



Sexual Orientation and Gender Identity Discrimination

By Kevin P. Perez

The law of sexual orientation and gender identity discrimination is constantly developing. While there was little support for such discrimination claims a couple decades ago, today there are myriad statutes, ordinances, and clever legal theories that can create liability where none previously existed. As a result, it is imperative for employers and their counsel to understand what potential claims for sexual orientation and gender identity discrimination exist, how to prevent such claims from arising, and how to defend against such claims. It is similarly important for plaintiff's counsel to understand how seemingly uncovered conduct may actually be proscribed by one or more laws or theories. What follows is a discussion of some of the statutory bases for liability for employment discrimination by individuals on the basis of their gay, lesbian, bisexual, or transgender ("GLBT") status.

A. Legal Framework

1. Title VII

Currently, Title VII does not directly prohibit discrimination based on sexual orientation or gender identity. This may change in the near future. More than 30 proposed bills have been introduced in Congress to amend Title VII to add sexual orientation in the last 25 years. *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. 2002). Further, the Employment Non-Discrimination Act ("ENDA") has been introduced several times over the past several years to make both sexual orientation discrimination and gender identity discrimination illegal. In November 2007, ENDA passed the house in a modified form that includes protection based only on sexual orientation.

http://www.hrc.org/laws_and_elections/enda.asp. This is the first time ENDA passed a chamber of Congress, and seems to signal that the times are changing.

It is anticipated that some modification of Title VII to include a specific prohibition on either sexual orientation, gender identity, or both, will occur in the next several years. Regardless of whether Title VII technically protects GLBT individuals, Title VII can be used by individuals who face discrimination on the basis of GLBT status under the theories of sex-plus discrimination and sexual stereotyping.

a. Sex-Plus Discrimination

One way individuals may bring a Title VII claim for discrimination on the basis of GLBT status is through the theory of "sex-plus" discrimination. This theory was first described by the United States Supreme Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Phillips*, the Court was presented with a claim of sex discrimination under Title VII by a mother of preschool-aged children who asserted that she was denied employment while fathers of preschool-aged children were not. The defendant had previously won summary judgment based on evidence that it hired more women than men for the position plaintiff sought, and the argument that there could, therefore, be no discrimination against women. The Court, however, found that because certain women were treated differently than *similarly situated* men, the defendant was violating Title VII's prohibition on discrimination on the basis of sex. The reason for the finding was that the only difference between the two groups was gender.

Thus, by using the sex-plus theory, plaintiffs can make out a *prima facie* case where not all members of a gender are alleged to be subject to discrimination. The Tenth Circuit shed further light on the sex-plus discrimination theory in *Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d 1199 (10th Cir. 1997). In *Coleman*, a female employee sued her employer alleging, *inter alia*, discrimination based on sex plus her common law marital relationship to another employee. The Tenth Circuit held that in order for the sex-plus discrimination theory to apply, there must be a corresponding subclass of the members of the other gender with the same secondary characteristic. Without such a subclass, there can be no comparison to determine if gender was the only differentiating factor. Implicit in the opinion is that plaintiff must show that the entire subclass of one gender with the secondary characteristic was treated differently than the subclass of the other gender with that characteristic.

Using the theory provided by *Phillips* and *Coleman*, an individual who was the subject of discrimination based on GLBT status can make out a *prima facie* Title VII

(continued on page 8)

Contents:

Sexual Orientation and Gender Identity Discrimination 1
Beyond Diversity:
Inclusion in the Legal Workforce 3
The Grammar Queen:
An Open and Closed Case 4
So . . . Let's Discuss Committees 5
Timeless Tips on Becoming a Better Leader 6

Colorado Association of Legal Support Staff

P.O. Box 2835
Denver, Colorado 80201-2835
www.calss.org

De Novo Staff

Cathy Hansen, PLS, Editor
303-965-8088 (phone)
303-896-2726 (fax)
cathy.hansen@qwest.com (e-mail)

CALSS Executive Committee

Ginny Lee, President (Denver)
720-946-4743 (phone)
303-825-0434 (fax)
glee@kcfpc.com

Pauli Ingwersen, PLS, President-elect
(Colorado Springs)
719-475-6487 (phone)
719-634-2461 (fax)
pingwersen@hollandhart.com

Karen Smith, Vice President (Grand Junction)
970-242-6262 (phone)
970-241-3026 (fax)
ksmith@wth-law.com

Carol Donahue, RP, Secretary (Denver)
303-764-3022 (phone)
303-863-0223 (fax)
cdonahue@sheridanross.com

Karen Hartley, PLS (Colorado Springs)
719-520-4675 (phone)
719-520-4415 (fax)
karen.hartley@el Paso.com

Audrey Brekel, Parliamentarian (Boulder)
303-417-8502 (phone)
303-866-0200 (fax)
audrey.brekel@hro.com

From the Editor:

What a wonderful year it's been! But like all good things, it must come to an end, so this is my last issue as editor of *De Novo*. I hope you've enjoyed the articles and information as much as I've enjoyed sharing them with you!

The next issue of *De Novo* will be distributed in November 2008. My best wishes to the new editor for another successful year in CALSS!

In the meantime, I look forward to seeing many of you in Boulder soon at the CALSS Annual Meeting & Educational Conference.

Cathy Hansen, PLS
De Novo Editor



De Novo is a bi-monthly publication of the Colorado Association of Legal Support Staff (CALSS), published in odd-numbered months. The information in this publication is intended for general guidance, and should not be construed as legal advice. CALSS accepts no responsibility for loss to any person or entity as a result of action or inaction based on the use of any information in this publication.

Articles that appear in *De Novo* do not necessarily reflect the view of CALSS, nor does their publication constitute an endorsement.

An annual e-subscription to *De Novo* is provided to members of CALSS as part of their membership dues. Printed copies may be obtained from the editor.

All correspondence regarding content should be directed to the editor. Original articles may be submitted for publication, as well as reprints of previously published articles. (In the latter case, please include author and publication information so appropriate reprinting permission may be obtained.)

Deadline for submission is the 15th day of the month preceding publication (i.e., December 15 for the January issue).

Beyond Diversity: Inclusion in the Legal Workforce

By Janet Ellen Raasch

The business climate of the 21st century is increasingly diverse. In order to succeed in this environment, law firms must take active steps to mirror the business culture of the present and the future – not rest blindly in the culture of the past.

Corporate counsel of Fortune 500 and other corporations have signed a pledge demanding that the law firms they hire increase the diversity of their ranks or risk losing them as clients. In spite of this challenge, law firms are not doing a very good job.

When it comes to diversity, the legal profession ranks far behind all other professions. According to data gathered in the last census, only 9.7 percent of attorneys nationally are members of minority groups. In Colorado, the number is a scant 6.9 percent.

At the same time, members of minority groups now account for 24.6 percent of doctors, 20.8 percent of accountants and auditors, and 18.2 percent of those teaching in colleges and universities. Why is the legal profession so far behind?

“For many years, law firms have been trying to address the issue of diversity by adopting piecemeal measures designed to recruit and hire – but not retain – minority lawyers,” said U.S. Magistrate Judge Kristen L. Mix.

“Instead, they need to look deeper – to change the very cultures of their law firms from the ground up,” said Mix. “Most law firm cultures evolved to ‘include’ the traditional category of lawyers – white heterosexual males. This needs to change.”

Mix addressed diversity in the legal profession at an educational meeting of the Mile High Chapter of the Association of Legal Administrators (www.milehighala.org), held in Denver March 20 at The Adams Mark hotel.

Mix spoke in support of the Colorado Campaign for Inclusive Excellence (www.colegaldiversity.org), created recently as the education and action arm of the Dean’s Diversity Council – a group of leaders from both law schools as well as all sectors of the Colorado legal community (including 28 law firms).

CCIE and DDC share the mission that, by the year 2016, all Denver metro law firms and corporate legal departments will have successfully developed and implemented initiatives that create cultures of inclusion – where attorneys of all backgrounds succeed without regard to gender, race, religion, national origin, disability or sexual orientation.

“As far as we know,” said Mix, “CCIE is the first organization in the United States to adopt this mission and support it with an aggressive action plan.”

A three-pronged effort

CCIE working groups focus their efforts on three problem areas: fewer minority students in the law-school

pipeline, difficulty recruiting minority graduates to predominately majority law environments, and – especially – difficulty retaining minority lawyers.

“On the pipeline front,” said Mix, “the number of minority students currently applying to law school is actually decreasing – which means that law firms and law departments have a smaller pool of graduates from which to select.”

Something in our culture is telling diverse high school and college students that the field of law is not an option – while other professions are.

“One way to address this problem is to support programs that introduce high school and college students to the law – hopefully igniting a spark,” said Mix.

These include programs like scholarships, college prep workshops, mentoring, summer internships and career networking.” The law schools at the University of Denver and the University of Colorado are active participants in this effort.

“On a less structured level, each of us can personally embrace the values of inclusive excellence – modeling them in our families and demonstrating them through our activities in local schools and community groups,” said Mix.

On the recruiting front, law firms and law departments will strive to attract minority lawyers (graduates and laterals) to the Denver area by maintaining a higher “inclusive” profile at local and national law schools, local and national minority recruitment fairs and local and national minority bar associations.

“In the future, a reputation for inclusiveness will be necessary in order to recruit the best law school graduates – majority as well as minority – to your law firm or your law department,” said Mix.

“The Millennial generation is the most racially and ethnically diverse in U.S. history. One of every three is a person of color and interracial friendships are the norm. Millennials not only tolerate diversity – they embrace it and value it. They will seek out inclusive workplaces and boycott those that are not.”

On the retention front, more than 40 percent of minority lawyers leave law firms after three years, 60 percent after four years and almost 80 percent after five years. When asked why they left, the most common response is a non-inclusive culture.

“The term inclusive excellence is a new paradigm for the legal profession and moves beyond mere numerical goals to embed practices and philosophies that encourage true diversity in every aspect of a law firm or legal department,” said Mix. “These practices and philosophies will attract diverse attorneys and encourage them to stay.”

CCIE has developed a set of best practices that define inclusive excellence in a law firm or law department.

(continued on page 4)

Beyond Diversity (continued from page 3)

These best practices were recently published in a handy workbook: *Beyond Diversity: Inclusiveness in the Workplace*. It is based on a program developed by The Denver Foundation for the local nonprofit community.

The comprehensive manual is a practical how-to guide for law firms and law departments that covers:

- Creating an inclusiveness committee;
- Training of committee members and retaining consultants;
- Defining what inclusiveness would look like and creating a case statement;
- Collecting and analyzing information about the existing culture;
- Creating the blueprint for a new, inclusive firm or department culture; and
- Implementing the blueprint and measuring progress.

Appendices to the manual include useful exercises, sample documents and resources.

“True cultural shifts happen when best practices coincide with firm cultures that embrace and value people from different backgrounds,” said Mix. “They happen when decision-makers recognize that these differences add value – making organizations more innovative, creative, responsive to clients and competitive in the marketplace.” ☞

Janet Ellen Raasch is a writer and ghostwriter who works closely with lawyers, law firms and other professional services providers to help them achieve name recognition and new business through publication of articles and books for print and rich content for the Internet. She can be reached at 303-399-5041 or jeraasch@msn.com.



The Grammar Queen: An Open and Closed Case

By Darlene Johnson

I dearly love it when a topic for this column drops right into my lap. That actually happened again today, when one of my co-workers asked me to proofread a marketing piece and this little gem popped out at me:

*With checklists, forms, and letters
you can successfully open,
manage, and close an estate in
Colorado.*

So what is wrong with this sentence? The answer has to do with the difference between a style called “closed punctuation” and one called “open punctuation.” Both are perfectly legitimate.

In closed punctuation, a comma is always used to set off a phrase or clause at the beginning of a sentence: “On Sunday, we went to church.” This style may be seen as relatively formal and a little old-fashioned. It is also very handy, which is why I personally prefer it.

Writers who prefer open punctuation would say that commas are over-used and are usually unnecessary after an opening phrase in a sentence: “On Sunday we went to church.” There is nothing wrong with that, and the previous sentence is perfectly clear without a comma.

However, people who use open punctuation should always be on the lookout for situations like the example in italics above. The phrase at the beginning of the sentence

(“With checklists, forms, and letters”) really needs a comma after it. Otherwise, in the readers’ minds, “letters” becomes “letters you can successfully open,” which really muddies the meaning of the sentence until you read it again.

Putting in the comma after “letters” clears up the sentence right away:

*With checklists, forms, and letters,
you can successfully open,
manage, and close an estate in
Colorado.*

So remember, there is nothing wrong with using either open punctuation or closed punctuation; it’s your choice. Do realize, however, that if you use open punctuation, there will be situations where you will be helping your readers by adding that comma. ☞

Darlene Johnson is the Managing Editor at Continuing Legal Education in Colorado, Inc. When she’s not busy making sure all the i’s are dotted and the t’s crossed, Darlene enjoys baking scones and spending time with her family. Send grammar questions to Darlene at djohnson@cobar.org.



SO...

Let's Discuss Committees

By Audrey Brekel

Committees are considered the workhorses of any organization. If you are aware of how CALSS and your local chapter work, you can see how important committees are and how important it is that the committees function as intended.

Generally, there are two types of committees:

Standing committees are listed in the organization's bylaws and they are considered a permanent part of the organization. Chairmen of the standing committees usually change when new officers are elected, but the committee's purpose, function and duties do not change.

Special committees are created to perform a special task and may be dissolved when that task is completed. A special committee may also be made a standing committee of the organization if its purpose becomes ongoing. An example of this situation in our organization is the Pro Bono Committee. The Pro Bono Committee started out as a special committee and then it became a standing committee through a Bylaw change. The size of a special committee is determined by its purpose. It can be as small as one person to as large as several members who can and will represent differing views of the membership. Committees can be useful to bring together people with differing ideas and experiences.

A committee can do only what the organization asks it to do and its duties are usually set forth in the Bylaws or Standing Rules of the organization – a committee cannot act independently of the organization. However, being the chairman or a member of a committee gives you the freedom to be creative. For example, one of the duties of the Continuing Legal Education Committee is to arrange seminars in locations as determined by the Committee members. The Committee members have the freedom to determine where and when seminars will be held, the topics to be presented, and getting attendees – so be creative in making it happen! Also, if a committee has an idea that it feels will benefit the organization, it can (and should!) bring the idea before the group.

The bylaws of an organization will state who appoints the members of a committee (it is usually a duty of the president) or if the members are elected (for example, pursuant to the CALSS Bylaws, the Nominations Committee for the ensuing year is elected by the delegates at the annual meeting).

Being a committee chairman is important. The chairman is responsible for calling committee meetings,

overseeing the work, and making sure the work is completed.

A committee chairman keeps a record of the committee's activities. That file then becomes a continuous record of the activities of the committee and is given to the new chairman at the beginning of a new fiscal year. When you are a committee chairman and you receive the file from your predecessor, be sure to go through the file. It will (or at least it should!) contain valuable information about what your duties are, any deadlines you must meet, and procedures to be followed.

Qualities of an effective committee chairman are (and feel free to add your own!):

- Enthusiasm for the organization and the committee.
- Time available to devote to the committee.
- Knowing how to do the work or knowing when and who to ask for guidance.
- The ability to work well with others and to inspire them.

A great way to get started if you want to become more actively involved by taking on a committee chairmanship is to work with the prior committee chairman as your mentor. Another possibility is that you could work with the current chairman in anticipation of being appointed to that committee next year – you can learn a great deal by observing and following the examples of successful leaders.

How do you let it be known that you would like to be a committee chairman or a committee member? Contact the president – she'll be very excited to hear from you!!
☞

Audrey Brekel is a past president and charter member of CALSS who currently serves as parliamentarian. Audrey has earned the reputation of parliamentary guru of the association, having written a number of articles and presented many seminars on the topic. Comments and questions may be directed to audrey.brekel@hro.com



Thanks for a great year in CALSS!

Timeless Tips on Becoming a Better Leader (Part 3 of 3)

By Cathy Hansen, PLS

Developing Personal Leadership

“Success is important only to the extent that it puts one in a position to do more things one likes to do.” Sarah Caldwell, Conductor

This article deals with the “look” of leadership—dressing for success, body language, and listening techniques. With apologies to our male members, the first section, *Dressing for Success*, applies mainly to women—you men may want to go directly to *Power Presentations*.

1. Dressing for Success

According to *Image Matters™, International*, some of the most common dressing errors for women include too casual, too dressy, or worn or scruffy shoes with rundown heels; brassy or extreme hair colors; too little or incorrectly applied makeup, or too bright eye shadow, heavy mascara and eye liner; cheap looking or inappropriate styles of purses or shoes, or uncoordinated accessories; too much perfume; too many rings; too dressy or too sporty watch; inappropriate jewelry, whether cheap, gaudy, or ostentatious; fingernail polish too bright; and nails too long or in need of a manicure.

A noted fashion editor once commented, “Dressing like a million is ultimately a state of mind. It can make you feel competent, confident, and secure. It can allow you to project the image that you get what you want, while letting you look like you already have it.” Five tips to looking like a million are:

1. Solid or monochromatic colors look richer than prints. Choose neutral colors as building blocks in a wardrobe.
2. Always buy the best fabric you can afford.
3. Well-tailored clothing that suits your figure makes you feel comfortable and look like a million.
4. If you splurge on one item, make it a sweater, blouse, or jacket. These can add an expensive look to an inexpensive bottom (and most people notice your top first).
5. At least one item of top quality—a strand of pearls or a special silk scarf—will help upgrade your whole outfit.

When shopping for clothing, remember the Cost-Per-Wearing formula: $C \div W = CPW$. If you purchase a \$275 suit that you can wear 10 times a month, 7 months out of the year for four years (280 times), the equation would be: $\$275 \div 280 = \$.98$ per wearing. On the other hand, if you purchase an evening dress for \$275 that you will wear once a year for four years (assuming you wear the same dress for every holiday party for four years in a row), the equation would look like this: $\$275 \div 4 = \68.75 per wearing.

Other good grooming dicta:

- Keep your hair up-to-date in cut and style.

- Repair chipped nail polish immediately.
- Don’t scrimp on quality skin care products, and use them faithfully.
- Guard against offensive body odors—keep in mind that some fabrics retain odors.
- Always check hose for runs, snags, and bagginess.
- Never let the heels of your shoes run down.
- Never wear soiled or stained clothes.
- Never go out with a missing button or falling hem.

2. Power Presentations

According to Bob Boylan in *What’s Your Point?* as much as 94% of an executive’s day is spent in some kind of communication activity. Of that amount, more than half is face-to-face. Yet, fewer than 1% of executives focus any attention after college on improving presentation skills.

The advantages to making a good presentation are obvious: by being concise and focused, you establish control of the meeting and are likely to be perceived as an authority—and the audience will then likely take the action you want them to.

Skills for a good presentation go hand-in-hand with personal communication skills. When you are involved in a conversation with a friend, you make eye contact, your voice flows in a relaxed manner, and you tell stories based on your own experience. Put these skills together with good audio-visual materials, organization, and preparation, and you have all the ingredients for an effective presentation.

The most important factor to consider before making your presentation is your audience. You have to know who they are and what they want to hear—only then can you appeal to the prevalent “What’s in it for me?” attitude of an audience.

3. Body Language

Your attitude and level of interest are communicated through your posture. For instance, chewing on a pencil, biting your fingernails, or keeping your hands in your pockets can convey insecurity; steepled hands, hands behind back or on coat lapels will convey confidence. Arms crossed over chest, legs crossed, fist-like gestures, and pointing your index finger will convey defensiveness; whereas, open arms or open jacket will convey openness. Anyone who has watched a speaker constantly clear his or her throat, fidget, or perspire (or worse, *been* that speaker) knows that these are all signs of nervousness.

4. Effective Listening Techniques

An effective leader is also an effective listener. Some techniques you can use to become a more effective listener are:

- Eliminate as many external and internal distractions as possible.

(Continued on page 7)

Timeless Tips (continued from page 6)

- Come to meetings prepared so you can devote your time to *actively* listening to others.
- If you realize you are not listening, move forward in your chair, or if possible, move closer to the speaker. Take notes if you begin to daydream.
- Don't just listen to what the speaker says. Consider content, intent, and nonverbal communication.
- Identify words that trigger your anger, and learn to control your reaction.
- Don't prepare your response while someone is still speaking. Never go into a communication situation with your mind already made up.
- Respond to a speaker non-judgmentally.
- Do not rely on others to interpret what happened or what was said in the meeting.

YOU CAN HAVE IT ALL!

Develop a personal leadership agenda. Beginning with your goal at the top of your agenda, include the steps that will help you achieve that goal: motivational forces and inspiration, commitment, instruction and resources, identification of influencers and mentors, and evaluation.

Become flexible enough to succeed. According to Abraham Zaleznik of Harvard University, "No matter how much you plan, when you get to the workplace, there are unanticipated problems." Flexibility gives you the power to tackle these problems with relative ease, exploring different approaches without prematurely categorizing or structuring any of its elements.

Be quality conscious. Although maintaining quality requires constant commitment, in the long run it will prevent many problems and save you from having to pick up the pieces later. Always remember that first impressions are very important in maintaining a quality environment, and quality in the little things will make it easier to maintain quality in the big things. According to Dave Thomas, founder of Wendy's Restaurants, "There is

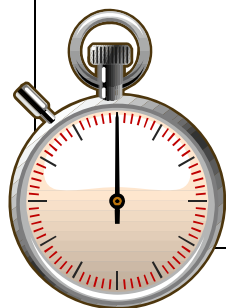
no limit to the quality that can be produced, even in the most menial job."

Now that you know the secrets of being an effective leader, it's time to get out there and go for it! If you haven't already done so, volunteer for a committee or run for office in your local chapter. Before you know it, you'll be ready to participate on the state level of our association. On the other hand, if you're not quite ready to be an officer or chairman, use these leadership techniques to become a better member—you are, after all, the foundation of our association. ☺

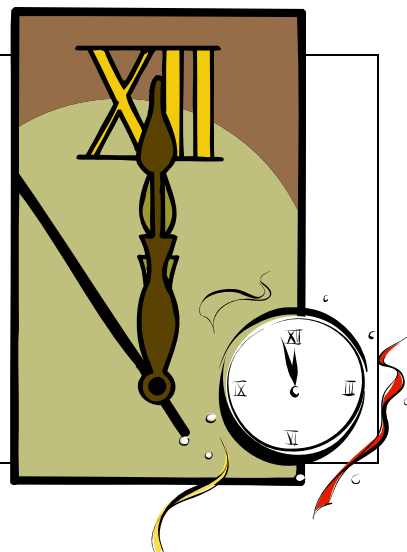
Cathy Hansen is a Certified Professional Legal Secretary, a CALSS charter member and current Bulletin Chairman. Employed in the legal field for more than 35 years, Cathy's experience includes working as a legal secretary, word processing supervisor, and judicial secretary. She is currently an executive administrative assistant supporting the Public Policy Department at Qwest Corporation. Cathy's seminars and articles have covered topics such as leadership, humor in the workplace and stress/time management. Although this leadership series was originally written more than 12 years ago, Cathy believes these tips are as true today as they were in 1995! Comments and questions may be directed to cathy.hansen@qwest.com.



(Picture taken by co-worker and labeled "Cathy with her 'Are you nuts?!' look.")



**“The Midnight Hour”
CALSS 12th Annual Meeting
& Educational Conference
Boulder Broker Inn
Boulder, CO
September 12-13, 2008**



Sexual Orientation (continued from page 1)

violation if he or she can demonstrate that men with a GLBT characteristic were treated differently than women with the same characteristic. Such a theory was raised in *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) in two separate ways. The first was based on the argument that the secondary characteristic was the attraction to men, and that the defendant discriminated against men who were attracted to men, but not against women who were attracted to men. The second way was more simple; it was that the defendant discriminated against men who were homosexuals, but not against women who were homosexuals. Fortunately for the defendant, neither argument was timely raised, and the First Circuit ultimately passed on the issue after somewhat lengthy discussion.

Nevertheless, there is no logical reason why a sex plus GLBT characteristic theory could not be used to establish a Title VII violation in a Colorado court if there is sufficient evidence that men and women with the same secondary GLBT characteristic were treated differently. Further, the secondary characteristic need not necessarily be related to sexual orientation or gender identity, but rather could be a characteristic of the plaintiff and the employees of the opposite gender. For example, in a job that does not have an appearance or dress code, a gay man with an earring or who wears makeup who is the subject of discrimination or harassment may be able to assert a Title VII claim if there is a class of women who wear earrings or makeup who are not the subject of such discrimination or harassment. Such a theory falls under sex-plus discrimination as well as sexual stereotyping, which is another method to make out a *prima facie* Title VII claim for discrimination based on GLBT status.

b. Sexual Stereotyping

The seminal case on the sexual stereotyping theory under Title VII is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, a female partnership candidate who had a great work track record with Price Waterhouse, and who had billed more than any other candidate being considered, was first passed over for partnership, then later was refused partnership consideration. Despite much praise for her accomplishments, attitude, and skills, partners told her that she was too harsh, overly aggressive, and impatient with staff. More importantly, comments were made that she was “macho,” that she “overcompensated for being a woman,” and that she needed to tone down her swearing because it was not lady-like. As the Supreme Court noted, the *coup de grace* was a comment that to improve her chance for partnership, she needed to “walk more femininely, talk more femininely, wear makeup, have her hair styled, and wear jewelry.” The history of partnership considerations was evaluated, and showed that female candidates fared better if they were more feminine and were not “women’s libbers.” There was also a partner who stated that he refused to consider any woman seriously as a partnership candidate. Looking to the sexual stereotyping portion of the case, the Supreme Court concluded that Hopkins suffered an adverse

employment action because of her gender in that she did not conform to the traditional gender role of femininity. Under the sexual stereotyping theory, had Hopkins been a man, none of the concerns would have been concerns, and “he” would have been made partner.

Price Waterhouse has been used as a basis for sexual stereotyping cases in a number of jurisdictions. As is relevant for this discussion, a *Price Waterhouse* type theory can be used to establish a Title VII claim based on arguments that GLBT status can, in certain cases, cause an individual to fail to conform to historical societal norms of masculinity or femininity. In the Sixth Circuit, *Price Waterhouse* formed the basis of an opinion that noted, “employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.” *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004). However, careful pleading and attention to the facts is necessary to sustain such a claim.

For example, in the relatively recent case of *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), the Court of Appeals was faced with a situation involving a pre-operative male-to-female transgender employee who had made the decision to live as a woman and was taking female hormones in preparation for eventual surgery. Etsitty presented herself as a man during the hiring and training process, and initially used the men’s restrooms. Eventually, she told her supervisor that she was a transsexual, and that she planned to appear female at work. Etsitty’s supervisor supported this decision, and Etsitty began to present herself as a woman and use female public restrooms. Eventually, upper management became aware of a male employee using female restrooms. Management inquired further, and when they learned that Etsitty had male genitalia, they grew concerned about potential liability for her use of female restrooms. There was also a concern that she might use both gender’s restrooms. Because the employer could not provide a unisex restroom for Etsitty, it terminated her on the basis that it could not accommodate her restroom usage. As a side note, Etsitty was told she was eligible for rehire after her sex reassignment surgery was complete.

Etsitty’s Title VII suit was based in part on the *Price Waterhouse* sexual stereotyping theory. Her argument was that she was terminated because she did not conform to her employer’s expectations of how men should appear and act. She also alleged that discrimination on the basis of transsexual status was clearly discrimination “because of sex.” The Tenth Circuit rejected the latter argument, citing to several consistent decisions in other jurisdictions that “sex,” under Title VII, is binary - one is either a man or a woman, and nothing else. Notably, the Court noted that someday, “sex” may be deemed to extend past the binary definition, but that day is not yet here. The Court also noted that transsexual status is not necessarily fatal to a Title VII claim. Similar findings have occurred on the issue of sexual orientation. *Rene*

(continued on page 9)

Sexual Orientation (continued from page 8)
v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (where the Court stated that sexual orientation is irrelevant under Title VII, and does not preclude a claim thereunder).

Turning to her *Price Waterhouse* theory, the Tenth Circuit determined that Etsitty did not present a *prima facie* case. The decision, however, was based on the fact that Etsitty failed to prove that her employer's concern regarding liability was pretextual. Thus, there is no reason to believe that the Tenth Circuit would not uphold a similar case if all elements are properly asserted.

The need to properly plead cases and be cognizant of all the surrounding facts is demonstrated by the opposite results obtained in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001) and in *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2005). In *Nichols*, the plaintiff filed a Title VII action that included allegations that he suffered harassment because he acted too feminine to fit within the male stereotype. As evidence, he was referred to as "she" by co-workers, was mocked for walking "like a woman," was derided for not wanting to have sex with a female co-worker, and was called various derogatory terms for homosexuals in various languages. The Ninth Circuit noted that the abuse heaped on the plaintiff reflected the belief that he did not act as a man should act, and concluded that the "abuse was closely linked with gender." In coming to this conclusion, the Court reiterated that *Price Waterhouse* bars sex stereotypes, and felt the acts in this case fell squarely in this prohibition.

In *Dawson*, the plaintiff was an openly lesbian woman who asserted that she did not conform to gender norms, did not meet stereotypical expectations of women, and can be viewed as more masculine than feminine. She was employed at a high-end, cutting edge hair salon in New York City. She contended that it was repeatedly made clear that women would not progress in the company, that she was repeatedly referred to as "Donald" because of her masculine appearance, that her co-workers said she should have sex with a man, and that she was fired because of her "dyke attitude." In reviewing the allegations, the Court found,

Dawson's claims of sexual discrimination, as she articulates them in the Complaint and elaborates in her deposition, [possess a] somewhat protean quality, [such that it is] hard to grasp or pinpoint precisely what conduct she accuses of offending whatever behavioral norms she asserts govern the circumstances. At various times in her pleadings and testimony, she asserts that she was disparately treated because of the way she looked, because she was a woman, because she was not a man, because she was a lesbian, because she was a lesbian who did not conform to gender norms.

Based on this problem, the Court had a difficult time determining what claims were based on Dawson's status as a lesbian, which will not satisfy Title VII, and what claims were related to sexual stereotyping, which can satisfy Title VII under *Price Waterhouse*. The Court was particularly cognizant of disallowing Dawson to bootstrap a claim for sexual orientation discrimination into Title VII. Confounding things further for Dawson was the dearth of evidence demonstrating that there was any employer hostility toward gender nonconforming behavior. To the contrary, there was evidence that the employees generally failed to conform to gender norms; that there were gay, lesbian, transsexual, and bisexual employees at the salon; and that some employees appeared androgynous. What seems to have happened is that Dawson tried to make up for a lack of gender evidence by adding a lot of sexual orientation evidence. In the end, the Court saw through this and found that there simply was insufficient evidence to show that the adverse action was the really result of gender stereotyping.

If any rule can be devined from the myriad sexual stereotyping cases, it is that through clever pleading, a *prima facie* case for Title VII sex discrimination can be made on behalf of individuals who suffered adverse action based on their GLBT status. However, the defense bar may have many opportunities, depending on the facts, to push the claim out of the realm of sex discrimination and toward non-federally-cognizable sexual orientation or gender identity discrimination claims. To the extent such distinguishing efforts are successful, state and local laws can provide alternate bases for liability, though with possibly reduced damages available.

2. State and local laws

a. Colorado Anti-Discrimination Act

Unlike Title VII, the Colorado Anti-Discrimination Act ("CADA") provides a specific prohibition on discrimination on the basis of sexual orientation or gender identity. C.R.S. § 24-34-402. Thus, no clever theories need be asserted in order to make a *prima facie* claim under the CADA.

However, proceeding under the CADA limits available damages significantly as compared with a Title VII claim. Under the CADA, damages are equitable in nature. At the administrative level, a plaintiff can obtain a cease and desist order and affirmative action such as hiring/promotion/reinstatement, posting of notices, and back pay (including benefits). C.R.S. §§ 24-34-306(9) & 24-34-405. Similarly, trial courts can award hiring/promotion/reinstatement and back pay under the CADA. *Agnello v. Adolph Coors Co.*, 695 P.2d 311 (Colo. App. 1984). Importantly, there is no right to a jury trial on a CADA claim even though back pay is included as relief as back pay has been deemed to be only incidental to the equitable remedies listed. *Continental Tire Co. V. District Court*, 645 P.2d 1310 (Colo. 1982).

b. Local Anti-discrimination Laws

Practitioners need to check the local laws in the municipality where the alleged discrimination took place to determine whether there exist additional grounds for liability for discrimination based on GLBT
(continued on page 10)

Sexual Orientation (continued from page 9)
status. For example, Denver provides protection similar to the CADA with regard to both sexual orientation and gender identity discrimination. Denver Revised Municipal Code § 28-93(a)(1).

Under the Code, when a civil suit is filed, the complainant may seek “all appropriate remedies.” Denver Revised Municipal Code § 28-110.5(c). Arguably, these could be the same remedies as a Title VII claim. However, the remedies provided by the Code itself are no better than those provided under the CADA. Denver Revised Municipal Code § 28-112. Thus, there is some question as to what damages are actually available.

To the extent the employer is located outside of the City and County of Denver, the practitioner must perform a thorough review of potentially applicable local laws to determine if additional claims can be asserted and whether any additional damages can be sought.

c. Colorado Lawful Activities Statute

Included within Colorado’s “mini-Title VII” is the Lawful Activities Statute. For purposes of this discussion, it is important to treat the statute separately. The reason is twofold. First, the statute is more limited in scope than the CADA. By its terms, the Lawful Activities Statute prohibits an employer only from *terminating* an employee for engaging in lawful activities off the employer’s premises outside of working hours, subject to certain exceptions. C.R.S. § 24-34-402.5. Though initially considered a smokers’ rights statute, it has been applied in the sexual orientation context.

In *Borquez v. Ozer*, 923 P.2d 166 (Colo. App. 1995), a homosexual employee claimed that he was fired because his employer felt he conducted himself in ways that the employer thought were improper, including having a sexual relationship with a homosexual man diagnosed with AIDS. Arguments that the statute should not apply because the termination was based on homosexual *status* rather than homosexual *activities* were found unpersuasive because the jury was presented with evidence that the employer objected to the employee’s homosexual relationship. As a result, the Court found that the termination resulted from the employee’s lawful, off-work activities, and constituted a violation of the statute.

The second reason to treat the statute separately is that, unlike a standard CADA discrimination claim, the Lawful Activities Statute allows recovery of back pay plus attorney’s fees and costs. C.R.S. § 24-34-402.5(2). Thus, the statute has more “teeth” than the CADA, and should be used if at all possible.

B. Conclusion

As is clear from the above discussion, there are various and overlapping federal, state, and local laws that can prohibit discrimination based on GLBT status. In Colorado, an individual who suffers discrimination on the basis of GLBT status has at least one automatic cause of action under the CADA. This claim, however, offers the

least in the way of relief. Depending on the facts, circumstances, and location of the discrimination, a Lawful Activities Statute claim and/or a municipal law claim may be brought as well, which can add attorney’s fees and possibly more to any award. Despite this, the main battle for both plaintiff and defense counsel will be waged on the Title VII front, as a successful Title VII claim entitles a plaintiff to potentially recover front pay, back pay, attorney’s fees, compensatory damages, and exemplary damages. ☞

Kevin P. Perez, attorney-at-law, is a shareholder in the Denver law firm of Kennedy Childs & Fogg, P.C. As chairman of the firm’s Employment Industry Group and frequent lecturer on employment matters to attorneys and HR professionals, Kevin brings his clients a high level of analysis, circumspection, and attention to detail. Kevin works with clients on the full spectrum of employment-related legal matters, including developing new employment policies, procedures and handbooks; ongoing counseling to maintain currency of existing employment policies and procedures; training and education of managers and staff to avoid employment-related issues; resolving employment claims or disputes; preparing employment contracts; counseling regarding compliance with ADA, HIPAA, FMLA, FLSA, EEOC and other state and federal laws and regulations; and defending employers from employment related claims, charges and suits, including discrimination and harassment, retaliation, ADA violations, non-compete issues, overtime, and FMLA violations.

