

Are Gender-Associated Pronouns the Next Workplace Battlefield?

by Dennis J. Merley - Tuesday, February 25, 2020



Pronoun wars in the workplace are heating up. American workers are increasingly identifying as transgender, an umbrella term covering a wide range of gender identity and gender expression that differs from what society typically associates with the person's biological sex.

This expanding range of self-image carries with it the desire and often insistence that accurate labels and correct pronouns be utilized.

Three recent cases involving the use (or nonuse) of desired gender-related pronouns may signal what Minnesota employers might expect in a workplace where the phrase "he said – she said" has gone the way of the rolodex, white-out and pleas to "work smarter, not harder."

Case #1

An Ohio public university professor refused the request of a transgender female student to stop calling her sir and address her as a female. Proclaiming his strong religious belief that a person's gender cannot be changed, the professor stood his ground even after the university warned him that he was violating their anti-discrimination policy. He **sued** the university for violating his 1st amendment rights of free speech and free exercise of religion.

Case #2

An Indiana school teacher has survived a motion to dismiss his **claim of religious discrimination** after he was fired for not complying with his high school's transgender name-and-pronoun-use policy. He too expressed the belief that gender is fixed at conception making it a sin to say or act otherwise.

Case #3

A Maryland transgender employee **sued** her employer for retaliatory discharge after she complained that managers and co-workers intentionally refused to call her by her chosen name, declined to refer to her with accurate gender-related pronouns, and criticized her clothing choices despite the fact that she wore the same types of clothes as other female employees.

What is an employer supposed to do when faced with competing expectations of respecting an employee's gender identity and honoring an objecting employee's religious convictions?

The First Amendment issue applies, of course, only to public employers and frequently is resolved under the US Supreme Court's pronouncement that freedom of speech for public employees applies only to personal speech and not when they are speaking in the course of their official duties. As such, the university professor's claim (Case #1) probably will depend upon whether it is a matter of personal preference or professional expectation to refer to students as Mr., Ms., or anything else of that nature.

Identity v. Beliefs

As for the discrimination claims, it is not yet settled whether federal law (Title VII) applies to gender orientation issues but the US Supreme Court **heard arguments** on that issue in October and is expected to rule this year. Regardless of that decision, though, Minnesota stands with roughly half the other states by including a **ban on sexual orientation discrimination** in our state anti-discrimination statute (the Minnesota Human Rights Act). "Sexual orientation" is **defined in the statute** to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."

As a result, Minnesota employers may expect transgender employees to ask or insist that their chosen pronouns be used (just like any other employee). Transgender people dismiss religious discrimination concerns (with some legal support on their side) by noting that as long as one particular religion is not singled out, a neutral and uniform policy requiring the use of requested pronouns is not discriminatory. Moreover, while employers cannot dictate what their workers believe, they certainly can and frequently do insist that employees not denigrate their co-workers who hold different beliefs.

On the other hand, workers with sincerely held religious beliefs correctly contend unlike most protected classifications that simply require equal treatment, religious convictions must be accorded reasonable accommodation. While recognizing that the legal obligation of religious

accommodation (unlike disability accommodation) requires only a minimal effort on the employer's part, those with strong convictions contend that it requires very little effort or burden simply to exempt them from the requirement to use particular pronouns.

What to Do Until the Courts Decide

Until Minnesota courts resolve these issues, employers need to determine how they will respond to this conundrum. Refusing to refer to a transgender female as "she" may not be an independent violation of law but it likely will be a piece of evidence if and when that employee brings a charge or lawsuit claiming hostile work environment based on sexual orientation. Is it really that difficult to honor the employee's request (and ask her co-workers to do the same), especially if this is done in good faith and with sincere earnestness?

By that same token, might it be possible to acknowledge sincerely-held religious beliefs and offer suggestions for not compromising them? For example, the employer might suggest the simple workaround of just using the employee's first name. If Steve is now Stephanie, the co-worker can avoid using pronouns merely by saying "Yes, I saw Stephanie leave a few minutes ago. I think Stephanie is on the way to visit Stephanie's mother." It may sound awkward for a bit but it is much less awkward than having the employee explain on a witness stand why he was unable to stop calling Stephanie "he" or "him."

Bottom Line

Until we know more about what is legally required, perhaps the best practice in this area is to treat all employees with respect and ask everyone else to do the same. In addition, do not blame any particular employee or group for this issue. It is just another reflection of our constantly changing workplace dynamics.