

The progression of transgender rights in the workplace

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The Progression of Transgender Rights in the Workplace Since 1975, Congress has considered amending Title VII to include a ban on employment discrimination based on sexual orientation. Most of the first employment discrimination cases brought by transgenders were dismissed because there is no federal law designating transgender as a protected class, or specifically requiring equal treatment for transgendered people. Until recently, Title VII's lack of legislative history and failed attempts by Congress to introduce or pass gender identity employment discrimination legislation left courts with little reason to deviate from precedent. Recent landmark cases have demonstrated that courts can successfully transcend societal prejudices and expand sex discrimination to cover discrimination against transgendered people. For the most part, gender discrimination cases arise under Title VII because it is enforceable against a vast majority of employers. In contrast, two of the cases discussed below include claims based on the Fourteenth Amendment's Equal Protection Clause which protects only against discrimination by government employers. *Smith v. City of Salem* Jimmie Smith is a transsexual, diagnosed with Gender Identity Disorder (GID)[i]; he was born a biological male, but has a female sexual identity. After being diagnosed he began expressing a more feminine appearance on a full-time basis, including while at work at the Salem Fire Department. Smith notified his immediate supervisor when co-workers began questioning his appearance and commenting that his mannerisms were not masculine enough. Smith requested the conversation be kept confidential. Against his wishes, the chief of the fire department was informed, followed by the law director of the city. During a meeting with the City's executive body on April

18, 2001, the likelihood of Smith completing a physical transformation from male to female was discussed, along with a plan to terminate his employment. The group agreed to require Smith to participate in three psychological evaluations in hopes that he would resign or refuse to comply. On April 20, legal counsel retained by Smith informed the City's executive body of the legal ramifications of proceeding with their plan. Six days later Smith was suspended for a full twenty-four hour shift based on an alleged infraction of department policy. Smith viewed the suspension as a pretext for sex discrimination and as retaliation for obtaining legal counsel and filing a complaint with the Equal Employment Opportunity Commission (EEOC). As a result of these incidents he filed suit against the City of Salem under Title VII of the Civil Rights Act of 1964.[ii] The trial court dismissed the suit on the grounds that Title VII protection is unavailable to transsexuals.[iii] On appeal, the Sixth Circuit of the Supreme Court reversed the district court ruling, noting that it relied on a series of pre-Price Waterhouse decisions.[iv] In such cases federal appellate courts regarded Title VII as barring discrimination based only on sex, not on gender. The landmark case of Price Waterhouse v. Hopkins[v], established a claim of sex stereotyping for employees who suffer adverse action for failing to conform to the stereotypical gender expectations. Based on this decision, the Sixth Circuit opinion states, After Price Waterhouse, an employer who discriminates against a woman because, for instance, they do not wear dresses or make-up, 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.[vi] The Sixth Circuit held that a self-identified transsexual can sue for sex discrimination under Title VII on the basis of discrimination due to non-stereotypical behavior and appearance and therefore, Smith's transsexual identity did not affect his well-pleaded claims of sex stereotyping and gender discrimination. The case outcome also established that successful plaintiffs no longer have to be members of a protected class; all they must show is behavior stereotypical to that class to qualify for protection as a member of that class. Less than a year later the Sixth Circuit affirmed their decision in *Barnes v. City of Cincinnati*.^[vii] The district court also dismissed Smith's claims pursuant to 42 U. S. C. § 1983 on the ground that he failed to state a claim based on the deprivation of a constitutional or federal statutory right. The Sixth Circuit found that the facts Smith alleged to support his claims of gender discrimination pursuant to Title VII easily constituted a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983. Therefore, the the district court's dismissal Smith's Equal Protection Clause claim was reversed.

Barnes v. City of Cincinnati In 1998, Phillip Barnes, a police officer with the Cincinnati Police Department (CPD) since 1981, passed a promotional test to become a sergeant. At the time he was living as a pre-operative male-to-female transsexual. While on duty Officer Barnes lived as a male but often lived off duty as a woman. Following the promotion he began a standard probationary period intended to allow superior officers to observe newly appointed sergeants to determine whether the person should remain in the position. After being subjected to a rigorous training program Barnes failed

his probationary period. Throughout the probationary period Sgt. Barnes was subject to more intense and formalized training than other sergeants.

Examples of such unequal treatment included an increased number of shifts, being required to wear a microphone and ride in a car with a video camera.

Inappropriate comments about his sexuality and sexual preferences were a common occurrence. Barnes was the only person to be put in a Sergeant

Field Training Program and the only one to fail probation between 1993 and 2000. Barnes claimed his failure of probation was due to illegal sex

discrimination based on his failure to conform to sex stereotypes and filed a complaint with the Equal Employment Opportunity Commission, followed by

a suit against the City of Cincinnati. In *Barnes v. City of Cincinnati* [viii] the jury returned a verdict in Barnes's favor in the amount of \$320, 511 and the

Southern District of Ohio court awarded \$527, 888 in attorney's fees and \$25, 837 in costs. Barnes made a prima facie case for sex discrimination

asserting the CPD violated Title VII by subjecting him to disparate treatment and by maintaining a work environment that was hostile to him because of

his sex. Price Waterhouse established Title VII prohibits discrimination

against a man because he fails to conform to the stereotypes associated

with being male. The CPD argued they demoted Barnes not because of his failure to conform to sex stereotypes, but because he failed to comply with

grooming and uniform standards and did not display the appropriate

command presence. The City appealed and in 2005 the United States Court of Appeals affirmed the judgment of the district court.[ix] *Schroer v.*

Billington Ex-Special Forces Colonel David Schroer was the dream candidate for the position of Specialist in Terrorism and International Crime with

Congressional Research Service (CRS) at the Library of Congress. However, three weeks prior to his anticipated start date, he was informed that the job offer had been rescinded. He received this news the day after a lunch meeting with the selecting official Charlotte Preece, during which he revealed that he was transgender and had made the decision to pursue sex reassignment surgery.[x] Schroer, now legally Diane, filed an administrative complaint with the Equal Employment Office of the Library of Congress, alleging sex discrimination under Title VII but was unsuccessful. Schroer then sued and after a bench trial in August 2008 the District Court for the District of Columbia found in her favor. Judge James Robertson held that discrimination on the basis of changing sex was discrimination on the basis of sex, and prohibited by Title VII of the Civil Rights Act of 1964. Although Schroer had already been diagnosed with GID, he applied for the position before he changed his legal name or began presenting as a woman. He believed if he started work at CRS as a woman it would be less disruptive and this decision prompted him to schedule the lunch meeting with Preece. Due to the classified nature of the job position Preece was concerned with Schroer's ability to get security clearance. Her perception of David Schroer as especially masculine, because of his prior Army and Special Forces background, made it difficult for her to visualize Diane Schroer as anyone other than a man in a dress. Preece admitted that she believed that others at CRS, as well as Members of Congress and their staffs, would not take Diane Schroer seriously because they, too, would view her as a man in women's clothing. Schroer's original complaint[xi] alleged only that her non-selection was the direct result of her disclosure of her gender dysphoria but

in an amended complaint[xii] asserted that she was discriminated against because when presenting herself as a woman, she did not conform to Preece's sex stereotypical notions about women's appearances and behavior. Judge Robertson concluded that Schroer was entitled to judgment based on Price Waterhouse claim for sex stereotyping and additionally she was entitled to judgment based on the language of the statute itself. Evidence established that the library revoked the job offer after learning a man named David intended to become a woman, thereby discriminating on the basis of sex. The government was ordered to pay \$183, 653 for back pay and benefits, \$300, 000 for non-pecuniary losses, and \$7, 537. 80 for past monetary losses. Schroer was awarded the maximum amount allowed, nearly \$500, 000. Glenn v. Brumby Vandiver Elizabeth Glenn, formerly known as Glenn Morrison, began working as a Legislative Editor for the Georgia General Assembly's Office of Legislative Counsel (OLC) in 2005. The same year she was diagnosed with GID and in preparation for sex reassignment surgery began living as a woman outside of the workplace. The following year Glenn informed her immediate supervisor of her intentions. Glenn's plan to undergo gender transition from male to female was relayed to Sewell Brumby, the head of the OLC. After confirming that Glenn intended to transition, Brumby immediately terminated her. Brumby believed the change would be disruptive and that co-workers may find it morally unacceptable, thereby making them uncomfortable.[xiii] Glenn filed a federal lawsuit in Georgia asserting that she was treated differently due to the nonconformity with gender stereotypes that she evidenced by her determination to live in accordance to her female gender identity.[xiv] She

filed suit pursuant to 42 U. S. C. § 1983 for violations of her rights under the Equal Protection Clause of the Fourteenth Amendment[xv] of the U. S. Constitution which requires each state to provide equal protection under the law to all people within its jurisdiction. In August 2010 the trial court granted relief to Glenn on the basis of sex discrimination and ordered that she be reinstated to her job.[xvi] However, Brumby appealed the decision and all parties agreed that for the duration of the appeal process Glenn would receive full salary and benefits in lieu of returning to work. In December 2011, the U. S. Court of Appeals for the Eleventh Circuit ruled to uphold the lower court ruling that the Georgia General Assembly discriminated against Glenn. Although Glenn chose to pursue only a remedy for the Fourteenth Amendment violation, the Eleventh Circuit still drew upon U. S. Supreme Court cases interpreting Title VII to reach its conclusion.[xvii] Whether purposely or not, the Supreme Court in Price Waterhouse provided transgender plaintiffs with a claim for relief under Title VII and had sweeping implications for transsexual employment rights. Although the case did not directly address transsexualism, it expanded on the meaning of sex under Title VII. In the time since, transgenders have successfully started bringing claims for discrimination using the Price Waterhouse sex stereotyping theory. As a result transgender discrimination issues have transcended to broader legislation such as the Equal Protection Clause. The legal status of transsexuals in the workplace is complicated and often uncertain; however the protections for transsexuals continue to multiply as litigation sets precedent for equality. Endnotes ----- [i] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-

TR), 4th ed. (2000), pp. 576-582. [ii] Civil Rights Act of 1964 § 7, 42 U. S. C. § 2000e et seq., (1964). [iii] Smith v. City of Salem, No. 4: 02CV1405, slip op. at 12 (N. D. Ohio 2004). [iv] Smith v. City of Salem, 378 F. 3d 566 (6th Cir. 2004). [v] Price Waterhouse v. Hopkins, 490 U. S. 228 (1989). [vi] Smith, 378 F. 3d 566 at 574. [vii] Barnes v. City of Cincinnati, 401 F. 3d 729 (6th Cir. March 22, 2005). [viii] Barnes v. City of Cincinnati, No. C-1-00-780, 2002 U. S. Dist. LEXIS 26207. [ix] Barnes, 401 F. 3d 729. [x] Schroer v. Billington, 577 F. Supp. 293, 2008 U. S. Dist. LEXIS 71358 (D. D. C., 2008). [xi] Schroer v. Billington, 424 F. Supp. 2d, 2006 U. S. Dist. LEXIS 14278 (D. D. C., 2006). [xii] Schroer v. Billington, 525 F. Supp. 2d 58, U. S. Dist. LEXIS 89885 (D. D. C., 2007). [xiii] Glenn v. Brumby, No. 10-14833, 10-15015, 2011 U. S. App. LEXIS 24137 (11th Cir. Ga., Dec. 6, 2011). [xiv] Glenn v. Brumby, 632 F. Supp. 2d 1308, 2009 U. S. Dist. LEXIS 54768 (N. D. Ga., June 25, 2009). [xv] 42 U. S. C. § 1983. [xvi] Glenn v. Brumby, 2010 U. S. Dist. LEXIS 66207 (N. D. Ga., July 2, 2010). [xvii] Glenn, No. 10-14833, 10-15015.