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Facilitating Facilities in the Workplace: The DFEH Litigates a Gender Identity Access Case

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The California Fair Employment and Housing Act (“FEHA”) makes both gender identity and gender expression characteristics protected against employment discrimination. The Sacramento Superior Court, in a case of first impression, has addressed that protection, permitting an employee to pursue a claim that the employer unlawfully used gender identity and gender expression to restrict access to restroom and changing facilities. It is also noteworthy that the party prosecuting the case is the California Department of Fair Employment and Housing (“DFEH”), which seeks to expand employee rights (and employer obligations). *Department of Fair Employment & Housing v. American Pacific Corp.* (March 13, 2014).

The Facts

The DFEH sued on behalf of a job applicant, Nick Lozano. Lozano’s sex assigned at birth was female, but he self-identifies as a transgender man. Lozano presented as male when successfully applying for a job with American Pacific Corporation (“AMPAC”). While undergoing a background check, Lozano informed the AMPAC human resources department that he was transitioning from female to male. Lozano did not present any legal or medical document to reflect his gender identity.

Because Lozano wanted to use the men’s restroom and locker room, AMPAC asked Lozano to delay his start date pending completion of sex reassignment surgery (SRS). AMPAC required Lozano to use the women’s restroom and locker room until he had surgery, at which point AMPAC would consider Lozano’s transition “complete.”

The Superior Court’s Decision

The DFEH brought three FEHA claims: (1) discrimination based on sex, gender, gender identity, and gender expression, (2) failure to prevent discrimination based on the same, and (3) failure to take all reasonable steps to prevent discrimination based on the same.

AMPAC moved to dismiss the claims, arguing that the FEHA does not prohibit employers from requiring restroom and changing room access on the basis of the employees’ birth-assigned gender. The DFEH responded that AMPAC’s practice violated the following FEHA language: “It is an unlawful employment practice ... [f]or an employer, because of the ... sex, gender, gender identity, gender expression ... of any person, to refuse to hire or employ the person or ... to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

The DFEH also argued that the court should construe California nondiscrimination statutes together, and should therefore rely on the Education Code provision that permits students to use school facilities in accordance with the student's gender identity. Additionally, the DFEH cited several other jurisdictions holding that nondiscrimination laws entitle transgender individuals to use the facilities that correspond with their gender identity.

Agreeing with the DFEH, the Sacramento Superior Court found that "[d]efendant's hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation." The Superior Court also dismissed as speculative another employer defense: "Individuals who claim a different gender from day to day, or who do so simply to be disruptive or to sexually harass other employees do not meet the definition of transgender."

Ultimately, the Superior Court held that Lozano had pleaded sufficient facts to state a FEHA claim for employment discrimination, reasoning that it would be unlawful for an employer to require a transgender employee to use the bathroom and locker room of his or her birth-assigned sex.

Takeaways for Employers:

"Transgender" is an umbrella term to describe individuals whose gender identity, gender expression, or behavior departs from those generally associated with the sex assigned at birth. Many transgender individuals never undergo SRS, for various reasons, such as personal health, benefit coverage, affordability, or individual preference. Accordingly, employers should remain aware that an employee's ability to rely on the FEHA's gender-identity protections does not depend on whether an employee has had SRS or has taken hormones. The Superior Court's order illustrates that making workplace decisions on the basis of whether an employee had SRS could be considered discriminatory. Further, note that asking for a diagnosis or other medical facts from a California employee would require careful consideration of employee privacy issues.

The issue that the Superior Court addressed may not have arisen had Lozano's gender identity matched the sex assigned at birth. But the FEHA broadly protects not only gender identity, but also gender expression (regardless of whether an employee self-identifies as a transgender individual). Therefore, California employers should remember that an employee's gender expression, including presenting in a way that does not comport with traditional gender roles, should not be a basis to treat the employee differently. That type of treatment could prompt a claim of gender expression discrimination, or sex discrimination based on a theory of unlawful sex stereotyping.

The Superior Court's decision is, of course, of limited significance, in that it arose on a motion to dismiss and applies only to the named parties. The decision is not binding on other courts. Further, we understand that AMPAC intends to ask an appellate court to reverse the trial court's decision.

Cases invoking issues of gender identity and expression are increasing in frequency. Further, the EEOC, the federal counterpart to the DFEH, interprets the sex discrimination provisions of Title VII to forbid discrimination against transgender individuals. Given the DFEH's involvement in the AMPAC case, and the DFEH's recently expanded role as an enforcer of the FEHA (making it analogous to the EEOC in this respect), it is more important than ever for employers to remain up to date on developments in workplace issues regarding gender identity and expression.

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