NEVADA LAW BULLETIN

OCTOBER 2017

Restroom Access for Transgender Employees

By Ann M. Alexander, Ph.D, Esq.

The rights of transgender individuals in workplaces have recently been under intense media scrutiny, but policymakers have often been unclear about how state and federal laws apply to particular situations. One question concerns the rights of transgender individuals to use restrooms consistent with their gender identities while at work. That question was addressed in Nevada in October 2016, when a federal judge in Nevada ruled that discrimination against a person based on transgender status is "discrimination because of sex" under Title VII and "gender-identity discrimination" under Nevada law. *Roberts v. Clark County School District*, 215 F.Supp.3d 1001 (D. Nev. 2016).

Clark County School District (CCSD) hired Bradley Roberts in 1992 as a campus monitor, when he was known as Brandilyn Netz. In 1994 Roberts was hired as a CCSD police officer, a job he held for the next 17 years without incident.

In 2011, Roberts began dressing like a man and identifying himself as a man. He began using the men's restroom at work, but others complained that a woman was using the men's restroom. When CCSD officials met with him, Roberts explained he was transgender and in the process of transitioning into a man. He told them he wanted to be known as Bradley Roberts and he wanted to use the men's restroom. He was told he could not use the men's restrooms and he should use the gender-neutral restrooms "to avoid any future complaints."

Roberts continued to request to use the men's restroom, but was told that CCSD would not refer to him as a man nor would he be allowed to use the men's restroom until he provided documentation of a name and sex change. Roberts was eventually banned from both the men's and women's restrooms and was required to use a gender-neutral or single occupancy restroom.

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Roberts filed a complaint with the Nevada Equal Rights Commission (NERC). He alleged gender-identity discrimination because of the restroom ban and harassment based on his meetings with CCSD officials. In May 2012, NERC issued a probable-cause finding, but CCSD timely issued a new restroom policy so that Roberts was no longer required to use gender-neutral restrooms. NERC closed the case but Roberts filed a second administrative charge alleging among other things that the CCSD retaliated against him because he filed the NERC complaint and that he was subjected to a hostile-work environment because coworkers asked prying questions and made crude gestures and remarks to Roberts.

In 2014, after the EEOC issued a right-to-sue letter, Roberts sued in federal court alleging discrimination, harassment, and retaliation under Title VII and Nevada's anti-discrimination statute, NRS 613.330-340.

Save the Date
ETS Employment Law Seminar
May 3, 2018
9:00 a.m. to 4:00 p.m.
The Grove in south Reno
Mark your calendars now!
More details to follow

Ruling on cross-motions for partial summary judgment, the Court considered the evolution of Title VII's prohibition against discrimination based on sex. Citing the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*, the Court explained that Title VII isn't just about keeping men and women on an "equal footing"—it protects people from all forms of "sex stereotyping." The Court examined Ninth Circuit decisions, found there is "little doubt which way the circuit is leaning in transgender Title VII cases," and held that discrimination "because of sex" under Title VII includes discrimination based on gender.

The Court analyzed Roberts' federal and state law discrimination claims similarly, finding (1) the bathroom ban was an adverse employment action, (2) CCSD treated Roberts differently than similarly situated employees because it banned him from using the men's or women's restrooms, and (3) CCSD failed to articulate a legitimate nondiscriminatory reason for the ban. Partial summary judgment was granted for Roberts, with the question of damages left for trial. The Court's decision does not foreclose the possibility that an employer may be able to articulate legitimate nondiscriminatory reasons for a bathroom ban. But employers should know that under the Court's burden-shifting analysis, any reason articulated by an employer would be scrutinized for evidence that the reason was nothing more than a pretext for discrimination.

Because there were questions of fact for trial, neither party was granted summary judgment on Roberts' harassment and retaliation claims.

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Nevada's New Pregnant Workers Fairness Act: It's More Complicated Than You Might Think …

By Rebecca Bruch, Esq.

Think you know all there is to know about pregnancy discrimination? Think again. On October 1, 2017, the Nevada Pregnant Worker's Fairness Act ("NPWFA") went into effect. However, some of the requirements have already taken effect, so it is important to understand the changes that have been made.

While there has been some protection for qualified pregnant workers under the ADA, Nevada's new law broadly expands the scope of that protection, and is not limited to circumstances which might be caused by a disability. Under the new law, Nevada employers with at least 15 employees cannot take adverse action against an employee, refuse to provide reasonable accommodations to an employee or applicant, or deny an employment opportunity to an otherwise qualified employee or applicant for a discriminatory reason. In addition, if an employee declines a particular accommodation or does not request an accommodation, she cannot be forced to accept an accommodation, absent a bona fide occupational qualification. If an employer can establish a direct relationship between pregnancy and the ability to perform the job, it may treat a pregnant employee less favorably than a nonpregnant employee, but that determination is no easy task.

Under the NPWFA, an employer must now engage in an interactive process comparable to what is required under the ADA. The goal is to make sure the employee has the ability to perform the essential functions of the position, and to do so with the same benefits and privileges available to other employees. Those accommodations might include providing assistance with manual labor for functions that are incidental to essential functions; authorizing light duty; temporary transfer to lighter duty; or a modified work schedule. The employer does NOT have to create a new position that would not otherwise have been created, or discharge or transfer a more senior employee or promote a pregnant employee who is otherwise unqualified for a job, unless the employer would do so to accommodate other classes of employees.

If an employer denies a reasonable accommodation, and cannot prove an undue hardship, a pregnant applicant or employee can file a complaint with the Nevada Equal Rights Commission, and then seek compensation through a lawsuit filed in court.

Starting June 2, 2017, Nevada employers were required to provide employees with notice of the NPWFA. The notice must be electronic or in writing. It must be posted in a conspicuous place at business locations in an area that is accessible to employees. It must be given to all new employees at the beginning of their employment, and within 10 days provided to any employee who informs her immediate supervisor that she is pregnant.

The notice must include the following information:

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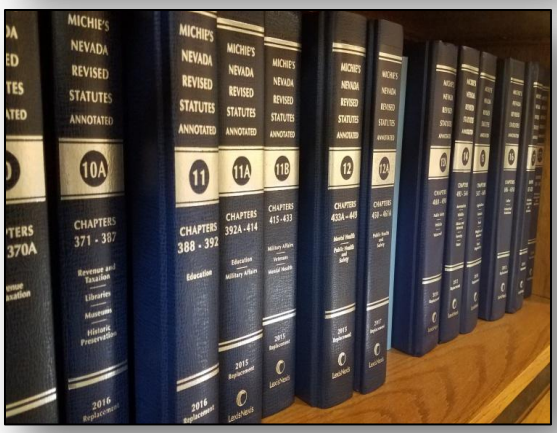

•Employees have the right to be free from discriminatory or unlawful employment practices based on pregnancy, childbirth or related medical conditions pursuant to NRS 613.335 and sections 2 to 8, inclusive of the Act.

•Female employees have the right to reasonable accommodation for a condition relating to pregnancy, childbirth, or a related medical condition.

The NPWFA goes well beyond prohibiting discrimination, and creates affirmative obligations for the employer to accommodate employees affected by pregnancy. Be sure to make it a priority to attend to these notice and posting obligations, review your policies, and provide training to managers and supervisors about your obligations. Call us if you have any questions.

ERICKSON, THORPE & SWAINSTON, LTD.

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Erickson, Thorpe & Swainston offers committed support in all phases of commercial & civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our client's expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.