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Call Me Caitlyn, Not Bruce: Navigating the New Transgender Landscape in Healthcare, Business, and Employment Claims

As public awareness surrounding transgender individuals has increased, so have transgender issues in the workplace. A study conducted by the U.S. Commission on Civil Rights revealed that virtually all transgender employees experience harassment or mistreatment on the job. The study also showed that many transgender employees were forced to use restrooms that did not match their gender identity, were told to dress and act like a different gender than their own or they would lose their job, or had their private information divulged without permission. This panel will provide an up-to-date and comprehensive overview of the legal protections afforded to transgender employees.

I. The Evolution of Transgender Rights

Although there is a documented history of transgender individuals dating back to ancient civilizations, transgender awareness is relatively new in the United States. In fact, employment protections were virtually non-existent until the passage of Title VII of the Civil Rights Act of 1964, which originally protected the classes of race, color, religion, sex, and national origin. Since then, there have been continuous efforts – some passages and some pushbacks – in an endeavor to expand protected classifications, including the protection of transgender individuals.

In 1993, Minnesota became the first state to ban discrimination on the basis of perceived gender identity with the passage of the Minnesota Human Rights Act, protecting transgender individuals from discrimination in the contexts of employment, housing, and public accommodations. This was followed by a similar law in Iowa in 1999, which was later repealed in 2000, but again reenacted

in 2007. On January 2, 2004, California's Fair Employment and Housing Act was amended to prohibit employment discrimination based on gender identity. In addition, amendments went into effect on April 1, 2016 that clarify key terms and strengthen the rights of transgender people to be free from discrimination in employment. Certain states, including Texas and Florida, do not have anti-discrimination laws that protect transgender individuals, although some cities offer protection.

On a federal level, the Equal Employment Opportunity Commission in 2012 specifically declared that transgender employees are protected under Title VII of the Civil Rights Act of 1964. In the case, Macy v. Dept. of Justice, 2012 WL 1435995 (Apr. 12, 2012), the EEOC held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII." The EEOC has set forth some examples of transgender-related sex discrimination that it views as unlawful sex discrimination, including:

- Failing to hire an applicant because she is a transgender woman
- Firing an employee because he is planning or has made a gender transition
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees
- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex
- Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another

unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability

In 2017, the EEOC received a total of 1,762 charges of discrimination that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status. This is an over 100% increase from the 808 charges filed in 2013.

In a 2016 report published by the UCLA School of Law Williams Institute, it was estimated that 0.6% of adults, about 1.4 million, identify as transgender in the United States. Although, this figure may be higher based on individuals who declined to report their transgender identity.

The Trump administration is trying to get the term "transgender" out of existence. He says trans protections are "fake news." The new proposed definition would eradicate federal recognition of the estimated 1.4 million Americans who have opted to recognize themselves as a gender other than the one they were born into. In a leaked memo draft, Health and Human Services stated that gender should be defined "on a biological basis that is clear, grounded in science, objective, and administrable."

II. The Current State of Transgender Issues in Employment Litigation

A. The Supreme Court Could Clarify Whether Title VII Bars Workplace Discrimination Based on Gender Identity

In October 2017, the Department of Justice issued a memo that stated: "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender *per se*, including transgender status." The DOJ's interpretation is a reversal of its interpretation under the Obama administration and also conflicts with the EEOC's interpretation, both of which deem that Title VII prohibits discrimination on the basis of gender identity.

Immediately following the DOJ's new interpretation, a court in the Western District of Oklahoma in held that Title VII protects transgender individuals from discrimination. [Tudor v. Southeastern Oklahoma State University, No. civ-15-324-C. (W.D. Okla. Oct. 26, 2017).] U.S. Circuit Courts are split on whether Title VII includes discrimination on the basis of gender identity, making this issue ripe for interpretation by the Supreme Court.

In 2013, funeral director Anthony Stephens came out to his colleagues at a Michigan funeral home, and indicated that he would be returning to work as his true self, Aimee Australia Stephens. Ms. Stephens had worked for Harris Funeral Homes for nearly six years, where she received positive performance reviews and regular raises. Two weeks later, the home's owner fired Ms. Stephens. When asked for the specific reason why he terminated Ms. Stephens, he stated: "Well, because he was no longer going to represent himself as a man. He wanted to dress as a woman." The owner also said he did not want to address Ms. Stephens as Aimee because he was uncomfortable with the name because he was a man. The owner told Ms. Stephens the situation was "not going to work out." He offered Ms. Stephens a severance package when she was fired, but she did not accept it.

Ms. Stephens filed a complaint with the EEOC, which sued the funeral home on her behalf. The EEOC accused the funeral home of terminating Ms. Stephens because she was transgender and for her refusal to conform to sex-based stereotypes. The District Court for the Eastern District of Michigan agreed with the funeral home that Title VII did not protect transgender people. The EEOC appealed. The 6th Circuit Court of Appeals ruled in favor of Ms. Stephens and the EEOC. The anti-LGBTQ group Alliance Defending Freedom petitioned the Supreme Court to take up the case, asking the justices to clarify whether Title VII bars workplace discrimination based on gender identity.

The petition was originally set for consideration in conference on November 30, 2018, then December 7, 2018, but was removed from the docket and has not been rescheduled as of the date of this writing.

In California, Government Code § 12940(a) provides: "It is an unlawful employment practice . . . [f]or an employer, because of the . . . gender identity . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

III. Transgender Issues in Medicine and Correctional Healthcare

In the medical setting, transgender issues arise mostly in the context of providing treatment options; not in attempts to "cure" a patient of a desire to live as a sex other than as he or she was born (akin to certain religious "conversion" therapies or stories like the book and movie entitled "Boy Erased"), but instead, modalities of care, such as medicines, therapies, and surgeries that assist with or fully accomplish the male-to-female (MTF) or female-to-male (FTM) transition. It must be understood that basic "gender non-conformity" is not the same as "gender dsyphoria." "Gender non-conformity" refers to the extent to which a person's gender identity, role, or expression differ from the cultural norms of that person's birth sex. "Gender dysphoria," as it is currently named in the DSM-V (formerly known as "Gender identity disorder"), refers to discomfort or stress caused by the discrepancy between a person's sex assigned at birth and their individual gender identity. Only some people with gender non-conformity will experience gender dysphoria at some point in their lives. It is for those persons whose gender non-conformity, i.e., simply their gender expression (clothing, self-identity, name changes, pronoun choices, etc.), causes them substantial stress that they may satisfy the diagnostic criteria for "gender dysphoria," and for whom treatment modalities specifically apply.

Under the DSM-V, a patient must have two of these six diagnostic criteria, lasting at least six months, to support a diagnosis of "gender dysphoria":

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender

With a diagnosis of gender dysphoria, certain treatment options are considered to be "standard of care" to try to relieve the stress of gender dysphoria and assist the MTF/FTM transition.

The World Professional Association for Transgender Health (WPATH) describes itself as an "international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health." Notably, the WPATH states that one of its main functions is to promote "standards of health care" for the treatment of patients with gender nonconformity, gender dysphoria, etc., and in that regard, the WPATH has articulated a published set of such standards.

Purpose and Use of the Standards of Care

One of the main functions of WPATH is to promote the highest standards of health care for individuals through the articulation of *Standards of Care (SOC) for the Health of Transsexual, Transgender, and Gender Nonconforming People*. The *SOC* are based on the best available science and expert professional consensus.[2] Most of the research and experience in this field comes from a North American and Western European perspective; thus, adaptations of the *SOC* to other parts of the world are necessary. Suggestions for ways of thinking about cultural relativity and cultural competence are included in this version of the *SOC*.

The overall goal of the *SOC* is to provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment. This assistance may include primary care, gynecologic and urologic care, reproductive options, voice and communication therapy, mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatments. While this is primarily a document for health professionals, the *SOC* may also be used by individuals, their families, and social institutions to understand how they can assist with promoting optimal health for members of this diverse population.

WPATH recognizes that health is dependent upon not only good clinical care but also social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship.

In most areas of medical specialty, "standards of care" are rarely "codified" or articulated in writing, but are frequently described as what a "reasonable" physician or provider may do in the same or similar circumstances. Those medical specialties that have attempted to articulate anything remotely called a "standard," often include careful disclaimers that such purported standards "are not rules, but are guidelines…" (see, e.g., American College of Radiology Standards), while most medical specialties do not even try to articulate any standards in writing, owing to the likelihood that they become rigid rules that may be enforced in medical negligence lawsuits without allowance for independent application. The WPATH, however, while containing language

allowing for "flexibility" of its articulated guidelines, nevertheless strongly endorses its standards for applicability in the care of transgender patients:

> The *SOC* are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender nonconforming people. While flexible, they offer standards for promoting optimal health care and guiding the treatment of people experiencing gender dysphoria – broadly defined as discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics) (Fisk, 1974; Knudson, De Cuypere, & Bockting, 2010b).

In fact, the WPATH goes further, and articulates the position that global application of the WPATH standards should actually be the minimum level of care provided, and that they are not intended to "limit" care:

Global Applicability of the Standards of Care

While the *SOC* are intended for worldwide use, WPATH acknowledges that much of the recorded clinical experience and knowledge in this area of health care is derived from North American and Western European sources. From place to place, both across and within nations, there are differences in all of the following: social attitudes towards transsexual, transgender, and gender nonconforming people; constructions of gender roles and identities; language used to describe different gender identities; epidemiology of gender dysphoria; access to and cost of treatment; therapies offered; number and type of professionals who provide care; and legal and policy issues related to this area of health care (Winter, 2009).

The *SOC* are not intended to limit efforts to provide the best available care to all individuals. Health professionals throughout the world – even in areas with limited resources and training opportunities – can apply the many core principles that undergird the *SOC*. These principles include the following: Exhibit respect for patients with nonconforming gender identities (do not pathologize differences in gender identity or expression); provide care (or refer to knowledgeable colleagues) that affirms patients' gender identities and reduces the distress of gender dysphoria, when present; become knowledgeable about the health care needs of transsexual, transgender, and gender nonconforming people, including the benefits and risks of treatment options for gender dysphoria; match the treatment approach to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria; facilitate access to appropriate care; seek patients' informed consent before providing treatment; offer continuity of care; and be prepared to support and advocate for patients within their families and communities (schools, workplaces, and other settings).

In recent years, the most commonly litigated area of medicine related to the provision of care to transgender or gender dysphoric patients is in the

correctional setting. In prisons and jails, medical care is constitutionally required for inmates who have a "serious medical need" (see Estelle v. Gamble, 429 U.S. 97 (1976), articulating that it is a violation of the Eighth Amendment, under 42 USC 1983, to act with deliberate indifference to a serious medical need). In that regard, Federal courts around the country have ruled that gender dysphoria is a "serious medical need," and as such, cannot be ignored, but must be addressed accordingly. Numerous courts in multiple jurisdictions have held that states refusing to provide medical care (hormone therapy, gender affirming products, hair removal, and even sexual reassignment surgery) are in violation of the Constitution, and have ordered such modalities of care be provided to incarcerated individuals with diagnosed gender dysphoria. In a ruling handed down several months ago, the U.S. District Court for the Northern District of Florida specifically noted that "this court finds the WPATH Standards are authoritative in the treatment of gender dysphoria." Keohane v. Jones, (4:16-cv-00511).

Clearly, there is a rapidly growing trend to recognize persons with gender nonconformity as no different than persons who are cisgender, and to further recognize gender dysphoria as a legitimate medical diagnosis that requires provision of care as articulated by WPATH. Healthcare providers and correctional facilities, along with other public and private industries, must understand that they cannot ignore gender nonconforming individuals or treat them differently because of those non-traditional gender expressions.