

# CLIENT ALERT: Massachusetts Commission Against Discrimination Finds Transgendered Person Not Subject to Discrimination

In October of 2001, the Massachusetts Commission Against Discrimination (“MCAD”) concluded that sex discrimination as prohibited by Chapter 151B, the Massachusetts anti-discrimination statute, included a prohibition against discrimination towards transsexual individuals. In so holding, the MCAD refused to follow federal and state courts which had ruled that discrimination against transsexuals was not considered discrimination based on sex under applicable statutes.

Almost eight years later, after a public hearing on the merits, the MCAD affirmed the decision of a hearing officer who found the transsexual individual was not subject to unlawful harassment or discrimination. In *Millett v. Lutco, Inc.*, the MCAD hearing officer concluded that three instances of inappropriate conduct, two by a co-worker and one by a supervisor, was so isolated and insufficiently severe or pervasive to alter the terms and conditions of the individual’s employment or to have created an abusive work environment. Additionally, the hearing officer determined that the company had legitimate business reasons for its termination of the transgendered employee.

The MCAD decision is most significant because the company’s response provides useful guidance for employers on how to address issues with transgender employees. When the employee (who presented himself as male) informed the company president and personnel manager that he had been living as a female outside of work and was scheduled for gender reassignment surgery, they reacted with sympathy and understanding. With the employee’s permission, company officials met with the managerial staff who, in turn, met with the employees to inform them of the employee’s transition. The message was conveyed to managers and employees that the company supported the employee’s decision and would not tolerate discrimination or harassment because of the employee’s sexual identity. When the few instances of harassment were brought to the company’s attention, the perpetrator was informed of the need to treat the employee with respect and that inappropriate conduct would not be tolerated.

Before the transition, when informed that the employee was uncomfortable using a certain men’s room, the company removed the men’s sign from the bathroom door and arranged for a lock to be placed on the door to ensure privacy. After the gender reassignment surgery, the employee used the women’s bathroom without objection from any of the other female employees. Additionally, the employee was granted a leave of absence to undergo the gender reassignment surgery. The company properly changed its personnel and payroll records to reflect the employee’s legal name change and new social security number.

Neither the Massachusetts Appeals Court nor the Supreme Judicial Court have considered the issue of whether transsexuals are protected by the state anti-discrimination statute. In the meantime, legislation is pending on Beacon Hill that would add transsexuals as a protected classification under Chapter 151B.

As the MCAD decision demonstrates, employers should proceed carefully and sensitively when faced with transgender issues in the workplace. Consultation with legal counsel should also be part of the employer’s process when considering how to handle the variety of issues which will arise when dealing with transgender employees.

*Nathan L. Kaitz is an attorney with Morgan, Brown & Joy, LLP. Nathan may be reached at (617) 523-6666 or at [nkaitz@morganbrown.com](mailto:nkaitz@morganbrown.com). Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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