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Takeaways After 4th Circ. Says ADA Covers Gender Dysphoria

By **Anne Cullen**

Law360 (August 17, 2022, 10:08 PM EDT) -- The Fourth Circuit this week became the first federal appeals court to rule that the Americans with Disabilities Act protects transgender people who experience gender dysphoria, a decision with implications experts said will reverberate across the nation.

Tuesday's lengthy split panel ruling made clear that gender dysphoria is distinct from the "gender identity disorders" that Congress wrote out of the ADA when the law was passed in 1990, endorsing a position increasingly adopted by federal district courts.

Gender dysphoria is defined by the American Psychiatric Association as clinically significant distress or impairment related to a strong desire to be of another gender, which can interfere with someone's social life and their ability to do their job, as well as other important daily functions.

Recognizing gender dysphoria as a disability under the ADA affords those with the condition the legal right to seek a workplace accommodation. It also clears the way for someone to bring a disability discrimination lawsuit if they experience bias based on their gender dysphoria in the broad spectrum of arenas the federal law covers, including employment, transportation and public accommodations.

LGBTQ rights advocates lauded the decision as a monumental win for the transgender community, and employment attorneys from both the management and worker sides told Law360 it lends weight to a significant shift underway in the application of disability discrimination law.

"To call this decision landmark is accurate," said Quinnipiac University associate dean and disability law professor Kevin M. Barry, who has penned academic papers and court filings on the issue and was also involved in the Fourth Circuit case.

While a circuit court ruling only binds courts within its jurisdiction — in the Fourth Circuit's case, those in Maryland, Virginia, West Virginia, North Carolina and South Carolina — legal experts said that Tuesday's opinion will have influence past those boundaries.

"This will not only change people's lives in the Fourth Circuit, this is a decision that will be relied upon and cited in many district courts outside the Fourth Circuit, and in other circuit court decisions that consider this issue," said Fox Rothschild LLP employment law attorney Brian McGinnis, who specializes in workplace policies affecting LGBTQ workers.

Here are three things to know in the wake of the seminal ruling.

Bostock's Gaps Are Getting Filled In

Employment attorneys said the Fourth Circuit's stance on the ADA shores up gaps in legal protections for transgender employees that were left open in the wake of the U.S. Supreme Court's landmark Bostock decision.

The high court ruled in Bostock v. Clayton County two years ago that Title VII bars employment discrimination based on sexual orientation and gender identity. While the watershed opinion solidified basic workplace protections for LGBTQ employees, the justices explicitly sidestepped the issues of sex-segregated bathrooms, locker rooms and dress codes in their decision.

The ADA can help bridge that gap, said Jillian T. Weiss, a lawyer who practices in New York and New Jersey and represents people who experience employment discrimination based on gender identity or sexual orientation.

"Even though Bostock was a great decision for trans people, Title VII has its limitations and the courts have been narrowing it for years," Weiss said. "The ADA is a lot more robust in many ways, so it is going to provide additional protection for trans people."

Unlike Title VII, the ADA requires employers to offer reasonable accommodations to disabled employees so they can enjoy the same "benefits and privileges of employment" as their peers. For workers with gender dysphoria, this could mean the right to use facilities or wear a uniform matching their gender identity.

Attorneys who counsel employers said their advice won't change in the wake of the Fourth Circuit's decision; they've already been instructing their clients to not get bogged down on the question of what constitutes a disability and simply offer work adjustments where requested.

"As for the practical application for employers, this doesn't change things dramatically," said James Hammerschmidt, co-president and employment law chair of Paley Rothman. "Any time that an employee seeks an accommodation, the smart thing to do is not get caught up in the disability issue, and just walk through the accommodation analysis."

However, lawyers said the ruling could change the tune of employers that might balk at a worker's request for a gender dysphoria-related accommodation.

"This will have some impact on the accommodation issues, and what it means to accommodate somebody for gender dysphoria," said Morrison Foerster LLP employment partner Andrew R. Turnbull. "If employers were going to question gender dysphoria as a disability before, especially if you're in the Fourth Circuit, that's off the table."

Science and the Law Are Both Developing

Tuesday's decision included a lengthy analysis of the evolution of the medical community's understanding of gender dysphoria, which the American Psychiatric Association added to its industry-definitive diagnostic manual in 2013.

In reaching the conclusion that gender dysphoria is distinct from a gender identity disorder — a diagnosis the association scrapped nearly a decade ago — the Fourth Circuit majority examined the history of both concepts and explained how both are viewed currently.

When the ADA was passed, the gender identity disorders excluded from the law's protections narrowly referred to the condition of identifying with a different gender, according to the opinion.

Gender dysphoria, on the other hand, is defined by the APA as significant discomfort or distress borne out of an incongruence between an individual's gender identity and the gender assigned at birth, which can result in intense anxiety, depression, suicidal ideation and suicide.

The Fourth Circuit said this shift in medical understanding makes clear that gender dysphoria should not be categorically excluded from the ADA's protections.

Disability law expert Jonathan Mook, of DiMuroGinsberg PC, said the analysis highlights that attorneys in this field need to stay on top of advancements in the medical community's understanding of disabilities.

"It's an important decision for ADA practitioners because it highlights the evolving underlying nature of ADA law," Mook said. "As medical science progresses and our understanding of various medical conditions changes, that's going to affect who is and who is not entitled to protections under the ADA."

"ADA practitioners need to keep abreast of changes in medical assessments and categorization to adequately practice ADA law," Mook said.

The Issue May Be Bound for the High Court

Experts pointed out that the Fourth Circuit's decision is by no means the final word on the subject — even within its own jurisdiction — and employers, workers and lawyers would be remiss to consider the issue resolved.

The ruling included a sharp dissent from one of the three panel members, and could potentially face scrutiny from the full court if the defendants seek an en banc review.

"I'm not sure the story is done on this yet," said Morrison Foerster's Turnbull. "We haven't heard the last word on this."

Attorneys said the Fourth Circuit has inched to the political left in recent years, but it is still generally considered a conservative court. While the issue won't necessarily fall on party lines, the panel behind Tuesday's opinion was split by political affiliation.

The ruling was authored by U.S. Circuit Judge Diana Gribbon Motz, an appointee of former President Bill Clinton, and U.S. Circuit Judge Pamela A. Harris, who was picked by former President Barack Obama. Meanwhile, U.S. Circuit Judge A. Marvin Quattlebaum Jr., who was nominated by former President Donald Trump, penned the dissent.

Paley Rothman's Hammerschmidt also said he'd be shocked if there wasn't discord on the issue outside the Fourth Circuit, with resistance likely coming from the more conservative Fifth, Seventh and Eleventh circuits.

"It would be surprising if this were followed in more conservative jurisdictions," Hammerschmidt said. "I don't see it being adopted uniformly."

"There will be a circuit split," he said.

Experts predicted the question will likely eventually be put before the Supreme Court, though employment attorneys said it's anyone's guess whether the justices will take up the issue.

"This is going to be an issue playing out on the national stage in the coming years," said DiMuroGinsberg's Mook. "We're going to be debating this for a while."

--Additional reporting by Braden Campbell. Editing by Abbie Sarfo.
