Legal INSIGHTS

with Jeffrey W. Larroca

The Brave New World of Expanding Gender and Sexual Status Rights

During the landmark debate over The Civil Rights Act of 1964, which codified into federal law the illegality of discrimination based on an individual's race, national origin, color and religion, passage seemed assured. Opponents explored every avenue to stymie the legislation, resulting in Howard W. Smith of Virginia, Chairman of the Rules Committee, offering a one-word amendment to the law -- "sex." As they say, hilarity ensued, and some wags dubbed the ensuing discussion "ladies day in the House." But the amendment passed, and Smith's gambit changed the face of the American civil rights movement. Though the Equal Employment Opportunity Commission was initially reluctant to enforce the gender discrimination provisions of Title VII, the new right - underscored by extreme disparities in pay and working conditions between men and women - soon became the basis of more complaints than any other single protected status under the new law.

The evolution of "sex" discrimination since that time has been impressive. Congress added pregnancy as a component of "sex" in 1978 with the Pregnancy Discrimination Act, and in ensuing court rulings, abortion was recognized as subsumed under pregnancy. Thus, from Representative Smith's facetious amendment, it became illegal to fire a woman because she became pregnant and, necessarily, because she was having or had an abortion. Similarly, the courts soon determined that "sex" also meant sexual harassment, so it became illegal for a boss to say to a female subordinate "date me or you are fired." Soon after, that prohibition on overt sexual discrimination was enhanced, when courts found that sexual harassment did not merely come in the form of "date me or you are fired/not hired ultimatums" but could also be constituted by a series of severe or pervasive acts, such as pressing for dates, discussion of pornography, lewd gestures, inappropriate touching, gender-based insults and more to boot.

The evolution, or revolution, has only just begun. In 1964, the idea that individuals would be protected because of their sexual orientation was even wilder than the protection against gender discrimination. Nonetheless, prior to 1964, two states did protect individuals against gender discrimination, whereas no states prohibited discrimination against gays and lesbians. Today, however, over half the states and the District of Columbia include sexual orientation as a protected category, and they are joined by numerous cities, counties and municipalities.

In many jurisdictions, prohibition against sexual orientation discrimination led to inclusion of gender identity protections, including transsexualism, an expansion dubbed by one commenter as "The New Frontier of Employment Law." Twelve states and the District of Columbia make discrimination against applicants and employees who may have the psyche of a man trapped in the body of a woman, or vice versa, illegal.

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The recent case of Diane Schroer provides us a glimpse as to the next wave. Schroer applied for a position with the Library of Congress. The Library was favorably impressed and offered Schroer - then "David" - a position. That's when Schroer informed the Library that he would be transitioning to a female before starting the job. The offer was rescinded, and Schroer sued for gender discrimination under Title VII. The Library's defense was clear and obvious - when "sex" was inserted into Title VII, it meant gender as assigned at birth. As such, the federal law did not cover Schroer.

The federal judge handling the case disagreed. When the Library tried to have the case dismissed before trial, the court addressed its argument that Title VII's definition of "sex" did not cover transgendered individuals, holding that such "arguments, perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence . . ." In short, the judge in the court held that "the times, they are a ' changing": "it may be time to revisit [the] . . . conclusion . . . that discrimination against transsexuals because they are transsexuals is 'literally' discrimination because of . . . sex. That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender." Ultimately, the Schroer case went to trial, and Schroer was awarded just under half a million dollars in damages.

What's on the horizon? Plenty. The Employment Non-Discrimination Act (ENDA), a proposed federal law that would add sexual orientation and gender identity as a protected status under federal law, currently sports 111 co-sponsors in the House of Representatives and 39 in the Senate. Perhaps as important, notwithstanding the lack of a federal mandate, private employers are voluntarily adopting non-discrimination policies with regard to sexual orientation and/or gender identity, including Wal-Mart and 95% of Fortune 500 companies. ●

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