



Transgender Employees in the Workplace: What are an Employer's Rights and Responsibilities?

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A funeral home in Michigan and an eye clinic in Florida recently confronted a similar issue: What actions to take, if any, upon learning that a male employee was transgendering to a female? In each instance, the employer fired the employee, which resulted in a lawsuit.

In September 2014, the Equal Employment Opportunity Commission (the "EEOC") took action against these employers by filing the first-ever lawsuits brought by the agency seeking to protect transgender workers under the Civil Rights Act of 1964. As reported by *The Detroit News*, the EEOC brought suit in federal courts in Michigan and Florida, respectively, against a Garden City-based funeral home and a Lakeland-based eye clinic.

The EEOC alleged that the funeral home worker, an employee of six years, was fired after informing her boss that he was transitioning from male to female, and that he would be starting to wear women's business attire to work. In the Florida case, the EEOC alleged that the eye clinic fired the employee, who presented as a man when hired, after he started dressing as a woman. The Florida lawsuit claims that the employee was told that his position was being eliminated, but another person was hired to replace the employee.

These lawsuits represent an uptick in the Federal government's efforts to protect transgender people at work. **So what should Michigan employers do - and not do - when dealing with a transgender employee?**

The recently filed EEOC lawsuits are based on the federal anti-discrimination statute, commonly known as Title VII. Title VII prohibits employers from discriminating against employees in the terms and conditions of their employment "because of . . . race, color, religion, sex or national origin."

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Female employees have traditionally used Title VII's protection to prevent employers from unlawfully taking their sex into consideration when deciding issues such as hiring, pay and promotion. Similarly, women have used Title VII's protections to sue employers for sexual harassment and hostile work environments.

In a 2012 decision, *Macy v. Holder*, the EEOC effectively expanded the meaning of sex discrimination in Title VII to include discrimination against transgender people. Courts have also expanded the rights of transgender employees under Title VII. In 1989, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the United States Supreme Court explained that Title VII's prohibition on discriminating against employees "because of sex" also prohibits employers from taking adverse employment actions against employees (such as terminating or refusing to promote an employee) based upon "sex stereotypes." In that case, Price Waterhouse refused to promote a female employee because the partners believed that she failed to conform to how women should behave. Specifically, Price Waterhouse told her that in order to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court ruled that Price Waterhouse had engaged in unlawful "sex stereotyping."

The United States Court of Appeals for the Sixth Circuit, whose decisions affect Michigan employers, considered the rights of transgender employees under Title VII in the case of *Smith v. City of Salem*, 378 F.3d 566 (2004). In that case, the Sixth Circuit held that employers may not discriminate against male transsexuals, nor discriminate against them based upon clothing and grooming which does not conform to traditional male stereotypes. The Sixth Circuit explained:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Similarly, in *Barnes v. City of Cincinnati*, 401 F.3d 729 (2005), the Sixth Circuit held that Title VII protects employees from sexual stereotyping related to dress and grooming.

In light of the *Price Waterhouse*, *Barnes* and *Smith* cases, Michigan employers who take adverse employment action against a transgender employee are at risk of a lawsuit based on the protections afforded to such employees under Title VII. That's not to say that employers cannot have and enforce gender-neutral workplace policies addressing, for example, display of jewelry or business attire, without violating Title VII.

While this analysis has focused on the law at the federal level, there has been some discussion and debate at the state level in Michigan about amending the state's Elliot-Larson Civil Rights Act to include protections for lesbian, gay, bisexual and transgender people. In his 2015 State of the State address, Governor Rick Snyder renewed his call for state leaders and the legislature to consider taking up the issue legislatively. We will keep you informed of any developments in the ongoing debate to amend Elliot-Larson.



This is an evolving area of the law and the Federal government has made clear its intent to step up its efforts to crack down on workplace discrimination against transgender people. If you have any questions about issues related to Title VII and workplace discrimination, please contact a Foster Swift Employment Law attorney.
