



TRANSCENDENTAL

APPLYING EXISTING LAW TO PROTECT TRANSGENDER PEOPLE IN THE WORKPLACE

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In recent years, the United States has experienced a seismic shift in cultural attitudes towards what we have come to know as the “LGBT” community. The distinct groups that comprise this alphabet soup have been a part of society since time immemorial, but for most of that time, they have been relegated to silence, shame and much worse. Television shows like *Orange Is the New Black* and the *Vanity Fair* cover story on Caitlyn Jenner have prompted a necessary national conversation on the lives and experiences of the “T” in LGBT.

No one would argue that transgender individuals have fully cast off the yoke of discrimination, but as a society we seem to be headed inexorably toward a more tolerant attitude, allowing more transgender people to be “out” with their status. It is still the early days in the “post-Caitlyn” world, but we have reached a point where the workplace can no longer ignore the concerns unique to transgender people.

Many state anti-discrimination laws provide explicit protections for transgender individuals, but this is not the case in most. Existing federal discrimination laws do not (yet) explicitly account for these “new” groups, nor do they leave transgender persons completely vulnerable to open discrimination. Thoughtful application of existing law provides stronger protection than many realize.

TITLE VII

A direct analysis of the text of Title VII reveals that the traditional gender framework for gender discrimination in the workplace is better equipped to handle the concept of transgender people than it is to handle homosexual employees.

The relevant text states: “It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; 42 U.S.C. § 2000e(a) (emphasis added).

Notice the use of the word “sex,” rather than “gender” or another term. Homosexual employees have long had to argue that they are subject to discrimination based on “sex” because they are being held to a sex-based stereotype.

For example, a male is discriminated against for being insufficiently “manly” if he is not attracted to females. While this approach has seen some success, it remains an oblique argument, and it requires uncomfortable assumptions about societally defined gender roles.

In the case of discrimination against transgender individuals, however, the argument is more direct. The basis of discrimination against transgender individuals is not as closely chained to traditional concepts of “gender,” societal roles or personality traits. Rather, transgender discrimination is directed more toward the physical or biological characteristics a person possesses, which fits more neatly within the Title VII “sex” language. Of course, it is probably a bit of a logical leap to assume most employers make fine distinctions between “sex” and “gender,” but the fact remains that the Title VII uses one word to the exclusion of the other, and they are not synonyms. The resulting analysis is likely favorable for the transgender employee.

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THE AMERICANS WITH DISABILITIES ACT

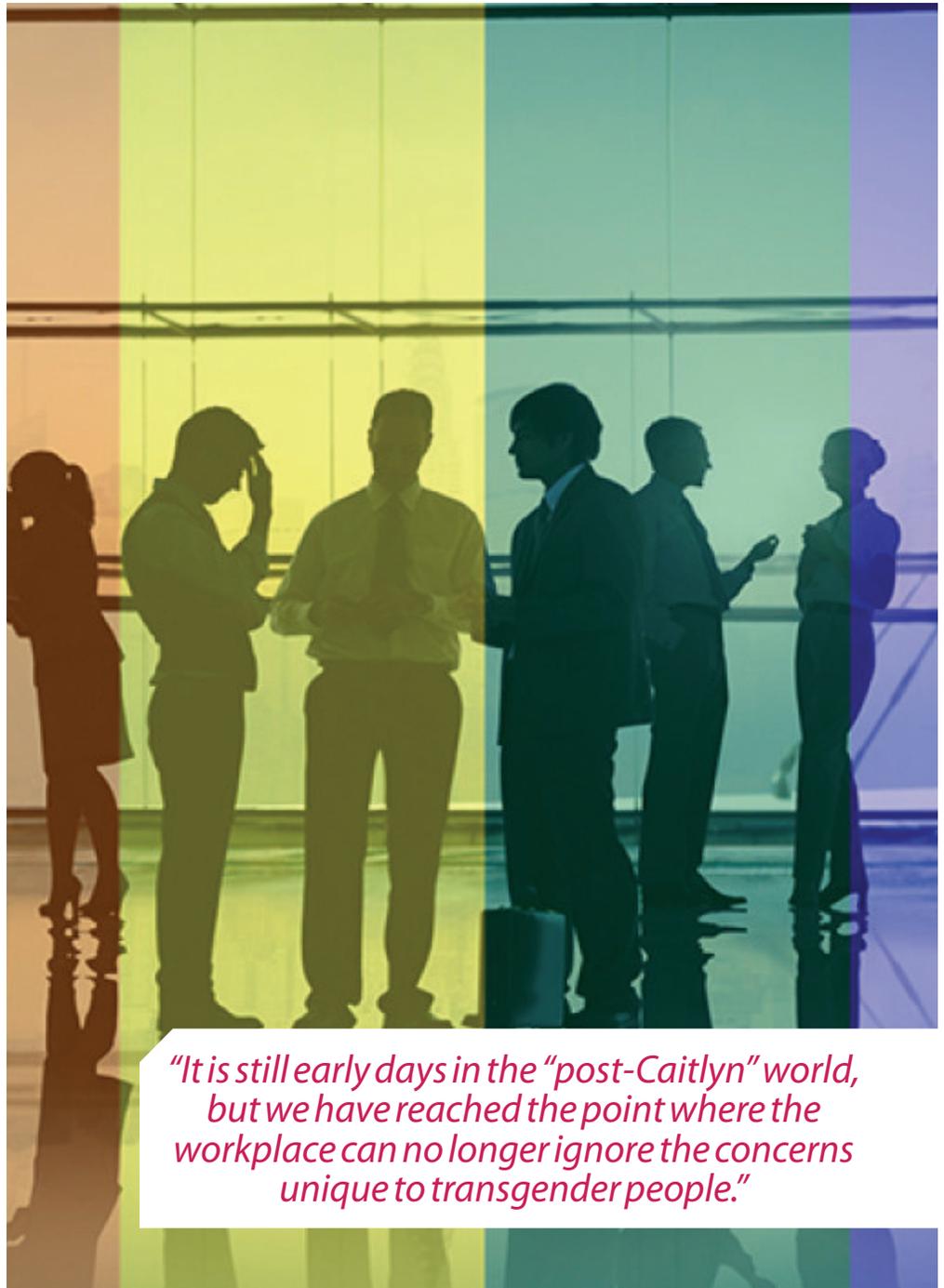
The law of the Americans with Disabilities Act (ADA) may provide another avenue for transgender individuals or those considering transition to seek redress for discrimination. Although some courts have been slow on the uptake, the Americans with Disabilities Act was amended in 2008 to greatly broaden the definition of disability and emphasize the law's liberal application. Of particular interest here is the law's now-explicit application to mental disabilities.

Under current definitions, gender dysphoria could qualify as a disability under the ADA. This means the ADA may provide protections for those who are planning or considering transition because of the incongruity between the physical characteristics they possess and those with which they identify. Indeed, in some cases a medical provider will require a diagnosis of gender dysphoria before prescribing the appropriate medical provisions for transition. To the extent gender dysphoria qualifies as a disability, not only would the employee be protected from discrimination, but the employer would be required to provide a reasonable accommodation for the individual.

Of course, transgender people are not inherently disabled and not everyone who transitions necessarily suffers from gender dysphoria. That is why it is critical that the ADA protects not only those who are disabled, but also those who are regarded as disabled. Employers who discriminate against transgender people often do so because they do not understand the underlying psychology. In those cases, the employee could show that the employer perceives "trans-gender" as a form of psychological disability. Thus, the "regarded as" disabled provision of the ADA may provide protection without the clumsy argument that "trans-gender" is synonymous with "disabled."

THE FAMILY AND MEDICAL LEAVE ACT

Again, transgender is not a disability, but for those who decide to undergo transition, there will likely be a medical component. The process may require a number of doctor's appointments and a significant amount of time out of work. If that is the case, then these appointments and any related time out of the office could be protected under the Family and Medical Leave Act (FMLA). The FMLA provides up to twelve weeks of unpaid leave in a one year period for serious medical conditions. Critically for those transitioning, this leave need not be consecutive. The FMLA allows for intermittent leave if needed, which is more conducive to the sometimes long transition period.



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IN CONCLUSION

Transgender issues in the workplace are "new" in the sense that we as a society are willing to talk about them more openly now. Ultimately, the hope is that American law becomes better tailored to handle this and other types of discrimination that were likely not part of the calculation when drafting our anti-discrimination laws. But while the law we have is not optimal, creatively applied it can still be effective, perhaps more for transgender individuals than for most of the other groups that form a part of the LGBTQ coalition. Transgender individuals and Human Resource professionals need to be aware of the range of discrimination protections applicable. Hopefully, the existing laws will serve to foster a reasonable atmosphere of respect and accommodation until the law catches up to our society's transitioning attitudes.

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