

**Annual TMHRA Conference**

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**When “Jane Becomes Joe,” and Other Employment  
Considerations in the Workplace**

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# Talking Today About Issues on the Horizon of Employment Law



# What Are We Going to Cover Today?

- What does the EEOC's letter ruling regarding transgender status say?
- What is the law now on this issue, and has it changed?
- Are there any guidelines for what to do/not do?
- What other areas are on the horizon now?



# EEOC's April 12, 2012 Letter Ruling:



- On April 12, 2012, the EEOC issued a letter ruling concerning transgender status
- The ruling in *Macy v. Eric Holder* equates discrimination against a transgender employee with sex discrimination



# Sex Discrimination: Covers Transgendered Applicants/Employees

- EEOC's April 12, 2012 decision – is it a bombshell or nothing new?
- Announced Title VII protects transgender status as sex discrimination when discrimination is based on . . .
  - **gender identity,**
  - **change of sex, or**
  - **gender stereotypes.**



# Mia Macy v. Eric Holder

- Macy, police detective, applies for ATF position as man
- “You have the job pending background check”
- Then reveals transitioning from male to female
- “Position no longer available due to budget cuts” and “Filled by another”
- Claims not hired “because made transgender status known”
- Previous cases held sex discrimination includes “*not just biological sex, but gender stereotyping – failing to act/appear according to expectations defined by gender*”
- New ruling clarifies that EEOC position is discrimination on basis of transgender status is sex discrimination under Title VII



# What Was the Law Before this Ruling?

- Title VII prohibits an employer from discrimination “because of the employee’s sex” but this did not necessarily protect transgendered worker.
- But it *did* include discrimination based on appearance or conduct that does not conform to stereotypical gender roles.
  - Examples – violations previously found when employee fired for not dressing “feminine enough” or man fired because he doesn’t behave “manly.”



# Possible Use of Testers To Evaluate Transgender Treatment

- Testers are applicants who apply for employment which they do not intend to accept to uncover unlawful hiring practices.
- Testers are matched to appear equally qualified with respect to their employment histories, educational backgrounds, references, and other relevant factors.
- Matched testers apply for the same job and their treatment is compared at each stage of the application and selection process.



# What To Do/Not Do

## Transgendered Applicants and Employees

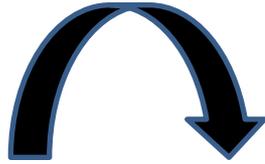


**DO  
THIS**

- ☑ Treat complaints from transgendered as sex discrimination complaints
- ☑ Focus on qualifications, ability to perform job
- ☑ Train supervisors on how to respond to gender transition or non-traditional gender presentation
- ☑ Be able to demonstrate others treated same
- ☑ Reiterate respect in the workplace for all employees



# Don't Base Decisions on An Employee's Gender Presentation



**NOT  
THAT!**

- ❌ Don't use appearance requirements such as "pretty" or "Midwestern girl look" (from actual case)
- ❌ Do not ignore complaints of harassment based on gender presentation
- ❌ Don't be inconsistent when giving reasons for hiring decision (like in *Macy* case)



# Hypothetical Problems for Discussion

- **Problem 1:** Dress code says men should wear suits, ties, and dress appropriately for men in a business environment. Male employee advises you that he now plans to present/identify as a woman. His supervisor disciplined him for dress code violation when he wore dress, acrylic nails & make-up to work. What do you do?
- **Problem 2:** After a citizen complains that the same employee “creeps me out” and “shouldn’t be working in the building permit office with the public,” the supervisor moved her to a job in the back office for same pay, based on her “making the public uncomfortable.” Employee complains. What do you do?
- **Problem 3:** You have a strict policy of requiring truthful applications/resumes and terminate those who engage in resume fraud. Transsexual applicant presents as woman, and says name is “Sheila” but drivers’ license says she is a man named “Sheldon.” Can you refuse to hire her based on a misrepresentation in her resume? What if discrepancy is only discovered *after* she’s hired?



# Hypothetical Problems for Discussion (Cont'd)

- **Problem 4:** An employee files a complaint with HR saying her religious beliefs conflict with supporting alternative lifestyles. She claims she's being harassed based on religion because she did not join entire department in an off-duty "transgender rights rally." Co-workers called her "ignorant," asked her why she wouldn't wear a LGBT t-shirt at a fun-run, excluded her from a collaborative work project, did not invite her to departmental meetings, and did not promote her based on her "negative attitude." What do you do?
- **Problem 5:** Biological male employee wants to use women's restroom because he identifies, dresses, and lives as a female. Biological female employee hears about it, and says she is offended by the request. How do you handle it?



# Cities/Counties with Non-Discrimination Ordinances that Include Gender Identity

- At least 163 cities and counties prohibit employment discrimination based on *gender identity* in ordinances governing all public *and* private employers in the jurisdiction.
- In Texas, this includes many major cities, and Houston is considering such an ordinance at this time.



# Other Topics on the Horizon For Lawyers and HR Professionals



# Other Topics on the Horizon – Religious Garb and Grooming

- 2014 -- EEOC issued a new guidance on religious garb and grooming in the workplace found at [http://www.eeoc.gov/eeoc/publications/qu\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/qu_religious_garb_grooming.cfm)
- Provides examples, and answers questions about how the law applies to religious dress and grooming practices, using specific hypotheticals.



# Other Topics on the Horizon – Domestic Violence

- EEOC issued Guidance on Victims of Domestic Violence, Dating Violence, Stalking
- No new legal protection – use of existing laws to benefit victims
- Guidance says EEOC will focus on the following:
  - Sex-based stereotypes affecting such victims
  - Sexual harassment that turns employees into such victims
  - Retaliation issues against such victims
- **Example 1** - victim of domestic violence terminated because supervisor says he fears potential “drama battered women bring to the workplace.”
- **Example 2** – Employer doesn’t hire man who obtained restraining order against domestic partner because “men should be able to protect themselves”



# Other Topics on the Horizon – Target on Inflexible Leave Policies

- EEOC targeting inflexible policies
- Both under ADA (if undue burden not established) and Title VII (if treatment not equal)
  - Recent settlements
    - Supervalu/Jewel-Osco - \$3.2million
    - Sears - \$6.2 million
    - Verizon - \$20 million



**Chai Feldblum** @chaifeldblum

25 Apr

Yes --& stay tuned for reasl accom guidance in a bit! @iantDC:  
@chaifeldblum This really has the potential to be a banner week for the #EEOC

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# Other Topics on the Horizon

## – Protection and Focus on Nursing Mothers

- Break time, private area other than a bathroom
- Increase on number of employers investigated
- EEOC's recent position:
  - Title VII prohibits discrimination based on lactation; and
  - the Pregnancy Discrimination Act covers lactation



# Questions?

