Changing Roles

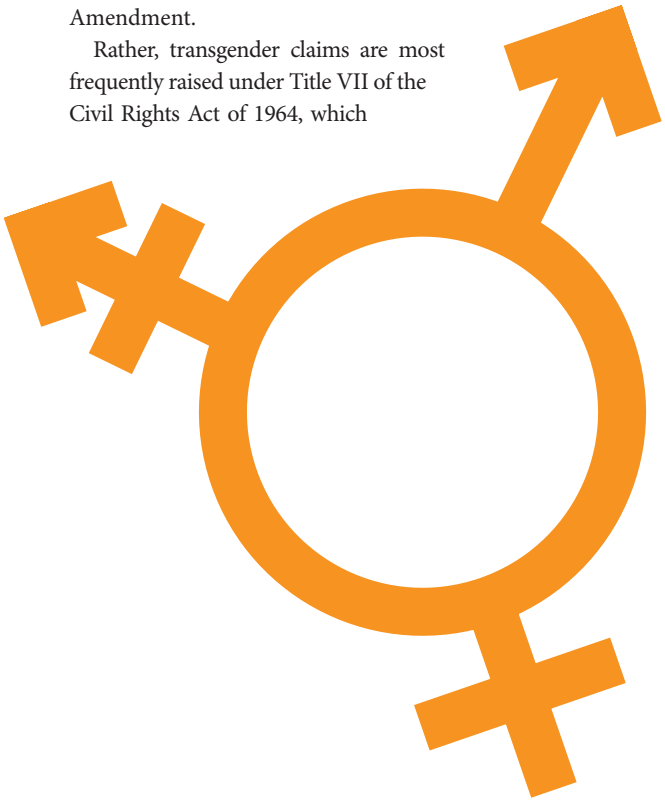
Transgender Law in Ohio

BY TAMI HANNON & AMI IMBROGNO

Transgender issues have been a hot topic recently, particularly with the announcement by Target that customers may use the restroom corresponding with their gender identity. However, considering the paucity of law on the topic, how can one advise clients as to the best practices for responding to the myriad of questions raised by this issue?

While "gender dysphoria" (previously "gender identity disorder") is a recognized medical condition, the ADA does not protect transgender status not related to an underlying physical impairment. 29 C.F.R. §1630.3(d)(1). Furthermore, gender identity is not a protected class under the Fourteenth Amendment.

Rather, transgender claims are most frequently raised under Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against any individual "because of…sex." However, "sex" is not defined within this statute, which has spurred much litigation over its meaning. While this article largely addresses workplace discrimination, the courts interpret other federal laws that prohibit discrimination based on "sex" by reference to Title VII. As such, this analysis also applies to areas such as education (Title IX) and Fair Housing.



An analysis of transgender issues under Title VII begins with *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), which was not about transgender individuals at all, but addressed "traditional" gender discrimination. Hopkins was told that she had a better chance of making partner if she "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely" and did things like "wear makeup, have her hair styled and wear jewelry." *Id.* at 1782. As a result, she filed suit under Title VII for gender discrimination, claiming that her promotion to partner was delayed because she was not "feminine" enough.

In affirming judgment for Hopkins, the U.S. Supreme Court confirmed that gender discrimination includes discrimination for failing to conform to the stereotypical idea of how a person of a particular gender should behave. *Id.* at 1791. As a transgender individual may not fit into the stereotypical idea of how one of his or her biological sex should appear or behave, *Price Waterhouse* allowed for the law to develop in the area of transgender discrimination.

Since *Price Waterhouse*, the Sixth Circuit has made clear that a transgender plaintiff may bring a claim based on a *Price Waterhouse* theory of failure to conform to a gender identity stereotype, though it has rejected the idea that transgender status itself is protected under Title VII.

The most prominent case extending *Price Waterhouse* to transgender law was *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004). Smith, who was born a male, worked as a lieutenant in the City of Salem Fire Department. After working there about seven years, Smith was diagnosed with Gender Identity Disorder and began "expressing a more feminine appearance on a full-time basis." Following comments from coworkers that Smith was not "masculine enough," Smith advised the supervisor of Smith's diagnosis and treatment, leading to a decision by the city that Smith would be terminated. Smith learned of the plan and obtained legal counsel. Several days later, Smith was suspended for an alleged violation of city policy. Smith claimed the suspension was retaliatory and filed a Title VII action in federal court alleging that the city's actions constituted gender discrimination as defined by *Price Waterhouse*. When the district court granted the city's motion to dismiss, Smith appealed.

The Sixth Circuit reversed the order dismissing the case, holding that "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." *Smith* at 575.

Despite *Price Waterhouse*, a valid claim cannot be stated because an employer merely disliked a person based on his or her status as a transgender person, or because an employer disagrees with the concept that one can change his or her gender identity. In *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), Vickers was

harassed because his co-workers believed him to be homosexual. The court held that Title VII does not prohibit people who are perceived as or identify as homosexuals from bringing claims, but they must allege that they did not conform to a gender stereotype in an observable way in the workplace. Though the court felt the harassment was "unacceptable and repugnant," it was not prohibited by Title VII.

Examples of what courts have considered "gender stereotyping" include:

- Comments that a male to female transgender individual lacked "command presence," should stop wearing makeup and should appear more masculine. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005);
- Refusing to refer to a male employee by his new husband's last name, which the employee adopted as his own. This was "gender stereotyping" as taking a spouse's surname is traditionally a female practice. *Koren v. Ohio Bell Telephone Co.*, 894 F.Supp.2d (N.D. Ohio 2012). (While this case addressed sexual orientation, it can be extended to transgender individuals who wish to be referred to by a name traditionally associated with the opposite gender.);
- Terminating a male-to-female transgender employee who stated her intention to dress as a woman at work. *EEOC v. RG & GR Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594 (E.D. Mich. 2015).

In contrast, a lesbian employee who claimed to exhibit a "non-gendernormative" style of dress was not able to state a claim under Title VII, as there was no evidence that co-workers or supervisors had ever commented about her style of dress or that her style of dress affected the workplace in any way. *Revely v. Cincinnati State Technical and Community College*, 2014 WL 5607605 (S.D. Ohio 2014).

One often discussed issue is restroom usage. Few courts have directly considered this issue, and it has not been addressed by the Sixth Circuit. Title VII law currently appears to permit decisions on restroom usage to be made based on biological sex. However, OSHA requires employees to be granted access to restrooms based upon their stated gender identity. As such, advising clients on restroom assignments should be made with OSHA requirements in mind. (Title IX law is more divided on the issue, with a push toward allowing usage based on gender identity.)

A quickly following question is whether an employer can request evidence of an employee's transgender status or progress through sexual reassignment surgery before permitting him or her access to gender specific facilities. The courts have not yet addressed this issue. OSHA's best practices prohibit requesting medical or legal evidence of gender identity (as do federal laws governing housing and prisons). The ADA limits any request for medical information to requests that are "job related and consistent with business necessity." Unless gender is a specific requirement for a job, it is doubtful such a request would meet with the ADA's requirements. An employer can potentially consider other alternatives to assess the genuineness of the employee's statement, such as whether the employee appears as the opposite gender outside of work. It may also be permissible to have a transitional period to allow everyone to adjust to the new situation. The best advice for a client is to work with the transgender individual and determine the best process for proceeding.

There is also the issue of how to address "objecting" coworkers or patrons. While the issue has not been decided by our courts in the context of transgender law, the Sixth Circuit generally prohibits one individual's views to be used to permit discrimination against another individual. For example, employees are not permitted to reject an employer's anti-discrimination policy based on a religious objection to a particular lifestyle. This case law will likely extend similar protections to transgender individuals.

At time of writing, 19 states plus the District of Columbia have anti-discrimination laws that protect transgender people. Ohio currently does not have any statewide law regarding discrimination of transgender people, but this may be changing. HB 289 was introduced on November 15, 2015, and referred to the Community and Family Advancement Committee, and SB 318 was introduced on April 25, 2016. Both of these bills, if passed as introduced, would expand protections to both transgender and homosexual people in a variety of areas.

Both bills prohibit discrimination based on gender identity or sexual orientation for housing, government contracts, funding domestic violence shelters, community school admissions, and other areas. Most notably for purposes of this article, the bills would make it illegal for employers to base payment of wages on gender identity expression or sexual orientation, and employers will not be able to fire, refuse to hire, refuse to promote, or partake in other adverse employment actions based on a person's gender identity expression or sexual orientation. Employers will not be allowed to ask for information about gender identity or sexual orientation on applications. The bills also remove homosexuality and gender identity disorder from the definition of a "physical or mental impairment" under the Ohio Civil Rights Act. As these bills have just recently been introduced, it is difficult to tell what changes will be made to them, if any, before and if they are passed. Further, several Ohio municipalities, including Cleveland, have enacted their own anti-discrimination protections that include transgender individuals, though remedies are often limited.

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