

Changing Times

Struggle for Transgender Legal Protections Yields Improvements at State, Local Levels

Lesbian, gay, bisexual and transgender (LGBT) individuals have long faced discrimination, both overt and subtle, in nearly all walks of life. They experience harassment and inequality in the workplace, prejudice and bigotry in familial relationships and, all too often, are the victims of hate-based violence. In addition, transgender individuals struggle with difficulties in obtaining appropriate sex and name designations on their identity documents and often face significant hurdles in obtaining appropriate medical coverage and care.

Although some states and municipalities have enacted legislation protecting LGBT individuals, the majority of Americans do not fall under the protective umbrella of these statutes, and many of those who do are unaware of their rights or unable to bring the claims necessary to protect them. Fortunately the number of those covered by anti-discrimination laws continues to grow, and many companies have added inclusive language to their non-discrimination policies. Protection for transgender individuals in particular has seen a marked increase in the past few years. There is, however, still a long way to go to level the playing field for LGBT Americans, particularly transgender individuals, compared with their heterosexual counterparts.

ADVANCES IN FEDERAL LAW

As part of the effort to address the difficulties faced by LGBT attorneys and clients, the Philadelphia Bar Association formed the Committee on the Legal Rights of Lesbians and Gay Men in 1997. Last year, in recognition of the importance of equal

rights for transgender individuals, and in a desire to be fully inclusive of all members of the LGBT community, the committee was renamed the Committee on LGBT Rights. In keeping with this recognition, we highlight below the state of the law affecting LGBT rights, with a particular emphasis on the vast strides made recently in the area of rights for transgender individuals.



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LGBT individuals currently have no statutory protection under federal anti-discrimination laws. Further, both the Rehabilitation Act and the Americans with Disabilities Act explicitly exclude “transvestism, transsexualism ... [and] gender identity disorders not resulting from physical impairments”

as qualifying disabilities under those laws. A number of attempts have been made to introduce legislation protecting LGBT employees at the federal level, but none have yet passed Congress.

The first bill addressing sexual orientation discrimination was introduced in Congress in 1974 and since that time a number of similar bills have been proposed. Beginning in 1996, a broad coalition of organizations began concerted attempts to introduce and pass an Employment Non-Discrimination Act (ENDA). In 2007, two versions of ENDA were introduced in the House. The first extended protection to all members of the LGBT community, the first time transgender-specific language had been included in such a bill. This bill, however, was later withdrawn and a second version without this language was passed. The removal of language providing protection to transgender individuals has been protested by many LGBT rights organizations, and it is unclear how the effort to guarantee federal protection to LGBT workers will proceed, as many organizations have vowed not to support legislation that does not include protection for transgender Americans.

Because of the lack of explicit statutory protection at the federal level, LGBT individuals must find other ways to assert their rights. Perhaps the most fruitful route has been through the prohibition on sex-based discrimination contained in Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment that is predicated on an employee’s race, color, religion, sex or national origin.

For many years the federal courts were inimical to Title VII claims brought by transgender employees alleging sex-based discrimination, with all that examined the question narrowly construing “sex” as a person’s biological sex at birth. Recently, however, the tide has begun to shift. This change is a function of both improving public opinion of LGBT individuals and judicial recognition that “gender,” i.e., the socially constructed norms associated with a person’s sex, is implicitly

protected under sex discrimination laws.

Price Waterhouse v. Hopkins was the watershed case in this area. Ann Hopkins, a female senior manager at Price Waterhouse, won a Title VII suit claiming that she had been denied a partnership position for which she was otherwise qualified in large part because she was perceived by male partners to act in stereotypically male ways. On appeal, the United States Supreme Court, while reversing on other grounds, squarely rejected the defendant's suggestion that "sex stereotyping" remarks of the kind made during Ms. Hopkins' partnership bid were not evidence of sex discrimination under Title VII. Observing that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match ... the stereotype associated with their group," the court found that the socially constructed norms associated with sex, and not simply anatomical sex, fall within the scope of Title VII's sex discrimination prohibitions.

Since *Price Waterhouse* was decided in 1989, the First, Sixth and Ninth Circuits have issued favorable decisions holding that transgender and gender non-conforming people may seek redress under Title VII and similar statutes, and anecdotal evidence suggests that courts at all levels are increasingly unlikely to dismiss such claims at the pre-trial level. As the Sixth Circuit declared in 2004, "discrimination against a plaintiff who is a transsexual — and therefore fails to act like and/or identify with his or her gender — is no different from the discrimination directed at Ann Hopkins in *Price Waterhouse*." These developments are encouraging, and the number of courts, including Pennsylvania district courts, to have adopted this reasoning continues to grow.

Unfortunately, there is no federal hate crime legislation covering LGBT individuals. In 2007, Congress passed the Local Law Enforcement Hate Crimes Prevention Act, which would expand existing federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability. President Bush has indicated he may veto the legislation if it reaches his desk.

ADVANCES IN STATE AND LOCAL LAW

Currently, thirteen states and the District

of Columbia, which together cover 38 percent of the population, prohibit both sexual orientation and gender identity discrimination. Another seven states prohibit discrimination on the basis of sexual orientation only. State courts and agencies also have increasingly followed the lead of the federal courts and afforded protection to plaintiffs in the state courts who had been discriminated against because of their gender identity under laws prohibiting discrimination on the basis of sex. Thirty-two states have hate crime legislation that covers sexual orientation, with an additional eleven covering gender identity as well.

Encouragingly, five states — Iowa, Vermont, Colorado, New Jersey and Oregon — have enacted transgender-inclusive anti-discrimination laws in the past two years. New Jersey, which already provided protection based on sexual orientation, added gender

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identity protection to its Law Against Discrimination in 2006. Bills have been introduced in both the Pennsylvania House and Senate to add sexual orientation and gender identity to the commonwealth's Human Relations Act. These bills both have a record number of co-sponsors.

Pennsylvania has prohibited discrimination in state employment on the basis of sexual orientation via executive order since 1975. In 2003, this executive order was amended to include gender identity or expression as well. Thirteen Pennsylvania municipalities now prohibit discrimination on the basis of sexual orientation and

gender identity — including Philadelphia, which added protection on the basis of gender identity to its Fair Practices Ordinance in 2002.

GAINS ELSEWHERE AND HOPE FOR THE FUTURE

Protections for LGBT Americans in the private sector continue to increase. Although protection for transgender individuals has historically lagged behind protection for lesbians and gay men, great strides have been made recently. The uproar in the LGBT community caused by the removal of protection for transgender Americans from the ENDA legislation is in many ways indicative of this shift.

Corporations are increasingly recognizing that extending benefits to all LGBT employees is good business. The increase in large companies explicitly prohibiting discrimination against transgender employees has been remarkable, increasing from only 1 percent in 2000 to more than 25 percent today. Many companies now provide comprehensive transgender health benefits as well. All eight Ivy League schools now prohibit discrimination based on gender identity, compared to just three at the beginning of 2006.

The passage of federal civil rights laws prohibiting sexual orientation and gender identity discrimination remains one of the most important goals of the LGBT civil rights movement.

Until such laws are passed, however, many alternative strategies can be pursued to help remedy discrimination against LGBT Americans. These include supporting the bills that would amend state law to provide protection on the basis of gender identity and encouraging cor-

porate clients to adopt non-discrimination policies that are inclusive of gender identity and that include equal medical benefits for transgender employees. Finally, Philadelphia attorneys can support the work of the LGBT Rights Committee by attending meetings or becoming involved in Committee projects and initiatives. With steps like these, we can move toward a future where the playing field is level for all, regardless of who they are or who they love. ■

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