

March 2016

EEOC enforces position against transgender bias in Phoenix workplace

by Dinita L. James
Gonzalez Law, LLC

The Equal Employment Opportunity Commission (EEOC) has taken a strong position that Title VII of the Civil Rights Act of 1964 bans discrimination against transgender individuals as a form of sex discrimination called sex stereotyping. Events at a Phoenix workplace in 2010 and 2011 gave the EEOC an opportunity to assert its position before a federal court. The case was eventually settled, but it provides some vivid examples of workplace behavior the EEOC would claim to be unlawful, while at the same time illustrating what the agency believes are best practices for dealing with transgender employees.

Time of transition

Deluxe Financial Services, Inc., a check printing company with headquarters in Shoreview, Minnesota, operated a call center in Phoenix until it was closed at the end of July 2011. Britney Austin went to work there in October 2007 presenting as male, her biological sex, and with a traditional male name. In the fall of 2010, she told her supervisor that she intended to begin presenting as female at work and then she began doing so.

In early 2011, Austin began hormone therapy and gave Deluxe documentation stating that she had been diagnosed with gender dysphoria, a formal diagnosis used by psychologists and physicians to describe individuals who experience significant discontent with their biological sex or the gender they were assigned at birth.

Austin then spoke with a senior manager and HR officer, Araceli Hernandez. During that conference, she asked for permission to begin using the women's restroom and have her sex designation and

name changed in Deluxe's records. She also stated that she had a court date in a couple of weeks to have her name officially changed to Britney Erica Austin.

After consulting with a company HR director, Hernandez told Austin that Deluxe would not change her sex designation from male to female in company records until she completed the gender-reassignment surgery process. In the meantime, Deluxe prohibited her from using the women's restroom.

Over the next six months, Austin repeatedly asked that her sex designation be changed in company records, providing documentation of her legal name change. Deluxe changed her name and sex designation in some company records but failed to update her sex or name in other systems that were available to outside vendors, customers, and colleagues.

According to the EEOC lawsuit, Austin's supervisors and managers regularly referred to her with male pronouns and by using her former name. Her coworkers also used male pronouns and worse, calling her "boy," "cheetah," and "Tarzan" to tease her about her hairiness, appearance, and clothes. The harassment was so open and notorious that supervisors and managers knew or should have known about it.

An outside vendor who trained Austin and her coworkers made fun of her female appearance during the training, and her coworkers laughed at her publicly. After the training session, Austin emailed her supervisor to complain about the harassment and asked that the supervisor warn her coworkers to stop. According to the EEOC, Deluxe never investigated her complaints or disciplined anyone she reported for making harassing

comments. However, one Deluxe manager did advise her to file a charge of discrimination, which she did.

At the time that it closed its Phoenix call center, Deluxe continued to identify Austin as male on many internal records, including in its personnel management software, where her name was changed, but not the designation of her sex.

From layoff to lawsuit

The EEOC's investigation and conciliation process took nearly four years. In June 2015, the agency sued Deluxe in federal court in Minnesota, bringing sex discrimination and harassment claims under Title VII. Austin joined the lawsuit on her own behalf, asserting sex discrimination and harassment claims plus discrimination claims under the Americans with Disabilities Act (ADA) as well as retaliation claims under both statutes. She also asserted discrimination claims based on Deluxe's health insurance policy, which contained an exclusion for all medical transition treatments for gender dysphoria, including pharmaceutical therapies and surgical interventions.

Austin's retaliation claims were based on her denial of severance benefits in connection with the layoff. She maintained that Deluxe's handbook provided for severance payments and the continuation of benefits, and there was no provision requiring that employees sign releases to receive those benefits.

According to her lawsuit, Deluxe was notified that she had filed an EEOC charge the day before the scheduled layoff. She claimed that on Deluxe's last day of operation in Phoenix, HR officer Hernandez demanded that she leave an employee appreciation and farewell breakfast to come to a meeting in her office. At the meeting, Hernandez presented Austin with a severance agreement and demanded that she sign it. She declined, and Deluxe did not pay her any severance benefits.

Employer agrees to deluxe remedy

On January 20, 2016, the Minnesota court entered a consent decree embodying the settlement terms to which Deluxe ultimately agreed. In its press release announcing that Deluxe would pay Austin \$115,000, the EEOC noted that this is the third

lawsuit it has filed alleging discrimination on the basis of transgender status. The agency obtained its first settlement in April 2015 from a Florida eye clinic, which paid \$150,000. According to the press release, the other lawsuit, against a Detroit-area funeral home, is still pending.

"This settlement underscores EEOC's commitment to securing the rights of transgender individuals under Title VII in the federal courts," general counsel David Lopez said in the press release. "We hope that employers will take notice and begin to take proactive steps to prevent and eliminate discrimination against their transgender workers."

Perhaps more notable than the monetary relief were the changes in its practices Deluxe agreed to make. The company agreed to revise its written policies to express a "strong and clear commitment" to preventing discrimination or harassment on the basis of gender dysphoria, sex stereotyping, gender identity, and transgender status. Deluxe also agreed to comply promptly and fully with any employee requests to change their sex designation or name in company records and promised not to require any sort of medical documentation or conduct any other inquiry into a requesting employee's medical history.

Deluxe also promised to ensure restroom access for transgender employees commensurate with their gender identity. Finally, the company agreed to remove the exclusion from its health insurance plan for any medically necessary care based on transgender status or a diagnosis of gender dysphoria. It's a safe bet that the policy changes to which Deluxe agreed are what the EEOC regards as the gold standard for employers seeking to comply with their Title VII obligations toward transgender workers.

Deluxe has committed to implementing an extensive training program covering all employees, with even more extensive and detailed training for managers, supervisors, and HR employees. The company also agreed to post a notice about the settlement, revamp its process for investigating employee complaints and provide additional training for investigators, and begin immediately factoring equal employment opportunity (EEO) compliance into its management evaluation and compensation system.

Deluxe must provide the EEOC extensive reports on its compliance with the decree for three years. Any unresolved violation during the three-year period will subject the company to sanctions for contempt of court.

Perhaps the most eye-opening thing Deluxe agreed to do was provide a letter of apology to Austin. The letter, signed by Julie Loosbrock, the company's senior vice president of HR, expresses her "sincere regret at how you were treated."

Do the right thing

There's certainly room to argue whether the EEOC is correct in interpreting Title VII to prohibit discrimination on the basis of transgender status. Deluxe chose not to take the chance that a federal judge would rule that the EEOC's interpretation is correct. Chances are, some other employer will be willing to take on that legal battle.

Nevertheless, good companies should not treat any employee the way Austin was allegedly treated at Deluxe's Phoenix call center. An individual who takes the steps Austin did to change her gender expression isn't doing it on a lark. Common decency commands that employers treat all employees with respect, regardless of their personal issues. HR should be leading the way, as Deluxe's senior VP of HR did in issuing the apology letter, not engineering the anguish, as some of the company's former HR staff appeared to do.

Dinita L. James is a partner with [Gonzalez Law, LLC](#) in Tempe and the editor of [Arizona Employment Law Letter](#). You can reach her at dinita.james@gnrlaw.com or 480-565-6400.