

"GENDER IDENTITY OR EXPRESSION" IS A NEW PROTECTED CLASS UNDER THE LAW AGAINST DISCRIMINATION AND THE EMPLOYER RESTROOM MAY BECOME THE NEXT BATTLEFIELD

By Howard A. Vex, Esq.

On December 19, 2006, Governor Corzine signed legislation that expands the list of characteristics protected by the New Jersey Law Against Discrimination. The newly protected characteristics are described as "gender identity or expression." The new protections will take effect on June 17, 2007.

The stated purpose for expanding the Law Against Discrimination was "to cover everyone, whether they have a typical or non-typical gender identity and expression." This new classification extends well beyond the existing protections for sexual orientation. Commencing on June 17, 2007, it will become unlawful for any New Jersey employer to make any employment decisions or otherwise discriminate against any employee (or any applicant) on the basis of that person's "gender identity or expression." Where the existing sexual orientation protections focus upon the gender an employee is attracted to, the new protections focus upon the employee's perception of his own gender, whether or not that perception is consistent with his actual gender.

Protected individuals under the new law will include: transvestites (*who adopt the dress and some behaviors of the other gender*); transsexuals (*who may be seeking or have undergone hormone therapy or a sex change operation*), and those employees who appear

androgynous and do not identify strongly with either gender. Any actions taken against these individuals based upon the protected characteristics, including exposure to a hostile work environment, can serve as the basis for litigation.

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This new law also imposes express limits upon company dress codes. Although employers retain the right "to require employees to adhere to reasonable workplace appearance, grooming and dress standards," they must now permit an employee "to appear, groom and

dress consistent with the employee's alleged gender identity or expression." For example, a male employee who identifies with the female gender must be permitted to dress, wear makeup and otherwise act like a woman. Any negative employment actions or even negative comments regarding his appearance or conduct could lead to a viable discrimination claim.

The new law goes further, mandating that all individuals be permitted to use public accommodations, such as restrooms, dressing rooms and showers, based upon their gender identity, irrespective of their actual gender. Thus, a male employee who identifies with the female gender must be permitted to use the women's restrooms, dressing rooms and showers. The boundaries of the new rights established by this law will almost certainly result in discomfort and distress among some other employees utilizing these facilities. Ultimately, such conflicts may have to be resolved by the Courts. ♦

For the ninth year in a row, Courter, Kobert & Cohen, P.C. has been listed in the New Jersey Law Journal ranking as one of the top 10 Lawyer/Lobbyists in New Jersey.

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MANDATED PAID FAMILY LEAVE MAY BECOME THE LAW IN NEW JERSEY

By Howard A. Vex, Esq.

A State Senate Bill that would guarantee New Jersey workers up to 12 weeks of paid leave to care for sick family members or new children is currently under consideration by the Senate Appropriations Committee and is supported by Governor Corzine. Several U.S. Senators have expressed an interest in a similar 6 week paid family and medical leave benefit. Although State and Federal law already allows up to 12 weeks of unpaid leave for employees working for companies with 50 or more employees,

many covered individuals often cannot afford to take advantage. Moreover, many employees work for businesses with less than 50 employees and have no leave rights under either the Federal Family and Medical Leave Act or the New Jersey Family Leave Act.

Under the proposed State law, all employers, irrespective of their size, would be required to grant their employees up to 12 weeks of family leave to care for a sick family member or new child. In addition, during this

leave, employees would receive a weekly payment from the State in an amount similar to what they would receive for a temporary disability. Although the new benefit would be funded through a new payroll tax paid by employees, the potential impact upon New Jersey businesses, especially those with less than 50 employees, would clearly be significant. ♦

DOMESTIC WORKERS: WHEN A HOMEOWNER BECOMES AN EMPLOYER

By Amanda L. Mulvaney, Esq.

When a homeowner hires an individual to do household work, and the homeowner, not the individual, controls the method and means of performance of that work, the hired individual will almost always be classified as an "employee" by the IRS. Employees are differentiated from "independent contractors," who are usually hired under contract to complete a specific task or provide an end product, and who determine for themselves the method for completion of the work. For example, a full time housekeeper, nanny or private nurse, whose hours are set by and who is directly supervised by the homeowner, is clearly an employee. In sharp contrast, an individual

retained under contract to perform a distinct project, such as a plumber, painter or renovation contractor, almost always retains independent contractor status.

This distinction can have significant ramifications. Indeed, where a homeowner retains employees to perform domestic services, the IRS requires payroll deductions for Social Security, Medicare, and unemployment taxes. State employment taxes must also be properly deducted. There are some limited exceptions to this tax requirement, such as those employees earning annual cash wages of less than \$1,500 (in 2006) and those employees under age 18, such as babysitters and yard workers, so long

as the work they perform is not their principal occupation.

Keep in mind, however, that the IRS, not the homeowner, makes the final determination of whether a domestic worker is an employee or an independent contractor for employment tax purposes. Accordingly, when a homeowner is uncertain regarding the tax status of a domestic worker, the issue should be resolved promptly by contacting the IRS or appropriate professional. Delaying resolution of this critical issue can result in substantial back tax liability and steep fines. An ounce of prevention can often be worth a pound of cure. ♦

SEXUAL HARASSMENT TEST

The majority of Americans still lack a sufficient understanding of the sexual harassment problem in the workplace. Test your knowledge. True or False:

1. Due to increased training and education, sexual harassment complaints in the United States are now on the decline.
2. Federal and State Law strictly prohibit all sexual jokes and comments in the workplace.

3. When sexual harassment is claimed, it is the intent of the harasser that determines whether or not his or her conduct was sexual harassment.
4. The victim of sexual harassment and the harasser cannot be of the same gender.
5. The majority of sexual harassment complaints arise from requests or pressure for sex by male supervisors toward female subordinates.
6. A person complaining of sexual harassment

must show that they were the intended object of the sexual comments or conduct.

7. Retaliation by supervisors or co-workers against persons complaining of harassment is strictly prohibited by Federal and State Law.
8. Employees complaining of sexual harassment cannot be discharged without proof of gross misconduct for at least one year following their complaint. *(Answers on page 3)*

WHEN THE FMLA/FLA GUARANTEE OF 12 WEEKS OF UNPAID LEAVE BECOMES 24 WEEKS IN NEW JERSEY

By Howard A. Vex, Esq.

The Federal Family and Medical Leave Act (the "FMLA") and the New Jersey Family Leave Act ("FLA") both allow for up to a maximum of 12 weeks of unpaid leave. However, because the FLA only provides for family leave, when a medical leave is taken for one's own medical condition, such leave is not counted against an employee's FLA entitlement. This concept is best illustrated by examples: Under the FMLA, a pregnant employee would be entitled to up to 12 weeks of medical leave before giving birth to

care for her own pregnancy-related medical condition (e.g., doctor-ordered bed rest). The FLA leave entitlement would not be triggered or exhausted by said medical leave. After the birth, the employee would remain entitled to take 12 weeks of family leave under the FLA to care for her newborn child, providing her with a total of 24 consecutive weeks of protected leave. Similarly, an employee who takes 12 weeks of FMLA medical leave for his own surgery would remain entitled to take his 12 weeks of FLA

family leave that same year to care for an ill family member, providing a total of 24 weeks of protected leave.

Obviously, the interaction of the FMLA and FLA are complicated and require careful analysis on a case-by-case basis. Should you have any questions or concerns in this regard, you should not hesitate to contact your human resource advisor or a legal professional. ❖

RECENT SUCCESSES IN COURT

Former Governor Ordered to Testify

The firm is representing a builder who is challenging the retroactive provisions of the New Jersey Highlands Act. Our client received approval to build a 20 lot subdivision and was denied the right to construct the subdivision because of the enactment of the Highlands Act even though his approval was obtained before the date of enactment. The Act provided for a retroactive date for the enforceability of the provisions of the law. The law firm with Lawrence Cohen and John Abromitis representing the client, has challenged the constitutionality of that provision of the Act as well as other provisions. In a decision which has been the first in the State, the Court has ordered that the Plaintiff has the right to take the depositions of former Governor McGreevey and members of his administration on the issue as to whether or not certain builders received preferential treatment in having their properties excluded from the implications of the Highlands Act because they were political donors or friends of the administration.

The firm of Courter, Kobert & Cohen has been very active in interpreting and challenging

provisions of the Highlands Act. We have represented not only private developers but municipalities which have issues with the Highlands Act.

Courter, Kobert & Cohen Prevails in Suit Against JCP&L

The firm represents Eric Walther, who owns property in Blairstown consisting of more than 200 acres. There are nine utility service poles spanning more than one mile from his home to the nearest access road. In the 1930's, Mr. Walther's parents executed an Easement Agreement with JCP&L's predecessor, which required the company to maintain the "pole line" including all affiliated structures. In exchange for this duty, JCP&L retained the benefit of charging the Walther family for utility services for more than 68 years.

Several years ago, the Walters experienced significant disruption of their phone service. Their investigation revealed that this resulted from deteriorating power lines and utility poles that were in a state of significant disrepair, which was causing power to bleed into the phone line.

JCP&L refused to perform any repairs, arguing that they had no record of ever having installed the poles, and thus contended it had no responsibility to maintain the poles. On behalf of the firm, John Abromitis, Esq. filed suit against JCP&L in the Superior Court of New Jersey, arguing that notwithstanding the "ownership" issue, the easement agreement clearly indicated that JCP&L had the duty to "maintain" the pole line in accordance with the clear and unambiguous language of the agreement. While in suit, the firm filed a Motion for Summary Judgment which was granted by the trial judge assigned to hear the matter.

Some have described the ruling and victory as significant and potentially "far reaching", as it could implicate the rights of farmers and other land owners in rural New Jersey, who may in the past may have been required by their utility company to maintain the utility poles and pole lines located on their property. The Walther case has received public attention and was recently covered in *The Express Times* newspaper in an article entitled, "Owner Wins One Against JCP&L". ❖

SEXUAL HARASSMENT TEST ANSWERS: 1—False, 2—False, 3—False (the critical factor is the impact upon the complaining employee), 4—False, 5—False (hostile work environment claims predominate), 6—False, 7—True, 8—False (retaliation is strictly prohibited, but such employees must still do their jobs and are provided no specific job protections).

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PEOPLE IN THE NEWS

Courter, Kobert & Cohen, P.C., is pleased to announce that:

ANDREW W. BONGIORNO (previously General Attorney and Assistant General Counsel at AT&T) has become a Member of the Firm, and serves as Managing Partner of our New York City office, 200 Madison Avenue, New York, NY 10016.

Andy concentrates his practice in complex commercial law matters. Andy is a seasoned business and legal adviser, with broad international and domestic experience. Most recently, he served as executive level lawyer for retail sales to AT&T's business customers—many of whom are Fortune 500 and Global 2000 companies, with worldwide operations. Andy has acted as lead counsel and business project manager for joint ventures, acquisitions, start-up businesses, and withdrawals from major business lines.

Andy is admitted in New York State, and is a graduate of Fordham University Law School (J.D. 1969) and Queens College (BA 1966).

MARISELA S. ROSS (previously AT&T's Chief Counsel for the Caribbean and Latin American regions) has joined the Firm and is also aligned with our New York City office.

Marisela concentrates her practice in telecom and commercial matters, with special emphasis on the Caribbean and Latin American region (CALA). Marisela most recently served as Chief Counsel for that region, with legal responsibility for all aspects of AT&T's business in CALA, including contracts, regulatory, traffic management, corporate, and labor matters. She is fluent in English and Spanish, with a strong working knowledge of Portuguese.

Marisela is admitted in New York, Connecticut, and Missouri. She received her J.D. from St. John's University School of Law (1981) and her BA from Queens College (Russian language and literature).

CHARLES A. CASTLE has been appointed sponsorship chairman for the 2007 Morris/Sussex/Warren Arthritis Walk to benefit the Arthritis Foundation. The Arthritis Walk will be held on May 20, 2007 in Independence Township at the "Field of Dreams".

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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