising their management clients not only on dress code issues but also on off-duty cross-dressing issues.
- ♦ Determining whether local ordinances and state law address these issues and, if so, how such authority would impact the institution's practices or policies.

F. Providing Locker Room Access

Though perhaps not applicable in most employment settings, especially in the field of higher education, the use of locker rooms can arise. In cases where locker room access is available for employees, an institution ought to consider:

- ♦ Granting a transitioning employee access according to the employee's full-time

⁵⁸ Human Rights Campaign Foundation, *Transgender Issues in the Workplace – A Tool For Managers*, *supra*, note 5 at 23.

⁵⁹ *Id.*

⁶⁰ See Transgender at Work, *Crossdresser Workplace Issues*, available at <http://www.tgender.net/taw/cd.html> (last visited Mar. 14, 2006).

gender presentation, provided there is no unavoidable nudity.⁶¹

- ♦ Whether alternative locker room accommodations are necessary on a case-by-case basis, keeping in mind the transitioning employee's respect, safety, and dignity.
- ♦ Alternative options such as individual showers and changing areas that ensure privacy to every worker; a separate changing schedule; or another nearby private area.⁶²

G. Restroom Access

Often the first practical issue to be raised in the context of an employee going through transition is the restroom issue. "Which bathroom will she use now?" is a frequent question, one posed by management or co-workers. Being able to use the bathroom that matches your own gender identity is vital.⁶³ Institutions that ensure that transitioning employees have access to the restroom that matches the gender the employee is currently presenting, are sometimes referred to as following the "principle of least astonishment." Some practical institutional considerations are as follows:

- ♦ Ensure that a transitioning employee has access to that restroom matching his or her new gender effective on the day of the workplace transition, the day that the employee first begins presenting in his or her new gender role. This is regardless of what stage the employee is in with respect to his or her personal transition process.
- ♦ As part of the written guidelines for transitioning employees, include language such as: "Transitioning employees are to use (or *individuals* if the guidelines are broad enough to encompass students or guests) the restroom facilities that correspond to the gender in which they are presenting."
- ♦ If any co-workers object to the transitioning employee's use of the new restroom, an appropriate accommodation for that objecting co-worker would be to designate a different restroom for him or her. The general consensus is that it would not be appropriate to isolate (and quite possibly ostracize) the transitioning employee by requiring him or her to use a separate restroom.
- ♦ Do not require a transitioning employee to prove his or her gender, *i.e.*, with an ID containing a gender marker of the desired bathroom.
- ♦ Consider designations of single-stall or gender-neutral restrooms, which require a mere change of the sign on the door and which all employees, regardless of gender, may utilize. If done, do not require transitioning employees to use only the gender-

⁶¹ See Human Rights Campaign Foundation, *Transgender Issues in the Workplace – A Tool For Managers*, *supra*, note 5 at 18.

⁶² *Id.*

⁶³ See Transgender at Work, *Restroom Access Issues*, available at <http://www.tgender.net/taw/restroom.html> (2005).

neutral single-stall restrooms.⁶⁴

- ♦ Consider creating or designating multi-stall gender-neutral restrooms, especially in new construction. Though not typical in our American culture, its implementation would be progressive and is argued by some to benefit all individuals, not just transgendered individuals, and could provide substantial cost savings.
- ♦ Remind transitioning employees that they have the full support of Human Resources and the particular department's management, and advise transitioning employees of whom to contact should restroom issues arise.
- ♦ List gender-neutral restrooms on websites and on campus maps.
- ♦ Determine whether local ordinances and state law address these issues and, if so, how such authority would impact the institution's practices or policies.

H. Personnel and Administrative Records

For many transgender individuals, a name change reflecting a different gender is a significant part of being able to express a true gender identity.⁶⁵ In many states, obtaining a legal name change is not burdensome, ranging anywhere from simply holding oneself out to the community with a different name (as long as it is not for fraudulent purposes), to submitting a form and paying a fee, to publishing the change in the newspaper, to petitioning the court for a change.⁶⁶ It is important for institutions to determine if laws in their jurisdiction govern their Human Resources departments' actions.

Many states have specific laws or administrative procedures that provide for transsexuals to obtain new or amended birth certificates indicating their new gender and, perhaps, a new name, after sex reassignment surgery.⁶⁷ Because state laws vary regarding changes on governmental issued documents, institutions ought to, in light of their jurisdictional laws, develop a system for changing internal personnel and administrative records. The following information may be helpful as institutions consider how best to address these issues.

- ♦ A random sampling of universities' practices revealed that if an individual provided documentation of any legal name or gender change or a social security card or a driver's license with either a new name or a new gender marked, most institutions would change the individual's name or gender in their record-keeping systems.

⁶⁴ See *Peeing in Peace: A Resource Guide for Transgender Activists and Allies*, Transgender Law Center, pages 13-15, available at <http://www.transgenderlawcenter.org/> (2005), then follow "Peeing in Peace a new resource guide" box and hyperlink.

⁶⁵ See Human Rights Campaign, *Transgender Name Changes*, available at http://www.hrc.org/Template.cfm?Section=Frequently_Asked_Questions5&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18686 (last visited Mar. 14, 2006).

⁶⁶ *Id.*

⁶⁷ See Human Rights Campaign, *Transsexuals & Birth Certificates*, available at http://www.hrc.org/Template.cfm?Section=Frequently_Asked_Questions5&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18685 (last visited Mar. 14, 2006).

- ♦ For transitioning employees, on the day of transition, update all possible references to the employee's name. This includes nametags, letterhead, door name plates, business cards, photo ID, e-mail, organizational charges, online phone directory, phone lists, computer accounts, personnel records, website references, brochures, college or department marketing materials, travel accounts, professional association memberships or list-servs, etc.
- ♦ For institutional records that ask an employee to disclose gender, a fill-in-the-blank line, rather than male or female check boxes, is more sensitive to transgender employees.⁶⁸ Likewise, any institutional surveys that the administration or Human Resources departments circulate may also contain check boxes that, for consistency's sake, institutions may wish to similarly modify.

I. Providing Benefits

Institutional benefits provided to employees may take on a new dimension with transgender employees. Health insurance, leave and flexible schedules, and spousal benefits are all items that may raise practical issues in the transgender context. For example:

- ♦ Consider health insurance. Many plans have a "transgender exclusion" that disqualifies both treatment and surgery. Institutions may wish to consider whether there are any possibilities available to modify that coverage.
- ♦ Consider spousal benefits, such as health insurance or reduced tuition. Since transgender employees may be married before transition, the issue arises of whether to cover or extend benefits to the employee's spouse once the employee transitions. Transition or even surgery does not necessarily legally terminate a lawful marriage. Institutions should check the laws in their jurisdictions. It may be that the employee will now have a legal spouse of the same gender and, thus, extending benefits may be appropriate. Institutions should not assume that spousal benefits coverage automatically terminates upon sex reassignment surgery. In institutions where benefits are provided to domestic partners, a transgender employee who now finds him- or herself in a same-sex marriage may choose to take steps to provide proof of domestic partner registration in an effort to maintain spousal benefits.⁶⁹
- ♦ Consider leave time and flexible schedules. For many transsexual employees, additional leave time may be necessary to accommodate varied appointments such as for therapy, hair removal, laser treatments, doctor visits, surgery, and other treatments. As mentioned above in Section III, the ADA has exempted transsexualism and other gender identity conditions; therefore reasonable accommodation in the ADA context will generally not be required unless state law provides otherwise. Institutions may wish to adopt practices that allow greater flexibility in this regard.

⁶⁸ This, of course, is applicable also to student records or admission applications.

⁶⁹ Institutions may wish to consider extending benefits to domestic partners if they do not already do so, although that inquiry and the host of associated issues are beyond this paper's scope.

V. CONCLUSION

As institutions strive to create and maintain an atmosphere of support and acceptance for all employees, understanding the interplay between the gender identity spectrum and the legal protections that may or may not be afforded will be of growing importance. Likewise, that increased understanding will lead to more informed decision-making on such institutional matters as policy expansions, administrative procedures, and other practical considerations affecting transgender communities.

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