

Gender Identity: The New Protected Class

By Gregg H. Mosson

In Maryland, people are protected from discrimination in employment, housing and public accommodations, due to their gender identity as well as sexual orientation, pursuant to Title 20 of the State Government Article of the Maryland Code. Federal law is catching up as courts across the country, including in Maryland, have found that Title VII of the Civil Rights Act of 1964 and Title IX of the Education Act of 1972 protect employees and students based on their transgender status and/or sexual orientation. However, some federal courts, also including some in Maryland, have reached the opposite conclusion.

Maryland Protects Gender Identity

In 2014, the Maryland legislature passed The Fairness for all Marylanders Act protecting people from discrimination based on “gender identity” in three primary areas: housing, public accommodations and employment. Sexual orientation is also protected expressly under state law.¹

The Maryland Code defines both gender identity and sexual orientation. Discrimination against a person due to sexual orientation is due to their sexual preference of “homosexuality, heterosexuality, or bisexuality.”² Gender identity is defined expressively as:

“ . . . the gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth, which may be demonstrated by:

(1) consistent and uniform assertion of the person’s gender identity; or



(2) any other evidence that the gender identity is sincerely held as part of the person’s core identity.”

Md. Code, St. Gov. Art. §20–101(e) (Westlaw 2018).

Maryland law also has held that persons can petition a court to enact gender change in state records akin to people’s ability to enact a name change. *In re Heilig*, 372 Md. 692, 816 A.2d 68 (2003).³

Notably, the definition of gender identity under the Maryland Code involves an assertion of “appearance” as well as an “expression” of gender, compared to gender at birth and not necessarily its physical change. The codes for Baltimore City, Baltimore County and Howard County support this definition of gender identity as expressive. Additionally, Baltimore City’s discrimination ordinance defines gender identity to include “being perceived as having a gender-related self- identity, self-image, appearance, expression, or behavior,” which expressly

¹ See Senate Bill 212 (Oct. 1, 2014); see also *e.g.*, Md. Code, St. Gov. Art. §20–606 (Westlaw 2018) (for employment).

² Md. Code, St. Gov. Art. §20–101(g) (Westlaw 2018).

³ In *Heilig*, the Court of Appeals overturned a trial court’s refusal to consider a gender designation change for an individual born in a different state than Maryland and remanded the case with guidance on what must be proven and the standards involved for a decision.

protects persons due to others' perceptions."⁴

Local codes usually have their own unique procedures, authorize investigations to be conducted and often cover smaller employers than state and federal law.⁵ State and federal law provides fee-shifting of attorney fees and costs for prevailing parties, while not every local code does.⁶

Under federal law, such a perception-based discrimination could be pursued through Title VII "gender stereotype" sex discrimination theories, which will be discussed in the second part of this article.

Title VII and IX: Expanding to Protect Transgender and Sexual Orientation Status Via Gender Stereotyping Discrimination

Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of "sex."⁷ In a series of seminal decisions, the U.S. Supreme Court held that sex discrimination also covers discrimination against someone who acts too manly, though she's a woman, or not manly enough, though he's a man. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109

S. Ct. 1775, 104 L. Ed. 2d 268 (1989); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).⁸ The rationale of these decisions engendered a flow of precedent holding that discrimination against people who violate the norms of gender stereotype equals discrimination due to sex, because sex includes stereotypes about each gender.

In 2014 in *Finkle v. Howard Cty.*, Judge Bredar of the federal district court expansively interpreted Title VII's protections for transgender employees, by construing them in a manner consistent with our state law. 12 F.Supp.3d 780 (D.Md. 2014). In *Finkle*, a retired D.C. police officer was working as part of the "horse mounted search and rescue organization in Crownsville, Maryland," but she was rejected for a volunteer additional position with certain tangible insurance and other benefits. She alleged that she was denied the position because of her obvious transgender status. Prior to retirement, she had been a man. See *id.* After reviewing precedents from the United States Supreme Court and other circuits, Judge Bredar held that discrimination based on transgender status violates Title VII. *Id.* at 788.

In 2018, Judge Russell of our Maryland federal court held that a biological girl who considered herself a boy had the Title IX right to use the boy's bathroom because otherwise, he/she suffered illegal sex discrimination as a transgendered individual.⁹ Being a "transgender boy," held the court, "does not conform to sex-based stereotypes associated with being defined female at birth" and so is protected. *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704 (D. Md. 2018).

In *M.A.B.*, the court looked to Title VII employment law from across the nation as well to *Finkle v. Howard Cty.* in Maryland to extend federal sex-based protection under Title VII to transgender persons. As the court notes, four federal circuits - but not yet the Fourth - have recognized "transgender status" discrimination as "per se sex discrimination" under federal civil rights laws. 286 F.Supp.3d at 714.

However, just three months before the decision in *M.A.B.*, Judge Grimm of our federal court held that sexual orientation discrimination is not prohibited by Title VII, though gender stereotype discrimination theories can

4 See Article 4, Section § 1-1 (I-1) of the Baltimore City Code ("Gender identity or expression' means an individual's having or being perceived as having a gender-related self- identity, self-image, appearance, expression, or behavior, whether or not those gender-related characteristics differ from those associated with the individual's assigned sex at birth."); see Article 29, Title I at § 29-1-101(1) of the Baltimore County Code of Ordinances ("Gender identity or expression' means a gender-related identity or appearance of an individual regardless of the individual's assigned sex at birth."); see Title 12, Subtitle 2 at Sec. 12.201 (IX) at the Howard County Code of Ordinances ("Gender identity or expression means a gender-related identity or appearance of an individual regardless of the individual's assigned sex at birth").

5 The Baltimore City discrimination Code, for instance, covers employers with 15 employees, compared to 20 under Title VII and even if these fifteen employees are achieved seasonally for "15 days" and not all year. See Article 4, Section § 1-1 (i)(1) of the Baltimore City Code. Baltimore County defines covered employers as a person or entity with one or more employees, full time or part time, during 20 or more weeks each year. See Article 29, Title I at § 29-2-201(c) of the Baltimore County Code of Ordinances

6 Md. Code Ann., State Gov. Art. § 20-1015 provides for attorney fees and costs for prevailing parties in Maryland discrimination cases under Maryland law. Md. Code Ann., State Gov. Art. § 20-1201 - § 20-1203 (Westlaw 2018) provides for a right of action at the Circuit Court as well as for attorney fees and costs for prevailing parties for local code actions of Howard, Montgomery, Baltimore and Prince George's Counties. However even here there are differences. Baltimore County only provides expressly for "attorney fees" while the other Counties offer "reasonable attorney's fees, expert witness fees and costs." The Baltimore City Code permits an appeal from its decision to the Circuit Court. See *Code Article § 4-4*.

7 The Act, as amended, is codified at 42 U.S. Code § 2000e-2. Definition (k) at § 2000e expressly includes as part of the definition of sex the following: pregnancy, childbirth and related medical conditions.

8 These two cases also are instructive in distinguishing vague workplace problems that might hide discrimination, but require more investigation, from robustly cognizable harassment claims. In *Oncale v. Sundowner Offshore Services*, for instance, a worker on an oil rig brought a cognizable sex harassment claim under Title VII, because he was considered not man enough by his co-workers and harassed, assaulted, humiliated and threatened with rape, as summarized by the U.S. Supreme Court.

9 Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*

protect homosexual employees from harassment under Title VII. *Churchill v. Prince George's Cty. Pub. Schs.*, No. PWG-17-980, 2017 U.S. Dist. LEXIS 197713, at *12 (D.Md. Dec. 1, 2017).¹⁰ The fundamental difference in these decisions lies in Judge Russell's reading of the developing case law nationally.

What About This Developing National Case Law?

In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018), the Second federal Circuit arrived at a similar conclusion to Judge Russell in Maryland that sexual orientation discrimination constitutes a form of sex discrimination because it breaks the gender stereotype of heterosexuality. At the same time, based on the appellate summary of facts, that employee will have a hard time to proving they were terminated due to sexual orientation rather than a customer complaint, unless there was no customer complaint.

Since 2015, the U.S. Equal Employment Opportunity's administrative system has supported the position that sexual orientation discrimination constitutes a form of sex discrimination, based on its holding in *Baldwin v. Foxx* that gender stereotypes assume heterosexuality.¹¹ As noted, this is expressly protected under Maryland law, but there is conflicting precedent in Maryland federal courts about whether it is protected also by federal law. Notably in *Baldwin v. Foxx*, the employee also alleged hearing derogatory comments about gays and about being gay from his supervisors. This provided motive evidence, helpful to prevail, compared to what's summarized in *Zarda*. As the EEOC stated, "Sexual orientation discrimination is also sex discrimination." *Id.* at 8.

Conclusion:

Maryland law protects people from discrimination who are targeted due to gender identity and sexual orientation. While sexual orientation is defined by the Maryland Code narrowly, gender identity is defined as an expression under state law.

Likewise under Title VII, Title IX and related federal civil right laws, gender discrimination includes protection from discrimination due to one's lack of conformity to gender stereotypes. The federal courts nationally have expanded this gender protection to cover sexual orientation and transgender status in some instances. As norms evolve, so shall this federal case law.

Biography

Gregg H. Mosson, Esq., practices employee rights, select civil litigation, Social Security disability benefits and domestic law, based out of Mosson Law, LLC in Towson, Maryland. He regularly practices before the circuit courts and U.S. District Court of Maryland as well as before state and federal administrative agencies. He is a *Summa Cum Laude* graduate of the University of Baltimore, with an MA from the John Hopkins Writing Seminars and BA in English. Before practicing law, he enjoyed a prior career as a writer and teacher. His legal commentary has appeared at the *Trial Reporter*, the *Maryland Bar Journal*, *Western State University Law Review* and *University of Baltimore Law Review*. His *Law Review* articles have been cited by the Delaware Supreme Court in *Eastern Sav. Bank v. Cach, LLC* (2015) and Maryland Court of Appeals in *Atty. Griev. Comm. v. Dore* (2013). He can be reached at Mosson Law, LLC (www.mossonlaw.com).

¹⁰ Gender-based stereotype discrimination applies to protect employees from harassment as well as discriminatory actions such as termination, demotion and/or failure to be promoted. In *Price Waterhouse v. Hopkins*, the female employee was successful in alleging she was denied promotion due to her employer and colleagues all telling her she was not feminine enough to move ahead. 490 U.S. 228 (1989). The Seventh Circuit recently applied this logic to protect someone due to their sexual orientation in their being terminated, based on the theory that heterosexuality is a gender norm being applied discriminatorily to this plaintiff-employee. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, __ F.3d __, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (en banc). Judge Grimm's decision above focused on harassment and also likely would deny that Title VII covers any discriminatory conduct due to sexual orientation because the discrimination must be motivated by "sex" under Title VII and not sexuality. This was standard federal law, until recently, as discussed in this article.

¹¹ EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

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