employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

FALL 2011

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Nevada a Progressive State?: Nevada Now Prohibits Employment Discrimination Based on "Gender Identity or Expression"

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On October 1st, Nevada became the 14th state, in addition to the District of Columbia, to prohibit employment discrimination based on a person's **"gender identity or expression."** Under the new law, which amends Nevada's existing employment discrimination statutes, "gender identity or expression" is defined as **"a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth."** Transgender people are now included as a protected class of individuals entitled to protection against discrimination in the workplace.

> **The inclusion of transgendered individuals in the definition of protected classes raises a host of questions for employers in Nevada, and since there is presently little or no case law for guidance, employers for the time being are left guessing at the best course of action.**

Like the other protected classes in Nevada, the new law applies to an "employer," which is defined by Nevada law as "any person who has **15 or more employees** for each working day in each of 20 or more calendar weeks in the current or preceding calendar year…"

Although the amendment adds "gender identity or expression" to the list of protected categories, it provides two important features for employers. First, it is not an unlawful employment practice for an employer to make an employment decision based on "gender identity or expression" when it "is a **bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.**" Second, "it is not an unlawful employment practice for an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards so long as such requirements are not precluded by law, except that an **employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.**" Under this provision, employers should apply the workplace dress code and grooming policy that matches the employee's "gender identity or expression." Thus, a male who self-identifies as female would be entitled to dress and present himself as a female, unless a bona fide occupational qualification would impair in some way the employer's normal operation of its business.

What are the Implications for Employers in Nevada?

The inclusion of transgendered individuals in the definition of protected classes raises a host of questions for employers in Nevada, and since there is presently little or no case law for guidance, employers for the time being are left guessing at the best course of action. One of the most controversial issues involves the use of bathroom facilities. This issue can be problematic because it may require the employer to balance rights of the transgender individual with the concerns or complaints of uncomfortable co-workers. The legislative comments to this enactment do not address this issue. Further, some states and other localities have already confronted the issue without arriving at a clear consensus. For example, the City of Boston enacted an ordinance expressly permitting individuals to choose public restrooms based on their gender identity, while Minnesota's highest court, which otherwise protects transgender persons against employment discrimination, found an exception for restroom use. But on the other hand, in another Minnesota case, the court rejected a female employee's claim of discrimination and harassment based on her objection to another transgendered employee's use of the women's restroom, even though there were other single-user restrooms available at the workplace.

All of this uncertainty begs multiple questions: Will public service industries such as hotels be required to allow obviously transgendered employees to work in "up front" positions? What is an employer to do when a co-worker or co-workers are uncomfortable about using the same restroom as a transgender employee? These issues and more will likely be brought to the courts over time. But in the meantime, an employer who is notified by an employee that he or she will be "transitioning" to the other gender should be aware that transgender individuals are protected from discrimination and consider carefully what issues might arise in their unique workplace. The wise employer will also be watchful for any conduct that could be considered discrimination or harassment by co-workers, and act accordingly to remediate and prevent such conduct. Finally, employers should update equal employment opportunity policies, harassment policies, employee handbooks and training programs for inclusion of gender identity or expression as a prohibited brand of discrimination.

"Me Too" Evidence – Evidentiary Pitfalls for Employers in Harassment and Discrimination Cases

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One of the principal challenges in any lawsuit against an employer for harassment or discrimination is to confine the plaintiff's case to actions taken by the employer against the plaintiff, as opposed to other employees. Evidence of the employer's discriminatory or harassing conduct against employees other than plaintiff and during time periods other than plaintiff's employment is significantly damaging to the employer's defense. However, the Court

of Appeals decision in *Pantoja v. Anton* (2011) 198 Cal. App.4th 87, cited on August 9, 2011, opens the door to "me too" evidence permitting other employees to testify as to instances of the defendant's discriminatory or harassing conduct involving them, including during time periods when plaintiff was not employed.

> **The court intimated that "me too" evidence would always be admissible absent the defendant admitting to a discriminatory intent or bias.**

In *Pantoja*, plaintiff was a female receptionist/secretary employed by an attorney solo practitioner and his law firm. Pantoja alleged that during the ten months she worked for the attorney, the attorney slapped her buttocks, touched her buttocks and leg while offering her $200, asked her for a shoulder massage, and repeatedly called her a "stupid bitch" before firing her. There were also numerous other female employees who would allegedly testify that the employer had engaged in similar conduct against them. However, some of this other conduct occurred before she was employed by defendant or was otherwise her presence.

The parties went to trial on plaintiff's claims for sexual discrimination and sexual harassment under the Fair Employment and Housing Act. At trial, the court granted employer's motion in limine under Evidence Code § 1101(a) (character evidence inadmissible to show propensity to commit act) and Evidence Code § 352 to exclude evidence of acts of discrimination and harassment by the employer unless the plaintiff personally witnessed such acts and the acts affected her working environment. At trial, the employer admitted to using profanities in the workplace but introduced testimony from other witnesses that the profanities were directed at situations and not to any particular person. In addition, the employer testified that he did not tolerate harassment in the work place. The jury returned a defense verdict.

The Court of Appeals in *Pantoja* reversed the trial court. The Court of Appeals framed the evidentiary issues as follows:

"In this employment discrimination case, we are asked to decide whether the court erred in not allowing the jury to hear 'me too' evidence, that is, evidence of the employer's alleged gender bias in the form of harassing activity against women employees other than the plaintiff...

We conclude that the evidence should have been admitted and the failure to do so was prejudicial."

The most critical ground for admitting the "me too" evidence by the *Pantoja* court was based upon Evidence Code § 1101(b) which permits character evidence to show a number of factors, including an individual's intent. The court determined that evidence that the defendant harassed other women was relevant to demonstrating that the defendant possessed a discriminatory intent or bias based on gender that motivated plaintiff's firing. The court went on to state that a defendant's discriminatory mental state is crucial in claims based upon either sex discrimination or sexual harassment, because it is an element of plaintiff's case. The court intimated that "me too" evidence would always be admissible absent the defendant admitting to a discriminatory intent or bias. In addition, the court determined that such evidence was admissible to impeach the defendant's credibility as a witness and to rebut factual claims made by defense witnesses.

The Court of Appeals further found that the "me too" evidence should not have been excluded as prejudicial under Evidence Code § 352, because it was relevant as to whether the defendant harbored a gender bias as expressed in his words and actions toward plaintiff and also relevant to the credibility of defendant's contentions that he had a policy of not tolerating harassment and the practice of not directing profanity at individuals.

Perhaps the most crucial lesson to be learned from the *Pantoja* decision is the importance of an employer having a strong anti-discrimination/anti-harassment policy in the workplace which is rigorously enforced by the employer. Employers who fail to enforce such a policy run the real risk of a jury hearing sordid tales of sexual discrimination or harassment involving "me too" employees.

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H.R. TIPS

The Discipline Process and Verbal Warnings

1. Document even "verbal warnings," including the facts that resulted in the warning.
2. Make sure that supervisors are trained to forward documentation of verbal warnings along with any subsequent written warnings to H.R. for the personnel file.
3. Tell supervisors to think of it this way: "If it isn't documented, it didn't happen."
4. Finally, advise supervisors not to minimize employee problems in order to avoid giving verbal warnings, or they will face bigger problems down the road.

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