What Can Employers Do About Employees Who Refuse to Refer to Transgendered Employees By Their Preferred Names or Pronouns?

Labor & Employment Law Update

By Peter Hansen on August 6, 2021

The short answer is, private sector employers can very likely terminate the employee. If the employee is at-will, they can be fired for any non-discriminatory reason (or no reason at all); and, intentionally using the wrong name or pronoun to refer to a coworker is certainly a non-discriminatory reason. Even if the employee has "for cause" protection through an employment contract, there's a pretty good chance that intentionally misgendering their coworker is sufficient cause to terminate, especially if they've been previously warned about similar behavior.

The issue is a bit more complicated if an employee claims their religious beliefs prevent them from referring to their coworkers by their preferred names or pronouns. Employers are generally required to accommodate employees' sincerely held religious beliefs, but what if accommodating those beliefs – *i.e.*, allowing them to call transgendered employees by something other than their preferred name or pronoun – requires them to discriminate against others? The answer is pretty straightforward: employers do not need to grant an accommodation that violates state or federal law, and as the EEOC recently noted, discrimination on the basis of gender identity violates federal law. Put another way, where the requested "accommodation" amounts to allowing one employee to discriminate against their transgendered coworkers, the accommodation amounts to an undue hardship that employers need not (and should not) provide. Public sector employers, particularly universities, should

also speak with their counsel about employees' potential First Amendment and Free Exercise Clause protections.

The Southern District of Indiana recently reached the same conclusion as the EEOC in *Kluge v. Brownsburg Community School Corporation*, regarding a teacher who alleged his employer failed to accommodate his religious beliefs and retaliated against him because he refused to refer to his students by their preferred pronouns on the basis of his religious beliefs. The court dismissed the lawsuit, noting in part that the employee's requested accommodation would result in an "'increased risk of liability' which in turn constituted an undue hardship" that employers need not bear.

So, employers should engage in the interactive process and at least attempt to come up with a reasonable accommodation to offer the employee. One possible accommodation employers could consider is a "last names" accommodation whereby the employee refers to all coworkers by their last names only … though the *Kluge* employer offered the same accommodation and had to withdraw it after receiving complaints. If you can think of another accommodation, I'm all ears. Seriously, email me. But I digress. The takeaway is this: regardless of an employee's religious beliefs, employers absolutely should not allow any employee to refer to others by anything other than their preferred name and pronoun.

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