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DISCRIMINATION

Transgender individuals face workplace discrimination at an alarmingly high rate, and there currently is no federal statute explicitly protecting against discrimination based on gender identity, gender expression, or transgender status, Outten and Golden attorneys Carmelyn P. Malalis and Sandra E. Pullman point out in this BNA Insights article.

The law has evolved over the last 35 years, however, as initially narrow interpretations of the ban on sex discrimination in Title VII of the 1964 Civil Rights Act have given way to broader readings of the law by many courts finding that discrimination based on sex is no different than discrimination based on changing one's sex. Malalis and Pullman track the changing views of federal courts, report on efforts by state legislatures to fill the void in federal law protections, and look to the proposed federal Employment Non-Discrimination Act as the possible answer to the question of employment bias protections for transgender workers.

Expanding Legal Protections for Transgender Employees

BY CARMELYN P. MALALIS AND SANDRA E. PULLMAN

Transgender¹ individuals remain some of the most vulnerable employees in today's workplace.

¹ Transgender is "an 'umbrella' term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers . . . ; intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived

Whether they are highly compensated employees, low-wage workers, or something in between, transgender employees experience various forms of employment discrimination—*e.g.*, failure to hire, disparate treat-

to be gender atypical." POLICY INST. OF THE GAY & LESBIAN TASKFORCE, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS*, 3 (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>.

ment, workplace violence, hostility, harassment, and wrongful termination—at particularly high rates. One recent study using matched-pair testing, where transgender individuals were paired with non-transgender individuals and sent to apply for the same jobs, found a 42 percent net rate of discrimination against transgender job applicants.² In nearly half the testing groups, the transgender applicant received no job offer, while a non-transgender applicant with similar or slightly inferior qualifications and interviewing skills did.³ Statistics compiled based on transgender employees' experiences are consistent with this study. In one poll, 49 percent of respondents confirmed that they had never been offered a job living openly as transgender.⁴ According to other polls in recent years, 20 percent to 57 percent of transgender respondents report having experienced employment discrimination.⁵ Such discrimination in employment has devastating financial consequences: In a number of surveys from 1999-2007, 6 percent to 60 percent of transgender persons were unemployed, and 22 percent to 64 percent of the employed population earned less than \$25,000 per year.⁶

Title VII Narrowly Construed, at First. The absence of a federal statute that explicitly protects against discrimination in the workplace based on gender identity,⁷ gender expression,⁸ or transgender status, has made it difficult for transgender employees to challenge the discrimination they experience. While Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on an individual's sex, that provision has been narrowly construed in the past to exclude transgender individuals. The first federal case to address the issue,⁹ *Holloway v. Arthur Anderson*, held that "Congress had only the traditional notions of 'sex' in mind," and therefore Title VII was intended to protect women as a class, not transgender persons.¹⁰

The U.S. Court of Appeals for the Eighth Circuit later agreed, in *Sommers v. Budget Marketing Inc.*, that the inclusion of "sex" as a protected category in Title VII was meant to create equal opportunities for women.¹¹ Observing that "Congress has not shown an intention to protect transsexuals," the court held that "discrimi-

nation based on one's transsexualism does not fall within the protective purview of the Act."¹²

Shortly thereafter, the Seventh Circuit definitively embraced this reasoning in *Ulane v. Eastern Airlines Inc.*, asserting,

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 a person born with a female body who believes herself to be male; 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.¹³

Price Waterhouse Opens the Door. Since *Ulane*, however, this historically narrow approach to Title VII has been repudiated by later decisions interpreting the statute's prohibition of sex discrimination more broadly.

In 1989, the Supreme Court opened the door to claims based on a sex stereotyping theory of discrimination in deciding *Price Waterhouse v. Hopkins*, a case involving a female accountant who was passed over for partnership at her firm because she did not match her employer's stereotype of women.

The court observed, "[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 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."¹⁴

Years later, the Ninth Circuit embraced the sex stereotyping theory and applied it in the context of the Gender Motivated Violence Act ("GMVA") in *Schwenk v. Hartford*.¹⁵ There, a transgender prisoner sued a state prison guard and several prison officials for attempted rape by the guard. Noting that Congress intended proof of gender motivation under the GMVA to mirror the analysis in Title VII, the court held that the rulings excluding transgender persons from protection under Title VII had been overruled by *Price Waterhouse*.¹⁶ Therefore, a transgender plaintiff could state a Title VII claim for discrimination based on the failure to act in accordance with sex stereotypes.¹⁷

In 2004, the Sixth Circuit followed suit in *Smith v. Salem*, finding that a transgender woman had successfully pleaded a Title VII sex discrimination claim because "[s]ex stereotyping based upon a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."¹⁸

² MAKE THE ROAD NEW YORK, TRANSGENER NEED NOT APPLY; A REPORT ON GENDER IDENTITY JOB DISCRIMINATION 4 (2010).

³ *Id.*

⁴ *Id.*

⁵ M.V. LEE BADGETT, HOLNING LAU, BRAD SEARS, & DEBORAH HO, THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION, 7 (2007), available at <http://www3.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf>.

⁶ *Id.* at 20.

⁷ Gender identity is generally defined as "a person's internal, deeply felt sense of being either male or female, or something other or in between." *Transgender Equality*, *supra* note 1.

⁸ Gender expression is generally defined as "all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions," *Transgender Equality*, *supra* note 1.

⁹ See Demoya R. Gordon, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 Cal. L. Rev. 1719, 1726 (2009).

¹⁰ 566 F.2d 659, 662-63 (9th Cir. 1977).

¹¹ 667 F.2d 748, 750 (8th Cir. 1982).

¹² *Id.*

¹³ 742 F.2d 1081, 1085 (7th Cir. 1984).

¹⁴ 490 U.S. 228, 251 (1989) (internal citations omitted).

¹⁵ 204 F.3d 1187 (9th Cir. 2000).

¹⁶ *Id.* at 1201.

¹⁷ *Id.* at 1202.

¹⁸ 378 F.3d 566, 572 (6th Cir. 2004).

In *Smith*, the plaintiff was a lieutenant with the Salem (Ohio) Fire Department who was suspended after informing her supervisor that she intended to transition from male to female. Applying a sex stereotyping theory, the court found that the plaintiff stated a claim for relief, explaining that, just as discrimination against women for not wearing dresses or makeup is discrimination on the basis of sex, “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.”¹⁹

A year later, in *Barnes v. Cincinnati*, the Sixth Circuit upheld a Title VII claim brought by a transgender police officer against the city, who alleged that she was denied a promotion because her supervisors thought she was not masculine enough.²⁰ Citing *Smith*, the court held that Barnes had made out a claim for discrimination based on her failure to conform to sex stereotypes.²¹

Over the last decade, several other courts have recognized the viability of *Smith*-like claims for sex stereotyping in the context of Title VII sex discrimination claims brought by individuals who were gender non-conforming or perceived to be so.²²

Schroer Court Takes Analysis a Step Forward. In 2008, the court in *Schroer v. Billington*²³ took the analysis of discrimination claims against transgender individuals another step forward.

The plaintiff in *Schroer* was a transgender woman who applied for a terrorism specialist position at the Library of Congress. With applicable advanced degrees, 25 years of service in the U.S. armed forces that included important command positions, and experience briefing senior government and military officials, she was more than qualified for the job. The Library of Congress offered her the job when she applied as “David,” and then rescinded the offer after she informed them that she would be transitioning from male to female.

After a bench trial involving testimony by medical experts, the court found that the plaintiff was entitled to judgment based not only on a sex stereotyping theory, but also on the plain language of the statute because “discrimination on the basis of gender identity is sex discrimination.”²⁴ The court went so far as to say that the analysis used by the courts in *Ulane*, *Holloway*, and their progeny in excluding transgender individuals from coverage under Title VII was “no longer a tenable approach to statutory construction”²⁵ and reasoned that just as “[d]iscrimination ‘because of religion’ easily encompasses discrimination because of a *change* of

religion[.]”²⁶ discrimination because of sex should also include discrimination because of a change in sex.

Though the approach of the *Schroer* court in applying Title VII more broadly is gaining favor in other courts and venues, it is still not consistently applied across different jurisdictions. In some instances, courts continue to reject Title VII claims brought by transgender individuals, reasoning that discrimination on the basis of transgender status does not violate Title VII.²⁷

Even when courts find in favor of transgender plaintiffs raising Title VII claims, the distinctions made are not always clear. For example, in *Glenn v. Brumby*, the plaintiff was found to have made out a prima facie case of discrimination by alleging that her employer had fired her because her “desire to present as a woman at work did not comport with Brumby’s stereotype of how a biological male should dress or behave.”²⁸ The court distinguished this sex stereotyping from discrimination based on the plaintiff’s decision to undergo a gender transition, which would not have been considered sex discrimination. The court observed, “While transsexuals are not members of a protected class based on sex, those who do not conform to gender stereotypes are members of a protected class based on sex.”²⁹ Since transgender individuals’ gender identity and gender expression often do not conform with societal expectations and stereotypes associated with the gender assigned to them at birth, it is difficult to imagine a transgender plaintiff not being a member of a protected class based on sex.

State and Local Statutes. In order to completely bypass this arbitrary line-drawing that sometimes takes place when transgender employees raise Title VII claims, many transgender rights advocates choose to litigate under state and local statutes when such statutes explicitly including gender identity and gender expression are available. The first statute prohibiting discrimination against transgender persons was passed in Minneapolis, in 1975.³⁰ To date, fifteen states and the District of Columbia have laws that explicitly prohibit discrimination based on gender identity,³¹ while at least 139 localities have such laws.³²

²⁶ *Id.*

²⁷ See, e.g., *Creed v. Family Exp. Corp.*, No. 3:06-CV-465RM (N.D. Ind. Jan. 5, 2009) (“Title VII’s prohibition on sex discrimination doesn’t extend so far” as to cover discrimination on the basis of transgender status); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K (S.D. Ind. 2003) (holding that the plaintiff’s “intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex.”).

²⁸ 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010).

²⁹ *Id.* at 1300.

³⁰ Marvin Dunson, *Sex, Gender, and Transgender, The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. OF EMP. & LAB. L. 465, 8 (2001).

³¹ HUMAN RIGHTS CAMPAIGN, *Statewide Laws and Policies* (July 11, 2011). http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf; NATIONAL GAY AND LESBIAN TASK FORCE, *State Nondiscrimination Laws in the U.S.*, http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_11_color.pdf, (June 14, 2011).

³² HUMAN RIGHTS CAMPAIGN, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, <http://www.hrc.org/issues/workplace/gender-identity-city-county-laws.htm> (June 21, 2011).

¹⁹ *Id.* at 574.

²⁰ 401 F.3d 729 (6th Cir. 2005).

²¹ *Id.* at 737.

²² See, e.g., *Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir. 1999); *Doe v. Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001 (1998); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S (W.D.N.Y. Sept. 30, 2004); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC) (W.D.N.Y. Sept. 26, 2003).

²³ 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

²⁴ *Id.* at 306.

²⁵ *Id.* at 307.

Additionally, some states have adopted the expansive reading of “sex” in their anti-discrimination statutes, mirroring *Schroer’s* reading of federal law.

In New York, for example, as in Florida and Massachusetts,³³ the state statute lacks explicit coverage for discrimination on the basis of gender identity, yet it has been interpreted broadly to include transgender persons as a protected group.

New York courts first expanded that state’s anti-discrimination law to transgender individuals in a case brought by the transgender tennis star, Renee Richards, in 1977.³⁴ Richards began her tennis career as a biological male, successfully competing in all-male tournaments as Richard Raskind. After she transitioned at the age of 41, she started competing on the women’s circuit. However, when she tried to qualify for the U.S. Open, the U.S. Tennis Association, the U.S. Open Committee, and the Women’s Tennis Association barred her entry, requiring her to take a chromosome test to prove she was a “normal female” in order to participate.³⁵

In strong language, the court found this to be a violation of the state anti-discrimination law, noting that such discrimination “not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic State and threatens the peace, order health, safety and general welfare of the State and its inhabitants.”³⁶

Later courts relied on this ruling to confirm that the state anti-discrimination law covers transgender individuals, though the legislature has not yet amended its definition of “sex” explicitly to do so.³⁷

While the Gender Expression Non-Discrimination Act has not yet been enacted to explicitly bar discrimination based on gender identity or expression in New York State, New York City amended its City Human Rights Law in 2002 by re-defining “gender.” The amendment defined gender to include not only actual or perceived sex, but also “a person’s gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.”³⁸

In 2001, a New Jersey state court held that the law prohibiting discrimination on the basis of sex includes protection for transgender plaintiffs.³⁹ In *Enriquez v. West Jersey Health Systems*, the plaintiff transitioned from male to female while working as a medical director. Soon after, her employer refused to renew her contract and cancelled all her patients because she would not continue to present as a male.⁴⁰ The court found that the New Jersey anti-discrimination statute covered transgender plaintiffs, observing, “It is incomprehensible to us that our Legislature would ban discrimina-

tion against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder.”⁴¹ Five years later, the New Jersey legislature enacted legislation to explicitly include gender identity and expression in its Law Against Discrimination, to further protect transgender and gender nonconforming employees.⁴² In the past five years, no transgender plaintiffs have litigated a discrimination case under the state statute to a final verdict, though some presumably have settled.⁴³

In one recently filed case, *Devoureau v. Camden Treatment Associates*, a transgender man brought suit under New Jersey Law Against Discrimination after he was fired from a male-only job when his employer learned that he was transgender.⁴⁴

Though these types of state and local statutes provide some degree of explicit protection for transgender employees, only 37 percent of the U.S. population is explicitly protected from discrimination based on gender identity or expression.⁴⁵ And even those state and local statutes with explicit protections for transgender employees may fall short of providing the broad relief envisioned by Title VII.

For example, the New York State Human Rights Law does not provide attorneys’ fees, which may make it difficult for transgender employees to obtain counsel. And the New York City Human Rights Law has its limits with regard to public employees. In *Jattan v. Queens Coll. of City Univ. of New York*, the court dismissed the plaintiff’s City Human Rights claim against Queens College, an instrumentality of New York State, holding that “the City of New York does not have the power to waive the State’s sovereign immunity.”⁴⁶

With these and other limitations, advocates for transgender rights are eager to see Congress pass the Employment Non-Discrimination Act (“ENDA”), the federal bill that would provide many of the same protections as Title VII and prohibit discrimination in employment on the basis of sexual orientation and gender identity. With the number of states and localities including protections for gender identity and expression continuing to grow, strong support from the business community,⁴⁷ and lobbying efforts by management and

⁴¹ *Id.* at 515.

⁴² N.J.S.A. § 10:5-5.

⁴³ Richard Pérez-Peña, *A Lawsuit’s Unusual Question: What is a Man?*, N.Y. TIMES, April 10, 2011, at A18.

⁴⁴ *Devoureau v. Camden Treatment Assocs.* (N.J. Super. Ct. Apr. 29, 2011), complaint available at http://www.transgenderlegal.org/media/uploads/doc_386.pdf.

⁴⁵ NATIONAL CENTER FOR TRANSGENDER EQUALITY, *Discrimination*, <http://transequality.org/Issues/discrimination.html> (2011).

⁴⁶ 883 N.Y.S.2d 110 (N.Y. App. Div. 2009).

⁴⁷ A growing list of Fortune 500 companies, including Coca-Cola, Bank of America, and Best Buy, support passage of ENDA. See HUMAN RIGHTS CAMPAIGN, *Business Coalition for Workplace Fairness, Members*, http://www.hrc.org/issues/business_coalition_workplace_fairness.htm (last viewed Aug. 5, 2011). As of March 2011, 229 (46 percent) of Fortune 500 companies had policies that include gender identity. See Hu-

³³ HUMAN RIGHTS CAMPAIGN, *supra* note 31.

³⁴ *Richards v. United States Tennis Assn.*, 93 Misc.2d 713 (N.Y. Sup. Ct. 1977).

³⁵ *Id.* at 716.

³⁶ *Id.* at 722.

³⁷ *Buffong v. Castle on Hudson*, 824 N.Y.S.2d 752 (N.Y. Sup. Ct. 2005); see also *Rentos v. Oce-Office Systems*, No. 95 CIV. 7908 LAP (S.D.N.Y. Dec. 24, 1996); *Maffei v. Kolaeton Indus., Inc.*, 164 Misc.2d 547 (N.Y. Sup. Ct. 1995).

³⁸ N.Y.C. Admin. Code § 8-502.

³⁹ *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 516 (N.J. Super. Ct. App. Div. 2001).

⁴⁰ *Id.* at 507.

plaintiff-side employment lawyers,⁴⁸ advocates are hop-

MAN RIGHTS CAMPAIGN, *Employment Non-Discrimination Act*, http://www.hrc.org/laws_and_elections/enda.asp (last viewed Aug. 5, 2011).

⁴⁸ See, e.g. The Labor and Employment Law Committee, The Committee on Sex and Law, and The Lesbian, Gay, Bisexual and Transgender Rights Committee of the New York

ing to see ENDA enacted in the near future to finally and definitively provide transgender and other gender nonconforming individuals with appropriate workplace protections.

City Bar, *The Employment Non-Discrimination Act* (April 2011), <http://www.nycbar.org/pdf/report/uploads/20072091-TheEmploymentNon-DiscriminationAct.pdf>.

