



LABOR AND EMPLOYMENT LAW

Federal Law Regarding Transgender Employees and Gender Identity Claims in the Workplace: An Overview

By Faith Isenhath

"You seem to assume that every person is either a man or a woman. ... Each person is actually both in varying degrees. ... I am more of a woman than I am a man. ... Society has decreed that there are men and there are women. ... People, both men and women, are both sexes. The most any man or woman can be is 80 percent masculine or feminine."

These are the words of Christine Jorgensen, the first highly publicized male-to-female transsexual, regarding her notion that male and female are not mutually exclusive categories but are overlapping ones.¹

Imagine a male employee named Kenneth who works as a pilot for an airline. During Kenneth's employment, he

undergoes sexual reassignment surgery, then comes back to work as a female employee named Karen.² What kind of protection does Karen have in the workplace? What are the employer's obligations, if any?

The number of transsexuals in the United States is estimated to be one in 10,000 for biological males and one in

30,000 for biological females.³ The protections the law offers transgendered individuals vary and ultimately depend on the facts of the particular employment situation and the particular jurisdiction. Attorneys need to be familiar with the law in this area so that they can provide guidance to employers and employees regarding this issue. Claims of discrimination against transgendered individuals are being litigated more frequently in the federal courts and, as explained below, Congress is now considering legislation to specifically address such claims.

Defining Transsexuality

The terms “transsexuality” or “transsexualism” refer to conditions in which people hope to change the bodily characteristics of sex. The terms apply whether or not the individual has undergone sexual reassignment surgery.⁴ Transsexuals are a subset of transgendered people—the term “transgender” being the broader term that is used to describe various forms and degrees of cross-gender practices and identifications.⁵ Many transsexuals identify themselves as heterosexuals; specifically, male-to-female transsexuals see themselves as heterosexual women, and female-to-male transsexuals see themselves as heterosexual men. There are some transsexuals who identify themselves as homosexual, bisexual, or asexual individuals.⁶ Transsexuals are different from transvestites or cross-dressers in that the latter dress in the clothes typically worn by the other sex but do not seek to change the sexual characteristics of their bodies.⁷

Many transsexuals face problems finding resources such as surgery, hormone treatment, and the social support they need to express their gender identity. Some transsexuals are diagnosed with gender-identity disorder, a condition that involves incongruity between an individual’s sex at birth and personal gender identity.⁸ The symptoms of gender-identity disorder include the following:

- a strong desire to be the other sex,
- frequent passing as a person of the other sex,
- a desire to live or be treated as a member of the other sex, or
- the conviction that he or she has the typical feeling and reactions of someone of the other sex.⁹

Acceptance into society and the community is an obstacle for transgender individuals.¹⁰ Transgender people face discrimination in employment, housing, public accommodations, credit, parenting, immigration, and prisons, to name a few areas.¹¹ Leslie Feinberg, a transgender activist, has made the following comment about what these individuals undergo:

If you are a trans person, you face horrendous social punishments—from institutionalization to gang rape, from beatings to denial of child visitation. ... This brutalization and degradation strips us of what we could achieve with our individual lifetimes. ... No one knows how many trans lives have been lost to police brutality and street-corner bashing. The lives

of trans people are so depreciated in this society that many murders go unreported. And those of us who have survived are deeply scarred by daily run-ins with hate, discrimination, and violence. Trans people are still literally social outlaws.¹²

Socially and politically, transgendered individuals are often cruelly compared with monsters such as Frankenstein’s.¹³ Even after individuals have completed sex reassignment surgery, some courts refuse to change the transgendered person’s birth certificate, while other courts have invalidated their marriages.¹⁴ The workplace is another area in which transsexuals face issues of protection and acceptance.

Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of “race, color, religion, sex, or national origin.” The interpretation of sex has created conflicting case law, particularly regarding whether Title VII extends to protect sexual orientation and gender identity.¹⁵ Not only is federal case law analysis related to gender identity in flux, but there is also a split among the circuits specifically relating to coverage under Title VII.¹⁶

Several circuit courts have held that Title VII provisions related to discrimination based on sex do not extend to protect transsexuals.¹⁷ In *Holloway v. Arthur Andersen & Co.*, a case decided more than 30 years ago, the U.S. Court of Appeals for the Ninth Circuit did not allow a male-to-female transsexual individual to bring a claim under Title VII for sex discrimination. The court indicated that sex should be interpreted in the “traditional way,” and the court recognized only two sexes—male and female—not a mixture of sexes. The Ninth Circuit concluded that the decision of the employee who brought the case to undergo sexual reassignment was not within the scope of Title VII.

Similarly, in 1984, in *Ulane v. Eastern Airlines*, the U.S. Court of Appeals for the Seventh Circuit held that Title VII does not prohibit an employer from terminating an employee for undergoing a sex change.¹⁸ The case involved Kenneth Ulane, who had been hired as a pilot for Eastern Air Lines but was later fired after he became Karen Ulane. In 1979, Ulane was diagnosed as a transsexual, and after first seeking psychiatric and medical assistance, she underwent treatment and eventually sexual reassignment surgery. After her surgery, Illinois revised her birth certificate to reflect the change, and the Federal Aviation Administration certified her flight status as female. After returning to work, Ulane was fired and therefore brought suit for sex discrimination under Title VII.

The Seventh Circuit held that Title VII’s prohibition against sex discrimination, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men, but does not apply to a person who has a sexual identity disorder. The court reasoned that the legislative history showed that Congress never intended to apply Title VII to nontraditional definitions of sex. The Seventh Circuit concluded that the new definition of sex had to come from Congress,

and therefore Ulane was not covered under Title VII.

Similarly, in a decision reached by the U.S. Court of Appeals for the Eighth Circuit in 1982—in the case of *Sommers v. Budget Marketing Inc.*—the court rejected a male-to-female transsexual's claim under Title VII.¹⁹ In that case, the plaintiff referred to herself as a female who had the anatomical body of a male. After only two days after Budget hired Sommers, the company terminated her, saying that she had misrepresented herself as an anatomical female when she applied for the job. Budget further stated that the misrepresentation led to disruption at Budget because many of the female employees notified Budget that they would quit if Sommers were allowed to use the female restroom.

Like the court in *Ulane*, the Eighth Circuit stated that, in the absence of congressional intent, Title VII covers only the plain meaning of sex. In addition, the court noted that the legislative history did not show any intention to include transsexualism in Title VII. The court also found that proposals to prohibit discrimination on the basis of “sexual preference” had been defeated. Therefore, the court decided that Title VII did not prohibit discrimination based on one's transsexualism.

Broadening the Term “Sex” Under Title VII

In the seminal case of *Price Waterhouse v. Hopkins*, decided in 1989, the U.S. Supreme Court adopted a broad interpretation of “sex” under Title VII.²⁰ In *Price Waterhouse*, Ann Hopkins, a senior manager at the accounting firm, alleged that the firm's partners had discriminated against her on the basis of sex after the partners refused to reconsider her for partnership. The partners criticized Hopkins for being “overly aggressive” and “macho” and complained that she was overcompensated for being a woman. One partner told her to enroll in “a course at charm school,” while another partner told her that she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” to improve her chances for being named a partner in the firm.²¹

The Supreme Court recognized that Hopkins had suffered discrimination on the basis of sex, because she was a woman who had failed to meet the stereotypical characteristics expected of women. The Court reasoned that the term “sex” in Title VII was no longer limited to a person's anatomical sex at birth, but included physical appearance, behavior, and other characteristics considered feminine or masculine. Justice Brennan stated:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” ... An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22:

out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.²²

The Court held that Title VII covers harassment directed at a person because the person fails to conform to traditional sex stereotypes.

A subsequent case decided by the Supreme Court case in 1998—*Oncale v. Sundowner Offshore Services Inc.*²³—broadened the scope of sexual discrimination under Title VII. The plaintiff in *Oncale* worked on an oil platform with eight other men and alleged that his co-workers had physically assaulted him in a sexual manner, threatened him with rape, and forcibly subjected him to humiliating sex-related actions. The lower courts in the case had ruled that Title VII did not extend to protect against sexual harassment by members of the same sex. In reversing the lower courts, the Supreme Court established that there was a cause of action under Title VII for same-sex harassment. Regarding its holding, the Court gave the following rationale:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.²⁴

The Court ascertained three types of evidence that might satisfy the “because of sex” element: (1) comparative evidence, (2) gender-specific actions or conduct, or (3) explicit or implicit proposals of sexual pursuit. Both the *Oncale* and *Price Waterhouse* rulings are significant because the decisions broadened the term “sex” under Title VII.

The U.S. Court of Appeals for the Ninth Circuit followed the Supreme Court's reasoning in *Price Waterhouse* and *Oncale* and concluded that a plaintiff could prove that same-sex harassment was sexual discrimination on the basis that the plaintiff did not conform to gender stereotypes.²⁵ In *Nichols v. Azteca Restaurant Enterprises Inc.*, the plaintiff alleged that he had been harassed because he carried his tray and walked “like a woman.” The court held that the harassment was sexual discrimination because it was based on gender stereotypes in violation of Title VII.²⁶

Based on the gender stereotyping theory articulated in *Price Waterhouse*, the U.S. Court of Appeals for the Sixth Circuit was the first circuit to explicitly hold, in 2004, that Title VII protected transgendered employees. In *Smith v. City of Salem, Ohio*, the plaintiff, who was born a male, worked at the city's fire department for seven years.²⁷ The plaintiff was diagnosed with gender-identity disorder and began exhibiting a more feminine appearance. After telling his supervisor about his disorder, the city officials tried to force him to resign by requiring him to undergo three

psychological evaluations of the city's choosing and then suspended him.

The Sixth Circuit relied on *Price Waterhouse* and ruled that “an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”²⁸ The court held that discrimination against a plaintiff who is a transsexual and therefore fails to identify with his or her gender or act like its members do is still sexual discrimination under Title VII.

The Sixth Circuit followed *Smith* with a similar decision in 2005, *Barnes v. City of Cincinnati*,²⁹ a case that involved a police officer whose superiors had attempted to prevent him from becoming a sergeant because of his feminine appearance and behavior. The plaintiff was a male-to-female transsexual, who lived as a male while on duty but lived as a female off-duty; his employer told him that he did not appear to be masculine. Similar to the plaintiff in *Smith*, the court established that the plaintiff was protected under Title VII by alleging discrimination because he did not conform to sexual stereotypes. The court held that the city’s discriminatory actions were impermissibly based on the plaintiff’s failure to conform to sexual stereotyping.

Outside of Title VII, other federal courts have applied the *Price Waterhouse* theory of gender stereotyping. In *Schwenk v. Hartford*, the plaintiff was a male-to-female transsexual prisoner, who had been sexually assaulted by a prison guard.³⁰ The plaintiff sued under the Gender Motivated Violence Act, which prohibits crimes of violence based on the victim’s gender. The U.S. Court of Appeals for the Ninth Circuit found that, under *Price Waterhouse*, “sex” as defined in Title VII encompasses both sex in the biological sense and gender; therefore, discrimination—because an individual fails to act in the way his or her biological sex typically acts—is prohibited under Title VII. Because the Gender Motivated Violence Act parallels the protections provided by Title VII, the court found that the plaintiff’s claim was valid.

In another federal case that was not brought under Title VII, the U.S. Court of Appeals for the First Circuit found that a transgendered woman who was denied a credit application had a valid claim under the Equal Credit Opportunity Act. In *Rosa v. Park West Bank & Trust Co.*, the plaintiff had gone to the defendant’s bank dressed in “a blousey top” and wearing stockings and requested a loan application.³¹ The bank employee asked to see identification. After the plaintiff showed three photo identifications, one of which showed the plaintiff in masculine clothing, the bank employee refused to give the plaintiff the application until she “went home and changed” into men’s clothing. The court looked at Title VII law to interpret the definition of discrimination on the basis of sex. The court stated that “[i]t is reasonable to infer that [the bank employee] told [the plaintiff] to go home and change because she thought that

[the plaintiff’s] attire did not accord with his male gender: in other words, that [the plaintiff] did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application.”³²

Recent Legislation

On June 24, 2009, Rep. Barney Frank (D-Mass.) introduced the Employment Non-Discrimination Act (ENDA), which expands protections on the basis of both sexual orientation and gender identity to public and private employers throughout the United States. ENDA would expand the protections against discrimination in the workplace on the basis of sexual orientation or gender identity to all employees in all 50 states and the District of Columbia. The purpose of ENDA is to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including meaningful and effective remedies for any such discrimination. The term “gender identity” under ENDA means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.³³ The procedures and remedies applicable to a claim alleged by an individual for a violation of ENDA are the procedures and remedies applicable to Title VII.

Outside of federal laws, several states have enacted statutory protection based on gender identity in public and private employment.³⁴ In addition, several cities have enacted ordinances that prohibit discrimination based on gender identity in public and private employment.³⁵

Conclusion

It is important for counsel to understand the protections afforded to transgendered individuals under the law in order to provide guidance to employers and employees on this issue. This area of employment law is rapidly changing. Employers should consider updating their equal employment opportunity policies and employee manuals accordingly and incorporate standard language prohibiting bias in all appropriate documentation. **TFL**

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Endnotes

¹Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Harvard University Press, 2002).

²See *Ulane v. E. Airlines Inc.*, 742 F.2d 1081 (7th Cir. 1984).

³American Psychological Association, *Sexuality: Transgender Individuals and Gender Identity*, available at www.apa.org/topics/transgender.html#howprevalent (last visited Nov. 13, 2009).

⁴Meyerowitz, *supra* note 1.

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸American Psychological Association, *supra* note 3.

⁹Abigail Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150 (2005).

¹⁰The issue of transgender is also now frequently in the news. See, e.g., Longman, Jere, *Track Officials and Runner Reach Agreement in Gender Inquiry*, N.Y. TIMES, Nov. 20, 2009, at B10 (describing Caster Semenya, the South African 800-meter runner competing as a woman, who was ordered to undergo “sex-verification tests” to confirm her gender and allowed to keep her gold medal, but whose sex-test results were ordered to be kept confidential. This article notes the controversy as to whether Semenya will “be allowed to continue to compete as a woman”); Goldman, Russell, *It’s My Right to Have a Kid Pregnant Man Tells Oprah—Transgender Man Says He Kept Uterus Intending to Become Pregnant*, (ABC News Apr. 3, 2008) available at abcnews.go.com/Health/story?id=4581943&page=1 (last viewed Nov. 20, 2009) (describing Thomas Beatie, “a former woman ... now a pregnant man” who underwent sex-change surgery but “kept his female sex organs intact because he hoped to have a child some day”).

¹¹Meyerowitz, *supra* note 1.

¹²Lloyd, *supra* note 9.

¹³A quote from a journal that focuses on issues of interest to transsexual individuals is revealing: “In these circumstances, I find a deep affinity between myself as a transsexual woman and the monster in Mary Shelley’s *Frankenstein*. Like the monster, I am too often perceived as less than fully human due to the means of my embodiment; like the monster’s as well, my exclusion from human community fuels a deep and abiding rage in me that I, like the monster, direct against the conditions in which I must struggle to exist. ... Like that creature, I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living. ... Though we forego the privilege of naturalness, we are not deterred, for we ally ourselves instead with the chaos and blackness from which Nature itself spills forth.” Lloyd, *supra* note 9 (citing Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix—Performing Transgender Rage*, GLQ: A J. OF LESBIAN & GAY STUD., 1(3): 227–54 (1994)).

¹⁴The precedent-setting case denying the request to change the birth certificate was *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (1966); see also *Kantaros v. Kantaras*, 884 So.2d 155 (Fla.2d Dist. App. 2004) (finding that marriage to a postoperative female-to-male transsexual was void).

¹⁵42 U.S.C. § 2000e-2(a); see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (ruling Title VII does not protect a transsexual employee alleging discrimination because of gender nonconforming behavior).

¹⁶The Americans with Disabilities Act and the Rehabilitation Act specifically excludes transvestism, transsexualism, and gender identity not resulting from physical impairments or other sexual behavior disorders from the defini-

tion of “disability.” 42 U.S.C. § 12211(b)(1); (Rehab. Act).

¹⁷*Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Ulane*, *supra* note 2; *Etsitty*, *supra* note 15; *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); *Grossman v. Bernards Twp. Bd. of Educ.*, 538 F.2d 319 (3d Cir. 1976).

¹⁸*Ulane*, *supra* note 2.

¹⁹667 F.2d 748 (8th Cir. 1982).

²⁰490 U.S. 228 (1989). The Court uses “sex” and “gender” interchangeably through the opinion.

²¹*Id.* at 234–35.

²²*Id.* at 251 (quoting *Sprogis v. United Air Lines Inc.* 444 F.2d 1194, 1198 (7th Cir. 1971)).

²³523 U.S. 75 (1998).

²⁴*Id.* at 79.

²⁵*Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864 (9th Cir. 2001).

²⁶*Id.*; see also *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (finding that a plaintiff may be able to prove a claim of sexual discrimination by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997) (holding Title VII does not permit an employee to be treated adversely because his or her appearance does not conform to stereotypical gender roles).

²⁷378 F.3d 566 (6th Cir. 2004).

²⁸*Id.* at 574.

²⁹401 F.3d 729 (6th Cir. 2005).

³⁰204 F.3d 1187 (9th Cir. 2000).

³¹214 F.3d 213 (1st Cir. 2000).

³²*Id.* at 215.

³³See National Center for Transgender Equality, *ENDA*, available at transequality.org/ENDA.html (last visited Nov. 13, 2009); Human Rights Campaign, *ENDA*, available at www.hrc.org/laws_and_elections/enda.asp (last visited Nov. 13, 2009). On Oct. 28, 2009, President Obama signed a hate crimes bill to protect transgendered individuals and others from hate crimes. See Ari Shapiro, *Obama Signs Hate Crimes Law*, available at www.npr.org (Oct. 28, 2009); David Stout, *Senate Approves Broadened Hate-Crime Measure*, N.Y. TIMES, available at www.nytimes.com (Oct. 23, 2009); National Center for Transgender Equality, *Hate Crimes Signed into Law*, available at www.transequality.org/hate-crimes.html (last visited Nov. 16, 2009).

³⁴States that have enacted such laws include California, Colorado, Iowa, Illinois, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, in addition to the District of Columbia, see Human Rights Campaign, *Transgender Inclusion in the Workplace, 2d Edition, A Human Rights Campaign Foundation Report*, available at www.hrc.org/workplace/transgender (last visited Nov. 15, 2009).

³⁵See *id.*