

# Transgender officer's claim advances after he alleges severe, pervasive mistreatment

by Jodi R. Bohr  
Tiffany & Bosco, P.A.

*Although Title VII of the Civil Rights Act of 1964 doesn't expressly include sexual orientation or gender identity in its list of protected categories, the Equal Employment Opportunity Commission (EEOC) interprets the statute's sex discrimination provision as prohibiting discrimination or harassment against employees on the basis of sexual orientation and gender identity. An Arizona federal court recently declined to dismiss a case brought by a transgender individual who claimed harassment on the basis of his gender identity.*

*Regardless of any personal stance on the issue, employers must be prepared for changes in the workplace as the gay and transgender community continues to make significant progress in the long fight for equality. And, as your editor so aptly put it in our March 2016 issue, "HR should be leading the way, . . . not engineering the anguish" (see "EEOC enforces position against transgender bias in Phoenix workplace" on pg. 1 of that issue.)*

### **Case background**

John Doe initiated his lawsuit against the state of Arizona under a fictitious name to protect his identity. Doe, a transgender man employed as a corrections officer by the Arizona Department of Corrections, is suing the state for discriminating against him on the basis of his gender identity and retaliating against him for filing a charge of discrimination with the EEOC.

The state asked the court to dismiss Doe's claims because he failed (1) to exhaust his administrative remedies with the EEOC and (2) to state a claim for gender discrimination. The court granted only part of the state's dismissal request.

### **Retaliation**

As is a common theme with many cases involving gender identity discrimination, Doe alleged that his

coworkers repeatedly made disparaging remarks about his gender, often referring to him as "he/she," "it," and "whatever." His supervisors told him that officers in his department were offended by his gender identity. They also told him that he was unsafe because his fellow officers wouldn't respond to emergency calls from him.

To make matters worse, Doe alleged that his coworkers placed him at risk by informing prison inmates of his transgender status. He claimed that he complained several times, but the department didn't conduct an investigation into the harassment or discipline the responsible employees.

Doe filed a charge of discrimination with the EEOC in which he complained of ongoing sex discrimination but failed to raise any complaints of retaliation. The EEOC issued him a right-to-sue letter at the end of its investigation. The state argued that Doe's retaliation claim should be dismissed because he failed to exhaust his administrative remedies with the EEOC. The court agreed.

Doe acknowledged that his EEOC charge didn't contain a claim for retaliation, but he asserted that it wasn't necessary because the retaliation stemmed from his filing of the charge itself. However, the court didn't find the retaliation claim to be "like or reasonably related to" his gender identity harassment claim. The EEOC also expressly noted in its right-to-sue letter that it didn't investigate any retaliation claim. For those reasons, the court found that it lacked jurisdiction to hear Doe's retaliation claim, and it therefore dismissed that claim.

### **Harassment**

To have a valid discrimination claim, Doe had to allege that (1) he belongs to a protected class, (2) he performed his job satisfactorily, (3) he suffered an adverse employment action, and (4) his employer treated him differently than similarly situated employees. The state argued that Doe failed to state a claim for gender discrimination because he didn't allege any adverse

employment action based on his gender. The court disagreed.

The court noted that Doe alleged in his complaint that he was subjected to severe and pervasive harassment by his fellow officers and supervisors. Allegations of severe and pervasive harassment are sufficient to demonstrate an adverse employment action for the purposes of a gender discrimination claim.

The court also wasn't persuaded by the state's assertion that because Doe didn't name coworkers or cite dates in his complaint, he failed to describe specific incidents of harassment. The court acknowledged that he didn't name coworkers in an effort to protect his identity in his complaint and determined that he wasn't required to do so to state a claim. According to the court, Doe "adequately alleged that he has been subject[ed] to workplace harassment and that his supervisors know of and refuse to investigate these events. . . . [He therefore] has stated a claim."

### ***Be proactive***

Employers must be cognizant of the sensitive and unique issues surrounding a transgender person's transition and the potential legal liability arising from the situation. The first step in preparing your workforce to respect transgender individuals is revising your equal employment opportunity policy to include sexual orientation and gender identity as protected statuses and implementing comprehensive training and educational programs for all employees—but, most important, for HR and supervisors.

In addition, it's important for all employees to address a transgender employee by the proper pronoun and the employee's preferred name. As this case demonstrates, a coworker's refusal to use the proper pronoun—or, worse, calling the transgender employee "it"—could constitute harassment. Although Title VII is not a general civility code, cases like Doe's serve as a reminder that all employees deserve to be treated with respect and kindness in the workplace.

When a complaint arises, you are responsible for conducting an investigation and taking appropriate corrective action if the investigation reveals misconduct (regardless of whether the misconduct is unlawful). Promptly addressing complaints of misconduct, however minor, will prevent employees' behavior from escalating to the level that it did in Doe's case.

*Jodi R. Bohr is an attorney with Tiffany & Bosco, P.A. and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at [jrb@tblaw.com](mailto:jrb@tblaw.com) or 602-255-6082.*