

## Gender Stereotyping Discrimination Under Title VII: Alive and Well After More than 20 Years of *Price Waterhouse v. Hopkins* (but Applied Somewhat Differently Among the Circuits)

**IN 1989, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that employers are prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII) from discriminating against an employee for**

that employee's failure to conform to the gender stereotype linked to his or her sex. In that case, a female employee was denied partnership in a national accounting firm because she was found to be too "aggressive" and did not behave in a feminine manner. Some partners praised the plaintiff's "strong character, independence and integrity," but others commented that she needed to take "a course at charm school." *Id.* at 234–235.

The Court found that gender stereotyping in *Price Waterhouse v. Hopkins* interfered with the plaintiff's ability to perform her job because she was discouraged to use "the forceful and aggressive techniques that made her successful in the first place." *Id.* at 251. "Impermissible stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men." *See Jespersen v. Harrah's Operating Company Inc.*, 444 F.3d 1104 (9th Cir. 2002).

Although it has been more than 20 years since *Price Waterhouse v. Hopkins*, courts apply gender stereotyping discrimination cases under Title VII somewhat differently, depending on the facts of each case and on the circuit where the case is filed.

For example, the Eighth Circuit in *Lewis v. Heartland Inns of Am. LLC*, 591 F.3d 1033 (8th Cir. 2010), found that a female plaintiff had established a prima facie case of sex discrimination under Title VII on a gender stereotype theory after allegedly being terminated for not being "pretty" and lacking the "Midwestern girl look." The plaintiff in that case described her appearance as being too masculine. She wore slacks and men's button-down shirts, she did not wear makeup, and her hair was short. Her manager described her as having an "Ellen DeGeneres kind of look."

By the same token, years before, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit held that a plaintiff—a transsexual who had

been diagnosed with gender identity disorder, was male by birth, had begun to express a more feminine appearance at work, and had allegedly been suspended for such reasons—had also established a prima facie case of sex discrimination under Title VII based on a gender stereotype theory. In that case, the plaintiff was a firefighter whose co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." The plaintiff's supervisor allegedly met with the city attorney "with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment" by requiring the plaintiff to undergo three separate psychological evaluations, which they hoped would lead to his resignation or refusal to comply, the latter of which would be grounds for terminating his employment for insubordination. *Id.* at 568, 569. *See also Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

On the other hand, the Second Circuit, in *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), and the Tenth Circuit, in *Krystal S. Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), rejected the application of the referred gender stereotype theory to plaintiffs with similar allegations as in *Lewis v. Heartland Inns of Am. LLC*, and in *Smith v. City of Salem* because their claims were directed more toward discrimination based on sexual orientation and transsexualism—categories that are not protected under Title VII.

In *Dawson v. Bumble & Bumble*, the Second Circuit found that a lesbian plaintiff had not established that the various adverse employment actions to which she had allegedly been subjected were motivated by her gender, her appearance, her sexual orientation, or some combination of these features. Therefore, her gender stereotype discrimination claim under Title VII failed. The plaintiff was employed by the defendant, Bumble & Bumble (a beauty salon), as a hair assistant, whose primary responsibility was to assist hair stylists. She was enrolled in the salon's training program, which assistants had to complete in order to be promoted to hair stylists. Because the plaintiff's performance at the salon's basic training program was deficient, she was not invited to participate in

the advanced training seminar and was ultimately terminated.

According to the plaintiff, at the time she was terminated by her employer, she was told that she was being terminated because she “seemed unhappy” and because of the way she dressed and wore her hair. She also contended that her failure to advance in Bumble & Bumble’s training program and her termination were the result of a discriminatory animus. As to the training program, the plaintiff alleged that it was repeatedly made clear to her that females rarely attained the position of hair stylist. With respect to her work on the salon floor as a hair assistant, the plaintiff alleged that she was subjected to a hostile work environment because of her sex. She claimed that “she was constantly harassed about her appearance, that she did not conform to the image of women, and that she should act in a manner less like a man and more like a woman.” The plaintiff claimed that she suffered discrimination on the basis of sex, sex stereotyping, and/or sexual orientation in violation of federal, state, and municipal law.

As previously explained, the Second Circuit rejected the plaintiff’s claims in the case. The court could not discern if the plaintiff was claiming discrimination based on her sexual orientation under Title VII, which is not a protected category under such law, or because of her sex based on a gender stereotype theory. The court also determined that the plaintiff had not produced any substantial evidence from which the court could have inferred that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action by her employer.

In *Krystal S. Etsitty v. Utah Transit Authority*, the Tenth Circuit determined that transsexuals are not a protected class for purposes of Title VII and that the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals because of their transsexualism per se. The plaintiff in this case was a transsexual who born as a biological male and given the name “Michael, but identified herself as a woman and had always believed she was born with the wrong anatomical sex organs. Plaintiff lived and dressed as a woman outside of work and used the female name of ‘Krystal.’”

The plaintiff applied for a position as a bus operator with the Utah Transit Authority (UTA). She was hired after successfully completing a six-week training course and was assigned to a position as an extra-board operator. She was not assigned to a permanent route or shift, but instead she would fill in for regular operators who were on vacation or called in sick. As a result, the plaintiff drove many of the UTA’s 115 to 130 routes in the Salt Lake City area over approximately 10 weeks as an extra-board operator.

The UTA’s employees use public restrooms while on their routes. Throughout her training period at the UTA, the plaintiff presented herself as a man and

used male restrooms. Soon after being hired she met with her supervisor, Pat Chatterton, and informed him that she was a transsexual. She explained that she would begin to appear more as a female at work and that she would eventually change her sex. Chatterton expressed support for plaintiff and stated that he did not see any problem with her being a transsexual. After the meeting, the plaintiff began wearing make-up, jewelry, and acrylic nails at work. She also began using female restrooms while on her route.

The operations manager of the UTA division where plaintiff worked heard a rumor that there was a male operator who was wearing makeup. The operations manager spoke with Chatterton, who informed her that the plaintiff was a transsexual and would be going through a sex change operation. When Chatterton told the operations manager this, she expressed concern about whether plaintiff would be using a male or female restroom. The operations manager told Chatterton that she would speak with the Office of Human Resources about whether the plaintiff’s use of the restroom would raise any concerns for the UTA.

After the operations manager discussed the issue with the Office of Human Resources, the Utah Transit Authority decided to terminate the plaintiff because of possible liability arising from her use of the women’s restroom. The plaintiff sued the UTA for sex discrimination under Title VII, alleging that she was terminated because she was a transsexual and because she had failed to conform to the UTA’s expectations of stereotypical male behavior. The court determined in that case that the UTA’s reasons for terminating plaintiff—its concerns about the plaintiff’s use of the women’s restroom—was a legitimate nondiscriminatory reason to terminate the plaintiff.

Although the gender stereotype theory under Title VII that had been established in *Price Waterhouse v. Hopkins* has been applied somewhat differently among the circuits through the years and is seldom successful because of its complexity, it is very clear that the courts still recognize the theory as a possible cause of action under Title VII. However, the outcome of such claims will depend on a case-by-case analysis that may vary depending and on the circuit, unless the theory is further clarified by the Supreme Court in a future case. **TFL**

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