

Employment Practices Liability

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Federal Judge Rules that Transgender Employee's ADA Claim May Proceed

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Executive Summary: On May 18, 2017, in the first decision of its kind, the Eastern District of Pennsylvania held that transgender people are not categorically barred from protection by the Americans with Disabilities Act (ADA) if they suffer from gender dysphoria. While it remains true that being transgender is not in and of itself a disability under the ADA, in ruling on the employer's motion to dismiss in *Blatt v. Cabela's Retail, Inc.*, the court held that the plain language of the ADA's exclusion of "gender identity disorders" from the definition of "disability" in 42 U.S.C. § 12211(b)(1) ("the GID exclusion") must be read narrowly. In so doing, the court held that transgender individuals who experience gender dysphoria are protected by the ADA and, therefore, Blatt could proceed on her ADA discrimination, failure to accommodate and retaliation claims.

Background: Gender dysphoria (formerly known as gender identity disorder) is currently included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) – the proverbial bible of psychiatric classification and diagnosis. Gender dysphoria is defined as "clinically significant distress" experienced by some people whose gender identity does not match their sex assigned at birth. Treatment typically includes psychotherapy and support in undergoing gender transition, which can be accomplished in a variety of ways, including hormone therapy, a changed gender expression, taking on a different gender role and/or surgery.

Blatt is a transgender female diagnosed with gender dysphoria. She filed suit against her former employer, Cabela's, alleging that it discriminated against her and failed to accommodate her gender dysphoria by requiring her to use the bathroom corresponding to her sex assigned at birth (male) and refusing to provide her with a nametag reflecting her female name and a female uniform, subjected her to a "pattern of antagonism" after she reported these issues to her supervisors, and later terminated her in violation of the ADA. Cabela's moved to dismiss the claim, arguing that pursuant to the ADA's GID exclusion, Blatt's ADA claim failed on its face. Blatt, joined by several amici, opposed the motion, arguing, inter alia, that the plain language of the ADA made clear that gender dysphoria is not included in the narrow GID exclusion.

The Eastern District of Pennsylvania agreed with Blatt. The court's primary reasoning rested on its view that the term "gender identity disorder" in § 12211(b)(1) must be "read narrowly to refer only to the condition of identity with a different gender, not to encompass...gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling."

In coming to this conclusion, the court focused on the remaining conditions excluded by §§ 12211(a) and (b): homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania

and substance abuse disorders with active illegal use of drugs. The court found that these conditions all fall within two categories: either (a) *non-disabling conditions* related to sexual orientation and/or gender identity or (b) *disabling conditions* related to harmful and/or illegal conduct. Gender dysphoria, the court reasoned, is disabling, thus excluding it from category (a), and is not associated with harmful or illegal conduct, thus excluding it from category (b). Consequently, because gender dysphoria cannot be included in either category, the court determined that it must fall outside the meaning of "gender identity disorders" as used in the statute. The court held: "If the term gender identity disorders were understood, as [Defendant] Cabela's suggests, to encompass disabling conditions such as Blatt's gender dysphoria, then the term would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct." The court found further support for its decision in the Third Circuit Court of Appeals' "mandate" that the ADA is "a remedial statute, designed to eliminate discrimination against the disabled in all facets of society [and] must be broadly construed to effectuate [those] purposes." To achieve this broad mandate, "any exceptions...should be read narrowly...."

Employers' Bottom Line: In addition to the expansion of LGBTQ employment rights under Title VII, as evidenced by recent Circuit and District Court decisions holding that discrimination "because of sex" includes discrimination based on sexual orientation (see [FordHarrison's Legal Alerts](#) for an up-to-date status on this topic), Blatt suggests that there may also be an expansion of the courts' understanding of cognizable ADA claims raised by transgender employees diagnosed with gender dysphoria. Given the possible trend this case may present, employers should engage in the interactive process with employees who request accommodations relating to gender dysphoria, to the extent they do not already do so.

As LGBTQ rights continue to be litigated and employers' obligations under federal and state law are more clearly defined, employers are encouraged to ensure that their policies, at a minimum, address the needs of and processes for applicants and employees who are transitioning or transgender, including (a) identifying the individual internally who will be charged with aiding a transitioning employee in managing his/her workplace transition; (b) developing a workplace transition policy; (c) creating a procedure for name changes and e-mail address updates; and (d) providing answers to frequently asked questions about dress codes and restroom use. Policies should also make clear that discrimination and harassment in the workplace, for whatever reason, are strictly prohibited.

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