When Cynthia becomes Cyrus: The legal rights of transgender employees

By the New York State Association of School Attorneys

As debate and litigation focus on the rights of transgender students, school officials should be aware of issues facing a similar population: transgender employees. Courts and the U.S. Equal Employment Opportunity Commission have found that the rights of governmental employees were violated when supervisors:

- Continued to call an employee "he" after the individual had begun to identify herself as female.
- Refused to allow an employee to change his name from Cynthia to Cyrus in an employer's computer system.
- Terminated an employee who announced plans to switch gender identity because "it would be disruptive … some people would view it as a moral issue, and … it would make [the employee's] coworkers uncomfortable."

School leaders should become familiar with the relevant laws and ensure that no employees, including transgender individuals, are discriminated against, harassed or otherwise treated unlawfully.

Statutory protections

Transgender individuals are people who have a gender identity that is different from their assigned sex at birth, such as a person identified as male at birth who later identifies as a female or vice versa. In the workplace, transgender employees are protected from discrimination and harassment under laws and regulations at both the state and federal level. In January, the state Division of Human Rights adopted regulations that expressly prohibited harassment and discrimination against transgender employees pursuant to the New York State Human Rights Law. These regulations expressly provide that discrimination and harassment on the basis of a person's gender identity is prohibited sex discrimination and harassment. The regulations state that disparate treatment of an employee on the basis of having gender dysphoria (the condition of feeling one's emotional and psychological identity as male or female to be different from one's assigned sex at birth) also can be a prohibited form of disability discrimination and harassment.

On the federal level, Title IX of the Education Amendments of 1972 prohibits, among other things, discrimination and harassment on the basis of sex in federally-funded education programs and activities. Also, Title VII of the Civil Rights Act of 1964 prohibits, among other things, employment discrimination and harassment on the basis of sex.

Both laws have been interpreted by federal agencies and courts as protecting transgender individuals from discrimination and harassment. Both the United States Departments of Education and Justice, which are tasked with enforcing Title IX, have stated that "discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex."

Similarly, several federal courts along with the U.S. Equal Employment Opportunity Commission (EEOC), have interpreted Title VII's prohibition against employment-based sexual harassment and discrimination as including prohibiting discrimination and harassment against employees on the basis of their gender identity or expression. Several federal courts have gone further and found that a governmental entities' discrimination against an individual on the basis of his or her gender identity or expression is a form of discrimination on the basis of sex in contravention of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Cases involving transgender employees

So far, the vast majority of cases addressing the rights of transgender employees have taken place in the federal courts and before the EEOC in the context of alleged violations of Title VII and the Fourteenth Amendment. Beyond establishing that discrimination and harassment on the basis of an employee's gender identity or expression is tantamount to discrimination and harassment on the basis of sex, these decisions provide insight into how judicial and quasi-judicial authorities such as the EEOC think employers should act with respect to the rights of transgender employees.

In *Glenn v. Brumby*, an employee of the Georgia General Assembly's Office of Legislative Counsel alleged a violation of the Fourteenth Amendment's Equal Protection Clause after she was terminated following her transition from male to female. The issue of her gender identity and expression in the workplace first arose one Halloween when employees were permitted to come to work in costume. The employee came to work presenting as a woman that day. When the employee's supervisor saw her, he told her that her appearance was not appropriate and asked her to leave the office. The supervisor deemed the employee's appearance as inappropriate because "he was a man dressed as a woman and made up as a woman," and "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing" and a male in women's clothing is "unnatural."

After the Halloween incident, the employee told her supervisor that she was transitioning to become a woman and would begin coming to work as a woman and would be changing her legal name. Soon thereafter the supervisor terminated the employee "because [the] intended gender transition was inappropriate . . . it would be disruptive . . . some people would view it as a moral issue, and . . . it would make [the employee's] coworkers uncomfortable."

The federal trial court in *Glenn v. Brumby* held that a governmental agent (the supervisor in this case) violated the Equal Protection Clause's prohibition of sex-based discrimination when he fired the transgender employee because of gender non-conformity. On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed in 2011 the lower court's decision and further noted that the claim would have also supported an alleged violation of Title VII.

In *Tudor v. Southeastern Oklahoma State Univ.*, a professor was denied tenure shortly after she transitioned from male to female. The university's human resources director allegedly told the professor that the vice president of academic affairs objected to the transition on religious grounds and would have preferred to terminate her, but that she could remain on the faculty without tenure if she dressed professionally and observed bathroom restrictions. In July 2015, a federal district court in Oklahoma denied the university's motion to dismiss the professor's hostile work environment claim and allowed the case to go forward.

In *Lewis v. High Point Regional Health Sys.*, the U.S. District Court for the Eastern District of North Carolina denied an employer's motion to dismiss an employee's Title VII sex discrimination claim on the basis that Title VII's sex discrimination provision prohibits discrimination related to transgender status. The employee, a certified nursing assistant, alleged that she was denied being hired for several positions because of her transgender status. At the time of her interviews, she was anatomically male, and was undergoing hormone replacement therapy in preparation for sex reassignment surgery in the future.

It is worth noting that employer liability is not limited solely to those extreme instances in which a transgender employee is subject to termination or denied an opportunity such as a promotion because of his or her gender identity or expression. In *Complainant v. Department of Veterans Affairs*, an employee was undergoing treatment for gender identity disorder and, as part of that treatment, legally changed his name from "Cynthia M. Drew" to "Cyrus Ethan Drew." As part of his job duties, the employee needed access to the VISTA computer system and was required to enter his name in order to use the system. The Information Security Officer refused to change the employee's name in the VISTA computer system for more than a year, prompting the employee to allege that the Department of Veterans Affairs had discriminated against him. The employee also alleged that the Information Systems Officer was hostile, threatening to terminate his access to all of the agency's computer systems. The EEOC found that the employee had stated a claim of sex discrimination actionable pursuant to Title VII and remanded the matter for further processing.

Lastly, in *Jameson v. U.S. Postal Serv.*, a transgender employee alleged that her locker was broken into, her property was left out to be stolen, and her supervisor repeatedly referred to her as "he." The EEOC found this was harassment on the basis of sex and a violation of Title VII. The EEOC noted that supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with and wishes to use in the workplace. The EEOC further noted that intentional misuse of the employee's new name and pronoun may cause emotional harm to the employee, and may constitute sex-based discrimination and/or harassment.

Lessons learned

Given the diversity of political, cultural, and/or religious beliefs that exist in our society, it is not surprising that issues of sexuality, gender identity and self-expression often evoke a wide array of emotions and reactions. While individuals in any given employment setting may have different personal beliefs or attitudes regarding transgender individuals, a workplace requirement to be polite to and respectful of others does not require anyone to surrender their own beliefs. As with many employment-related issues, a small amount of common sense and sensitivity when issues first arise can be the difference between expensive litigation and workplace harmony.

According to the Transgender Law Center, transgender co-workers do not expect any special treatment. They simply want their identities to be respected, e.g. to be addressed by the name and pronoun that reflects their gender identity. Accordingly, those who are unsure of what pronoun to use should politely ask their co-worker how they would like to be addressed. Along these same lines, a transgender employee should not be asked what his/her "real" name is as this implies that the preferred name and identifier are not "real."

Do not assume that transgender employees will want to discuss their private health care matters with district officials or with their co-workers. Transgender employees should be allowed to initiate these conversations at their own pace. Remember, however, that it is inappropriate for co-workers to ask questions about private medical history.

If a co-worker exhibits hostility or has difficulty showing respect to a transgender employee, that person may need to be counseled by district administrators. As with other issues involving potential discrimination, staff training may be appropriate. A review of existing anti-harassment policies may also be in order.

For questions about training, policy review and legal issues, consult your school attorney. Ultimately, however, "treating others as we ourselves would want to be treated" is perhaps the best advice that can be given and followed when interacting with transgender employees.

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