

Walking the Diversity Compliance Tightrope: Maintaining the Balance Between Enforcement and Equity

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Abstract

Many federal laws, such as Title VII of the Civil Rights Act of 1964, have enabled women and minorities access to the workplace. These same laws have mandated that employers prevent discrimination against women and minorities, yet when employers utilize various strategies for eliminating discrimination in the workplace, they have found themselves faced with litigation for their efforts. For example, human resource managers have been struggling with finding ways to prevent and eliminate sexual harassment and one solution has been to require their employees to sign no-fraternization agreements. Unfortunately, rather than solving the problem, the employer has compounded the problem since it is quite common for employers to punish female violators of the policy while no action is taken against male violators. This paper will examine some unique diversity compliance issues and problems that have arisen in the workplace and how human resource managers should respond to these situations. Particular issues, such as sexual harassment in e-mail, religious “witnessing”, and transgender issues will be highlighted.

Introduction

Employers have often felt that they are walking a dangerous tightrope – dangerously teetering between compliance with the various employment laws and the unexpected problems that arise from the employer’s effort to comply. Various laws like Title VII of the Civil Rights Act require that the employer keep a workplace free of discrimination. Employers are very anxious to avoid costly litigation and avoid the great amount of time that is involved in defending their various employment practices. However, in their zeal to comply with the law, employers may unwittingly create additional problems associated with their compliance solutions. In fact, some of the “solutions” to various legal issues may produce even greater legal headaches than the ones they were originally trying to resolve. Case law provides useful examples of compliance problems and provides guidance for human resource managers as to what kind of problems might arise.

Sexual Harassment

Sexual harassment is one of the most frequently litigated employment issues and costs the employer hundreds of thousands of dollars in attorney fees, court fees and lost productivity time. The U.S. Merit Systems Protection Board conducted surveys amongst government

employees in 1981 and 1988 and found that the government spent \$267 million dollars in turnover and loss of productivity costs resulting from sexual harassment.¹ Litigation costs for the private employer in 1998 ran on average of \$80,000 and peaked at \$200,000.^{2,3} The average jury award for cases going to trial was \$181,847.⁴ Obviously, these figures don't begin to represent the thousands of dollars that have been offered in settlement agreements nor the awards that have been paid out in unreported cases. Preventative costs can be just as high with costs totaling 6.7 million dollars for a typical Fortune 500,⁵ making for an estimated of \$282.53 per employee.⁶

It is no wonder that employers feel a great pressure to eliminate sexual harassment in the workplace. One type of preventative measure that has been used is to control or prohibit dating relationships at the workplace. There are two general approaches that are used by employers to curtail romantic relationships at work – a “no dating” or “no fraternization” policy.

“No Dating” or “No-Fraternization” Policies. Some companies are trying to prevent sexual harassment from occurring is by adopting no-fraternization policies or other contractual arrangements where the parties either promise not to engage in any relationships with fellow employees other than a work relationship. Efforts to enforce the contracts have resulted in unexpected litigation over the no-dating policies such as bias in enforcement (where women are disciplined for violations of a no-fraternization policy more so than men); worker complaints of the employer's interference with personal relationships; and concerns over violations of freedom of association and invasion of privacy. Some employees can turn to state statutes which either directly or indirectly protect the employee's right to date.

No Dating Policies and State Statutes. Some states have statutory protections for employees that either directly or indirectly would protect the right of an employee to date. An employer with a “no-fraternization” policy as well as a “no-dating” policy may encounter legal challenges to their policies due to the fact they conflict with state laws. But some state statutes

¹ The United States Merit Systems Protection Board, “Sexual Harassment in the Federal Government: An Update, 11 (1988).

² Bond, Carrie. “Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace.” 65 *FORDHAM L. REV.* 2489, 1997.

³ Gazeley, Barbara J. “Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases.” 33 *WILLAMETTE L. REV.* 605, 1997.

⁴ *Supra.*, note 1.

⁵ *Id.* The study that was cited was from *Working Woman* magazine.

⁶ *Id.*

do not explicitly protect an employee's right to date, but may protect that right through implication.

For example, in *State v. Wal-Mart Stores, Inc.*,⁷ Laural Allen and Samuel Johnson were discharged from Wal-mart when they started dating one another while Ms. Allen was separated from her husband. Wal-mart had established a no-dating policy for its employees in 1989. Romantic involvement of any kind between employees was prohibited. A 1989 Wal-Mart "Associates Handbook" states:

"a dating relationship between a married associate and another associate other than his or her own spouse is..... prohibited."⁸

Allen and Johnson brought an action against Wal-Mart originally alleging wrongful discharge and sought reinstatement, back pay, and injunctive relief for violation of Section 201-d of the Labor Law of New York which protects the employees' right to engage in "recreational" activities without interference from the employer.⁹ Section 201-d of the Labor Law states:

"2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property;

Recreational activities are defined as follows:

"b. "Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational

⁷ *State v. Wal-Mart Stores, Inc.* 621 N.Y.S.2d 158 (N.Y.A.D. 3 Dept.,1995)

⁸ *State v. Wal-Mart Stores, Inc.*, 1993 WL 649275, 1 (N.Y. Sup. 1993). (not reported).

⁹ *State v. Wal-mart Stores, Inc.*, 1993 WL 649275 (N.Y.Sup.1993). The first cause of action alleges the wrongful discharge of Allen and Johnson under 201-d(2)(c). of the New York's Labor Law. The second cause of action alleges that the discharge of Allen and Johnson in violation of Section 201-d of the Labor Law contravenes Executive Law 63(12), which prohibits repeated and persistent illegal transactions of business. The third cause of action alleges that Wal-Mart's personnel policy, dated August 1989, prohibiting dating relationships between employees, violated Labor Law 201-d(2)(c). and Executive Law 63(12). The fourth cause of action alleges Wal-Mart's work policy, dated August 1993, prohibits "romantic" involvements between workers, regardless whether such involvement takes place outside of work and off the employers' premises, and again alleges that this policy violates Labor Law Section 201-d(2)(c), and Executive Law 63(12).

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purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material; "¹⁰

Allen and Johnson alleged in their complaint that dating falls under the definition of a “recreational activity” and should be protected under the statute. The district court found for the plaintiffs concluding that the state statute was ambiguous and could be interpreted as including dating relationships. The Appellate court disagreed with the lower court’s interpretation and said that the statutory language clearly did not include dating. Thus, Wal-Mart’s policy and termination did not violate New York’s labor law. The Appellate Division of the New York Supreme Court affirmed the decision.¹¹ The employer’s no-dating policy was found not to have violated New York law, but the question remains whether other courts might feel that similar state laws, while ambiguously stated, actually do protect the right of employees to date.

State statutes may be invoked even if the employer has no set policy prohibiting dating, but acts adversely towards dating employees. Jess McCavitt brought suit against his employer, Swiss Reinsurance America Corporation (SRAC), for his termination resulting from his dating relationship with Diane Butler.¹² SRAC did not have a no-dating policy/no-fraternization policy, yet when the company learned that McCavitt was in a romantic relationship with Butler, McCavitt experienced adverse treatment at his job. He was first passed over for a promotion because of the relationship and then eventually terminated. McCavitt filed a claim relying on the same New York statute that had been at issue in the *State v. Wal-Mart* decision.¹³ The trial court had to answer the question of whether the discharge, which was due primarily to the dating relationship, was in violation of New York’s Labor Code §201-d(2)(c). The district court granted SRAC’s motion to dismiss for failure to state a claim. The Appellate court affirmed the decision, relying on the *State v. Wal-Mart* case. The court again claimed that the phrase “recreational activities” which appeared in the Labor Code, did not include dating.¹⁴

Human resource managers would do well to check state laws to make sure that dating is not a protected activity under the state statutes. It is highly ironic that some employers could

¹⁰ *Id.*, at 2.

¹¹ *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (3d Dep’t 1995).

¹² *McCavitt v. Swiss Reinsurance America Corporation*, 237 F.3d 166 (2nd Cir, 2001).

¹³ *Id.* at 167.

¹⁴ *Id.*, at 168.

very well be held liable for infringing their employees' rights under state laws in the effort to comply with federal law.

Differential enforcement of non-fraternization policies. Employers hope that no-dating policies will help avoid sex discrimination suits, yet the employer may unwittingly be on the receiving end of a discrimination lawsuit for the discriminatory enforcement of the no-dating policy. United Parcel Service, (UPS) had several such claims brought against it for its enforcement of its non-fraternization policy. The facts of each of these cases are slightly different but are illustrative of the types of issues that may arise from the implementation of no-dating policies. In the case of UPS, it was found that the employer had discriminated by enforcing its no-fraternization policy against female employees but not male employees.

UPS had a no-fraternization policy that forbade any romantic relationships between supervisors and managers with their employees. It also strongly discouraged peer fraternization which was defined as prohibiting any romantic relationship and cohabitation. In *Russel v. United Parcel Service*¹⁵, Andrea Russel, a supervisor, became romantically involved with Tani Mann, a part-time hourly employee, in January of 1993. The two began living together in March 1993. Both Russel and Mann were aware of and discussed the fact that their romantic involvement and living arrangement violated defendant's policy against fraternization which specifically prohibited fraternization between supervisors and hourly employees.¹⁶

Another employee observed the two of them at a Travis Tritt concert and reported them to management.¹⁷ When confronted by management and asked if she intended to make Mann move out, Russel said she did not. When she was given the option to voluntarily resign or be fired, Russel asserted that others had violated the policy with no negative repercussions.¹⁸ She refused to resign and was terminated. She filed a discrimination action on the basis of gender and sexual orientation in the Franklin County Court of Common Pleas.¹⁹ Russel claimed that UPS was discriminatory in its enforcement of the policy since other male employees were not required to resign when they had violated the policy. The trial court granted summary judgment in favor of UPS.²⁰ On appeal, Russel dropped her sexual orientation claim. The appellate court

¹⁵ *Russel v. United Parcel Service* 673 N.E.2d 659 (Ohio App. 10 Dist., 1996).

¹⁶ *Id.*, at 97.

¹⁷ *Id.*, at 98.

¹⁸ *Id.*

¹⁹ *Id.*, at 99.

²⁰ *Id.*

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found that Russell had demonstrated that her termination which was allegedly based on the fraternization policy was pretext since there was evidence that other male supervisors who had violated the policy were only asked to alter their living arrangements, or were not disciplined at all if one of the parties voluntarily resigned. The decision was reversed in favor of Russel and remanded.²¹

Patricia Shumway was another UPS employee who claimed she was the victim of biased enforcement of the UPS no-fraternization policy. She had been promoted to a first-line supervisor and was required to attend training for that position.²² Part of the training involved the trainees becoming acquainted with the “no fraternization” policy of UPS. Mark Besaw, an hourly employee whom Shumway had been dating, confessed to his manager that he and Shumway had been dating but claimed the relationship was over although he expressed concern that Shumway was having trouble in letting go of the relationship.²³ Besaw claimed Shumway had shown up at his house and the two of them argued sufficiently loud enough to create a disturbance. When the manager confronted Shumway about the issue, she at first denied having the relationship with Besaw and then eventually confessed.²⁴ She was offered the chance to resign, but refused.²⁵ She brought a Title VII claim for discrimination based on gender saying that UPS regularly let male supervisors stay with the company even when they had violated the “no fraternization” policy.²⁶

The trial court granted summary judgment to UPS on a technicality citing that Shumway had failed to establish a prima facie case of discrimination since she had not been terminated as required, but in fact had resigned her position. The district court also had asserted that Shumway had failed to file a statement asserting that she had been forced to resign which would constitute a constructive discharge. The Court of Appeals made note that the trial court had erred in determining that Shumway had failed to establish her prima facie case since there was evidence that she had filed a Statement of Facts which indicated she had been forced to resign. Nevertheless, the Court of Appeals decided to affirm the judgment of the trial court citing that none of the male supervisors Shumway used as her comparison were “similarly situated” since

²¹ *Id.*, at 102.

²² *Shumway v. United Parcel Service, Inc.* 118 F.3d 60 (C.A.2 1997).

²³ *Id.*, at 62.

²⁴ *Id.*

²⁵ *Id.*, at 62-3.

²⁶ *Id.*, at 63.

they were not under the supervision of McGraw (Shumway's supervisor) nor Johnson, the HR manager. Furthermore, the court said that since McGraw had always handled all of his fraternization cases in the same way at the Syracuse facility as well as in the New York facility, there was no evidence that he treated male offenders any differently than female offenders.²⁷

Even though some of the UPS plaintiffs were successful, the issue of unfair enforcement of no-fraternization policies poses a lesson for employers in that if a policy is to be used to prevent discrimination from occurring, then it must be consistently and evenly applied in order to avoid additional discrimination charges. Human Resource managers should carefully train supervisors on the policies and the dangers of uneven enforcement.

No Fraternization Policies and Invasion of Privacy Issues. Some employers consistently enforce their policies, but are brought to court because the policies are perceived to conflict with public policy issues and unfairly intrude upon the employee's privacy. In *Watkins v. United Parcel Service, Inc.*,²⁸ Watkins was a male employee of UPS who was promoted to a managerial position. He began a relationship with a female driver in direct violation of the no-fraternization policy, a policy of which Watkins was well aware. UPS became aware of the relationship and Watkins' District Manager questioned him about it. Watkins was offered the opportunity to either resign or be terminated. Watkins refused to resign and so he was terminated.

Watkins brought a wrongful termination action based on several legal theories including: (1) breach of an employment contract (the anti-fraternization policy was not found in the employee handbook, but found in a separate corporate document "Impartial Employment and Promotion Guidelines"²⁹); (2) tortious invasion of privacy (for his termination for dating a subordinate which he states is a private activity) ; (3) intentional infliction of mental and emotional distress; (4) intentional interference with benefits under the Employee Retirement Income Security Act (ERISA) (his termination interfered in his rights to various stock options), (5) breach of fiduciary duties; and (6) a public policy exception of Mississippi's employment-at-will rules. Watkins's main assertion was that the termination was a public policy exception and tied his claim to a Constitutional claim of infringement on the Fifth Amendment, but this claim failed since UPS is a private employer.

²⁷ *Id.* at 64-5.

²⁸ *Watkins v. United Parcel Service, Inc.* 797 F.Supp. 1349 (D.Miss.,1992)

²⁹ *Id.* at 1352.

In granting employer's motion for summary judgment, the Judge Wingate of the District Court held that: (1) employer's policy book did not create express or implied written contract of employment; (2) court would not adopt public policy exception to Mississippi's at-will employment rule; (3) employee failed to show bad faith or utterly reckless prying on part of employer, as required to support invasion of privacy claim; and (4) employee failed to establish prima facie case that employer's actions were so extreme, outrageous or repulsive as to warrant imposition of liability on theory of intentional infliction of mental and emotional distress.

It would have been interesting to see the court's decision had UPS not been a private employer. The courts have yet to comment on the Constitutionality of a no-dating policy in the workplace, but such litigation will surely come to pass. If such a claim is brought before the courts, it would seem likely that the employer would not be able to justify the benefits of the no-dating policy as outweighing the drawbacks of the intrusive nature of the policy on the employee's privacy. Yet, employers don't seem to be deterred by Constitutional considerations. In fact, some employers are willing to take action against employees who are dating each other despite the fact that the company has no express prohibitions regarding dating.

Employer Interference with Dating Employees in the Absence of a No-dating Policy and State Statutory Protection. At times, an employer may have no policies prohibiting dating yet take action against employees who are dating. When the state is silent on dating policies, the courts are forced to examine the reasons for the termination and whether it was solely based on the dating-relationship or some other job-related reason.

In *Kendall v. City of Canfield*,³⁰ Kendall was hired as a dispatcher for the City of Canfield's police department in August of 1998. Kendall then applied for and was promoted to the position of part-time police officer in May of 1999 and became a full-time officer in July 1999.³¹ During his employment, Kendall was commended for both his work ethic and his performance. While serving as a full-time police officer, Kendall entered into a relationship with a fellow officer at the department, Valorie Hohmann.³² Ms. Hohmann was hired approximately two weeks after Kendall became a full-time police officer, and they began dating in August of

³⁰ *Kendall v. City of Canfield*, Ohio, 76 Fed.Appx. 617, Slip Copy,2003 WL 22089368 (6th Cir. Ohio, 2003). (unreported)

³¹ *Id.*, at 619.

³² *Id.*

1999.³³ By the first week in September, they were dating exclusively and it remained a romantic relationship at the time of Kendall's deposition in December of 2000.³⁴

Before dating Ms. Hohmann, Kendall stated that everything was going fine at work, and he had every reason to believe he was doing a good job. After his supervisors learned of their relationship, however, Kendall states that everything went downhill. Kendall's superiors had asked Ms. Hohmann out numerous times and, when they found Kendall was dating her, Kendall states they retaliated against him by putting his actions under a microscope. He was written up for several violations, several of which involved driving violations (speeding). Because of these and other violations, the police department terminated Kendall's employment six months into his probationary period.³⁵ Kendall brought a §1983 action against the city for violating his constitutional right of freedom of association. The district court found for the city and Kendall appealed. The jury was given four interrogatories and indicated that while they believed that Kendall's relationship with Ms. Hohmann was a motivating factor in Kendall's dismissal, the jury responded that they believed the city would have fired Kendall despite the relationship, due to the documented incident reports on Kendall for various accidents and improper procedure.³⁶ The court of appeals affirmed the lower court's decision.³⁷

Once again, employers must take care to document the reasons for an employee's termination, especially if that termination takes place in proximate time to when an employee begins dating another employee. It is very likely that the employee will view such a termination as undue interference in his/her private life and bring an invasion of privacy claim against the employer.

SEXUAL HARASSMENT IN THE ELECTRONIC AGE

Sexual harassment through e-mail. With the advent of computers and e-mail in the workplace, employers are facing another source of sexual harassment. Offensive and intimidating material transmitted through the computer may give rise to a sexual harassment claim. Employers are held accountable for offensive material that has been transmitted through the Internet or through company e-mail. For example, in *Blakey v. Continental Airlines, Inc.*,³⁸

³³ *Id.*

³⁴ *Id.*, at 620

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 622.

³⁸ *Blakey v. Continental Airlines, Inc.* 751 A.2d 538 (2000).

Blakey, the first female captain to fly an Airbus or Air300 aircraft at Continental Airlines, had brought a federal sexual harassment claim against the airline because several of her fellow pilots engaged in sexual harassment. The pilots had put pornographic pictures in the cockpit and made vulgar remarks to Blakey.³⁹ Shortly after she filed her federal claim, she discovered vulgar and harassing material posted on an electronic bulletin board for Continental employees which was run by CompuServe.⁴⁰ The content contained objectionable material directed at Blakey, who brought a defamation claim in addition to her sexual harassment claim as well as using the comments to support her sexual harassment claim.⁴¹ The trial and appellate court ruled in favor of the employer saying the employer had no duty to monitor the content of a private electronic bulletin board. But, the Supreme Court of New Jersey did say that the employer does have a duty to stop such harassment when the employer knows or has reason to know of the harassment.⁴² An electronic bulletin board might be considered part of the workplace and one relevant inquiry would be whether the bulletin board which was maintained by CompuServe was “sufficiently integrated” with Continental’s workplace and whether Continental derived benefit from having that electronic forum.⁴³

Not only do sexually harassing e-mails represent liability for the employer, but so does the electronic transmission of offensive messages. In *California Bourke v. Nissan Motor Corp.*,⁴⁴ (1993), a co-worker was attempting to demonstrate the e-mail system and randomly chose a message from Ms. Bourke, a fellow employee. The message turned out to be sexually explicit. After receiving a report concerning the incident, management ordered a complete review of Ms. Bourke’s e-mail and those sent by members in her work group. Bourke and a co-worker, Rhonda Hall, were found to have several messages of a personal and sexually explicit nature. Each employee was given a written warning. Both protested the decision, and, as a result, Ms. Hall was terminated and Ms. Bourke resigned. The trial court had granted summary judgment in favor of Nissan and the California Court of Appeals upheld the trial court’s decision for the simple reason that both plaintiffs had signed waivers stating that they promised to use the e-mail system only for business purposes. This case established that employers do have a duty to

³⁹ *Id.* at 48.

⁴⁰ *Id.*

⁴¹ *Id.* at 54.

⁴² *Id.* at 57.

⁴³ *Id.*

⁴⁴ *Bourke v. Nissan Motor Corp.*, No. B068705 (Cal. App. 2d Dist., Div 5)(July 26, 1993) unreported decision.

investigate offensive e-mails.

Garrity v. John Hancock Mutual Life Insurance Company,⁴⁵ examined the issue as to whether or not an employer has a right to intercept e-mail communications. In *Garrity*, two employees were fired for sending lewd and obscene material through the company's e-mail system. The employees countered that the employer invaded their privacy since the company had told them that their e-mails were private. The court was forced to examine whether the employee's expectation of privacy was reasonable, and if reasonable, was the employer justified in examining their e-mail.

Nancy Garrity and Joanne Clark regularly received sexually explicit e-mails from Internet joke sites and from other third parties, one of whom was Ms. Garrity's husband. The material was forwarded to other employees. One employee complained about the e-mail and so the employer began an investigation. The e-mail folders of Garrity and Clark were examined along with the folders of coworkers who regularly received such e-mail. After reviewing the contents of the files, it was determined that Garrity and Clark had violated the company's e-mail policy.

The e-mail policy was quite explicit in stating that any obscene, defamatory, racially offensive material was prohibited and should not be sent through company e-mail. If such e-mail was reported, it would be considered a violation of company policy and would possibly result in termination. The policy also stated that all e-mails were the property of John Hancock and were stored on the company's system. The company stated that even though it was not the usual policy of the company to review e-mails, it would be forced to do so if employees sent unauthorized e-mail. The company specifically reserved the right to review inappropriate e-mail.

The plaintiffs stated that they had been given the impression that their e-mails would remain private since they had been shown how to create a private e-mail folder using personalized passwords. The court said that even though the plaintiffs believed that their e-mail was private, the relevant inquiry was whether their expectation of privacy was reasonable. The court concluded that the employees had no reasonable expectations of privacy as evidenced from the e-mail policy of the company and statements made by the plaintiffs where they had stated that they expected that their e-mails would be forwarded to other users. Furthermore, the e-mail

⁴⁵ *Garrity v. John Hancock Mutual Life Insurance Company*. 81 BNA IER CAS 981, (Mass. District Court, (May 7, 2002).

was voluntarily sent by the plaintiffs over the company intranet system which by definition eliminated any expectation of privacy. The plaintiffs admitted that they knew the defendant company had the ability to review e-mails. The court went on to say that even if employees did have a reasonable expectation of privacy, that privacy interest was outweighed by the employer's need to keep the workplace free from harassment. So, where existing statutes mandate that the employer take affirmative steps to eliminate things such as racially harassing e-mails, as is required by Title VII of the Civil Rights Act of 1964, the employer will have much more latitude in any intrusion upon the privacy of company employees.

It seems clear that while an employer may have explicit policies regarding the proper use of e-mail, employees may still hold the view that "personal" e-mail, even though sent over the company's network, is off limits to the employer. The human resource manager needs to explicitly explain to employees that any e-mail sent over the company network is always subject to review, despite its "personal" nature.

RELIGIOUS DISCRIMINATION AND ACCOMMODATION

Religious Speech and "Witnessing". Recent years have witnessed resurgence in the participation of religion and religious practices. Certain religions require their members to witness to others – to actively profess their religious beliefs. Some believe that their religion directs them to "save" their fellow employees. For example, in *Chalmers v. Tulon Company of Richmond*⁴⁶, a supervisor sent letters to various employees' homes commenting on their social behavior and how it violated religious principles. Chalmers was an evangelical Christian (Baptist), and had developed a close friendship with her supervisor, LaMantia, who was in charge of sales throughout the eastern United States. The two of them had discussed religious issues and LaMantia never expressed any discomfort with these conversations.⁴⁷ There came a time where Chalmers felt that LaMantia was ready "to accept God". Chalmers felt compelled by God at that time to write LaMantia a letter urging him "to get right with God".⁴⁸ She was prompted to send the letter since LaMantia had misled various individuals about the needed turnaround time for various jobs. The letter was sent to LaMantia's house which urged LaMantia to, "get your life right by [the Lord]" and that he [LaMantia] should confess his

⁴⁶ *Chalmers v. Tulon Company of Richmond*, 101 F.3d 1012 (4th Cir. 1996).

⁴⁷ *Id.* at 1015

⁴⁸ *Id.*

wrongdoing.⁴⁹ The letter was opened by LaMantia's wife who thought the improper conduct being referenced in the letter involved adultery since LaMantia had a previous adulterous affair. LaMantia's wife called Chalmers to inquire whether she was referring to adultery in the letter. After threatening to rip up the letter, LaMantia's wife called her husband and accused him of adultery.⁵⁰ LaMantia later complained to Craig Faber, Vice President of Administration and asked for Chalmers termination.

The investigation of LaMantia's complaint revealed that she had sent a second letter to one of Chalmers' subordinates, Brenda Combs. Combs had been recuperating from an illness after having given birth to an illegitimate child. The letter told Combs that God "doesn't like it when people commit adultery" and that Combs should "get right with God".⁵¹ Combs felt "crushed" after reading the letter and felt the Chalmers was accusing her of an "immoral lifestyle".⁵²

Faber concluded that the letters disrupted the workplace, invaded the worker's privacy, and had a negative effect on work relationships. Chalmers was subsequently terminated by memorandum which reiterated the findings of Faber and upper management. Chalmers subsequently filed a TVII charge of discrimination on the basis of religion.⁵³

The court stated that an employer must accommodate an employee's religious expression or conduct even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge. The court concluded that Faber's reason for discharging Chalmers was legitimate and nondiscriminatory. The court stated that in order to be successful in her claim, Chalmers must demonstrate "1) he or she has a bon fide religious belief that conflicts with an employment requirement; 2) he or she informed the employer of this belief; 3) he or she was disciplined for failure to comply with the conflicting employment requirement."⁵⁴ Although the court found that Chalmers had satisfied the first and third element, she never communicated that her belief required her to send the letter which so greatly disturbed her co-workers. As a result, Tulon could not be expected to accommodate her religious beliefs since they were not aware it was her religious beliefs that prompted her to send the letters. Chalmers

⁴⁹ *Id.*

⁵⁰ *Id.* at 1016.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1016-17.

⁵⁴ *Id.*, at 1019.

conceded that she did not provide notice to her employer, but she claimed that none was needed in this case since Tulon never made her aware that her letter writing violated company policy. Since she was not aware that her actions violated company policy, she was not in a position to request accommodation. In addition, she claimed that her religious beliefs were well known and that in and of itself should have put the company on notice that a potential religious issue had arisen.⁵⁵ The court disagreed saying that while the company may have had knowledge regarding Chalmers' beliefs, this could not have forewarned them that she would be sending disturbing letters to her coworkers chastising them for their conduct. The court further stated that even if Chalmers had proved her prima facie case, her overall claim would fail since the letter writing could not be reasonably accommodated, even with advanced notice.⁵⁶

Even though the court found that Chalmers was sincere in her religious beliefs, the court felt that the employer should not have to accommodate such a practice. The court considered the letter writing to be harassment of a fellow employee.⁵⁷ The human resource manager is in a dilemma – whether to infringe on the free speech of one worker to protect the rights of the harassed worker or allow the speech and risk lower performance.

Speech can come in symbolic form as well and employers might find themselves in an awkward position where symbolic religious speech must be suppressed due to the effect it has on other workers. For example, in *Wilson v. U.S. West Communications*⁵⁸ an employee was terminated for refusing to remove or cover a button which depicted a graphic anti-abortion message. The button had a color photograph of an eighteen to twenty week old fetus with the accompanying words “Stop Abortion” and “They Forgot Someone”.⁵⁹ Ms. Wilson wore the button at all times except when she bathed or when she slept. She felt compelled to wear the button and said that she believed the Virgin Mary herself would have chosen the button. Ms. Wilson described herself as a devout Roman Catholic.

The button proved to be quite disruptive since employees stopped work just to discuss the button. Others threatened to walk off the job because they found the button to be disturbing for personal reasons having to do with miscarriage, infertility problems, etc. Ms. Wilson was asked

⁵⁵ *Id.* at 1020.

⁵⁶ *Id.* at 1021-22.

⁵⁷ *Id.*, at 1022.

⁵⁸ *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995).

⁵⁹ *Id.*, at 1339.

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to remove the button, but she refused citing that she would not take the button off because she had made a solemn vow to wear the button until all abortions ended.⁶⁰

After five meetings with her supervisors, two of whom were also Roman Catholic, three options were extended to Ms. Wilson. She was told she could 1) wear the button only in her cubicle; 2) cover the button while she was at work; or 3) wear a different button containing the same message but no photograph. Ms. Wilson refused all three options saying that all of the options would cause her to break her vow to God.⁶¹

The options were extended to Ms. Wilson several times after that and each time she refused. Other employees continued to refuse to sit in on meetings with Ms. Wilson because they were disturbed by the button. Supervisors kept offering the three options, but each time Wilson refused until finally, her supervisor sent her home. She was eventually fired for three days' unauthorized absence. Wilson sued U.S. West for firing her based on the grounds of religious discrimination.⁶²

Wilson had to establish a prima facie case of religious discrimination by showing that: (1) she had a bona fide religious belief that conflicts with an employment requirement; (2) she informed her employer of this belief; (3) she was disciplined for failing to comply with the conflicting employment requirement.⁶³ The parties stipulated that Wilson's "religious beliefs were sincerely held," and the district court ruled that Wilson made a prima facie case of religious discrimination. The court then considered whether U.S. West could defeat Wilson's claim by demonstrating that it offered Wilson a reasonable accommodation. An employer is required by Title VII of the Civil Rights Act of 1964 to "reasonably accommodate" the religious beliefs or practices of their employees unless doing so would cause the employer undue hardship.⁶⁴

The court reviewed the facts to see whether U.S. West had provided reasonable accommodation for Wilson's religious beliefs and concluded that with the exception of the option which would require Ms. Wilson to cover the button, none of the other options were reasonable since the other options would force Wilson to break her vow to God.⁶⁵ Interestingly enough, the court went on to say that although Wilson had characterized her need to wear the

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir.1984).

⁶⁴ *Supra*, note 30 at 1340.

⁶⁵ *Id.*

button as a requirement of her vow, she never held herself out to be a witness for the Catholic voice which seemed to suggest that the court did not feel Wilson was engaged in religious speech. Wilson had claimed that to cover the button would violate her right to religious speech, but the court felt that since her vow did not require her to be a living witness, her religious rights were not violated.⁶⁶ The court reiterated the Supreme Court's previous holdings that an employer does not have to use an employee's preferred accommodation, but only must offer what is "reasonable" in order to comply with the statute.

Human resource managers may have a difficult time trying to accommodate certain religious practices when those practices impose on the beliefs of others or causes disruption in the productivity of other workers. However, the courts seem to be consistent in their view that the employer need only provide a reasonable accommodation for the employee's religious beliefs and not the particular accommodation that conforms to the wishes of the employee who is requesting the accommodation. Furthermore, employers will not be held accountable for not offering accommodation when they have no notice of the need for accommodation by the plaintiff.

TRANSGENDER DISCRIMINATION

There are some diversity issues that have no particular federal legal protection such as sexual affinity discrimination. Even though there is no federal law which prohibits discrimination based on sexual orientation, human resource managers are very likely to be called upon to address various issues that can and do arise – health and benefit allocation, dress codes, and policies regarding transgender employees. The employer may be tempted to proceed with whatever action they deem appropriate since federal law does not specifically prohibit an employer from discriminating against an employee for transgender status.

Transsexual discrimination is one of the fastest growing issues related to sexual orientation or affinity discrimination.⁶⁷ Transsexuals are required, as part of their sex-reassignment surgery, to live as members of the opposite sex for a period of at least one year.⁶⁸ During that time, they will dress and act as members of the opposite sex; they will take hormones

⁶⁶ *Id.*, at 1340-1332.

⁶⁷ Bennett-Alexander, Dawn D. and Hartman, Laura P. *Employment Law for Business* 4th Ed. (McGraw-Hill /Irwin: Boston), 2004.

⁶⁸ The Harry Benjamin International Gender Dysphoria Association, Inc. <http://www.hbigda.org/>. Last visited on March 6, 2005. (HBIGDA) is a professional organization devoted to the understanding and treatment of gender identity disorders. The organization has published guidelines for treating gender dysphoria.

and will present themselves to the public as members of the opposite sex. Most of the cases that have been brought involve discrimination against a transgender individual who is in the process of being in transition for the sex reassignment surgery. The early cases were uniformly in favor of the employer because Title VII did not include protection for sexual affinity orientation nor did it provide protection for transsexuals, but subsequent cases relied on other theories which made the claims more compelling.

Title VII and Transgender Issues. In *Ulane v. Eastern Airlines*,⁶⁹ Ulane was a licensed pilot who had previously served in the military. Ulane was diagnosed as a transsexual in 1979 and had testified that he always had felt like a female. Ulane received psychiatric treatment for his condition and began receiving female hormones.⁷⁰ Finally, in 1980, she received sexual reassignment surgery and her birth certificate was altered to reflect her change of gender to female. Eastern Airlines was only aware of the change after Ulane returned from sexual reassignment surgery. Ulane was shortly terminated thereafter. The district court found that Ulane had been terminated because she was a transsexual, but since Title VII did not protect transsexuals, the charges were dismissed. The Seventh Circuit concurred in the opinion.⁷¹

While a plain reading of Title VII would lead one to believe that transsexuals have no federal recourse for discrimination they may face, claims have been brought under federal and state laws protecting the disabled.

Reasonable Accommodation and Transgender Issues. A Title VII claim is not the only type of claim that might be brought by a transsexual employee. Some claims have been brought against the employer charging the employer with failing to provide reasonable accommodation for their gender dysphoria (transsexualism) based on disability. For example, In *Jane Doe v. the Boeing Company*⁷², a biological male was reprimanded for wearing “excessively” feminine attire, i.e., pink pearls. Doe had applied to the company and was originally hired as a male in 1978. In 1984, Doe concluded that she was a transsexual and her assessment was confirmed by her treating physicians. Doe notified her employers in March of 1985 of her intent to undergo reassignment surgery and the requirement that she would have to live as a full-time female for at least 12 months prior to the surgery.⁷³

⁶⁹ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

⁷⁰ *Id.* at 1083.

⁷¹ *Id.* at 1084.

⁷² *Jane Doe v. the Boeing Company*, 121 Wash. 2d 8 (1993).

⁷³ *Id.*, at 11.

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The airline said as long as Doe was a biological male, Doe could not wear feminine attire or use the women's restroom, but she would be allowed to do so upon completion of her reassignment surgery. Boeing did permit Doe to wear a unisex uniform, but Doe was absolutely forbidden to wear "excessively feminine" attire on the job. It should be noted that the unisex attire included nylons, earrings, lipstick, foundation and clear nail polish, but Doe could not wear "excessively" frilly clothing like dresses. Doe's physician and psychiatrist testified that the unisex attire was "sufficiently feminine" for Doe to qualify for sex reassignment surgery.⁷⁴

Between June and September of 1985, Boeing started receiving a number of anonymous complaints about Doe's attire and use of the women's restrooms, Doe was issued a written warning saying that if Doe violated the rules about the unisex attire and using the women's restroom, she would be terminated. Doe was to comply by November 1, 1985, but on November 5, Doe added a set of pink pearls to her uniform which she refused to remove. It was decided that the addition of the pearls rendered the unisex uniform as being "excessively feminine". Doe was terminated.⁷⁵

Doe brought suit saying that her termination was in violation of Washington's Law Against Discrimination,⁷⁶ which requires an employer to accommodate an individual who is considered to be handicapped (i.e., gender dysphoria) under the statute.⁷⁷ The trial court ruled against her saying that she was temporarily handicapped under the statute, and thus the law would not provide her with any protection. The Appellate court reversed, saying that Boeing

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 12.

⁷⁶ *Washington's Law Against Discrimination*, RCW49.60.180 (The regulation provides that:

(a) A condition is a "sensory, mental, or physical handicap" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question ... In other words, for enforcement purposes a person will be considered to be *handicapped* by a sensory, mental, or physical condition if he or she is *discriminated against because of the condition* and the condition is abnormal.

(b) "The presence of a sensory, mental, or physical handicap" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

(i) Is medically cognizable or diagnosable;

(ii) Exists as a record or history; or

(iii) Is perceived to exist, whether or not it exists in fact. The regulation provides that:

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(ii) Exists as a record or history; or

(iii) Is perceived to exist, whether or not it exists in fact.

⁷⁷ *Supra* note 43 at 11.

failed to accommodate Doe, but the Washington Supreme Court disagreed. In examining the state statute, the court concluded that while gender dysphoria was an abnormal condition,⁷⁸ Boeing did not discharge Doe because of her condition, but terminated her for her violation of the unisex dress code. The court also reiterated that the commonly held principle that the employer is not required to provide an accommodation that is preferred by the employee, but merely offer a reasonable accommodation.⁷⁹

Boeing's accommodation of the allowing Doe to wear the unisex uniform would be considered a reasonable accommodation. The medical experts stated that the unisex uniform met the requirements for living in the social role as a woman. Furthermore, since Doe's dress did not directly impact her performance, there was no accommodation that Boeing could have provided that would have enhanced Doe's performance and thus there was no duty on the employer to provide any accommodation.⁸⁰

Transsexual and Gender Stereotyping. A recent case has offered another avenue of protection for transsexuals which involves the legality of sexual stereotyping. In *Smith v. City of Salem, Ohio*,⁸¹ a firefighter who was born genetically male and who was subsequently diagnosed as gender identity disorder, filed a discrimination suit against the city and city officials for TVII sex discrimination. The trial court dismissed the case, but the appellate court reversed.

Smith was a lieutenant firefighter for seven years and had no blemish on his employment record. He was subsequently diagnosed with Gender Identity Disorder (GID) which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity.⁸² Once he was diagnosed, Smith adopted a more feminine style of dress which was in keeping with the medical protocols for treating GID. Soon, co-workers began to question him about his appearance stating that he was not "masculine enough". As a result, Smith went to his supervisor, Eastek, and told him about his coworkers' reaction as well as providing notice to his supervisor that Smith would ultimately undergo sex-reassignment surgery.

In the course of the conversation, Smith specifically asked Eastek not to divulge the nature of the conversation to Greenamyre, the fire chief. Unfortunately, Eastek did not keep his

⁷⁸ *Id.* at 17.

⁷⁹ *Id.* at 18-19.

⁸⁰ *Id.* at 20-23.

⁸¹ *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir 2004).

⁸² *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 576-582 (4th ed.2000).

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promise. Greenamyre then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment. On April 18, 2001, Greenamyre and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. While Ohio law allows for such meetings, this particular meeting did not follow the prescribed procedures which were mandated by law.⁸³

It was decided at the meeting to require Smith to undergo three psychological examinations. The committee thought that Smith would refuse this request and if he did, he could be immediately terminated for insubordination. One member of the committee, who did not speak throughout the meeting, immediately phoned Smith to inform him of the Committee's plan. Smith retained counsel as a result of the Committee's plan. Smith's attorney informed the Committee of the legal ramifications of their plan. Two days after that, Smith received his "right to sue" letter from the EEOC and 4 days after that, Smith was suspended for a 20-hour shift assignment for allegedly violating a City or Fire Department policy.

A hearing was held in front of the Salem Civil Service Commission where Smith maintained that his suspension was due to selective enforcement of the City's policy because of his transsexualism. Smith wished to introduce evidence regarding the meeting where the Committee hatched its plan, but the Commission's chairman would not allow it, despite the fact that Ohio law would allow Smith to introduce such evidence.⁸⁴ The suspension was upheld but later reversed by the Columbiana Court of Common Pleas. Smith filed a federal TVII sex discrimination and retaliation, a 42 U.S.C. §1983 claim, and state law claims of invasion of privacy and civil conspiracy. The district court dismissed the state and federal claim and granted the City's motion to dismiss. Smith claimed on appeal that the district court was wrong to dismiss the case on the principle that a Title VII claim was unavailable to transsexuals. He also challenged the trial court's finding that he did not suffer any adverse employment action. The appellate court found that Smith had made out a *prima facie* case of Title VII discrimination. To establish a *prima facie* case of employment discrimination pursuant to Title VII, Smith must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly

⁸³ Ohio Revised Code § 121.22(G)

⁸⁴ Ohio Administrative Code § 124-9-11

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situated individuals outside of his protected class.⁸⁵ Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination "because of ... sex" protects men as well as women.⁸⁶ The complaint also alleges that 1) Smith was qualified for the position in question since he had been a lieutenant in the Fire Department for seven years without any negative incidents; and 2) He would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

To establish a *prima facie* case of retaliation pursuant to Title VII, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action.⁸⁷ Smith's complaint satisfied the first two requirements by explaining how he sought legal counsel after learning of the Salem executive body's April 18, 2001 meeting concerning his employment; how his attorney contacted Defendant DeJane to advise Defendants of Smith's representation; and how Smith filed a complaint with the EEOC concerning Defendants' meeting and intended actions. With respect to the fourth requirement, a causal connection between the protected activity and the adverse employment action, "[a]lthough no one factor is dispositive in establishing a causal connection, evidence ... that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation."⁸⁸ Here, Smith was suspended on April 26, 2001, just days after he engaged in protected activity by receiving his "right to sue" letter from the EEOC, which occurred four days before the suspension, and by his attorney contacting Mayor DeJane, which occurred six days before the suspension. The temporal proximity between the events was significant enough to constitute direct evidence of a causal connection for the purpose of satisfying Smith's burden of demonstrating a *prima facie* case.

One of the most interesting aspects of the case was that Smith based his claim of TVII discrimination on sex stereotyping, which was at issue in *Price Waterhouse v. Hopkins*.⁸⁹

⁸⁵ *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir.2000).

⁸⁶ *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983).

⁸⁷ *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir.2004) (citation omitted)

⁸⁸ *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000); *see also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir.1988) (employee's discharge "soon after" engaging in protected activity "is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir.1986) ("Causation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge.").

⁸⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Hopkins had been considered for partnership, but was denied because she was considered “too macho”. She was told that she would have a better chance of receiving the partnership if, “a course at charm school,” “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹⁰ Six members of the Court in *Hopkins* concluded that such remarks were evidence of gender discrimination and four members stated that the comments also represented gender stereotyping. The Supreme Court made clear that in the context of Title VII, discrimination because of “sex” includes gender discrimination: “In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁹¹ The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁹²

Smith stated that the same type of gender stereotyping was present in his case since his coworkers began commenting on his lack of a masculine appearance and the resulting plan to force him to resign was done because he did not conform to a masculine stereotype. The Sixth Circuit agreed that the City acted in a discriminatory manner based on sex stereotyping and that the district court was in error for dismissing Smith’s claim on the basis that TVII does not protect transsexuals. The court found that when an employer acts in a discriminatory way against an employee for failing to conform to gender stereotype is a violation of Title VII. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.⁹³

The Court then turned its attention to whether Smith had been the recipient of an adverse employment action. The district court found he had not since the Court of Common Pleas had reversed the suspension. The district court had relied on the findings of *White v. Burlington Northern & Sante Fe Ry. Co.*,⁹⁴ the district court held that Smith's suspension was not an adverse employment action because the Court of Common Pleas, rendering the “ultimate

⁹⁰ *Id.*, at 235.

⁹¹ *Id.*, at 250.

⁹² *Id.* at 251.

⁹³ *Smith v. City of Salem, Ohio* at 575.

⁹⁴ *White v. Burlington Northern & Sante Fe Ry. Co.*⁹⁴, 310 F.3d 443 (6th Cir.2002)

employment decision," reversed the suspension, and that accordingly, Smith's Title VII claim could not stand. However, the Sixth Circuit had subsequently overruled and vacated *White*, and because of this, the court held for Smith. In addition, the Fire Department suspended Smith for twenty-four hours. Because Smith works in twenty-four hour shifts, that twenty-four hour suspension was the equivalent of three eight-hour days for the average worker, or, approximately 60% of a forty-hour work week. Thus, Smith satisfied the adverse employment requirement of both an employment discrimination and retaliation claim pursuant to Title VII.

The Sixth Circuit found that Smith had sufficiently met his burden of proof regarding his §1983 claim for gender discrimination on the basis of violations of the Equal Protection Clause of the Constitution thus reversing the district court's dismissal of the claim. However, the Court affirmed the lower court's decision to dismiss Smith's §1983 claim for Due Process violations of the 14th Amendment. The court referred to the fact that a state's failure to follow due process in and of itself would not necessarily give rise to a Constitutional claim. Furthermore, since Smith did not offer any proof that he experienced any deprivation in property or liberty, the claim failed. The case was remanded back to district court.

It is clear that even if there is no federal law specifically prohibiting discrimination against transsexuals, employers would be well advised to follow a cautious approach when asked to accommodate the needs of a transsexual.

Summary. Compliance with diversity regulations is never an easy matter. Employers find themselves not only responsible for compliance with federal law on diversity issues, but they also find themselves having to deal with the fallout from some of the unanticipated consequences of compliance. As these cases have shown, it is never an easy matter to comply with federal laws and employers, and human resource managers must be vigilant in anticipating any backlash to practices and policies that are designed to encourage diversity in the workplace.