Bob Joyce, UNC School of Government
Summer County Attorneys' Conference
July 9, 2016

House Bill 2, Counties as Employers, and Bathrooms

This outline focuses on the effects of HB 2 on counties as employers. To understand what those effects may be, we have to step back and look, very briefly,

- at recent developments in the federal law of discrimination "because of sex"
- at what HB 2 does with respect to employment law
- at the HB 2 bathroom rules, and
- at federal bathroom law developments

The Developing Federal Law on the Meaning of "Because of Sex"

The chief federal statute outlawing employment discrimination is, of course, Title VII of the Civil Rights Act of 1964. From its inception, Title VII has made it unlawful to discriminate in employment on any of these five grounds:

- race
- color
- religion
- national origin, and
- sex

The basic prohibition. The act states the basic prohibition as "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, <u>because of</u> such individual's race, color, religion, <u>sex</u>, or national origin"

What does the statute mean when it outlaws discrimination that is "because of sex?" At the time of the enactment of Title VII, newspapers ran help wanted ads with the labels "Jobs—Male" and "Jobs—Female." The early effect of the law was to outlaw such discrimination based on the status of being male or female. As the law developed, it became clear that, as the courts interpreted it, "because of sex" meant something more than simply the status of being male or female. For example, in 1980, the Equal Employment Opportunity Commission issued regulations stating that the creation of a hostile or offensive environment because of sexual harassment in the workplace was unlawful discrimination because of sex, and in 1986 in *Meritor*

Savings Bank v. Vinson, 477 U.S. 57, the U.S. Supreme Court agreed: "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."

Expansive interpretations of "because of sex." Three years later, in 1989, the question of the meaning of "because of sex" was before the U.S. Supreme Court again. This time, the Court said that "because of sex" includes because of "sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228. A woman alleged that when she had not been promoted within her employer firm she was told that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure the promotion. The Court found that this constituted evidence of sex discrimination as "sex stereotyping." "Because of sex" includes, the Supreme Court said, an "entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Nine years after that, the Supreme Court (in an opinion by the late Justice Scalia) ruled that the statutory prohibition on discrimination "because of sex" can go far beyond what might have originally been anticipated. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75. The Court held that a male employee could maintain a Title VII action based on sexual harassment toward him by other male employees. Justice Scalia said that while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] . . . Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This prohibition] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements."

Transgender discrimination and "because of sex." In these decisions, the Supreme Court clearly indicated that the term "because of sex" was amenable to an expanded interpretation. But what about discrimination on account of gender identity or gender expression. Can such discrimination be said to be discrimination "because of sex?"

The answer developing in very recent years is Yes. In a 2012 decision, the EEOC said this:

> "When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' . . . This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person". *Macy v. Dep't of Justice*, Appeal No. 0120120821, 2012 WL 1435995

Other EEOC decisions have followed this reasoning, and the courts are beginning to recognize that disparate treatment of a person because of that person's gender identity or gender expression can constitute unlawful discrimination "because of sex." One such court decision is from North Carolina in 2015. *Lewis v. HighPoint Regional Health Systems*, 79 F. Supp. 3d 588

(EDNC). An anatomically male individual whose gender identity and gender expression were female was undergoing hormone replacement therapy in preparation for a sexual reassignment surgery. She applied for a job with HighPoint and advanced to a third round of interviews before being turned down. She sued under Title VII, alleging that she was turned down because of her transgender status and that amounted to unlawful discrimination "because of sex." Noting that neither the U.S. Supreme Court nor the federal Fourth Circuit Court of Appeals had ruled on the status of a transgender claim under Title VII, the federal judge held that the plaintiff had stated a claim and allowed the case to go forward.

Who knows where the law on transgender claims under Title VII will ultimately settle, but the current—and very recent—trend is toward a recognition that discrimination because of gender identity or gender expression is discrimination "because of sex."

This trend under the federal law is in direct contrast to the employment law implications of House Bill 2.

HB 2 and Employment Law

House Bill 2 is often referred to as the "bathroom bill" and its bathroom provisions will affect counties in North Carolina as employers, but several provisions of the bill directly address employment law, separate from the bathroom question.

No state law protection against employment discrimination on account of gender identity or gender expression

HB 2 amends the state's Equal Employment Practices Act to change the Act's list of employment discrimination grounds, found in GS 143-422.2. Before HB 2, the act expressed the public policy of the state that everyone should be free from discrimination in employment on the basis of

- race
- religion
- color
- national origin
- age
- sex, or
- handicap

HB 2 amends this list to change the term "sex" to "biological sex," which it defines to mean the male or female designation on a person's birth certificate. [1] So after HB 2, the list of non-discrimination grounds under the Equal Employment Practices Act is

[1] In fact, the term "biological sex" is not defined in GS 143-422.2 as amended by HB 2. Instead, HB 2 includes the definition of "biological sex" as "the physical condition of being male or female [as] stated on person's birth

- race
- religion
- color
- national origin
- age
- biological sex (as shown on a birth certificate), or
- handicap

Before "sex" was changed to "biological sex," there was some argument that the state's Equal Employment Practices Act was meant to establish a policy against discrimination on account of a person's gender identity or gender expression. That is the direction in which federal law is headed, as discussed on pages 1 through 3 above. Now the state's policy of nondiscrimination is limited to "biological sex" as shown on the birth certificate. It is therefore clear that the state law does not prohibit discrimination on account of gender identity or gender expression.

As a consequence, it is not a violation of the state's Equal Employment Practices Act for an employer to discriminate on the grounds of gender identity or gender expression. It may, however, be a violation of federal law.

The end of the wrongful discharge tort based on unlawful discrimination

In 1986 in *Sides v. Duke Hospital*, the North Carolina Court of Appeals for the first time recognized a cause of action that came to be known as the "public policy wrongful discharge tort." In that case, a nurse claimed that Duke University fired her because of her truthful testimony in a medical malpractice case against Duke. She sued in tort for wrongful discharge. Duke responded, saying (among other things) that she was an at-will employee and for that reason could be fired because of her testimony or for any other reason Duke wanted. The Court of Appeals said that it is true that generally speaking an at-will employee can be fired for any reason, but in this case the public policy behind people testifying truthfully in court is so strong that the Court of Appeals was creating a new tort—the *public policy wrongful discharge tort*. If an employer fires an employee for any reason that violates the public policy of the state, the dismissal amounts to the tort of wrongful discharge, and the employee can sue for damages.

GS 143-422.2 has said for decades that "[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination" on the grounds of race, sex, age, etc. That is a clear statement of public policy. So, the courts for a long time have said that if I am fired because of my race or sex or age (or other ground in the enumerated list), then I can bring the public policy wrongful discharge tort action. That is, I am suing because of employment discrimination, but I am not bringing an action directly under GS 143-422.2. Rather I am bringing a tort action.

---

certificate" in the parts of the bill concerning bathroom usage. It seems reasonable to "borrow" the definition for use in GS 143-422.2.

Now, this is where HB 2 kicks in. It amends GS 143-422.2 by adding (among other words) this provision: "[N]o person may bring any civil action based upon the public policy expressed herein." That is, the public policy against employment discrimination expressed in GS 143-422.2 may now no longer be the basis for a public policy wrongful discharge tort lawsuit.

Before HB 2's "no lawsuits" provision was put into place, employees fired because of their race or religion or color or national origin or age or sex or handicap could bring a public policy wrongful discharge tort lawsuit. Now, no such lawsuit can be brought. If I am fired because of my race, I have no right to sue in North Carolina state court under North Carolina state law. I could still seek relief under federal law, but no longer under state law.

No employment discrimination ordinances

HB 2 provides that the Equal Employment Practices Act, as limited by the phrase "biological sex," is the sole source of law on the subject of employment discrimination in North Carolina, and no county (or other unit of government) may enact any ordinance or policy dealing with the subject at all.

No minimum wage or overtime ordinances

HB 2 amends the state's Wage and Hour Act (Article 2A of Chapter 95 of the General Statutes), which deals with minimum wage, overtime pay, youth employment and a few other matters. The state's Wage and Hour Act is not a major concern for units of government as employers. As employers, they are exempt from many of its provisions (and they are, by contrast, fully governed by the federal Fair Labor Standards Act, which covers the same subject matter and is a big deal).

Chiefly, the HB 2 amendments provide that the Wage and Hour Act is the sole source of law on its subjects in North Carolina, and no county or other unit of local government may enact any ordinance or adopt any policy dealing with the subjects at all.

No employment regulation of contractors

HB 2 amends statutes that relate to the public contracting authority of cities and counties (GS 160A-456 and GS 153A-449). Sometimes cities and counties have required that a contractor, in order to do business with the city, must meet certain employment-related requirements, such as certifying that the contractor does not engage in employment discrimination. HB 2 provides that no city or county may impose "regulations or controls on the contractor's employment practices." No longer may a city, for example, require that in order to bid on a contract a contractor must certify to its policy of nondiscrimination in employment.

This provision of HB 2 has no direct effect on cities or counties or other units of government in their capacities as employers of their own employees.

Applying HB 2 to counties as employers

Under HB 2, counties (and other units of local government) may not enact ordinances or adopt policies regarding employment discrimination by employers in their jurisdiction, and they may not impose any rule related to employment discrimination on businesses who contract with them. They may not enact ordinances or adopt policies regarding minimum wage or overtime requirements for employers in their jurisdiction or businesses who contract with them.

But how does HB 2 affect counties as they enact ordinances or adopt policies dealing with <u>their own</u> employees? That is, how does HB 2 affect counties as employers?

To answer these question, we have to look at the two special provisions regarding counties as employers that are found right in HB 2 itself.

The first special provision. The first one deals with the changes to the Equal Employment Practices Act. HB 2 says that its limitations on employment discrimination provisions—that "sex" means "biological sex" and that no county may enact any employment discrimination regulations—do not apply to "such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

In my view, this provision says that a county may enact an ordinance or adopt a policy regarding employment discrimination with respect to its own employees that is broader than HB 2 allows under the Equal Employment Practices Act as it is amended. That means, it appears to me, that a county could enact a personnel ordinance or adopt a personnel policy that would, for example, prohibit discrimination within its own workforce on the grounds of sexual orientation, gender identity, or gender expression. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

Now, the special provision that permits employment discrimination regulations that are "applicable to personnel employed by that body" contains a restriction. It says that such a regulation must not be "otherwise in conflict with State law."

So, would a county's personnel policy banning employment discrimination in its own workforce on account of sexual orientation be "otherwise in conflict with State law"? I think not. It would clearly be in conflict with the Equal Employment Practices Act as amended by HB 2, but this special provision is itself an exception to the Employment Practices Act as amended by HB 2. The phrase "otherwise in conflict with State law" must refer to elements of state law other than the Equal Employment Practices Act.

The second special provision. The second special provision for local governments as employers applies to changes to the Wage and Hour Act. HB 2 says that no city or county may enact any ordinance or adopt any policy dealing with minimum wage or overtime requirements at all. But the special provision says that the prohibition does not apply to "a local government regulating, compensating, or controlling its own employees."

This provision says that a county may adopt minimum wage and overtime protections for its own employees that are greater than the law allows. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

HB 2 and the Bathroom Rules

Here is the basic requirement with respect to bathrooms imposed by HB 2 on counties and other units of government in North Carolina: "Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." GS 143-760(b). That requirement has two parts. First, it requires that multiple occupancy bathrooms be "designated" for use by persons based on their biological sex. Second, it requires that those bathrooms be "only used" by persons based on their biological sex.

What to do now to comply

What must a county (or other unit of government) do to be in compliance with the "designated" part? It seems to me that the county is in compliance if it has signs labeling each multiple occupancy bathroom as "male" or "female" (or equivalent term). I do not read the statute as requiring more than that. Surely, virtually every county in the state is already in compliance with this "designated" part.

What must a county do to be in compliance with the "only used" part? It seems to me that a county is in compliance if it appropriately responds to reports of the law's violation. Such a report would assert that a person of one biological sex is (or has been) using a multiple occupancy bathroom designated for the other sex. What would constitute an appropriate response to such a report will almost certainly vary with the circumstances. It might consist of an informal inquiry by the county officials in charge of the facilities. It might consist of seeking the assistance of law enforcement. (In that context, see Jeff Welty's blog post here: http://nccriminallaw.sog.unc.edu/crime-transgendered-person-use-wrong-bathroom/) In any event, I think the obligation with respect to the "only used" part does not require counties to monitor facilities to ensure compliance.

In short, until a report of a violation of HB 2's "only used" requirement is made, I think a county is in compliance with the statue simply by having proper bathroom signage. If there is a report of a violation, then the county must determine what steps, if any, to take in response. In the abstract, it is not possible to say just what those steps would be. If an assertion of unlawful discrimination is made, then an analysis of the requirements HB 2 and possibly applicable federal law will be necessary. And not easy

A county is not required by the statute to undertake to construct single occupancy bathroom facilities. It may, of course, but it is not required to.

Leased facilities

The statute is not completely clear regarding a county's obligations when the county leases and uses privately-owned facilities or when a private entity leases and uses county-owned facilities. My guess is that a court, if called upon to decide, would hold that the law's obligations follow the actual user. That is, since a private entity is not governed by the HB 2 bathroom rules, the rules would not apply to a county-owned building that is leased to and used by a private entity. On the other hand, since the HB 2 bathroom rules do apply to units of government, I think they would apply when a county leases and uses a privately-owned building.

Bathrooms, HB 2, and Federal Law

As we have seen, the federal employment discrimination law with respect to gender identity and gender expression appears to be moving in one direction, and the state employment discrimination law appears to be moving in a different direction. In many instances, that will simply mean that protection will be available under federal law but not under state law. That is, there will not be a conflict; there will simply be federal protection but not state protection.

With respect to bathrooms, however, there may actually be a conflict.

As discussed on pages 1 through 3, the development of the interpretation of Title VII has been toward an understanding that discrimination because of gender identity or gender expression is unlawful discrimination "because of sex." In that context, the issue of bathroom usage has arisen under federal law.

Title VII and OSHA

In a 2015 decision, the EEOC ruled that an employer's restriction on a transgender woman's ability to use a multi-person female restroom facility constituted a violation of Title VII:

> "[W]here, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women's restrooms." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)

Also in 2015, the Occupational Safety and Health Administration of the U.S. Department of Labor, stating that access to toilets is a health and safety issue for employees, and noting that "employers may not impose unreasonable restrictions on employee use of toilet facilities," said this:

> "[A] person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself." *Best Practices: A*

Guide to Restroom Access for Transgender Workers,
https://www.osha.gov/Publications/OSHA3795.pdf

Title IX and the Fourth Circuit

The federal law developments with respect to employment discrimination because of gender identity or gender expression are recent. The very most recent development is just one month old—it dates from April of 2016. It is not directly relevant to employment discrimination cases because it did not concern *employment* discrimination. Instead, it concerns a claim of unlawful *educational* discrimination by a transgender school student under Title IX of the Education Amendments of 1972. It is a decision entitled *G.G. v. Gloucester County School Board*, No. 15-2056 (April 19, 2016).

While the decision is not *directly* relevant, however, it is nonetheless likely to prove important for employment discrimination law, for two reasons.

First, it is a decision by the federal court of appeals that has jurisdiction over North Carolina—the federal Fourth Circuit Court of Appeals. The case arose in Virginia, but it has the same affect in North Carolina as if it arose here. Its interpretation of the law is binding on federal district courts in this state.

Second, while the decision does not deal directly with an employment discrimination statute, it does deal with an education discrimination statute with provisions that are directly parallel to Title VII's provisions. There is every reason to suspect that the court's interpretation of Title IX will be highly influential in future interpretations of Title VII.

Title IX and discrimination "on the basis of sex." The basic prohibition of Title IX is this:

> "No person in the United States shall, <u>on the basis of sex</u>, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

A student who was assigned the sex of "female" at birth began hormone treatments, legally changed his name to a traditionally male name, and began to live his life as a boy. At his request, school officials took steps to insure that he was treated as a boy. They allowed him to use the boys' restrooms. When complaints came to the school board, the board adopted a new rule that the use of restrooms "shall be limited to the corresponding biological genders."

The student sued, alleging that the failure to allow him to use the boys' restrooms was a form of discrimination against him "on the basis of sex," within the meaning of Title IX. The Fourth Circuit agreed, in effect holding, for purposes of bathroom usage, "on the basis of sex" includes "on the basis of gender identity."

In reaching that conclusion, the court noted that under Title IX there is a regulation providing that a school "may provide separate toilet, locker room, and shower facilities on the basis of sex." The court said:

> "[This regulation] is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."

and

> "[This regulation] is susceptible to more than one plausible reading . . . determining maleness or femaleness with reference exclusively to genitalia . . . or with reference to gender identity."

Given that ambiguity, the court said, it would follow the interpretation made by the Office for Civil Rights in the U.S. Department of Education, that gender identity is the proper way to determine maleness and femaleness: "[A] school generally must treat transgender students consistent with their gender identity."

Title VII and "because of sex." As the discussion on pages 1 through 3 of this outline shows, the federal law under Title VII interpreting the prohibition of discrimination "because of sex" is increasingly moving toward including within that prohibition "because of gender identity." This Title IX case interpreting Title IX's prohibition of discrimination "on the basis of sex" as including "on the basis of gender identity" is consistent with that movement and is very likely to reinforce it.

Applying the HB 2 Bathroom Rules in the Workplace

Suppose an employee's apparent sex does not match (for whatever reason) the sex with which that employee identifies.

May the county permit the employee to use the multi-person bathroom of the sex with which the employee identifies? Under HB 2, the answer is clearly No, unless the sex with which the employee identifies is the same as that indicated on the employee's birth certificate. (There is a question, of course, of how the county would know what sex is shown an employee's birth certificate. May it simply take the employee's word for it?)

The fact that HB 2 clearly answers the question No may not, however, be the end of the matter. That is because the law of sex discrimination under Title VII of the federal Civil Rights Act of 1964, as interpreted by the Equal Employment Opportunity Commission and to some extent by the courts, is moving to protect individuals from discrimination on account of gender expression or gender identity. This development of the law, as discussed above, is ongoing and uncertain. It is not possible at this point to say that an employer's refusal to allow an employee to use a bathroom other than that of the employee's "biological sex" is a violation of Title VII, but it is extremely likely that test cases will be sought. Where the law will go cannot now be fully predicted.