

It's Not Just a Job—LGBT Workplace Issues

by Robyn B. Gigl and CJ Griffin

With the exception of marriage equality, New Jersey has generally been at the forefront of protecting the rights of its lesbian, gay, bisexual and transgender (LGBT) residents. New Jersey's Law Against Discrimination (LAD),¹ passed in 1945, is considered one of the most progressive and inclusive state anti-discrimination laws in the country. In the absence of a federal statute protecting the rights of LGBT individuals in the workplace, the LAD has been instrumental in securing equal opportunities and safe working environments for LGBT employees in New Jersey. This article addresses workplace issues that may be encountered by LGBT clients or employers of LGBT individuals.

Privacy Issues and Coming Out in the Workplace

The decision to be 'out' in the workplace can be a major one, and it can be deeply personal. Even though societal attitudes toward LGBT individuals have improved in the past few decades, workplace discrimination and harassment remains a reality for LGBT employees.² Between 15 and 43 percent of LGB employees have faced some form of discrimination or harassment at work.³ For transgender employees, the number is even more alarming: At least 90 percent of transgender individuals have directly experienced workplace discrimination, harassment or mistreatment.⁴ In light of these statistics, it is not surprising that many LGBT employees choose not to come out at work.

Obviously, there is nothing mandating that employees reveal their sexual orientation or gender identity to their employers. Moreover, because LGBT employees are members of a protected class under the LAD, for an employer or supervisor to ask about their sexual orientation or gender identity would violate the law.⁵ Nonetheless, an LGBT employee may choose to self-disclose orientation or gender identity during the hiring process or during the course of employment. Some LGBT employees may wish to limit their disclosure, and an

employer must respect their request for confidentiality. Employees in New Jersey have a right to privacy in the workplace under common law⁶ and the state constitution.⁷ This right covers sexual activity and orientation.⁸

Privacy issues are at the forefront of workplace concerns for both employees and employers, particularly in this era of Internet and social media use. To date, there have been no cases addressing a situation where an employee was 'outed' or their sexual orientation was discovered via Facebook or other social media. However, employers must be cognizant that if they provide forums, blogs, listservs or other online resources for employees, to the extent those resources become closely related to the workplace environment and beneficial to the employer, harassment or violating an employee's privacy on them may lead to employer liability.⁹ All covered LGBT employees, regardless of whether they are out, are entitled to be protected against harassment, discrimination and retaliation under the LAD.

Workplace Discrimination and Harassment

New Jersey was the first state in the nation to pass an anti-discrimination statute¹⁰ and the fifth to add sexual orientation to the list of protected classes.¹¹ Additionally, in 2006 the New Jersey Legislature amended the LAD to include discrimination based on a person's gender identity or expression.¹² The LAD currently provides:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

For an employer, because of the...*civil union status, domestic partnership status, affectional or sexual orientation, ...gender identity or expression, ...*to refuse to hire or employ or to bar or to discharge or require to retire...from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment....¹³

Thus, broad protections are afforded to LGBT persons

under the LAD for discriminatory treatment at work, whether due to the person's relationship status, gender expression, or sexual orientation.

Because there is no federal statute protecting the rights of LGBT employees, except when dealing with federal employees (who are not within the ambit of the LAD) or other circumstances that prevent invocation of the LAD (*i.e.*, choice of law issues), there is no question that the LAD is an employee's best recourse for workplace issues arising from his or her LGBT status. Because a person's status as a lesbian, gay, bisexual or transgender individual makes them part of a protected class under the statute, the protections afforded are no different than any other protected class, such as race or gender. Equally important is that an employee does not have to be LGBT or admit being LGBT to be protected under the LAD. If the discrimination or harassment is the result of a perception that the employee is LGBT, it violates the LAD.¹⁴

For a transgender employee, the LAD not only protects against discrimination based on gender identity or expression, it also may provide a claim under the LAD's disability provision.

In *Enriquez v. West Jersey Health Systems*,¹⁵ a case decided prior to the 2006 amendment of the LAD, which added "gender identity or expression" as a protected class, the Appellate Division concluded that gender dysphoria¹⁶ is a disability protected under the LAD.¹⁷ This protection may be unnecessary in litigation, but may be beneficial to a transgender employee who intends to transition from the gender he or she was assigned at birth to the gender with which he or she identifies. In that case, the employee can utilize *Enriquez* to request an accommodation from the employer, and the employer has an affirmative obligation to engage in a "good faith interactive process" to determine whether a "reasonable accommo-

dation" is available to accommodate the disability.¹⁸

LGBT employees who, for whatever reason, fall outside the protection of the LAD have a more difficult time confronting workplace issues involving LGBT status. When the LAD is not applicable, the main source of recourse is Title VII of the Civil Rights Act of 1964.¹⁹

Discrimination claims brought by LGB plaintiffs under Title VII will only be successful if those plaintiffs can establish that the discrimination or harassment was based on "sex stereotyping," a theory established by the United States Supreme Court in *Price Waterhouse v. Hopkins*.²⁰ In *Price Waterhouse*, the plaintiff sued for gender discrimination under Title VII when she was denied a partnership position with the firm because she was not feminine enough. The Court held that Title VII prohibits not just discrimination based on biological sex but also discrimination based on gender or sex stereotypes.²¹ The wrongful conduct is impermissible not because it is directed at an employee's sexual orientation, but rather because the employee does not adhere to a socially imposed gender stereotype.

The difference between discrimination or harassment that occurs "because of sex" and "because of sexual orientation" can be subtle. For example, in *Bibby v. Coca Cola Bottling Co.*,²² the plaintiff alleged that his coworkers called him a "faggot" and a "sissy," and stated "everybody knows you're as gay as a three dollar bill."²³ The Third Circuit found the plaintiff had only established that his coworkers discriminated against him because of his sexual orientation, not "because of sex" or because he failed to live up to any gender stereotype.

In contrast, in *Prowel v. Wise Business Forms, Inc.*,²⁴ the Third Circuit found the plaintiff established that the discrimination occurred not simply because of his sexual orientation but

also because of his effeminacy. His coworkers had harassed him by calling him a "faggot" and making comments that he failed to live up to stereotypical male traits. The court noted that while his fellow male coworkers were very "blue collar" and "rough around the edges," Prowel was "well-groomed," "neat," and performed his job duties with "pizzazz."²⁵ Because the basis of his coworkers' harassment and discrimination was his femininity and failure to be "masculine," not merely his sexual orientation, a Title VII sex stereotyping claim survived summary judgment.²⁶

The issue of discrimination involving a transgender employee under Title VII has not been addressed by the Third Circuit in more than 35 years,²⁷ but a number of federal decisions in other circuits in the past decade have demonstrated a willingness to recognize that discrimination against a transgender employee is cognizable under a Title VII sex-stereotyping theory.²⁸ Additionally, at least two federal courts have recognized that discrimination against a transgender employee is discrimination "because of sex" under Title VII.²⁹

Of particular note is the Equal Employment Opportunity Commission's (EEOC) decision issued on April 20, 2012, in *Macy v. Holder*,³⁰ where the full commission unanimously ruled 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."³¹ Although an EEOC ruling is not binding on federal courts, it does provide authority for interpreting Title VII protections for transgender employees.

Based on *Macy* and other federal decisions, it is anticipated that should the Third Circuit be called upon to consider whether discrimination against a transgender individual violates Title VII, it will find such discrimination prohibited, either under a sex-stereotyping

analysis or directly under a 'because of sex' theory.

Medical Leave Disparities

Requests for medical leave by LGBT employees highlight some of the disparities among marriage, civil unions and domestic partnerships. At the state level, the New Jersey Family Leave Act (FLA)³² provides identical coverage to LGBT and heterosexual persons. That is, New Jersey's Civil Union Act³³ amended all other statutes to require that marriages and civil unions are treated identically.³⁴ The FLA's shortcoming is that it applies only to leave to care for another and not leave to care for one's own serious health condition.³⁵

The Federal Family Medical Leave Act (FMLA),³⁶ in contrast, provides leave for an individual's own serious health condition, as well as leave to care for another family member. For instance, when taking leave to care for a son or daughter, the Department of Labor has ensured that "an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship."³⁷ Thus, an LGBT person who parents a non-biological child can still request FMLA leave to care for that child during adoption, birth, or serious illness.

But, the disparity between legal entitlements to leave for LGBT employees and straight employees is evident when the law refers to caring for a "spouse" with a serious health condition. Pursuant to the 1996 Defense of Marriage Act (DOMA),³⁸ "marriage" means "only a legal union between one man and one woman as husband and wife," and the word "spouse" refers only to "a person of the opposite sex who is a husband or a wife."³⁹ For New Jersey LGBT employees, this means requests for medical leave to care for a civil union or domestic partnership partner must be made via the FLA.

LGBT Loss of Soft Benefits

Even without considering the intricacies of Employee Retirement Income Security Act (ERISA) plans or health benefit plans, the impact of the DOMA and the lack of marriage equality in New Jersey have deprived most LGBT employees in New Jersey of 'soft benefits' that mid-sized and large employers may provide to married, straight employees. These benefits often include bereavement leave, employer-provided supplemental life insurance for a spouse, adoption assistance, retiree health benefits for spouses and employee discounts for spouses. These are important employee incentives, and being excluded from them can be frustrating for LGBT employees.

Conclusion

Despite substantial progress, lesbian, gay, bisexual and transgender employees still face discrimination and inequities in the workplace. If the DOMA is struck down, LGBT employees may begin receiving the same benefits as their straight counterparts. Likewise, as LGBT equality becomes mainstream politically and socially, there likely will be greater overall equality and less intolerance in the workplace. ♀♂

Endnotes

1. N.J.S.A. 10:5-1, *et seq.*, L. 1945, c.169 as amended and supplemented.
2. William Harms, *Americans Move Dramatically Toward Acceptance of Homosexuality, Survey Finds*, University of Chicago (Sept. 28, 2011), available at news.uchicago.edu/article/2011/09/28/americans-move-dramatically-toward-acceptance-homosexuality-survey-finds. (last viewed on March 13, 2013).
3. Crosby Burns and Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, Center for American Progress (2011).

4. Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, p.56 (2011), available at www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf. (last viewed on March 9, 2013).
5. N.J.S.A. 10:5-12c.
6. *Hennessey v. Coastal EaglePoint Oil Co.*, 129 N.J. 81 (1992).
7. *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985) (the constitutional right of privacy "embraces the right to make procreative decisions ... [and] the right of consenting adults to engage in sexual conduct").
8. *Id.*
9. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (2000).
10. *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 N.J. 381, 399 (2007).
11. *Lewis v. Harris*, 188 N.J. 415 (2006).
12. See N.J.S.A. 101:2-1, Historical and Statutory Notes.
13. N.J.S.A. 10:5-12 (emphasis added).
14. N.J.S.A.10:5-5hh; see also *L.W. ex rel. L.G.*, 189 N.J. at 381.
15. *Enrique v. W. Jersey Health Sys.*, 342 N.J. Super. 501 (App. Div. 2001), *certif. denied*, 170 N.J. 211 (2001).
16. "Gender dysphoria" refers to the discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth. See Fenway Health, Glossary of Gender and Transgender Terms, at 7-8 (Jan. 2010 Revisions). www.fenwayhealth.org/site/DocServer/Handout_7C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf. (last viewed on March 9, 2013).
17. *Enrique*, 342 N.J. Super. at 520.
18. *Tynan v. Vicinage 13 of the Superior Court*, 351 N.J. 385, 400 (App. Div.

- 2002).
19. 42 U.S.C. §2000e-2(a)(1).
 20. 490 U.S. 228 (1989).
 21. *Id.* at 251.
 22. *Bibby v. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).
 23. *Id.* at 259-60.
 24. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).
 25. *Id.* at 287.
 26. Highlighting the differences between state and federal law is the Appellate Division decision in *Kwiatkowski v. Merrill Lynch*, 2008 WL 3875417 (App. Div.), *certif. denied*, 197 N.J. 259 (2008). In reversing the granting of summary judgment dismissing plaintiff's complaint, the court held that a single comment allegedly uttered by plaintiff's supervisor under her breath that plaintiff is a "stupid fag" is so patently offensive that it, alone, could give rise to a hostile work environment claim. The court specifically compared the comment to the comment in *Taylor v. Metzger*, 152 N.J. 490 (1998), in which it was alleged that the sheriff of Burlington County referred to an African American female sheriff's officer as a "jungle bunny."
 27. *Grossman v. Bernards Twp. Bd. of Educ.* 538 F.2d 319 (3d Cir.), *cert. den.*, 429 U.S. 897 (1976).
 28. *Smith v. City of Salem*, 369 F.3d 912, 918 (6th Cir.), *amended and superseded*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.), *cert. den.*, 546 U.S. 1003 (2005); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).
 29. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
 30. *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. April 20, 2012).
 31. *Id.* at 8.
 32. N.J.S.A. 34:11B-1, *et seq.*
 33. N.J.S.A. 37:1-28 to -36, L. 2006, c.103.
 34. N.J.S.A. 37:1-31 ("Civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.").
 35. Leave may be taken "upon the birth or placement for adoption of a child or serious health condition of a family member." N.J.S.A. 34:11B-2.
 36. 29 U.S.C. § 2601, *et seq.*
 37. U.S. Department of Labor Clarifies FMLA Definition of 'Son and Daughter,' Department of Labor press release (June 22, 2010), available at www.dol.gov/opa/media/press/WH/D/WHD20100877.htm. (last viewed on March 9, 2013).
 38. 1 U.S.C. § 7 (1996).
 39. *Id.*

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