



## **11th Circuit States Transgender Employees Protected Under Discrimination Laws**

In a decision issued Tuesday, December 6, 2011, the Eleventh Circuit Court of Appeals (11th Circuit), which covers Alabama, discussed transgender employee protections under federal discrimination laws. Title VII of the Civil Rights Act of 1964 (Title VII), among other things, prohibits employment discrimination on the basis of “sex.” In the past, courts have struggled with the limits of “sex” discrimination. Generally, sex discrimination protects individuals from adverse employment actions on the basis of their sex; for example, an employer may not terminate a female employee’s employment because it does not think a female can perform the applicable work. However, it was unclear whether sex discrimination prohibitions extended to stereotypes based on an employee’s “gender.” Many groups advocate that gender differs from sex, in that sex is a biological characteristic, while gender is a social construction. As such, a person can have a biological birth sex of female but project a male gender. If such person takes affirmative steps to alter his or her original birth sex, such person may be transgender. Until recently, Title VII did not expressly protect such persons under sex discrimination guidelines.

In a 1989 case, Price Waterhouse v. Hopkins, the United States Supreme Court held that discrimination based on gender stereotypes violates the sex discrimination provisions of Title VII. This case involved a woman who was denied partnership in her accounting firm because of stereotypes related to her female gender; more specifically, the firm noted that to increase her chances of making partner, she should “walk more femininely, wear makeup, have her hair styled, and wear jewelry.” The Court held that stereotyping based on the woman’s failure to conform her gender to that of her biological sex was protected by the sex discrimination guidelines of Title VII. Despite this case, it remained unclear whether transgender employees, specifically, were protected by the sex discrimination laws. Several circuit courts have held that transgender employees are protected; other courts have held that they are not expressly protected.

Citing Price Waterhouse, the 11th Circuit addressed transgender employees and sex discrimination laws in its December 6th decision in Glenn v. Brumby. In Glenn, plaintiff-employee was born a biological male but was subsequently diagnosed with Gender Identity Disorder. She decided to transition to a female gender and sex. The employee informed her supervisor that she planned to begin the transition, and she was subsequently terminated on the basis of her decision. Glenn’s employer was a state governmental entity, so she filed a lawsuit alleging sex discrimination pursuant to statutory protections specific to governmental employees.

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However, in analyzing her claims, the 11th Circuit spent a significant amount of time discussing coverage of claims by transgender employees under Title VII, which governs both private and governmental employers. The Court stated that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.” As such, the 11th Circuit has stated, for the first time, that transgender employees are expressly protected from discrimination on the basis of gender non-conformity through statutory prohibitions on sex discrimination.

As a result, employers in Alabama should consider changes to their Equal Employment Opportunity policies. While most employers already, or should already, include prohibitions against discrimination based on sex, employers should consider extending this to prohibit discrimination based on gender identity or other types of gender-stereotyping. Arguably, as a form of sex discrimination, this may already be covered by your policy. However, by expressly including gender identity as a protected characteristic, an employer could show a stronger commitment to protecting these individuals from discrimination in the workplace. Such a policy could provide some protections to an employer in the event of litigation or other issues related to its treatment of transgender employees in the workplace.

Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989)

Glenn v. Brumby, 2011 WL 6029978 (11th Cir. 2011)

## **FEES & BURGESS, P.C. - Calendar of Events**

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminars:

### **Fair Labor Standards Act Compliance: Common Pitfalls and How to Avoid Them**

**Date: January 11, 2012; 11:30 a.m. – 12:45 p.m.**

**Location: Fees & Burgess, P.C.**

Jeff Roth and Leah Green, of Fees & Burgess, P.C., will be presenting a special lunch and learn focusing on Fair Labor Standards Act Compliance. This program will last approximately 75 minutes and will focus on likely areas for misclassification of non-exempt employees, common misunderstandings related to payment on a “salary” basis, overtime payment and payments overlooked in calculating the regular rate, independent contractor versus employee, and other joint-employer issues, recordkeeping requirements, and recent enforcement activity, primary industry targets, and enforcement focus.

The cost of this lunch and learn will be \$49.00, and will include lunch.

This program has been submitted for one hour of HRCI credit.

## **FEES & BURGESS, P.C. - Calendar of Events, *continued from page 2***

### **Employment Law Survival Training for Managers: 10 Key Areas of Legal and Practical Knowledge**

**Date: January 19, 2012; 8:00 a.m. - 5:00 p.m.**

**Location: Fees & Burgess, P.C.**

This day-long program, presented by Jeffrey Roth, Leah Green, and Ryan Blount, is a must for training managers and supervisors to recognize and deal with challenging employee issues that arise daily in the workplace. Attendees will learn key aspects of critical issues and how to work with existing company policies to address and resolve them.

The 10 key areas covered in the program will include:

The Employment Relationship	Company Policies/Handbook/Code of Conduct
Equal Employment Opportunity	Hiring/Promotion
Wages/Hours/Compensation	Labor Relations/Union Free
Conflict Management/Grievances	Occupational Safety and Health Act of 1970
Discipline/Termination	

This highly-interactive program includes discussion of real-life scenarios encountered by supervisors, and how, and how not, to respond to each scenario or crisis. This program is designed to help managers and supervisors from small and large businesses recognize high risk situations and minimize, or eliminate, those risks.

This program has been approved for 6.5 (General) recertification credit hours toward PHR, SPHR, and GPHR recertification through the HR Certification Institute.

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### **2012 FMLA Master Class**

**Date: January 25, 2012**

**Location: Birmingham Marriott; Birmingham, Alabama**

This all-day event, scheduled for January 25, 2012, at the Birmingham Marriott in Birmingham, Alabama, is sponsored by M. Lee Smith Publishing and will be presented by Jeffrey Roth, Allen Anderson, and Leah Green of Fees & Burgess, P.C. This program is designed to help human resource professionals become even more proficient in FMLA administration and learn the latest compliance tactics.

Several specific areas of discussion will be covered, including recent FMLA developments; serious health conditions and collecting medical information; military family leave; meeting notification deadlines, curbing abuse, and preventing claims; advanced FMLA issues; coordinating FMLA with ADA, worker's compensation, and state family leave laws; and what may be happening next.

Registration for the event will begin at 7:30 a.m. and will include a continental breakfast. The program will begin at 8:30 a.m. and end at 4:30 p.m.

This program has been approved for 6.25 (General) recertification credit hours toward PHR, SPHR, and GPHR recertification through the HR Certification Institute. This program has also been approved for 6.25 hours of CLE.

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To register, or more information on these and other programs, please visit us online at [www.feesburgess.com](http://www.feesburgess.com); contact us by e-mail at [seminars@feesburgess.com](mailto:seminars@feesburgess.com); or by phone at (256) 536-0095.



### SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact [seminars@feesburgess.com](mailto:seminars@feesburgess.com).

### NEWSLETTERS

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