

Should Your School's Dress Code Address Transgender Students?

By Danielle Urban (Denver)

Teenagers who push the limits of school dress codes are nothing new. Experimenting with clothing, hairstyles, and even make-up is a way for teens to explore their identities and test the limits of socially-acceptable behavior. Although school officials might find dress code enforcement challenging, dress code violations in the past tended to be fairly routine and usually revolved around prohibiting overtly sexually suggestive clothing or outward signs of gang affiliation.

But a new wrinkle in the dress code debate has developed, with some students demanding to express their gender or sexual identities by cross-gender dressing. Although cross-gender dressing is not particularly widespread in schools, a growing number of students throughout the country have begun dressing according to the gender identity they have chosen, which may not necessarily reflect their biological gender.

Whether the student is gay, lesbian, transgender,¹ or just testing the limits of a school dress code, the issue has emerged as a dress-code challenge for many school officials, and schools must face competing demands and evolving ideas of acceptable dress.

Recent Challenges

Recent news reports provide examples of how different schools deal with the issue. A gay male high school student was recently elected prom queen at a Los Angeles high school. Last fall in Arizona, a freshman female who identifies as male was nominated for homecoming prince. Both students apparently enjoyed the support of their schools.

Other schools have been less supportive of blurring traditional gender expectations for dress, citing the potential for distraction for other students and worries of violence toward the cross-dressing student as reasons to prohibit cross-gender dressing. Schools have reportedly sent male students home for wearing wigs or make-up, and prohibited students from cross dressing for their yearbook photographs.

And cross-gender dressing is not only limited to high-school students. In 2006, a six-year old student entered kindergarten in Miami as a girl, despite the fact that the child is genetically male. The student, who was diagnosed with gender dysphoria, has the school system's support as she navigates the uncertain waters of elementary school as a transgender student.

Although such circumstances are not common, recent data suggests that student requests for exceptions to dress codes to accommodate cross-gender dressing are on the rise. With over 4,000 gay-straight alliance clubs currently in place at high schools throughout the country, we can only expect that student requests for exceptions to school dress codes will increase as students become more aware of these issues.



Legal Obligations

There are no federal laws requiring that a school permit cross-gender dressing. However, there is case law holding that a public school's failure to protect students from harassment and discrimination based on that student's sexual orientation, which may be expressed through cross-gender dress, is a violation of the Equal Protection Clause. Additionally, some state laws and local ordinances may require that transgender students and students who do not conform to traditional ideas of gender-appropriate dress be protected from discrimination and harassment while in the school environment.

In California, for example, the state legislature passed the California Student Safety and Violence Prevention Act of 2000, which prohibits discrimination or harassment in public schools against transgender and "gender non-conforming" students. This law protects such students from being expelled from school, kicked out of class, held after school, treated differently or punished in any way because of their gender expression.

Although California's law is perhaps the broadest in coverage, many other municipalities and a few states have ordinances or laws in place prohibiting discrimination based on gender identity. Most of these laws

¹ "Transgender" is an umbrella term often used to describe individuals who are biologically one gender, but believe themselves to be another gender ("gender dysphoric"). The term "transgender" also includes individuals whose appearance and gender identity is "non-conforming" to traditional social expectations of either gender; that is, individuals who believe themselves to be both male and female or neither male nor female. A gender non-conforming individual may or may not identify as lesbian, gay, bisexual. A "transsexual" is an individual who transitions from one gender to another.

Legal Considerations For Tough Economic Times

By Suzanne K. Bogdan (Fort Lauderdale)

Even though there are signs that the economy is recovering, many schools are still finding that they are overstaffed in light of their budget needs. Although most private schools issue contracts for new and returning teachers between February and April, they may not know the full extent of their re-enrollment commitments until later in the spring. Worse yet, parents who do commit in the spring may change their mind if the parents' financial situation changes after signing the re-enrollment contract. Schools then find that they are faced with a need for a reduction in force.

Problems can arise when schools use the reduction process to weed out underperformers without having good documentation of the performance problems. We have outlined below some of the thorny issues that school administrators need to continue to deal with properly to protect the institution.

Contract Decisions

Make sure you are using a good contract that has been drafted by or reviewed by your legal counsel. As a general principle, vague and ambiguous terms in a contract will be construed against the drafter. Since the school typically drafts the contracts, this means that if a provision in the contract is unclear or conflicts with another provision (or published document), the interpretation that favors the employee will be the meaning a court will give to the term.

In addition, school administrators must ensure that the contract provides the school with flexibility to terminate employees (and the school's pay obligations) for various reasons that can be anticipated: performance; interaction; policy violation; under-enrollment or financial stressors. Some schools also choose to include a no-cause provision, which gives the school flexibility to terminate the relationship with a set amount of notice or pay in lieu of notice, such as 30, 60, or 90 days pay. Each of these clauses must be carefully drafted to reflect both your school philosophy and to be upheld in the event of a legal challenge.

If You Must Reduce Your Workforce

If you find that, even with your best efforts, you must reduce the number of employees, these decisions should be made with the advice of counsel. Reduction decisions often result in litigation if the decision-making process is viewed as unfair or illegal. Indeed, age discrimination claims resulting from the reduction process is one of the fastest growing categories of claims.

There are many issues that must be taken into consideration when making these decisions. If you are considering reducing mid-year, you must ensure that your employment contracts for the positions in question permit you to terminate the relationship (or reduce compensation) mid-year. Many schools are surprised when they learn that their contracts do not provide any flexibility.

Some of the decisions you must consider up front are will you reduce teachers or staff based on qualifications? performance? seniority? cross-training? some combination of the above? Who will make the decisions? What documentation is there of the process or the need?

If you are using performance as a criterion, what do your existing documents reveal regarding the employee's performance? Are there evaluations, observations, emails, memoranda or other documents that contradict the decision that an individual is a low performer compared to others? Did the individual consistently receive raises, bonuses, etc., that are indicative of good performance?

Other important considerations are whether the individuals under consideration for reduction fall into protected categories. These include not only the categories of race, sex, religion, and national origin, but whether the employee has recently exercised rights under the Family and Medical Leave Act (i.e., taken job protected leave or currently on leave), had a workers' compensation injury, or complained about some inequity, discrimination, or other protected activity.

If the school's selection process results in the decision-making having a larger impact on individuals over the age of 40, minorities, women, or others who have recently exercised rights, the school could find that its savings in employee salaries is quickly eaten up by the cost of litigating or settling claims.

After The Selection

Once the selection process is complete, the school will need to decide whether it wants to offer employees severance agreements? If so, there are specific state and federal requirements that must be included in a severance agreement for it to validly release claims, including specific requirements under the Older Workers' Benefit Protection Act (OWBPA) for a release to validly release age claims.

Finally, if the school finds itself in a position of needing to hire later in the same school year, it should consider re-employing persons that it has recently let go due to economic circumstances. Otherwise, the decision to hire a new employee could result in a challenge by a separated employee.

These are a few of the issues that school administrators must consider before simply making decisions to reduce the workforce. It is far better to invest the time and energy up front to think through as many of these issues as possible, rather than having to scramble after the fact to justify decisions that, at best were rushed and, in the worst case, may have been improper.

For more information on these issues, contact the author at sbogdan@laborlawyers.com or 954.525.4800.



Does Not Renewing A Teacher's Contract Risk An Employment Lawsuit?

By Tamara Devitt (Irvine)

Before deciding to terminate a teacher's employment contract, a school is likely to take several steps. The school's administrator will carefully review the contract to ensure that the school complies with any provision that requires "good cause" for termination. The human resources director will scrutinize the articulated reason for termination in order to confirm that the decision does not appear to be based on unlawful discrimination or retaliation. The Head of School may even consult with legal counsel about the termination decision.

But what about the decision *not to renew* a teacher's contract at the end of the school year? The same administrators who painstakingly examine a decision to terminate a teacher's contract, often view the decision not to renew the contract as risk-free. What's to worry about when the school simply elects not to renew a teacher's contract? The school has fulfilled its legal and contractual obligations, right? *Right?* Not necessarily.

There is some disagreement among courts as to whether the non-renewal of a teacher's contract is an "adverse employment action" that could give rise to liability for wrongful termination, discrimination or retaliation under federal and state anti-discrimination laws. But those courts that view a claim for non-renewal of a contract as a basis for a discrimination or retaliation lawsuit are increasingly in the majority.

In a recent case, a Court of Appeals held that non-renewal of a contract alone *could* constitute an adverse action where the teacher sought renewal. *Leibowitz v. Cornell University*.

What Is An "Adverse Employment Action" Anyway?

Employees who claim unlawful discrimination must first establish that: 1) they are a member of a protected class; 2) qualified for the position; 3) *suffered an adverse employment action*; and 4) the adverse action occurred under circumstances that give rise to an inference of discrimination.

Though courts may differ in their views of what is "materially adverse," it's clear that not everything that makes an employee unhappy is an actionable adverse action. The overall trend has been to expand the definition of adverse action, thereby effectively diminishing an employee's burden in establishing claims of unlawful discrimination or retaliation.

In discrimination cases, an adverse employment action generally means a material change in terms or conditions of employment. This includes failure to hire, discharge, demotion, wage cut, a material loss of benefits, denial of a promotion or a transfer, or a material change in job duties. Courts that define adverse action broadly consider other employment actions to be actionable as well. For instance, the Tenth Circuit has found a significant change in benefits to be an adverse employment action, and the Ninth Circuit considers decisions negatively affecting compensation to be adverse employment actions.

In retaliation cases, the standard is even more broad. The U.S. Supreme Court has held that an employee's burden to establish a "materially adverse employment action" is merely to show that he or she suffered some action that would dissuade a reasonable worker from exercising protected rights. *Burlington Northern & Santa Fe Ry. Co. v. White* 548 U.S. 53, 68 (2006).

Facts Of The Case

Margaret Leibowitz was first employed by Cornell University pursuant to a term employment contract in 1983. Leibowitz's position was never tenured. Under the school's rules, the contract term could be no more than 5 years, and in truth, the length of the term varied. The school renewed Leibowitz's term contract several times.

When Leibowitz's contract expired on October 31, 2002, the school elected not to renew it, citing budgetary reasons. Although there were other vacant positions around the time Leibowitz's contract was to end, the school did not consider Leibowitz for any other positions for which she might have been qualified.

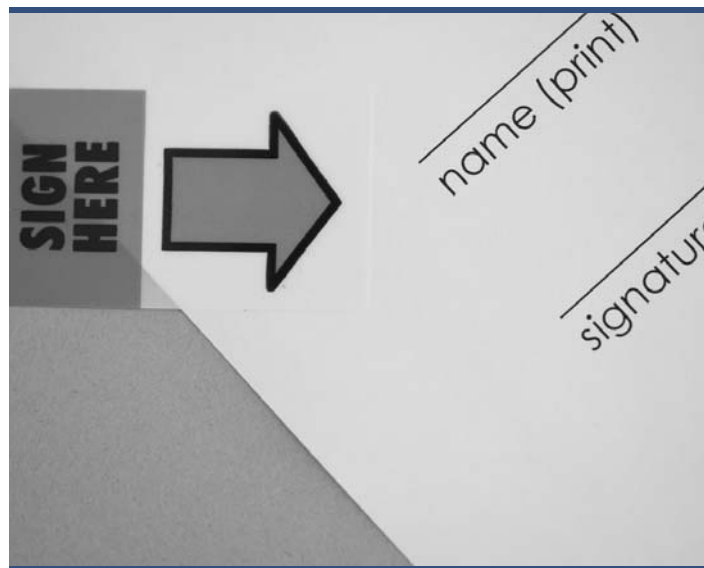
Leibowitz sued in federal district court, claiming that the decision not to renew her contract constituted gender and age discrimination. The school asked the court to dismiss the claims. It argued that Leibowitz failed to establish her case because non-renewal of her term contract was *not* an adverse

employment action since the contract merely expired by its own terms. The district court agreed that Leibowitz failed to show that the school had a policy of granting tenure to term employees, and since Leibowitz did not have a guarantee of lifetime employment, she suffered no material adverse change in the terms of her employment when her contract expired and the school did not renew it. Leibowitz appealed.

The U.S. Court of Appeals for the Second Circuit saw the case differently and held that the school's decision not to renew Leibowitz's contract *could* constitute an adverse employment action. In reaching this conclusion, the Second Circuit defined "adverse employment action" for purposes of both the Age Discrimination in Employment Act and Title VII as "more disruptive than a mere inconvenience or an alteration of job responsibilities" to include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." The Court explained that where renewal of an employment contract is sought by an employee, non-renewal *alone* could constitute an adverse action.

Many – But Not All – Courts Agree: Non-Renewal Is The Same As Termination

In the *Leibowitz* case, the Second Court cited decisions of the Third, Sixth, Seventh and Tenth Circuits, and several district court decisions,



Continued on page 4

Should Your School's Dress Code Address Transgender Students?

Continued from page 1

apply to places of "public accommodation," and typically are interpreted to mean that the school must consider a "reasonable accommodation" based on a person's gender identity. Depending on how the law is drafted, it may apply to both public and private schools.

Steps to Consider

What does this mean for your school? In addition to your school's obligations under the Equal Protection Clause (if your school is a public school), be aware of any state laws or local ordinances that might address gender identity issues. If your school has a dress code, it is important that the dress code policies are enforced in a fair and consistent manner. Any dress code policies should be developed, and revised if necessary, with the needs of all students in mind, taking into account the mental and physical health of all students, community standards, and the legal implications of a discriminatory dress code. All students must be held to the same dress-code standards. Rules against sexually provocative clothing, for example, must be equally enforced for transgendered student as well as for the straight, gender conforming students. Permitting a straight female student to wear a shorter skirt than a transgendered student is impermissible.

Finally, regardless of whether your school permits students to cross-dress, it is important that you take all necessary steps to prevent harassment, discrimination, and violence against gay, lesbian, or transgendered students by fellow students, teachers, and administrators.

According to a 2001 National School Climate Survey by the Gay Lesbian Straight Education Network, 89.5% of transgender students report feeling unsafe in their schools, and statistics indicate that transgender students are at a higher risk for dropping out of school and committing suicide. Gay, lesbian and transgendered students report feeling particularly unsafe in restrooms, locker rooms, and lunchrooms. Any discussions regarding school dress code policies should take all of these issues into account, and, at a minimum, ensure that all forms of discrimination and harassment are prohibited.

For more information on this issue, contact the author at durban@laborlawyers.com or 303.218.3650.

Does Not Renewing A Teacher's Contract Risk An Employment Lawsuit?

Continued from page 3

The *Education Update* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

Office Locations

Atlanta phone 404.231.1400	Houston phone 713.292.0150	Orlando phone 407.541.0888
Charlotte phone 704.334.4565	Irvine phone 949.851.2424	Philadelphia phone 610.230.2150
Chicago phone 312.346.8061	Kansas City phone 816.842.8770	Portland ME phone 207.774.6001
Columbia phone 803.255.0000	Las Vegas phone 702.252.3131	Portland OR phone 503.242.4262
Dallas phone 214.220.9100	Louisville phone 502.561.3990	San Diego phone 858.597.9600
Denver phone 303.218.3650	New Jersey phone 908.516.1050	San Francisco phone 415.490.9000
Fort Lauderdale phone 954.525.4800	New Orleans phone 504.522.3303	Tampa phone 813.769.7500

where those courts expressly concluded that non-renewal of an employment contract satisfies the adverse-action requirement. Some circuit courts, such as the Ninth circuit, have yet to consider this precise issue. Other courts have simply adopted with little analysis the parties' express or implicit agreement that non-renewal of a contract *is* an adverse employment action.

Only a few courts have found non-renewal of an employment contract *not* to be an adverse employment action. For instance, in California, an employee whose fixed-term contract is not renewed cannot state a common law tort claim for wrongful termination in violation of public policy. Illinois state courts have held similarly. Significantly, these cases did not concern statutory discrimination or retaliation actions.

What Does This Mean For Your School?

In light of the trend to expand the definition of adverse employment action, schools should exercise care when deciding not to renew an employment contract. Don't just assume that because a contract is ending, the school's legal obligations are fulfilled and the decision not to renew is risk-free. Take the same steps to evaluate the potential risks of a decision *not to renew* an employment contract as to evaluate a decision to *terminate* an employment contract. Carefully screen decisions not to renew an employment contract in order to ensure that such decisions are based on lawful, legitimate, non-discriminatory and non-retaliatory criteria in order to mitigate the risk of claims of wrongful termination, discrimination or retaliation.

For more information, contact the author at tdevitt@laborlawyers.com or 949.851.2424.

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Education Update* (or its sister publication the *Labor Letter*), let us know by contacting Suzanne Bogdan, Chair of our Education Practice Group at (954) 847-4705 or sbogdan@laborlawyers.com, or e-mail the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.