



Gender Identity Law Poses Challenge For Employers

ANTI-BIAS STATUTE COULD SPUR LITIGATION REGARDING RESTROOMS, DRESS CODES

By MARIE P. GRADY

In the not-too-distant past, attorney Pamela J. Moore represented a manufacturing company that found itself in a bit of a bind. A male supervisor who was undergoing sex reassignment surgery wanted to use the women's restroom, but female members of his staff revolted.

In that case, the company resolved the problem by assigning a gender neutral bath room to the manager. But what if the supervisor demanded to use the lady's room today? Under a new state law outlawing bias based on gender identity or expression, the answer is not so clear cut.

"My question is whether that's going to be permissible under the statute if there are people out there who are going to push the envelope and say, 'No, I don't want to use a gender neutral [rest room],' " said Moore, a partner at McCarter & English and leader in the firm's Labor & Employment Group.

While employment law practitioners generally back this latest attempt to combat discrimination, most agree that the broad language in the state statute is bound to result in litigation. Connecticut banned discrimination based on gender identity or expression as of Oct. 1, joining 14 other states and the District of Columbia.

The law expands the scope of Connecticut's anti-discrimination laws to prohibit discrimination on the basis of gender identity or expression in employment, housing, public education and accommodations. The law exempts most religious organizations, said Joshua A. Hawks-Ladds, chairman of Pullman & Comley's Labor and Employment Practice Group.

And what of employers who are unaware of the law's provisions?



Attorney Pamela J. Moore said employers can seek evidence that an employee is sincere about his or her decision to identify with the opposite gender.

"Ignorance is not bliss," said Day Pitney's Daniel L. Schwartz, chair of the firm's Labor & Employment Department. "Ignorance is risk."

As is the case with other forms of discrimination, those who complain of bias must first exhaust administrative remedies, including filing a complaint with the Connecticut Commission on Human Rights & Opportunities within six months of the alleged discriminatory action. If an employee prevails on a claim of discrimination, remedies may include back pay, lost compensation, attorney's fees and potential emotional distress damages.

Although it is not a requirement that the



Attorney Joshua A. Hawks-Ladds said Connecticut is again at the forefront of protecting individual rights, but the courts may have the final say on how ambiguities in a new gender identify bias law are resolved.

complaint first be brought to an employer, Schwartz said that is advisable.

He said employers must include notice of the law in required equal employment opportunity postings; state contracts must also reference its provisions. Schwartz pointed out that the law is going into effect at a time of heightened awareness. "There is an increase in public awareness in part due to Chaz Bono," he said.

Chastity Bono was the daughter of entertainers Sonny Bono and Cher and, as a blonde tyke, was often featured on her parents' hit TV show in the 1970s. Recently, Chastity Bono became Chaz bono after sex reassignment surgery. Chaz Bono is cur-

rently appearing on the popular "Dancing With The Stars" TV show.

Harder To Track

Notwithstanding public awareness, employment lawyers say discrimination based on gender identity bias may not be as easy to track as discrimination based on race, gender, or age. The law defines *gender identity or expression* as a person's "gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."

The law does not detail what aspects of one's identity, appearance, or behavior are "gender-related," nor does it address spaces traditionally segregated by gender, such as restrooms or dressing rooms.

It does state that a person's gender-related identity must be "sincerely held, part of a person's core identity, or not being asserted for an improper purpose." Types of evidence to satisfy these requirements include a person's medical history, receipt of care or treatment related to the gender-related identity, or evidence showing "consistent and uniform assertion of the gender-related identity."

At least five U.S. jurisdictions have policies concerning access to public restrooms based on gender identity, with Colorado and San Francisco specifically prohibiting the practice of singling out transgender people to require proof of gender, according to data compiled by the Transgender Law & Policy Institute. Civil rights agencies in at least four states with gender identity discrimination laws report only a handful of complaints concerning access to restrooms, but many inquiries from employers as to what access should be provided.

In Washington, D.C., which enacted such a law in 2006, the District's Human Rights Commission has advised that transgender individuals must be allowed access to restrooms based on their gender identity, according to the Transgender Law & Policy Institute. The Washington agency received about 30 complaints from 2006 to 2009 regarding gender identity bias, with the majority concerning alleged employment violations.

In California, which has outlawed discrimination based on gender identity since 2003, the Department of Fair Employment and Housing reported in 2009 that it had

not received any complaints regarding individuals inappropriately using restrooms or "cross dressing in a manner inconsistent with their gender identity."

With the enactment of Connecticut's new law, however, some questions are bound to surface, lawyers agree. "That's why courts exist," said Hawks-Ladds, of Pullman & Comley. "Having litigated discrimination cases for over 20 years now, I can tell you these types of laws often result in litigation over subtle definitions and meanings."

Panel Discussion

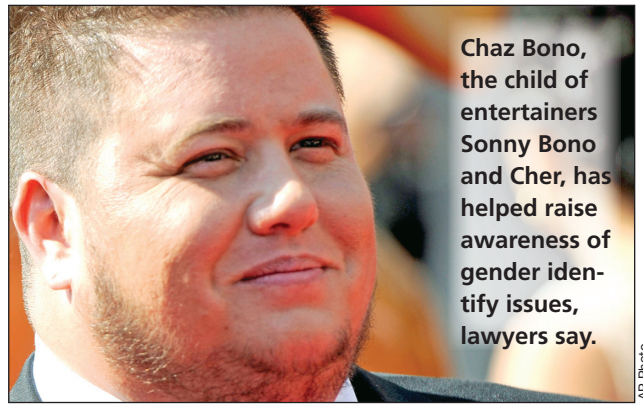
Shipman & Goodwin is hosting a free panel discussion to answer such questions at its Hartford office from 4 to 6 p.m. on Oct. 5. Among featured speakers is Jennifer Levi, the Transgender Rights Project director at Gay & Lesbian Advocates and Defenders and a professor of law at Western New England University School of Law.

According to McCarter & English's Moore, under Connecticut's law, employers can seek evidence from an employee when questions arise as to the sincerity or consistency of his or her beliefs. She recalled the case of a retailer she worked with before the law was enacted which had hired an employee who had interviewed for the position as a man but showed up dressed as a woman, "and not a very attractive woman," for his first day on the job.

"The employer called and said, 'Jim Jones just showed up as Julie Jones and what do we do?'" Moore recalled. "We instructed the manager to tell him your dress is inappropriate."

Moore said an employer would have to sit down with the employee and perhaps seek evidence that the person sincerely identifies with the opposite gender. In this case, the fact that the employee dressed as a man one day and a woman the next may not demonstrate the "consistent and uniform assertion of the gender-related identity" described in the law.

Employers will also have to be careful to ensure that they are equally applying dress codes and other workplace rules. If, for instance, they regularly allow employees to dress casually or provocatively, they cannot single out a person who identifies with the



Chaz Bono, the child of entertainers Sonny Bono and Cher, has helped raise awareness of gender identity issues, lawyers say.

AP Photo

opposite sex for different treatment.

The lawyers agreed that many of the questions may be addressed via regulations issued by the state Department of Labor and decisions by the human rights commission. Whether the law will lead to more gender identity or expression bias complaints in the state is unclear.

The number of individuals protected by the law is unknown. Estimates suggest that 1 percent of the U.S. population may be transsexual and one study showed that up to 8 percent identify with a sex other than their physiological gender, according to reports compiled by the Human Rights Campaign.

The Commission on Human Rights and Opportunities has not separately tracked gender bias complaints, which are often listed under gender-based or disability-based complaints because there was no protected class under the law until now. However, Charles Krich, principal attorney at the agency, has said he knows that that gender identity complaints exceed some in other categories.

Hawks-Ladds said the law is part of a long history of protecting individual rights in the state.

"I think it's interesting Connecticut again is at the forefront of attempting to protect individuals who may be marginalized by society in some fashion; where that legislation will put us in the courts ... has yet to be seen."

For her part Moore said employers are interested in doing the right thing.

"I personally don't think our society is nearly as tolerant as it could be. But I honestly think most employers I work with will do whatever they can to apply the act. Their biggest problem [may be] dealing with the attitudes of others in the workplace." ■