Transgender Discrimination Protection Under Employment Laws In New York

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Recent events and rumors regarding Olympian, celebrity and Kardashian-family dad Bruce Jenner potentially transitioning from male to female have highlighted issues involving gender-identity in popular culture. However, many people are likely unaware that studies show individuals who identify as transgender are four times more likely to live in extreme poverty, have double the rate of unemployment as the general population, and approximately 90 percent of the transgender population has experienced discrimination in the workplace. See Grant, Jaime M., et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011. The following represents a brief overview of transgender protections in the workplace that cover the State and City of New York.

Federal Law

There are currently no federal laws expressly prohibiting employment discrimination on the basis of an individual's status as transgender. However, under Title VII of the Civil Rights Act of 1964, an individual's transgender status may be protected depending on the circumstances. Over the last couple of decades, many individuals have vindicated their rights under Title VII – not by directly claiming "transgender" to be a protected group – but by alleging discrimination on the basis of gender stereotyping. The Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (superseded by statute on other grounds), was pivotal in allowing individuals to assert such claims. In Price Waterhouse, the plaintiff was a female senior manager who claimed she was repeatedly passed over for partnership on the basis of her gender, while the defendant claimed that the decision was made because of her character. The plaintiff, however, provided evidence that "some of the partners reacted negatively to Hopkins' personality because she was a woman." Id. at 235 (noting that partners described her as "macho," and that she "overcompensated for being a woman," and that she should take "a course at charm school."). The Court went on to hold that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Following Price Waterhouse, several federal courts have found that an individual may maintain a Title VII gender discrimination claim under the "sex stereotyping" theory in the context of a plaintiff's transgender or transsexual status. See, e.g., Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) ("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."); Schroer v. Billington, 577 F. Supp.2d 293 (D.D.C. 2008) ("Ultimately, I do not think that it matters for purposes of Title VII liability whether the [defendant] withdrew its offer of employment

because it perceived [the plaintiff] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.").
The U.S. Equal Employment Opportunity Commission ("EEOC") has lent strong support to this proposition as well. In Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012), the complainant, who at the time presented as a male, applied to work for the Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF"). The ATF offered Ms. Macy the job. Ms. Macy then informed the ATF that she would be transitioning from male to female. Shortly thereafter, the ATF informed Ms. Macy that budgetary concerns precluded them from hiring her. The EEOC held, in no uncertain terms, that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."

New York State Law

New York has no state law directly prohibiting discrimination on the basis of gender identity or gender expression. However, several courts have applied the New York State Human Rights Law, N.Y. Exec. Law §§ 290, et seq. ("NYSHRL") to transgender individuals in the same way as federal courts applied Title VII. See, e.g., Hispanic Aids Forum v. Estate of Bruno, 16 A.D.3d 294 (1st Dep't 2005) ("[A]n anatomical male who puts on what he believes to be the trappings of femininity, and is treated differently for doing so, is experiencing sex discrimination, under Title VII and no less under New York Executive Law."); Buffong v. Castle on Hudson, 12 Misc.3d 1193(A), at *1 (Westchester County, Aug. 9, 2005) ("Case law supports the view that a transgendered person states a claim pursuant to New York State's Human Rights Law on the ground that the word 'sex' in the statute covers transsexuals.").

Over the past decade, efforts have been made to add statutory protections for transgender individuals under the NYSHRL. The Gender Expression Non-Discrimination Act ("GENDA") was first introduced to the State Assembly and Senate in 2003, and has passed the Assembly several times since 2007, but has not yet been brought to a vote in the State Senate. GENDA, as drafted, would amend the NYSHRL to "prohibit[] discrimination based on gender identity or expression." Finally, in 2009, then-Governor David Paterson issued Executive Order No. 33, which prohibits discrimination against any employees of New York State agencies on the basis of their gender identity or gender expression.

New York City

New York City Law is extremely clear on this issue and unambiguously provides protection against discrimination on the basis of gender identity. Like the laws described above, the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101, et seq. ("NYCHRL") prohibits, among other things, employment discrimination on the basis of gender. However, NYCHRL defines gender as including "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." Id. at § 8-102(23).

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