

SacLEGAL Newsletter



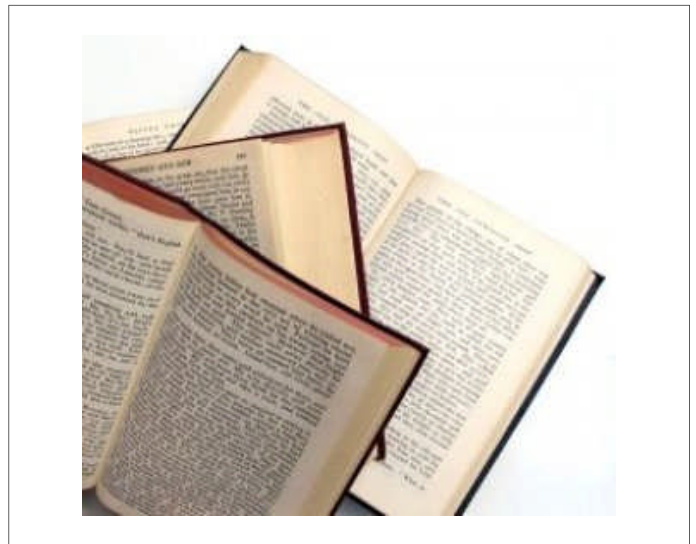
Transgender Discrimination Case Law

By Robert L. Boucher, Esq.
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Transgender discrimination cases proceed as any sex stereotype discrimination cases. As such, transitioning employees and their employers should be aware of case law underlying the right to be free from employment discrimination.

A. The *Prima Facie* case

Historically, federal courts have denied Title VII protection for discrimination based on transgender status: Title VII protects “sexual stereotypes” not “gender identity.” Even sex stereotyping was not protected until 1989, when the Court ruled that failure to promote a woman because she acted too “macho” amounted to Title VII discrimination. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228. The courts reasoned, essentially, that gender identity is a matter of choice,



whereas sexual characteristics are biological. See e.g. *Holloway v. Arthur Anderson* (1977) 566 F.2d 659 (discrimination based on plaintiff’s medical procedure not protected); *James v. Ranch Mart* (1995) 881 F.Supp. 478 (“Congress did not intend to ignore anatomical classification and de-

termine a person’s sex according to [psychology]”) (citations omitted).

Current case law exposed this false dichotomy, framing transgender Title VII protection as sexual stereotype discrimination. As such, transgender

(Continued on page 2)

INSIDE THIS ISSUE:

Member Spotlight: Meet the Board Members	2
Transgender Discrimination Case Law (cont'd)	2
Fifteen Years of SacLEGAL	3
Non-Profit Releases Report Calling for Medicaid and Social Security Changes to Benefit GLBT Elders	3
Transgender Discrimination Case Law (cont'd)	4
Member Spotlight: Meet the Board Members (cont'd)	5

Remember!

- You can renew your membership online at www.saclegal.org/join!
- Our Spring Social will be on April 15.
- Our Summer BBQ will be held on May 16 at the home of Co-Chair Patrick Holstine. Watch your e-mail for details.
- Check out our facebook and twitter pages! Links are available at www.saclegal.org.

Spring Social—Headhunters April 15

Please join us for the SacLEGAL Spring Social. This event was very successful last year and we would like to continue that success this year. The event will be held on April 15 at Head Hunters at 20th and K Streets in Sac-

ramento. Stop by between 6:00 and 8:00 p.m. Light appetizers will be provided and drinks will be available at happy hour prices for attendees.

So come to either mope

about how much you owe in taxes or come to spend your tax refund before it comes! Either way, we hope to see you there.

For more details, find us on Facebook.

Member Spotlight: Meet the Board Members

Each newsletter we feature a different SacLEGAL member. This month our Member Spotlight focuses on one of the new members who joined our board of directors in 2010: Kathleen A. Doty. SacLEGAL posed a variety of questions to Kate and the following are her responses.

Please provide a bit of background information about yourself.

I am a Colorado native, and while I haven't spent much of my adult life there, I remain a mountain girl at

heart. I received my undergraduate degree from Smith College in Northampton, Massachusetts. I moved to New York City after graduation where I worked for a documentary production company that produced science, adventure, and travel films. I also freelanced for a number of magazines, including GO Magazine, a great lesbian lifestyle and listings publication. I moved to California to go to law school at the University of California, Davis School of Law (King Hall). After law school I clerked for a year in

Hawai'i, and returned to Sacramento to work as the Fellow at the California International Law Center at King Hall and teach Appellate Advocacy.

Why did you decide to go to law school and become a lawyer?

One Saturday I was surfing in Long Island and collided with another surfer. His board popped up and hit me really hard in the head. I signed up for the LSAT the next day. That is the truth,

(Continued on page 5)

Transgender Discrimination Case Law

(Continued from page 1)

persons enjoy protection from discrimination under Title VII. *Smith v. City of Salem, Ohio* (6th Cir. 2004) 378 F.3d 566; *Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187 (analogizing Title VIII to criminal statute, discrimination for failure to act according to gender expectations is forbidden).

Transgender discrimination under California's Fair Employment and Housing Act ("FEHA") is expressly prohibited: "Sex' includes ... a person's gender" as defined by "a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." The legislature enacted this change in 2004, bringing the statute in line with case law, and eliminating the false sex/gender dichotomy.

Once the protected category is established, plaintiff must make the standard *prima facie* showing: (a) he or she was subject to an adverse employment action; (b) that action was taken because of transgender status; and (c) he or she is qualified for the position, and (d) was treated differently from other non-transgender employees. *Kortan v. Cal. Youth Auth.* (9th Cir. 2000) 217 F.3d 1104.

B. Factual Bases

The disconnect between an employee's self-identified gender and the others' perception of gender can cause confusion and embarrassment for both. As such, the transition is not solitary, but is shared between the employee and those around her. When does this discomfort cross from being inconvenient to being discrimination?

One theory used to support transgender discrimination claims is constructive wrongful termination, where plaintiff must show: (a) the employer's actions violated public policy; (b) these actions were so intolerable that a reasonable person would have resigned; and (c) the employer had actual knowledge of the intolerable conditions but failed to remediate them. *Brady v. Elixir Industries* (1987) 196 Cal.App.3d 1299, 1306, (overturned on other grounds).

Under this theory, the plaintiff must ask what a "reasonable person" would have done in her shoes. Some of the issues which arise include:

- Which gender pronouns and title does the employee prefer?

(Continued on page 4)

"Transgender discrimination under California's Fair Employment and Housing Act . . . is expressly prohibited."

Fifteen Years of SacLEGAL

In 1993, Larry Levine, a professor at Pacific McGeorge, was asked to serve on the Committee on Sexual Orientation Discrimination for the State Bar of California. While serving on the committee, Larry realized that although the San Francisco Bay Area, Los Angeles, and even Orange County had bar associations assembled gay, lesbian, bisexual and transgendered individuals, no such bar association existed in the Sacramento region.

At the same time, Eileen Gillis, a local family law attorney, had been struck by the same need in our community. Perhaps it was kismet — Larry and Eileen met up and began developing the idea of creating an LGBT lawyer group in Sacramento County.

In 1995, the Sacramento Lawyers for the Equality of Gays and Lesbians was formed and became affiliated with the Sacramento County Bar Association, with the primary mission to promote equality for members of the

lesbian, gay, bisexual and transgender community.

The purposes and goals of SacLEGAL are as follows:

Forum and Network. To provide a forum and network for members of the legal community and others who are interested in securing the human and civil rights of LGBTQQIA individuals; to evaluate candidates for judge-ships.

Legal Rights. To defend and expand the legal rights of LGBTQQIA people, and to secure for LGBTQQIA individuals basic human and civil rights, such as the right to be free from discrimination.

Education. To educate the LGBTQQIA community in Sacramento County about their legal rights; to educate the community at large about the legal rights of LGBTQQIA individuals; to be available to judges, government officials, and others for advice regarding issues affecting the gay and lesbian community.

Programs and Activities.

To implement activities and programs of particular interest to LGBT people within the legal community.

This year marks the fifteenth anniversary of SacLEGAL and these fifteen years have seen incredible strides in LGBTQQIA rights. We have seen anti-discrimination laws passed by the California legislature. Domestic partnership law has grown and evolved and the California Supreme Court recognized the right to marry. Our hearts were broken when that right was taken away, and legal challenges are still ongoing. Although there are battles that remain before LGBTQQIA individuals will have full equality, we are pushing in the right direction.

In order to celebrate the 15-year anniversary of SacLEGAL, we will be planning an event this fall. More details will follow.

“Although there are battles that remain before LGBTQQIA individuals will have full equality, we are pushing in the right direction.”

Non-Profit Releases Report Calling for Medicaid and Social Security Changes to Benefit GLBT Elders

By Melissa Borrelli

The Services and Advocacy for GLBT Elders (SAGE) nonprofit released a report this month calling on lawmakers to consider changes to Medicaid and Social Security rules, among other programs, that could help gay and lesbian senior citizens.

The report calls on federal and state lawmakers to consider ways to legally recog-

nize same-sex relationships so aging partners can have access to the same support systems as heterosexual seniors.

In addition to the challenges already faced by the aging population, GLBT seniors face unique issues including unequal treatment under laws, programs, and services and higher levels of poverty, social, and community isolation.

The report, which has been endorsed by AARP and the American Society on Aging, can be viewed here: http://sageusa.org/about/news_item.cfm?news=177.

SAGE is the world's oldest and largest non-profit agency addressing the needs of GLBT elders.

Transgender Discrimination Case Law

(Continued from page 2)

- Has the employee taken a new name?
- Did the employee inform his or her employer?
- Did the employer provide a choice of rest-facilities?
- Did others comment on the employee's physical changes?
- Were any comments or misuse of gender pronouns overtly mocking?
- Did the employee complain when others failed to comply?
- Did the employer train its employees to accept the change?
- Did the employer investigate and remediate any complaints?

For instance, a decision-maker's remarks about gender may indicate discriminatory bias, depending on "various factors including context, inflection, tone of voice, local custom, and historical usage." *Ash v. Tyson Foods, Inc.* (2006) 546 US 454, 456. Thus, even unintended un-supportive comments may provide the basis of a discrimination claim.

C. Avoiding Litigation & Defenses

To avoid such claims, the Transgender Law Center recommends employers add the phrase "gender identity and expression" to anti-discrimination policies. Once in place, the TLC recommends employers support that policy

by:

- Training employees to use the correct pronouns and names;
- Training managers that the employee may, under certain circumstances, change her name or gender identity without a court order;
- Providing unisex rest facilities, but giving the employee her choice of facilities;
- Providing dress-codes, where pertinent, that allow for assigned-gender appropriate dress;
- Where gender segregation is a job requirement, assigning the employee to the gender-segregated job appropriate for her identified gender.

See, "Advancements in State and Federal Law Regarding Transgender Employees," (2006) pub. NCLR and TLC (tinyurl.com/yhnk87h). As with all cases of reported discrimination, a well-documented investigation into any complaint is well advised. See, e.g., *EEOC v. Go Daddy* (2009) 581 F.3d 951 (single complaint led to plaintiff's successful retaliation claim, though underlying discrimination claim failed).

Any investigation should include evidence of the employee's own behavior, for instance, whether she:

- Unreasonably encouraged inquiry into her transition, then later sought to use others'

responses against the employer;

- Refused to participate in the designation of bathroom facilities;
- Presented sufficient markers to help others understand her assigned gender;
- Acted respectfully when requesting the use of correct gender pronouns, subsequent complaints, etc.;
- Made requests and complaints to the correct person.

Defenses available in other suits apply where the underlying issue was the plaintiff's gender identity, for example: Under constructive wrongful termination, the adverse treatment must impair the employee's job prospects, not be mere annoyances. *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359. To be deemed intolerable, the adverse conditions must be unusually aggravated or amount to a continuous pattern. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238. An inference of no discrimination arises where the same person both hired and took the adverse employment action, despite the existence of the protected category. *Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267.

The law requires employers to be sensitive to the transitioning employee's needs. The employer's reasonable attempts to accommodate will both guide employees to interact appropriately, and will protect the employer from discrimination claims.

"The law requires employers to be sensitive to transitioning employee's needs."



SACRAMENTO LAWYERS FOR
THE EQUALITY OF GAYS AND
LESBIANS

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MISSION

SacLEGAL is a professional association of attorneys, legal professionals, and legislative advocates, affiliated with the Sacramento County Bar Association. Our mission is to promote equality for members of the lesbian, gay, bisexual and transgender (LGBT) community. We will accomplish our mission through strong leadership, legislative advocacy, education, and participation in civic and social activities within the legal community and community at large.

Member Spotlight: Meet the Board Members

(Continued from page 2)

really. But perhaps more seriously, while I love film-making, I wasn't satisfied with the type of indirect change I could make in that capacity. I chose law because I see it as a more direct way to impact our world. So far, it hasn't let me down.

What is your favorite song, movie and/or book and why?

I love horrible pop, Hawaiian, and ballroom music. My favorite directors are Baz Luhrmann, Darren Aronofsky, and Barbara Kopple. At the moment I'm reading *What is the What: The Autobiography of Valentino Achak Deng* by Dave Eggers. It's fabulous, and I would highly recommend it to anyone looking for

an accessible introduction to the Darfur conflict.

What is something people would be surprised to know about you?

I'm a total a capella junkie. I sang bass in my college group, The Vibes, and tenor in my law school group, Law Cappella. I was crushed when The Sing Off didn't make it past the pilot.

What is the best piece of advice you have ever received?

That you have to carve your own path; no one else can do it for you. I think that's true in law and life.

What were you doing ten years ago?

Ten years ago I was finishing my first year of college. About this time of the year I was preparing to leave for the Dominican Republic where I spent a summer near the Hatian border working for a grassroots literacy program.

What do you believe is the biggest issue facing the LGBT community today?

I think the biggest issue the LGBT(IQ) community faces is working to achieve acceptance in society at large while retaining an identity that is uniquely and organically queer.