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Employment Law

Noble Step for Transgender Employees Protected Under the ADA

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In 1980, the American Psychological Association added "Gender Identity Disorder" to its third volume of the Diagnostic and Statistical Manual (DSM). Affecting approximately 0.014 percent of transgender persons, gender identity disorder or gender dysphoria is defined by the DSM as persistent cross-gender identification coupled with clinically significant distress in social, occupational or other important areas in functioning.

Common complications of the disorder include depression, emotional distress, isolation and suicide. Although the number of transgender persons in the United States is difficult to measure, data compiled by the UCLA School of Law's Williams Institute, estimates that 1.4 million adults in the United States identify as transgender—meaning that as many as 20,000 Americans are struggling with gender identity disorder, and likely many more who do not report or self identify as transgender.

Despite its place in the DSM, gender identity disorder was historically exempt as a "disability" under the Americans with Disabilities Act (ADA). The ADA explicitly exempts from its definition of disability "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders." Remarkably, lawmakers at the time felt that allowing gender identity disorders to be protected under the ADA would result in protection for employees engaging in activities employers deemed to be "immoral." However, in a less Neanderthal approach to gender identity, the U.S. District Court for the Eastern District of Pennsylvania rejected an employer's motion to dismiss holding that, after being refused accommodation for gender identity disorder, a transgender employee sufficiently stated a claim under the ADA, see *Blatt v. Cabela's Retail*, No. 5:14-cv-04822 (E.D. Pa. May 17).

According to the decision, in 2006, Kate Lynn Blatt was hired (and then fired) as a merchandise stocker at Cabela's Retail Inc., a sporting goods store. Blatt, a transgender woman, informed her employer that she suffered from gender dysphoria and its effects, but so long as she was able to live openly as a woman at her job, her condition would not affect her ability to work. Cabela's refused, forbidding Blatt from using the female bathroom or issuing a name tag displaying her female name. At one point, according to legal documents filed in the case, Blatt's supervisor told her she could not use the female restroom, even after she legally changed her name and gender designation from male to female, because "she could potentially rape or sexually assault a person

while accessing the female restroom."

While still employed at Cabela's, Blatt was also subjected to harassment from coworkers who allegedly called her a "ladyboy," "fag," "freak" and "sinner," according to Blatt's complaint. Blatt specifically requested use of the female bathroom as an accommodation, which her employer purportedly refused. Further, Blatt's supervisor required all employees to refer to Blatt as "James," her birth name, or face termination of employment. Eventually, Blatt was fired following an altercation with a co-worker who allegedly told Blatt, "You're not a real woman and you never will be."

After she was fired, Blatt brought suit under Title VII for sex discrimination and the ADA alleging that because her gender disorder substantially limits one or more of her major life activities—just as would any other disability—she should not have been fired for the accommodation she requested.

When bringing suit for sex discrimination under Title VII of the Civil Rights Act of 1964, courts have historically rejected gender identity as falling under "sex." In *Hively v. Ivy Tech Community College*, 129 FEP Cases 657, 7th Cir. App. (July 28, 2016), the Seventh Circuit rejected the idea that sex and gender identity are protected as the same class, relying on language in other legislation such as the Violence Against Women Act and Federal Hate Crimes Act that separates the two. And, although many courts have recognized gender identity discrimination as sufficient sex discrimination (see *Chavez v. Credit Nation Auto Sales*, (11th Cir. Jan. 14, 2016); *Schwenck v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)), most cases rely on the theory under *Price Waterhouse* (barring discrimination based on gender stereotypes) as opposed to recognizing an individual's status as a transgender person as a protected class in itself.

Although the court has yet to rule on Blatt's sex discrimination claim under Title VII, her success against Cabela's motion to dismiss her claim under the ADA made two important distinctions. First, the court recognized that identifying as transgender in itself is not a medical condition. Specifically, the court rejected Cabela's argument that the ADA's language excluded "only the condition of identifying with a different gender" and not "a condition like Blatt's gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." Second, the court stated that gender identity disorder is a medical condition and is therefore not excluded under the ADA.

Blatt's case highlights the double-edged problem faced by many in the transgender community. On the one hand, many transgender men and women, have strongly advocated against the idea that simply identifying as transgender is a mental illness and should not be included in the DSM at all. In an article for The Guardian, Mauro Cabral, executive director of Global Action for Trans Equality, explains that "to treat trans people as psychologically abnormal suggests that just being ourselves is a disorder." Cabral rejects the idea that "a medical professional needs to provide a specific - diagnosis for transgender persons to have access to those key but basic rights: identity, freedom of expression, bodily integrity, autonomy and health care."

However, despite the existence of state-by-state anti-discrimination statutes and a handful of case law, an individual's status as a transgender person remains unprotected by the text of Title VII and by federal law. For now, it seems that a clinical diagnosis may be what it takes for transgender persons to succeed under the limited legal remedies available when faced with discrimination in the workplace. In the meantime, our own Eastern District of Pennsylvania has taken a noble, if not courageous, step in combating discrimination which plagues members of the transgender community. •

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