Legal Update Article

Federal and State Mandates on Use of Employees' Personal Pronouns Create Uncertainty

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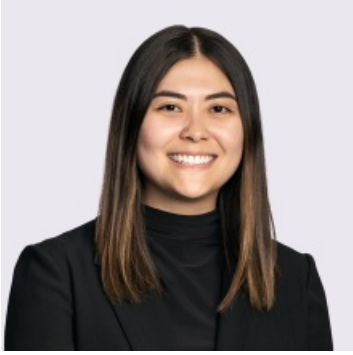

Employers must proceed carefully when responding to complaints around pronoun use where federal and state mandates appear to conflict. For instance, Equal Employment Opportunity Commission (EEOC) guidance states that misgendering can constitute a violation of Title VII of the Civil Rights Act when done intentionally (Sexual Orientation and Gender Identity (SOGI) Discrimination); on the other hand, Florida law prevents a public school teacher from using her personal pronouns and titles when communicating with students at school.

Florida Case

Florida's "Let Kids Be Kids" law took effect on July 1, 2023. The law makes it "the policy of every [Florida] public K-12 educational institution … that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex." § 1000.071(1), Florida Statutes. The statute also prohibits all employees or contractors of public K-12 educational institutions from using a student's "preferred [sic] personal title or pronouns if such preferred [sic] personal title or pronouns do not correspond to his or her sex." § 1000.071(3), Florida Statutes.

In *Wood v. Fla. Dep't of Educ.,* No. 4:23cv526-MW/MAF (N.D. Fla. Apr. 9, 2023), Katie Wood, a 10th-grade algebra teacher and transgender woman, stopped using her pronouns after Section 1000.071(3) went into effect.

The other plaintiff, AV Schwandes, was a teacher and is non-binary and uses they/them pronouns. While teaching, Schwandes used the title "Mx." and continued to do so after Section 1000.071(3) went into effect. After refusing to comply with school directives, Schwandes's employment was suspended without pay and then terminated, and the Florida Department of Education opened an investigation into their "failure to follow directives from [their] employer."

Wood and Schwandes challenged the statute and moved the district court for preliminary injunctions against enforcement of Section 1000.071(3), arguing the statute violates federal authorities, including Title VII and the First Amendment.

In support of the Title VII claims, Wood argued that (1) requiring her to introduce herself using different pronouns was an adverse employment action, and (2) she faced an ongoing and irreparable injury due to the threat of termination and delicensing at work. Schwandes argued that the Florida Department of Education's investigation was an adverse employment action under Title VII. Moreover, both plaintiffs argued they were entitled to preliminary injunctions on First Amendment grounds.

Denying the request to block enforcement of the law on Title VII grounds, the court held that the plaintiffs had not demonstrated a likelihood of success on the merits. The

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court held that Wood failed to assert facts sufficient to show Section 1000.071(3)'s requirements constituted a serious and material change in the terms, conditions, or privileges of her employment.

While emphasizing that it did not seek to minimize the seriousness of what Schwandes was experiencing, the court held Schwandes lacked standing to bring a Title VII claim because the investigation into them did not constitute an adverse employment action until their license was suspended or "some other more tangible action is taken."

However, the court suggested that Wood could succeed under a Title VII hostile work environment theory with more facts demonstrating the conduct she endured was severe. The court stated, "[A]fter reading Ms. Wood's declaration, this Court can imagine that her workplace may have become hostile after Section 1000.071(3) was implemented." It pointed to facts that were missing from the record, such as how often she was misgendered, whether the misgendering was intentional, and whether the misgendering was condoned by her supervisors.

Ruling on the First Amendment arguments, the court found, as with the Title VII claim, Schwandes lacked standing to bring the claim. However, the court granted a preliminary injunction as to Wood, finding the Florida statute could not dictate without limitation how she refers to herself when communicating to students.

Takeaways for Employers

The court's suggestion aligns with EEOC guidance that misgendering can constitute a Title VII violation when done intentionally. The EEOC has issued at least one decision supporting that position. In *Lusardi v. Dep't of the Army,* EEOC Appeal No. 0120133395 (Apr. 1, 2015), it concluded that Title VII was violated where an employer denies a federal employee equal access to a common restroom corresponding to the employee's gender identity. The Commission's position aligns with some state and local prohibitions on intentional misgendering. For example, the New York State Division on Human Rights and New York City Commission on Human Rights both consider intentional pronoun misuse to be a violation of the respective State and City statutes.

Employers must tread cautiously when responding to complaints around pronoun use. Cases of employees asserting objections to using a colleague's stated pronoun, including faith-based objections, are working their way through the courts, and at least some courts have enjoined the EEOC from implementing its guidance based on religious objections. Additionally, courts consider any difference in treatment of employees based on their transgender or cisgender identity to be potential grounds for liability under Title VII.

Employers have obligations to ensure employees work in a harassment-free environment. In light of the legal uncertainty around objections to pronoun use, employers should consider emphasizing core values in the workplace, such as treating all employees with respect and dignity. Entering Pride month, employers are encouraged to conduct harassment prevention training that includes a section on LGBTQ+ issues, including the misgendering, deadnaming, and outing of colleagues who may not be ready to be out in the workplace. Allyship continues to be important in demonstrating support for others who may not feel comfortable always being the person to correct pronoun usage.

Equally as important is employers' duty to engage in a good-faith dialogue with employees asserting complaints around pronoun use or religious objections to such use to find reasonable solutions. Additionally, employers should review company policies and practices to ensure they comply with applicable law and regulations.

Please contact a Jackson Lewis attorney with any questions.