At Sidebar

by Bruce McKenna

The Transgender Dilemma

Recent decisions addressing the constitutionality of state law bans on gay and lesbian marriage may portend of the next wave of legal issues surrounding the means by which the law and, therefore, businesses may be called on to address and resolve issues raised in the context of the use of private facilities by individuals who have undergone and completed or, perhaps more challenging, are in the process of undergoing, gender reassignment surgery (hereinafter "GRS procedures").[1] It is estimated that as many as 500 GRS procedures are performed in the United States each year. Indeed, there might be more if insurance covered GRS procedures (which it typically does not, but some policies are beginning to include certain limited and defined benefits related to GRS procedures)[2] because the costs are high. But, aside from the financial cost, the emotional cost may be even higher and more difficult to address. In-depth psychological counseling is "a must" both prior to and following (sometimes for many years) a GRS procedure. But, as attorneys, what should we be looking for and, when we find it, what can we do?

A Brief and Clearly Inadequate Overview of Some Pertinent Authority

Rudimentary research indicates that at least 14 states and the District of Columbia have laws that relate, at least in part, to transgender issues. Equally rudimentary, and likely even less reliable, research indicates that at least 93 cities and counties have passed laws prohibiting gender identity discrimination. Clearly, however, their protections vary, and it is certainly not the purpose of this *Sidebar* to discuss the various laws.[3] Indeed, the idea for this article resulted from clients who have been confronted by the issues in the context of using fitness center, health club, locker room, and restroom facilities. Specifically, over the past three years, more than a few fitness centers have received requests from persons who, at the time, were undergoing GRS procedures and sought to use the locker rooms and restrooms of the gender that they sought to become rather than their assigned sex at birth. In addition, some transitioning individuals merely took it upon themselves to begin using facilities designated for the opposite gender. Each situation creates problems for the business because the people making the requests are not employees, there is likely no state action involved, and other users of the facilities are concerned about the transgender person, who has not completed his or her GRS procedure, using facilities for one or the other sex when the person is in transition.

So, how does a business respond when confronted with making a decision about a request for an accommodation by a person in the process of undergoing a GRS procedure that has not yet resulted in full transition? There are no easy answers, and it is not the purpose here to attempt to provide any. But, the transgender dilemma is real, important, and possibly moving at breakneck speed toward becoming a very important social and legal issue.[4]

Some federal precedent does, however, provide guidance. In *Etsitty v. Utah Transit Authority,*[5] the Tenth Circuit Court of Appeals, although noting that Title VII is a remedial statute, nonetheless expressly stated that "the vast majority of federal courts to have addressed this issue … conclude discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex."[6] The court stated that the record before it contained "nothing … to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."[7] The court held:

> In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.
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> Further, this court has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation. … Although there is certainly a distinction between a class delineated by sexual orientation and a class delineated by sexual identity, [*Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005)], nevertheless

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> demonstrates this court's reluctance to expand the traditional definition of sex in the Title VII context.

The court concluded:

> Scientific research may someday cause a shift in the plain meaning of the term "sex" so that it extends beyond the two starkly defined categories of male and female. *See Schroer v. Billington,* 424 F. Supp. 2d 203, 212–13 & n. 5 (D.D.C.2006) (noting "complexities stem[ming] from real variations in how the different components of biological sexuality ... interact with each other, and in turn, with social psychological, and legal conceptions of gender"); *cf. Brown v. Zavaras,* 63 F.3d 967, 971 (10th Cir.1995) (stating that the possibility that sexual identity may be biological suggests reevaluating whether transsexuals are a protected class for purposes of the Equal Protection Clause). At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not "discrimination because of sex." Therefore, transsexuals are not a protected class under Title VII and [the plaintiff] cannot satisfy her prima facie burden on the basis of her status as a transsexual. *See Plotke* [*v. White*], 405 F.3d at 1099 (requiring plaintiff to show she belonged to a protected class as part of her prima facie showing).[8]

Etsitty has been criticized and distinguished, and courts in other circuits have refused to follow its conclusions.[9] In *Lopez v. River Oaks Imaging and Diagnostic Group, Inc.*,[10] an offer of employment to the plaintiff was rescinded because the plaintiff had supposedly "'misrepresented' herself as female when she 'presented [her]self as a female' but was 'later learned [to be] a male.'"[11] The employer urged that its position was nothing more than the "implementation of its policy against hiring an applicant who lied during the interview process."[12] The court noted that the stated reason for the rescission of the job offer was "open to two interpretations"[13] and stated:

> That the statement may require "context and explanation" does not take it out of the realm of direct evidence. The statement directly links the adverse employment action at issue with the alleged unlawfully discriminatory motive. *See, e.g., Jones v. Overnite Transp. Co.,* 212 Fed. Appx. 268, 273 (5th Cir. 2006) (finding that the proffered evidence did not qualify as direct evidence because of an insufficient nexus between the racist statements at issue and the adverse employment action suffered by the plaintiff). Because the statement could be evidence which, when viewed in the light most favorable to [the plaintiff], "proves that fact [of discrimination] without inference or presumption," and suggests that "discriminatory animus in part motivated or was a substantial factor" in [the employer's] decision to rescind the job offer, *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir. 1993), it qualifies as direct evidence sufficient to overcome [the employer's] motion for summary judgment. *See Fabela v. Socorro Indep. Sch. Dist.,* 329 F.3d 409, 415 (5th Cir. 2003) ("In a Title VII context, direct evidence includes any statement or document which shows on its face that an improper criterion served as a basis-not necessarily the sole basis, but *a* basis-for the adverse employment action."); *see also Jones v. Robinson Prop. Group, LP,* 427 F.3d 987, 993-94 (5th Cir.2005) ("[A statement that] clearly and explicitly indicates that the decision maker(s) ... used [race, sex, etc.] as a factor in employment decisions ... is by definition direct evidence of discrimination.").[14]

The court added that, contrary to the employer's assertion, the plaintiff had no legal duty to reveal her gender identit disorder.[15]

Of course, the problem under consideration is in the fact that the overwhelming majority of cases have arisen in the employment arena. Where most of us will likely see the practical implications of the transgender issue is in the decision to provide gender-neutral restrooms. Those, of course, also do not quite solve the problem that certain facilities encounter, where locker room usage is critical to the survival of the business and, in many instances, those locker rooms are the only areas of the facility in which restrooms are located. Neither would a multi-user restroom solve the problem because of the fact that it must be questioned whether such a restroom would truly be gender neutral to males transitioning to female and females transitioning to male. Nor does providing three locker rooms solve the problem, for the same reason.

Occupational Safety and Health Administration regulations generally require that workers have unrestricted access to appro-

priate and convenient restroom facilities. But a non-employee transgender individual in transition,[16] or even temporarily cross-dressed, may not feel comfortable in using a restroom that coincides with their assigned sex at birth. What is more distressing is that using the restroom that matches their chosen gender identity or their outward presentation may result in arrest. And, it appears under federal law that segregation in connection with public restrooms and lavatories based on sex may be permissible. Possibly for that very reason, many states and municipalities have enacted measures to prohibit sex discrimination in connection with use of public accommodations. When an issue arises, though, the initial legal obstacle may come in determining whether the transitional transgender issue really presents an issue of "sex" discrimination in the first instance because the word may not have a statutory definition. Moreover, even when legislation attempts to define critical terms, it is often inconsistent, both internally and when considered in the context of enactments designed to reach potentially similar issues. It thus falls on regulatory agencies and private entities to fill the statutory gaps. From the governmental side of that equation, such efforts have typically been seen in traditionally more liberal political venues.[17]

In *Hispanic AIDS Forum v. Bruno*,[18] the dissent succinctly stated the issue as whether it is "sex discrimination under the New York State Human Rights Law (Executive Law § 296[5][b][1]) or gender discrimination under the New York City Human Rights Law (New York City Administrative Code § 8-107[5][b][1]) when a landlord refuses to renew the lease of a tenant who provides services for transgender clients, unless the tenant prevents those transgender clients from using the building's restrooms and common areas?"[19] The majority opinion, however, rejected the discrimination claim and stated that the "complaint, as it stands, alleges not that the transgender individuals were selectively excluded from the bathrooms, which might trigger one or both of the Human Rights Laws, but that they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological sexual assignment."[20] Although the majority appeared to agree that New York City's Human Rights Law prohibited discrimination based on gender identity, the court held that the landlord was not required to honor the gender identity of the transgender clients of the tenant that he sought to preclude from using the restrooms. According to the court, the landlord's discriminatory conduct relating to use of restroom facilities was not based on gender identity and, therefore, dismissed the sex and gender discrimination claims.[21]

In holding as it did, the *Hispanic AIDS Forum* Court cited to the decision in *Goins v. West Group*.[22] *Goins* involved the claim of a transgender former employee who alleged, among other things, sexual orientation discrimination because some of the defendant's female employees observed the plaintiff using the women's restroom and they believed the plaintiff to be biologically male.[23] As a result, the defendant "considered the female employees' restroom use complaint as a hostile work environment concern and decided to enforce the policy of restroom use according to biological gender."[24] "After considering the options, the [defendant] decided that it would be more appropriate for [the plaintiff] to use either a single-occupancy restroom in the building where she worked but on a different floor or another single-occupancy restroom in another building."[25] The plaintiff's "discrimination claim [was] predicated on her self-image as a woman that is or is perceived to be inconsistent with her biological gender."[26] The parties agreed that the plaintiff "consistently present[ed] herself as a woman."[27] The trial court granted the employer's motion for summary judgment. Although the Minnesota Court of Appeals reversed that decision, the Supreme Court ruled against the plaintiff based on a finding that the employer's designation of restroom use in accordance with biological gender assigned at birth did not constitute sexual orientation discrimination. In addressing the issue, the court stated:

> The [Minnesota Human Rights Act] prohibits sexual orientation discrimination in the workplace. … The definition of "sexual orientation" includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."
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> [The plaintiff] alleges that [the defendant] engaged in impermissible discrimination by denying her access to a restroom consistent with her self-image of gender. We do not believe the MHRA can be read so broadly. As the district court observed, where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender. … While an employer may elect to offer education and training as proposed by [the plaintiff], it is not for us to condone or condemn the manner in which [the defendant] enforced the disputed employment policy. … Accordingly, absent more express guidance from the legislature, we conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA.[28]

In *Freeman v. Realty Resources Hospitality, LLC, d/b/a Denny's of Auburn*,[29] the Maine Superior Court quite directly and simply held if the Denny's site manager had prohibited the plaintiff from using the women's bathroom based on her gender identity, then that would be a violation of the Maine Human Rights Act. Although the decision was, apparently, the first of its kind in American jurisprudence, its legacy is not likely to focus on its precedential value as it only held that the plaintiff had stated a claim for relief. Rather, the true impact of the decision is that it resulted in a settlement by which Denny's restaurants agreed that at all of its facilities—at least in Maine—all transgender individuals would have access to the restroom consistent with their stated gender identity.

Conclusion

Industry trade publications indicate that clubs and fitness centers (particularly on the coasts) are beginning to build and remodel existing facilities with a third locker room and/or restroom. But that does not alleviate the issues identified in the text, and the traditional two-restroom facility does not alleviate the potential ramifications of members of fitness centers who express concerns, at the very least, about transitioning individuals using a locker room different from the sex of their birth. Indeed, there are known instances in which a transvestite, who has no intention of undergoing a GRS procedure, has asked to be permitted—and even worse, simply decided on his/her own—that use of the locker room is entirely appropriate, despite potential criminal ramifications. As a litigator, considering the potential ramifications of the transgender dilemma is mind-numbing. In representing businesses, considering the options and pitfalls of developing policies and procedures is, at best, difficult and, at worst, a breeding ground for litigation. Insurance underwriters will be required to assess an entirely new risk that, even though the frequency of occurrence will likely be minimal, the potential exposure to the risk of loss is, quite possibly, enormous. But respect for the rights of all individuals affected by these new issues is something of which we must all be aware.

It is certainly not the purpose or the intent of this *Sidebar* to attempt to address the geopolitical, societal, cultural, and religious issues that are imbued in the overall topic. I certainly do not even begin to purport to know the answers to the myriad legal issues that lie at the heart of the transgender dilemma. The preparation of this *Sidebar* was the result of seeing in my own practice, while representing the health and fitness club industry, that transgender issues are becoming more and more prevalent. Businesses are going to have to deal with them, and the law appears to be unsettled in many instances. Add to that the problem that many issues must be decided based on the particular facts of any given scenario, the transgender dilemma will undoubtedly prove to be just that—a dilemma not only for the transgender individual, but for business and government as well. Two conclusions appear apt: first, the transgender dilemma will not be solved simply by attempting to address it in blanket fashion in state public accommodations statutes, municipal ordinances, and agency regulations; and, second, it is an issue with which the bar will soon be faced with what will only likely be increasing frequency. ⊙

Endnotes

[1]The author expresses special gratitude to P. Craig Bailey for his research and insight into the issues discussed herein.

[2]In June 2008, the American Medical Association (AMA) House of Delegates stated that the denial to patients with gender identity disorder, *see* note 15, *infra*, of otherwise covered benefits represents discrimination and that the AMA supports "public and private health insurance coverage for treatment for gender identity disorder as recommended by the patient's physician." AMA Resolution 122 "Removing Financial Barriers to Care for Transgender Patients."

[3]For the purpose here, suffice it to say that if a statute or ordinance purports on its face to ban discrimination based on sexual orientation, which is defined to include gender identity, then it would *seem* that such an enactment would provide protection to transgender individuals. If the enactment purports to prohibit discrimination based on perceived as well as actual sexual orientation, it would *seem* that the enactment would provide protection to a transgender person if the alleged misconduct could be established to be based on a belief that the object of the activity was gay or lesbian. Indeed, the Sixth and Ninth Circuits have found some protections for transgender persons under the Civil Rights Act of 1964. Although federal disability statutes typically provide no protections, statutes in nine states do provide certain protections. Federal law prohibits sex discrimination in educational programs receiving federal funds, thus barring sexual harassment of a transgender student. Seven states appear to have laws explicitly protecting transgender students from discrimination and/or harassment. Some of the protections, however, are dependent on the individual having been

Transgender continued on page 23

TRANSGENDER continued from page 7

diagnosed with gender identity disorder. *See* note 15, *infra*.

[4]As this *Sidebar* was submitted, the June 9, 2014, issue of *TIME Magazin*e hit the newsstands, its cover page story being entitled "The Transgender Tipping Point—America's Next Civil Rights Frontier."

[5]*Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007).

[6]*Id*. at 1221.

[7]*Id*. at 1222.

[8]*Id*. (certain internal citations omitted) (internal footnote omitted).

[9]*See, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (proffered reasons for declining to rehire transgender employee were either pretextual or "facially discriminatory as a matter of law").

[10]In *Lopez v. River Oaks Imaging and Diagnostic Group, Inc*., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

[11]*Id*. at 662.

[12]*Id*. With regard to the alleged misrepresentation, the *Lopez* Court specifically noted that the plaintiff identified both her adopted female and legal male names on her job application. In addition, she identified her male name as her "full name" and her female name as "other name used" on background check forms. Thus, the court was able to conclude that the document was sufficient to show, for purposes of establishing a *prima facie* case of sex discrimination, that the plaintiff did not misrepresent herself as female during application process in violation of employer's rule that it did not hire applicants who lied during interview process. *Lopez*, 542 F. Supp. 2d 653 at 665.

[13]*Id*.

[14]*Id*. (internal footnote omitted).

[15]Gender identity disorder has been defined as "a conflict between a person's physical gender and the gender he or she identifies as." U.S. National Library of Public Medicine, www.ncbi.nlm.nlh.gov/pubmedhealth/PMH0002495/.

""Transgender people are those who have a strong and persistent cross-gender identification and experience persistent discomfort about their assigned sex.' (Diagnostic and Statistical Manual of Mental Disorders, at 532-533 [4th ed. 1994] [DSM-IV]). The term applies whether or not these individuals undergo complete gender reassignment surgery, hormone therapy and treatment to alter their secondary sex characteristics, or simply present themselves, in dress, appearance and behavior, as belonging to the gender with which they identify (*id.*)." *Hispanic AIDS Forum v. Bruno,* 792 N.Y.S.2d 43, 49 (N.Y.A.D. 2005), Saxe, J., dissenting. In *Lopez*, the record contained evidence that the plaintiff "in fact took steps to affirmatively inform the [employer] of her biological sex. Indeed, at least one of her interviewers had been told that [the plaintiff] was transgendered and that interviewer admits she was aware of this fact throughout the entire interview process. [The plaintiff] also listed as job references two then-current … employees, each of whom knew of [the plaintiff's] status and has stated that she (each employee) had informed both of [the plaintiff's] interviewers of it prior to [the plaintiff's] interview." *Lopez*, 542 F. Supp. 2d 653 at 664. *See also Glenn v. Bumbry*, 663 F.3d 1312 (11th Cir. 2011) ("discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause [because] discrimination 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"). In so holding, the *Glenn* Court cited to *Schwenk v. Hartford*, 204 F.3d 1187, 1198 - 1203 (9th Cir. 2000), which "concluded that a male-to-female transgender plaintiff who was singled out for harassment because he presented and defined himself as a woman had stated an actionable claim for sex discrimination under the Gender Motivated Violence Act because 'the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like one."' *Glenn*, 663 F.3d at 1317. The *Glenn* Court also cited to *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 - 16 (1st Cir. 2000), in which the court held "that a transgender plaintiff stated a claim by alleging that he 'did not receive [a] loan application because he was a man, whereas a similarly situated woman would have received [a] loan application. That is, the Bank ... treat[s] ... a woman who dresses like a man differently than a man who dresses like a woman.'" *Glenn,* 204 F.3d at 1317. The *Glenn* Court also cited to *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004), in which the court "concluded that a transsexual firefighter could not be suspended because of 'his transsexualism and its manifestations' … because to do so was discrimination against him 'based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.'" *Glenn*, 663 F.3d at 1317. Finally, *Glenn* cited to *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), in which the court held that a transsexual plaintiff stated a claim for sex discrimination 'by alleging discrimination ... for his failure to conform to sex stereotypes.'" *Glenn*, 663 F.3d at 1317.

[16]It appears that gender identity disorder does not qualify as a disability under the Americans with Disabilities Act but, given the descriptions set forth above, *see* note 15, *supra*, as a layman and without delving into the judicial interpretations of that act, one may be led to wonder why it would not.

[17]*See* note 21, *infra*.

[18]*Hispanic AIDS Forum v. Bruno*, 792 N.Y.S.2d 43 (N.Y.A.D. 2005).

[19]*Id*. at 48.

[20]*Id*. at 47.

[21]*Hispanic AIDS Forum* has likely been effectively overruled by favorable New York City Regulations.

[22]*Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

[23]*Id*. at 721.

[24]*Id*.

[25]*Id*.

[26]*Id*. at 722.

[27]*Id*.

[28]*Id*. at 723.

[29]*Freeman v. Realty Resources Hospitality, LLC, d/b/a Denny's of Auburn*, No. CV 09-199.