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Employers Should Be Mindful of Sex-Stereotyping Claims in Dealing With Gender Identity

CARLA J. ROZYCKI AND DAVID K. HAASE

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Courts have long been in agreement that discrimination against a transgendered person is not sex discrimination actionable under Title VII of the Civil Rights Act of 1964, as amended, because "sex" means biological male or female status, not sexuality or sexual orientation.

See, for example, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-64 (9th Cir. 1977) (rejecting the idea that "sex" as defined in Title VII could be extended to gender identification, the 9th Circuit concluded that "Congress had only the traditional notions of 'sex' in mind" and held that "[a] transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (rejecting a transgender sex discrimination claim, the 8th Circuit held that "the Court does not believe that Congress intended ... to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual. ... Plaintiff, for the purposes of Title VII, is male because she is an anatomical male."); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (finding that a post-operative transsexual was not protected by Title VII, the 7th Circuit held that "The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a

person born with a male body who believes himself to be female, or [vice versa]; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.").

In a case that did not involve a transgendered employee, the U.S. Supreme Court stated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), that in "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" (emphasis added).

But in several transgender cases that followed *Price Waterhouse*, courts distinguished that case and did not recognize sex discrimination claims brought by transgendered employees who claimed to be the victims of unlawful sexual stereotyping.

See, for example, *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994) (citing to the *Holloway* line of cases rather than *Price Waterhouse* to hold that employment discrimination



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CARLA ROZYCKI



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DAVID HAASE

based on transsexualism is not prohibited by Title VII); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (distinguishing *Price Waterhouse* on the basis that the plaintiff in that case was not a transsexual, the court held that "[i]t is unclear ... whether a transsexual is protected from sex discrimination and sexual harassment under Title VII.").

It has not been until very recently that some federal courts have held that transsexuals are protected by existing federal sex discrimination laws under the *Price Waterhouse* sexual-stereotyping analysis. For example, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the 6th Circuit ruled that a preoperative transsexual firefighter could state a claim for sex discrimination and stereotyping under Title VII. In rejecting the *Holloway* line of cases, the court held that "[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, [the plaintiff] has sufficiently pleaded claims of sex stereotyping and gender discrimination [under Title VII]." Id. at 572.

Most recently, while finding no cause of action under Title VII for discrimination against a transgendered employee, the U.S. District Court for the Northern District of Indiana held that an employee going through the process of gender transition from male to female could proceed with claims that the employee was terminated for not meeting male gender stereotypes. *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630, at *2-4 (N.D. Ind. Aug. 3, 2007). Amber Creed presented as a male when hired by Family Express as a sales associate. Over the next six months, however, Creed began to wear clear nail polish, black mascara, trimmed eyebrows and a more feminine hairstyle while wearing the required polo shirt and slacks. Creed alleges she was finally told not to present herself in a feminine manner at work. When she told her employer that she was going through the process of gender transition and refused to present herself in a more masculine way at work, she was terminated.

While concluding that the 7th Circuit holding in *Ulane* — that discrimination against transsexuals because they are transsexuals is not discrimination "because of sex" — remains controlling law, the court held a transgender plaintiff can state a "sex stereotyping" claim under *Price Waterhouse* for discrimination due to the failure to act or appear masculine or feminine enough for an employer. Id. at *3. The court emphasized that such a claim could only be successful if the plaintiff could prove that the claim arose from the employee's appearance or conduct and that the employer acted with stereotypical motivation about how

a male or female should present. Denying Family Express' motion to dismiss the sexual-stereotyping claim, the court concluded that Creed's allegations adequately supported a "plausible" claim of discrimination due to sex. Id. at *4. The court observed: "[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex." Id. at *4, quoting *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

Employers dealing with issues of gender identity need to carefully analyze their decisions to make sure they do not fall within this "sexual stereotyping" theory recently recognized by several courts. Further, employers need to check the laws of their state and local municipalities, which increasingly have added "gender identity" as well as "sexual orientation" to the protected classes of employees.

Carla J. Rozycki and David K. Haase are partners in Jenner & Block's Chicago office and co-chairs of the labor and employment practice group. Rozycki also serves as co-chair of the firm's Positive Work Environment Committee. The authors wish to thank Stephanie L. Reinhart for her assistance on this column.

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