Transgender Rights in the Workplace

by Robert Baror

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From Caitlyn Jenner to North Carolina's Public Facilities Privacy and Security Act, otherwise known as the North Carolina transgender bathroom law, transgender rights have become a major issue in American life. While some are pushing for additional legal protections for transgender individuals and others are attempting to enact legislation restricting transgender rights, it is worth reviewing the current state of the law concerning transgender rights. Although the issue of transgender rights has only recently come to the fore in the broader public sphere, federal courts have been addressing this issue for years. By and large, after initial hesitation, these courts have extended federal antidiscrimination protections to transgender individuals.

The history of the courts' interpretation of Title VII of the Civil Rights Act of 1964 and gender identity began with a strict construction of Title VII, which placed transgender rights outside of the scope of employment protections afforded by federal law. The primary initial cases dealing with transgender discrimination in employment were the Ninth Circuit's *Holloway v. Arthur Andersen & Co.*[1] and the Eighth Circuit's *Sommers v. Budget Mktg. Inc.*,[2] each of which held that Title VII did not protect against discrimination based on gender identity. In the *Sommers* case, the court looked to the so-called "plain meaning" of the word "sex" and rejected that it covered gender identity, and it also pointed to the lack of legislative history indicating an intent to cover transgender discrimination.[3] These were the same factors that the Ninth Circuit had previously looked to in *Holloway*. Interestingly, since *Sommers* and *Holloway* both explored legislative history, another court recently noted that the insertion of the provision for "sex" discrimination in Title VII has been interpreted by some as "a gambit of a Southern [congressman] who sought thereby to scuttle the whole Civil Rights Act," since he apparently thought it would be a "poison pill" to the legislation.[4] Accordingly, the legislative history on the "sex" protections of Title VII appears as if it may be singularly uninformative.

The starting point for the current transgender jurisprudence is a case that was not about transgender rights at all: the 1989 U.S. Supreme Court case of *Price Waterhouse v. Hopkins*.[5] *Price Waterhouse* had to do specifically with gender stereotyping and a woman who was perceived as too masculine. In *Price Waterhouse*, the plaintiff was advised that her chances of making partner would improve if she would "walk more femininely, talk more femininely, wear makeup, have her hair styled, and wear jewelry."[6] In reviewing these facts, the Supreme Court held that this constituted discrimination on the basis of sex, as protected under Title VII because discrimination based on gender stereotypes, such as was occurring, was sex discrimination.

Unwittingly, the majority in *Price Waterhouse* opened the door to transgender claims under the theory that discrimination against a biological man identifying as a woman, or someone who had transitioned from a biological man to a woman, was discrimination on the basis of gender stereotype. Essentially, as the line of argument goes, a biological man who suffered from discrimination based on the fact that he behaved in a feminine manner, rather than in a typically masculine way, was the victim of gender stereotyping, which is actionable under Title VII as sex discrimination.

As this line of argument was put forward in the service of transgender rights, it has been adopted by numerous Circuit Courts of Appeals. For instance, in 2004, the Sixth Circuit decided the case of *Smith v. City of Salem, Ohio,* in which the plaintiff, an employee of the Salem Fire Department, sued because he was suspended and subjected to other adverse employment actions after he revealed that he would likely physically transition from a man to a woman.[7] The Sixth Circuit, in reaching its decision, explicitly referenced *Price Waterhouse* and reasoned as follows:

> After *Price Waterhouse*, 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.[8]

Similarly, the Eleventh Circuit, in the 2011 case of *Glenn v. Brumby,*[9] adjudicated a case in which the plaintiff, an employee of the Georgia General Assembly's Office of Legislative Counsel, was terminated after informing her supervisor that she would be transitioning from male to female and would begin coming to work dressed as a woman. The plaintiff was terminated because the employer claimed that "the gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue and that it would make [the plaintiff's] co-workers uncomfortable."[10] The plaintiff then sued under 42 U.S.C. § 1983, which is available to public employees, based upon the theory that discrimination on the basis of her transgender status was sex discrimination in violation of the 14th Amendment's equal protection clause.

As this was a § 1983 case, and not a Title VII case, the *Glenn* court did not look to *Price Waterhouse* initially. Instead, in reaching the conclusion that transgender rights were protected in the workplace, the court first looked to *City of Cleburne v. Cleburne Living Ctr. Inc.*, a Supreme Court opinion from 1985.[11] *Cleburne* requires the state to treat all individuals similarly situated alike or otherwise to avoid all classifications that are "arbitrary or irrational." The Eleventh Circuit then went on to identify discrimination against transgender individuals as a form of sex discrimination, based upon Title VII jurisprudence and other case law, and accordingly pronounced the level of constitutional review as being that of "heightened scrutiny."[12] Concomitant with "heightened scrutiny," courts have found that gender-based classifications are "inherently suspect" as the Supreme Court stated in *Frontierio v. Richardson*[13] And, in *Glenn*, the Court made the unequivocal pronouncement that "a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender nonconformity."[14]

Despite the success that transgender individuals have enjoyed in the federal courts, it is important to note that their victories under Title VII have been through the indirect *Price Waterhouse* gender stereotyping theory. When courts have been confronted with the argument that transgender or transsexual status is itself directly protected under Title VII, there is still resistance to this idea. For example, the Tenth Circuit in *Etsitty v. Utah Transit Auth.*, a 2007 case, was confronted with the argument that transsexuals are directly protected by Title VII because "a person's identity as a transsexual is directly connected to the sex organs she possesses, [thus] discrimination on that basis must constitute discrimination because of sex."[15] The court rejected this argument, stating that transgender is not a "sex," as "sex" is "starkly defined [by only the] categories of male and female."[16] However, despite rejecting the premise that transgender individuals are a protected category, like males or females, by virtue of being a subset of "sex," the Tenth Circuit did recognize the *Price Waterhouse* gender stereotyping path toward protection of transgender individuals. While the court did not adopt this line of reasoning, it "assume[d] without deciding, that such a claim is available."[17]

In addition to the Title VII and § 1983 jurisprudence on discrimination against transgender individuals, there have also been cases dealing with the impact of Title IX of the Educational Amendments Act of 1972 on transgender discrimination. While Title IX is often thought of as merely being about banning sex discrimination in funding for and access to educational programs, it has been interpreted to provide a private right of action for sex discrimination and retaliation in the employment context for employees of educational institutions receiving federal funds.[18] Accordingly, Title IX, which parallels Title VII, functions as an independent antidiscrimination employment statute. Therefore, Title IX cases on sex discrimination are relevant to the employment lawyer.

There have been two Title IX cases on transgender discrimination of recent vintage that are worth noting: the Western District of Pennsylvania's 2015 decision of *Johnston v. Univ. of Pittsburgh*[19] and the Fourth Circuit's *Grimm v. Gloucester Cty. Sch, Bd.* decision.[20] Both concern student access to services, but both are transferable to the employment realm. In *Johnston*, a transgender male was ultimately expelled from the University of Pittsburgh because of his insistence on using male locker rooms and bathrooms in contravention of the university's policy. Similarly, in *Grimm* a transgender high school student sought to use facilities that corresponded with his gender identity.

The *Johnston* court, in adjudicating the plaintiff's claim, looked to the *Price Waterhouse* gender stereotyping line of cases. However, rather than applying the rationale of those cases to the university's refusal to allow a plaintiff to use male facilities, the court found that "to state a cognizable claim for discrimination under a sex stereotyping claim, a plaintiff must allege that he did not conform to his harasser's vision of how a man should look, speak, and act. Sex stereotyping claims are based on behaviors, mannerisms, and appearances."[21] Based on its review of the case law, the court concluded that "use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[22] Thus, the court did not apply *Price Waterhouse* in that instance.

In contrast to the *Johnston* case, the Fourth Circuit in *Grimm* found that Title IX required that a transgender high school student be allowed to use the bathroom that corresponded to his gender identity, not his biological sex designation. However, *Grimm's* Title IX analysis revolved around deference to a Jan. 7, 2015, opinion letter from the Department of Education's Office of Civil Rights requiring schools to treat transgender students in a manner consistent with their gender identities.[23] Thus, the cross-applicability of this case to Title VII may be limited. However, in a Title IX employment case, there may be a good faith argument for applying *Grimm* in the employment realm, as an apt extension of existing law.

Regarding the specific bathroom issue, on May 2, 2016, the Equal Employment Opportunity Commission issued a "Fact Sheet Regarding Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964." This fact sheet directs employers to allow employees to use the bathroom that corresponds with their gender identities. Thus, it appears likely that the "bathroom issues" may trend toward greater protection for gender identity and away from strict binary interpretations of sex, as applied by the *Johnston* court.

Of particular note, though, on Aug. 3, 2016, the U.S. Supreme Court stayed the mandate of the Fourth Circuit in *Grimm*, pending the timely filing and disposition of a petition for a writ of certiorari. The stay means that the transgender student is not allowed to use the boys' restroom at his school. The stay also suggests that the issue of bathrooms and gender identity has captured the attention of at least four justices (the number required for the Court to take up a case on the merits). Whether the Court denies the petition for writ of certiorari or takes up the issue on the merits, its ruling will likely have broad ramifications that will resonate with Title VII interpretation as well. Therefore, it is important for practitioners to pay atten-

continued on page 51

Labor and Employment Corner *continued from page 11*

tion to the likely Supreme Court adjudication of *Grimm*, though as of yet no petition for certiorari has been granted.

In conclusion, a well-developed body of federal law on transgender rights already exists, and the broad thrust of the law over the past approximately 25 years has been toward greater protection against transgender discrimination. Employers who seek to impose restrictions on transgender employees that conflict with their gender identities or who wish to make employment decisions on the basis of an individual's transgender status will expose themselves to potential significant liability. When advising clients, the safest route to take is to recommend that they proceed as if transgender were a protected class. This is the *de facto* status that has been achieved through the *Price Waterhouse* gender stereotyping line of cases, even though transgender is not currently a specifically protected class. However, the *Grimm* case, which appears to be poised for decision by the Supreme Court, will likely have a major impact on future transgender litigation. ⊙

Endnotes

[1]*Holloway v. Arthur Andersen & Co.*, 556 F.2d 659 (9th Cir.1977).
[2]*Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir. 1982).
[3]*Id.* at 750.
[4]*Fabian v. Hospital of Cent. Conn.*, __ F. Supp. 3d __, 2016 WL 1089178, at *7 (D. Conn. Mar. 18, 2016).
[5]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[6]*Id.* at 235.
[7]*Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004).
[8]*Id. at 574.*
[9]*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
[10]*Id.* at 1314.
[11]*City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 446-47 (1985).
[12]*Glenn,* 663 F.3d at 1318-19.
[13]*Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).
[14]*Glenn,* 663 F.3d at 1320.
[15]*Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007).
[16]*Id.*
[17]*Id.* at 1224.
[18]*Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll.,* 31 F.3d 203 (4th Cir. 1994).
[19]*Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).
[20]*Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).
[21]*Johnston*, 97 F. Supp. 3d at 680.
[22]*Id*. at 681.
[23]*Grimm*, 822 F.3d at 715.

Lawful Search *continued from page 31*

overbreadth of her seizure of documents.").
[24]*United States ex rel. Cieszyski v. LifeWatch Servs. Inc.,* 2016 WL 2771798 (N.D. Ill., May 13, 2016).
[25]*Id.* at *5.
[26]*Id.*
[27]*See Walsh v. Amerisource Bergen Corp.*, No. 11-7584, 2014 WL 2738215, at *6 (E.D. Pa., June 17, 2014) (noting that courts "have focused on the reasonableness and scope of the plaintiff's disclosure in determining whether to permit counterclaims in an FCA action"); *Siebert v. Gene Sec. Network Inc.*, No. 11-CV-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (recognizing public policy preventing counterclaims based on taking documents, but declining to dismiss counterclaim in that case "because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim").
[28]*United States ex rel. Wildhirt v. AARS Forever Inc.*, No. 09 C 1215, 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013). Although the issue of dependent and independent claims is not a topic for this article, in discussing a series of Ninth Circuit cases, the court in *U.S. ex rel. Battiata v. Puchalski*, 906 F. Supp. 2d 451 (D.S.C. 2012), held that: "[i]f a defendant's counterclaim is predicated on its own liability, then its claims against the relator typically will allege that the relator … caused the defendant some damage by the act of being a relator, that is, by disclosing the defendant's fraud…. This … kind of action has the same effect of providing contribution or indemnity, with the perverse twist that the relator is not even accused of contributing to the defendant's fraud…. If such suits were allowed, they would punish innocent relators, which would be a significant deterrent to whistleblowing and would imperil the government's ability to detect, punish, and deter fraud." *Id.* at *7.
[29]*Id.* at *3.
[30]*Id.*
[31]*Id.*
[32]*Walsh v. Amerisource Bergen Corp.*, No. Civ.A 11-7584, 2014 WL 2738215, at *7 (E.D. Pa., June 17, 2014) (denying the relator's motion to dismiss counterclaim based on taking documents where the relator "fail[ed] to provide any justification in response to [the] defendants' allegation that he disclosed, to his personal attorneys, information that was protected by the attorney-client privilege").
[33]The crime fraud exception to the attorney-client privilege is not a topic for this article.
[34]*U.S. ex rel. Gaston v. Mount Sinai Hosp.*, No. 13 CIV. 4735 RMB, 2015 WL 7076092, at *5 (S.D.N.Y. Nov. 9, 2015).
[35]18 U.S.C. §§ 1833(b)(1)(A)(i)-(ii) (2016).
[36]18 U.S.C. § 1833(b)(3)(A).
[37]*U.S. ex rel. Ceas v. Chrysler Group*, Case No. 12-cv-2870 (N.D. Ill., June 10, 2016).
[38]*Id.* at *2.
[39]*Id., citing Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879-880 (N.D. Ill. 2002).
[40]*Ceas*, 2016 WL 3221125, at *2.
[41]*See X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), *aff'd*, 17 F.3d 1435 (4th Cir. 1994).
[42]*See Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969); *Furash & Co. Inc. v. McClave*, 130 F. Supp. 2d 48, 58 (D.D.C. 2001).