Gender discrimination is a hot topic for California employers, with a recent California appellate court decision regarding sexual orientation discrimination and new regulations issued by the California Fair Employment and Housing Council (FEHC) regarding transgender discrimination. In Husman v. Toyota, (Case No. B268300), the California Court of Appeal reversed a trial court order granting summary judgment in favor of the defendant on plaintiff’s claim of employment discrimination based on sexual orientation. The court found that the plaintiff's evidence of invidious sex or gender stereotyping related to his sexual orientation — the perception he was “too gay” raised a jury question as to whether his sexual orientation was a substantial motivating factor for his termination. Additionally, effective July 1, 2017, new FEHC regulations clarify and expand existing protections for transgender applicants and employees.

Husman v. Toyota

On June 21, 2017, the Second Appellate District issued a decision utilizing, for the first time in a summary judgment context, the mixed-motive analysis articulated by the California Supreme Court in its 2013 decision, Harris v. City of Santa Monica. The court acknowledged that the defendant had established a legitimate, nondiscriminatory reason for terminating the plaintiff — his unsatisfactory work performance. The court also agreed that the plaintiff had not raised any issue that the defendant's reason was a pretext for discrimination. Nonetheless, and although not argued by the parties in the trial court, the court of appeal exercised its discretion to consider a mixed-motive analysis. Under this analysis, the appellate court concluded that the plaintiff had raised a triable issue as to whether impermissible bias also was a substantial motivating factor for his termination. The court relied on the plaintiff’s evidence that one of defendant's executives harbored stereotypical views of gay men and articulated clear opinions as to what he considered appropriate gender identity expression. In particular, the executive had observed at various times that the plaintiff had made “a very clear statement” about his sexual orientation and should cut his hair, and had ridiculed him for wearing a scarf as an accessory when it was not cold outside. The court accepted plaintiff’s argument that these remarks,
although possibly not patently offensive to a non-gay observer, revealed that the supervisor viewed him as “too gay” and incompatible with defendant’s corporate culture, even if a less obviously gay employee would be acceptable. The court found these “stray remarks” sufficient to raise a triable issue despite the fact that they were not made in the context of the termination decision. The court concluded that the comments “had the capacity to affect management’s perceptions of [the plaintiff’s] performance and attitude.”

In reaching its decision, the court also undercut the continued viability of the favorable inference of a non-discriminatory motive generally given to employers when the same person who hires (or promotes) an individual also terminates the individual's employment. Instead, the court relied on a “cat's paw” theory that the allegedly biased executive influenced the termination decision. The court observed that employment decisions in large companies are rarely the responsibility of a single person.

This decision particularly is troubling given the significant evidence of the defendant's ongoing efforts to promote diversity and inclusion, which the court acknowledged made it a "close call." The court, however, suggests that summary judgments may be difficult for employers to obtain given what it sees as the required "nuanced analysis of complex discriminatory behavior."

Transgender Identity and Expression Regulations

New FEHC regulations, effective July 1, 2017, increase protection for transgender applicants and employees under the California Fair Employment and Housing Act (FEHA) and provide guidance for employers about employment practices that constitute gender discrimination.

Expanded Definitions: The FEHA prohibits discrimination and harassment on the basis of sex, gender, gender identity, and gender expression. The new regulations define gender expression, gender identity, sex, sex stereotype, and transitioning within the employment context pursuant to FEHA.

“Gender expression” means a person's gender-related appearance or behavior or the perception of such appearance or behavior.

“Gender identity” means each person’s internal understanding of their gender, or the perception of the person’s gender identity, which may include female, male, a combination of male and female, neither male nor female, or transgender.

“Sex” is defined also to include a perception by a third party of pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender, gender identity; or gender expression.

“Sex stereotype” is defined also to include an assumption about a person’s gender roles, gender expression, or gender identity.

Transitioning: The regulations also prohibit discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning. The regulations define “transitioning” as a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.

Physical Appearance, Grooming, and Dress Standards: Employers may not impose upon an applicant or employee any physical appearance, grooming or dress standard that is inconsistent with an individual’s
gender identity or gender expression, unless the employer can establish business necessity.

Inquiries Regarding Gender or Sex: Employers may not inquire about or require proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment, unless: (1) the employer establishes a bona fide occupational qualification (BFOQ) defense or (2) for recordkeeping purposes, the request for information is made solely on a voluntary basis.

If, however, an employee initiates communication with an employer regarding the employee's working conditions, then the employer may communicate with the employee about the employee's sex, gender, gender identification, or gender expression.

Gender Preference: Employers must abide by an employee’s request to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns. An employer is permitted to use an employee’s gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation.

Facilities: Employers must permit employees to use facilities (such as restrooms and locker rooms) that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth. To respect the privacy interests of all employees, employers must provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. An employer, however, may not require an employee to use a particular facility. Employers cannot require employees to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender (although employers are permitted to make a reasonable and confidential inquiry for the “sole” purpose of ensuring access to comparable, safe, and adequate multi-user facilities).

Employer Takeaway

California employers should review their policies and practices that implicate gender identity, gender expression, and sexual orientation. Additional training of supervisors regarding gender discrimination also may be necessary.

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