

APPENDIX E

EMPLOYMENT DISCRIMINATION AND THE TRANSSEXUAL

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EMPLOYMENT DISCRIMINATION AND THE TRANSSEXUAL¹

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Transsexuals² who lose their jobs because of their medical condition have fared poorly in seeking relief through the courts. With a few exceptions, a transsexual who is fired for having Gender Identity Disorder and following a recognized course of medical treatment³, will not be able

¹This paper is dedicated to the three transsexuals the author has known who have taken their own lives in the past year. May they find the peace they could not find in life.

² For purposes of this paper a transsexual will be defined as a person who has Gender Identity Disorder which is a "persistent discomfort about one's assigned sex or a sense of belonging to the other sex . . . [and] . . . a desire to be . . . of the other sex", as defined by The American Psychiatric Assn Diagnostic and Statistical Manual of Mental Disorders § 302.3 , 4th ed. 1994.

A recent case explained transsexualism in this manner, "Medically, the term is generally considered to be a condition where physiologically normal individuals experience discontent being of the sex to which they were born and have a compelling desire to live as persons of the opposite sex. The discomfort is usually accompanied by a desire to utilize hormonal, surgical and civil procedures to live the sex role opposite to which they were born. They are thus persons whose anatomic sex at birth differs from their psychological sexual identity. A transsexual is not homosexual in the true sense as the latter seek sexual gratification from members of their own sex as members of that sex, whereas transsexuals' erotic attractions are generally with persons of their own anatomic sex, but viewing themselves as members of the opposite desired sex. Not to be confused with transsexuals are transvestites, who are persons content with their own sex and are heterosexual, but who dress as members of the opposite sex for sexual arousal [See, Spelling "Relief" for Transsexuals, 4 Yale Law & Policy Review 125 (1985); The Law of Transsexualism, 4 Conn. L.R. 288 (1975); Transsexuals in Limbo, 31 Maryland L.R. 236 (1971)]. Maffei v. Kolaeton Industry, Inc., Nos. 124783/94, 95-178, 1995 WL 168807, at *3 (N.Y.Sup. March 14, 1995)

³ see Standards of Care, Harry Benjamin International Gender Dysphoria Association, Inc., Revised draft 1/90, "§4.9.1 Standard 9. Genital sex reassignment shall be preceded by a period of at least 12 months during which time the patient lives full-time in the social role of the genetically other sex."

The vast majority of litigation in the area of transsexual employment discrimination occurs when a pre-operative transsexual starts to live in the social role of a female and

to win back his job by

seeking relief under federal or state statutes. This paper will look at the case histories under various legal theories both federal and state, critique the analysis and interpretation used by the courts in applying those statutes, and offer possible short and long term strategies for protecting the right of a transsexual to follow a recognized medical treatment and remain employed.⁴

FEDERAL LAWS

Equal Protection

Claims for equal protection⁵ for transsexuals are difficult to uphold because the courts generally use a rational basis analysis⁶. In order for a court to apply a strict scrutiny analysis it would have to find that transsexuals are a suspect class and that transsexuals have an immutable characteristic that is an "accident of birth⁷."

goes to work in that social role. A pre-operative transsexual is a transsexual who has not yet had the Sex Reassignment Surgery (SRS); a post-operative transsexual is a transsexual who has had SRS.

⁴ For a transsexual the importance of being able to remain employed has been recognized as one of the most difficult of the problems he faces in resolving his gender dysphoria. ". . . the reason we have chosen the title 'Law and Employment Policy' is because employment is one of the biggest problems that our community, the transgendered community, does have." Phyllis Frye, Friday Luncheon Speech, Proceedings of the First International Conference on Transgender Law and Employment Policy page 27, (1992).

⁵ A claim for equal protection would be based on transsexuals, as a group, being treated differently from similarly situated groups.

⁶ In analyzing a statute to see if it violates the Equal Protection Clause of the Constitution the Court will look at the classification created and see if the individuals who are similarly situated will be treated similarly. It will apply a "mere rationality" test if the classification is not one of the limited "suspect" classes.

⁷Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973).

Holloway v. Arthur Anderson and Company⁸, was the first time a federal appeals court heard an argument for equal protection for transsexuals. Holloway argued that if Congress had chosen to expressly exclude transsexuals from the coverage of Title VII that there would be a violation of equal protection. The court held that they could not "conclude that transsexuals are a suspect class," because transsexuals are, "not necessarily a 'discrete and insular minority'." Nor, "has it been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth' like race or national origin."⁹ Based on that conclusion the court held that they only needed to apply a rational basis analysis to the exclusion of transsexuals from Title VII. Then the court went on to apply the rational basis analysis to Title VII holding that "it can be said without question that the prohibition of employment discrimination between males and females . . . is rationally related to a legitimate governmental interest."¹⁰ The court never did analyze what the legitimate governmental interest in excluding transsexuals from the term sex in Title VII's prohibitions was. The court did indicate in dicta that "transsexuals claiming discrimination because of their [genetic] sex, male or female, would clearly state a cause of action under Title VII"¹¹.

In Doe v. United States Postal Service¹², the court denied a motion by the USPS to dismiss for failure to state a claim where Doe had alleged, among other claims, that the Postal Service had violated her equal protection right to employment with the federal government. Doe was a pre-operative transsexual (male to female) who claimed that the USPS denied her a promised job when

⁸ 566 F2d 659 (9th Cir. 1977)

⁹ Holloway at 663.

¹⁰ Holloway, at 663-64.

¹¹ Holloway, at 664.

¹² No. CIV.A.84-3296, 1985 WL 9446 (D.D.C. June 12,1985).

she informed the USPS of her intention to undergo Sex Reassignment Surgery. Doe was offered a temporary (six months) Senior Clerk Typist position. She was interviewed and presented herself as a male, which she was at that time.¹³ After Doe learned that the USPS would withdraw their offer of employment she offered to serve the entire employment term as a male and the USPS refused to reinstate the offer, based solely on their opposition to her intention, after her employment was up, to undergo SRS. On the issue of whether Doe had alleged that the USPS had violated her equal protection right to a job with the federal government the USPS asserted that "it is rationally related to a legitimate governmental interest for 'an employer to treat a transsexual in the manner the Postal Service did here.'¹⁴" But the court found that "No government interest has been identified . . . and this issue is properly a question to be decided."¹⁵

Sex, More Than Chromosomes

Transsexuals have often argued that they should be included in the term sex in the remedial employment discrimination statutes that prohibit discrimination based on sex. Their argument has been that what most people consider a rather simple determination, what sex are you, is actually very complicated and should be determined by more than chromosomal factors¹⁶. The courts have not been persuaded by this argument.

¹³ Doe had Sex Reassignment Surgery about six months after the events in question.

¹⁴ Doe at *4.

¹⁵ Doe at *4.

¹⁶ "experts now generally agree that there are at least seven variables that interact to determine the ultimate sex of an individual, to wit: 1) Chromosomes (XX female, XY male; 2) Gonads (ovaries or testes); 3) Hormonal secretions (androgens for males or estrogens for females); 4) Internal reproductive organs (uterus or prostate); 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self identity. [See, Note, 80 Northwestern L.R. 1037 (quoting from N. Benjamin, *The Transsexual Phenomenon*, p. 14 [1966]. *Maffei v. Kolaeton*, Nos. 124783/94, 95-178, 1995 WL 168807, at *3 (N.Y.Sup. March 14, 1995).

A good example of the way courts have treated the "sex is more than chromosomes" argument is found in Ulane v. Eastern Airlines, Inc.¹⁷ Karen Ulane was¹⁸ a pilot for Eastern Airlines who was hired as a male in 1968. She worked for the airline until 1980. In 1980 she took a leave of absence from her job, underwent sex reassignment surgery, then reported back to work. Eastern fired her shortly after she went back to work. The court in Ulane refused to understand that sex is more than chromosomes and wrote that "if the term 'sex' as it is used in Title VII is to mean more than biological male or female, the new definition must come from Congress¹⁹." The court was unpersuaded by the lower court opinion of Judge Grady²⁰ that formed the basis for the appeal in Ulane.

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. . . . After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex.²¹

The appeals court refused to approve the lower courts finding that sex could be defined by the scientific community, "We do not believe that the interpretation of the word 'sex' as used in the statute [Title VII] is a mere matter of expert testimony or the credibility of witnesses produced in court²²."

A different approach was used by a transsexual who brought a Title VII action in Sommers v. Budget Marketing, Inc.²³ Sommers' alleged that she had been

¹⁷ 742 F.2d 1081 (7th Cir. 1984).

¹⁸ Karen Ulane died in crash of a DC-3 in late 1989.

¹⁹ Ulane at 1087.

²⁰ Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill. 1984).

²¹ Ulane v. Eastern Airlines, Inc., 581 F.Supp. 821, 823 (N.D. Ill. 1984).

²² Ulane, 742 F.2d 1081, 1087 (7th Cir. 1984).

discriminated against because of her status as a female with the anatomical body of a male and that the fact that she had not yet had sexual conversion surgery should not prevent her from being classified as female. Budget moved for dismissal on the grounds that Title VII does not cover transsexuals and the court treated Budget's request as a summary judgment request. Budget claimed that they dismissed Sommers because she misrepresented herself as an anatomical female on her job application. Budget further alleged that the misrepresentation led to a disruption of the company's work routine in that a number of female employees said they would quit if Sommers were allowed to use female restroom facilities²⁴.

The court dismissed Sommers claim under Title VII and held that "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in the absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."

However, it is interesting that the court was troubled by Sommers' dilemma:

We are not unmindful of the problems Sommers faces. On the other hand, Budget faces a problem in protecting the privacy interests of it's female employees. According to affidavits submitted to the district court, even medical experts disagree as to whether Sommers is properly classified as male or female. The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers' own use?

Perhaps some reasonable accommodation could be worked out between the

²³ 667 F.2d 748 (8th Cir. 1982).

²⁴ Which bathroom a pre-operative transsexual is to use is one of the most often cited problems facing an employer. If the transsexual uses the bathrooms assigned to her new sex individuals using that bathroom may feel a sense of unease because they still think of her as being he. Yet if the transsexual uses the bathroom of her chromosomal sex she may face harassment or worse from individuals who have an illogical hatred of anyone who is different.

parties.²⁵

The problem with the courts' analysis in "sex is more than chromosomes" cases are that the courts are applying too narrow a construction to the interpretation of a remedial statute. An analogy may be helpful to illustrate to the courts why transsexuals should be covered in the term "sex" in Title VII. If a non-sabbatarian changes his religion to become a sabbatarian²⁶ and is fired for making that change the courts have not had any trouble finding that he was discriminated against on the basis of religious discrimination.²⁷ In the sabbatarian cases the courts have not focused on the question of whether or not Title VII was passed to protect a particular religion, no matter how radical or on the fringe it might be, but have focused on the general protection for religion. The courts should not focus on whether or not the change is specifically protected, but on whether the category is protected. There is much more to sex than xx or xy chromosomes.

Since 1977, when the court decided Holloway, there have been some studies from the scientific community that suggest transsexualism may have some of its roots in genetics²⁸. As our understanding of the concept of sex is broadened by the scientific

²⁵ Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982).

²⁶ A sabbatarian is "one who observes the seventh day of the week, Saturday, as the Sabbath." Webster's Encyclopedic Unabridged Dictionary of the English Language, First Edition 1989.

²⁷ Cummins v. Parker Seal Co., 516 F.2d 544, U.S. Ct. of Appeals 6th Cir (1975). Blalock v. Metal Trades, Inc., 775 F.2d 703, U.S. Ct. of Appeals 6th Cir. (1985). Mann v. Milgram Food Stores, 730 F.2d 1186, U.S. Ct. of Appeals 8th Cir. (1984).

²⁸ Kim E. Stuart, J.D., The Uninvited Dilemma: A Question of Gender, 146 -147 (1991), quoting research done by a West German, Wolf Eicher, PH.D., on the reversed responses of a group of male to female and female to male transsexuals to HY antigens which are normally found in the chromosomal male cellular structure. Normal genetic males are HY

community we need to apply that broader understanding to the coverage of sex in remedial statutes like Title VII. Most of the cases dealing with transsexuals and Title VII have been decided by summary judgment against the transsexual with the courts making rather conclusory statements that, since there is no legislative history to support Congress' intent to have the term sex cover transsexuals, therefore transsexuals are not covered under Title VII. What the courts should instead be doing is allowing the case to go to trial to decide if the underlying discrimination is based on sex, as sex is now understood, or is for another reason.

There is one recent case²⁹ where a transsexual's Title VII claim was able to withstand a motion to dismiss. Barbara James was a pre-operative transsexual who was discharged from Ranch Mart Hardware, Inc. for being an anatomical male working and dressing as a woman. Ranch Mart asked for a judgment on the pleadings, or in the alternative, a motion to dismiss. The court held that, "Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII."³⁰ The court also held that James "cannot state an actionable claim under Title VII for discrimination based upon her sex as a female. . . . [because] Congress did not intend to ignore anatomical classification and determine a person's sex according to the psychological makeup of that

positive and normal genetic females are HY negative. Dr. Eicher's study found that male to female transsexuals were HY negative and female to male transsexuals were positive the exact opposite of the predicted results.

²⁹ James v. Ranch Mart Hardware, Inc., No. 94-2235-KHV, 1994 WL 731517 (D. Kan. December 23, 1994).

³⁰ James at *1.

individual.³¹ But James made a unique claim. She alleged that "even though defendant terminated her (a male, working and living as a female), it would not have terminated one of its female employees, living and working as a male."³² On this claim the court denied Ranch Mart's motion to dismiss and went on to say, "Whether plaintiff can prove this allegation remains to be seen."³³ As it turned out James was unable to bear the burden of proof in her claim³⁴.

Transsexualism as a Disability

Since transsexualism is a medical condition that has a recognized course of treatment and since transsexuals were being terminated, or not hired, because of their medical condition it seems logical that transsexualism could be construed as a handicap and come under the protection of the remedial statutes that protect handicapped individuals. The lone bright star in federal statutes for transsexuals seeking relief for employment discrimination under the disability laws was the Rehabilitation Act of 1973, however that relief was short lived.

One case that found in favor of a transsexual as a handicapped person was Doe v. United States Postal Service³⁵. This is the same case that was discussed under the equal protection analysis. Doe advanced several different claims, among

³¹ Id. at *1 and quoting Sommers v. Budget Marketing, Inc., 667 F. 2d 748, 749 [27 FEP Cases 1217] (8th Cir. 1982)

³² Id. at *1.

³³ Id. at *1.

³⁴ James v. Ranch Mart, Inc., No. 94-2235-KHV, 1995 WL 148366, (D. Kan. Feb. 22, 1995)

³⁵ No. CIV.A..84-3296, 1985 WL 9446 (D.D.C. June 12, 1985).

them was a claim that as a transsexual she was handicapped and was covered by the Rehabilitation Act of 1973. The court upheld the handicap claim, of Doe, against a motion by the USPS to dismiss for failure to state a claim upon which relief could be granted. The court found that, "the language of the Rehabilitation Act and of the accompanying regulations is broadly drafted, indicating a legislative intent not to limit the Act's coverage to traditionally recognized handicaps."³⁶ The USPS counter argument was that since a transsexual's condition may be alleviated by hormones and gender reassignment surgery the impairment was short-term and therefore not covered by the Act. However the court said that "the mere fact that treatment may be available does not automatically remove an afflicted individual from the scope of this statute."³⁷ In 1992 Congress amended the Rehabilitation Act to exclude transsexuals³⁸. To understand the reasons for the exclusion of transsexuals it is necessary to look at the legislative history of the American's With Disabilities Act of 1990.

In 1990 Congress passed the American's with Disabilities Act (ADA). The ADA contains an explicit section³⁹ stating that transsexualism and gender identity disorders

³⁶ Doe v. United States Postal Service, No. 84-3296, at *2 (D.D.C. June 12, 1985).

³⁷ Id. at *2

³⁸ "(F) For the purposes of sections 501, 503, and 504, the term 'individual with a disability' does not include an individual on the basis of-

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;"; Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4349 (1992).

³⁹ § 511 Definitions (b) Certain conditions

Under this Act, the term "disability" shall not include-

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical

are not, without a physical causation, considered disabilities. This section was put in at the request of Senator Jesse Helms.⁴⁰ The exclusion clause adopted into the

impairments, or other sexual behavior disorders;

⁴⁰ On Thursday September 7, 1989 the Senate was considering the ADA and the following dialogue took place;

Mr. HELMS.

Mr. President, for the record, I wish to ask the distinguished manager a few questions about this bill, the Americans With Disabilities Act of 1989.

In the bill, the definition of "individuals with disabilities" includes anyone with a physical or mental impairment limiting one of life's major activities, and anyone regarded as having such an impairment.

The report lists many mental and physical disorders and therefore it must have been the intent of S. 933's authors that it be an all-encompassing bill; is that correct?

Mr. HARKIN.

Well, the Senator's question was, Did we intend for the bill to be all- encompassing?

Mr. HELMS.

Yes.

Mr. HARKIN.

Within the definition the Senator just read, that is correct.

Mr. HELMS.

I thought the Senator would say that, so I will be specific. Does the list of disabilities include pedophiles?

Mr. HARKIN.

What?

Mr. HELMS.

P-e-d-o-p-h-i-l-e-s?

Mr. HARKIN.

I can assure the Senator no.

Mr. HELMS.

How about schizophrenics?

Mr. HARKIN.

Schizophrenics, yes.

.....
Mr. HELMS.

Homosexuals?

Mr. HARKIN.

No; absolutely not.

Mr. HELMS.

The Senator is certain about that?

Mr. HARKIN.

I am absolutely certain.

Mr. HELMS.

Transvestites?

Rehabilitation Act is identical to the clause in the ADA.

There has never been a case that has challenged the constitutionality of the exclusion clause but there should be. An equal protection challenge to the exclusion clause could be made because no rational basis has ever been advanced by Congress for the exclusion.

Recall that the court upheld in Doe v. United States Postal Service⁴¹ the equal protection argument made by Doe. Recall also that the USPS advanced no rational argument for denying Doe employment other than that she was a transsexual. The assertion by Senator Helms that the ADA would cover a transsexual is correct, but in amending the ADA to exclude transsexuals no reason was given for doing so. Since transsexuals are not a suspect class any statute discriminating against them must be analyzed under a rational basis test and only if the classification is "purely arbitrary"⁴²

Mr. HARKIN.

Absolutely not.

Mr. HELMS.

People who are HIV positive or who have active AIDS disease?

Mr. HARKIN.

Just a moment, I may have misspoken.

Let us back up to transvestite. I said no, but I am told by staff that one court at one time held that a transvestite was mentally impaired, and I further understand the Senator from North Carolina added an amendment to the fair housing amendments last year that took care of that, and it was accepted.

Mr. HELMS.

Where does that leave us with respect to this bill?

Mr. HARKIN.

I do not know. Just a minute.

If the Senator would like to offer an amendment, we will accept it. If can I ask the Senator, if it could be drafted the same way you did last year on the Fair Housing Act. 135 Cong.Rec. S10765-01 (1989)

⁴¹ No. CIV.A..84-3296, 1985 WL 9446 (D.D.C. June 12, 1985).

⁴² Lindsay v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337 (1911).

will the law be overturned. If you look at the legislative history for the transsexual exclusion clause in the ADA there was no rational reasoning offered for excluding transsexuals. There was simply an assertion by Senator Helms that they would be covered under the wording of the ADA and a promise to exclude them if Senator Helms would draw up the amendment. In some cases the Court has held that an irrational prejudice against a class of individuals was not a legitimate exercise of legislative power.⁴³ If the Court were to analyze the ADA and the Rehabilitation transsexual exclusion clauses it would find no reasoning in the legislative history to support the exclusion clauses. There is no record of a Congressional hearing on why transsexuals should be excluded from coverage as disabled individuals yet courts that have reached the issue of whether transsexuals are disabled have concluded that they are.

It may be argued that transsexuals should be excluded because employers should not have to accept employees whose presence might disrupt the workplace but that concern can be easily taken care of. Employers need only make a reasonable accommodation; a concept that is well defined by the handicap antidiscrimination statutes and the case law decided under those statutes. On the other hand it may be argued that transsexualism is a perversion like the other categories it is listed with in the exclusion clause. But of the disorders listed in the exclusion clause only transsexualism is a disorder that, by its very nature, leads to a recognized course of medical treatment. A transvestite may be a transvestite and not seek medical treatment.

⁴³ "[R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 451, 105 S.Ct. 3249, 3260 (1985) Cleburne was a case where the court unanimously invalidated a zoning ordinance requiring a mentally retarded group home to obtain a permit but placed no such restriction on individuals who were not retarded.

A transsexual, by definition, will seek medical treatment to alleviate her condition. It seems disingenuous to include transsexuals in a grouping of disorders that normally do not seek medical treatment. Can there be any logical reason for inclusion of transsexuals in such a group?

A possible argument for a rational basis for not considering transsexuals as disabled is the stigmatizing effect that being declared "disabled" may have on the group. This benign argument may seem appealing. It ostensibly takes in to account the feelings of transsexuals and claims to have the transsexual's best interests at heart. The same logic has been advanced regarding the issue of affirmative action. Those who are the beneficiaries of affirmative action will actually be hurt by it because they will be singled out for special treatment and those not getting the special treatment will think that they couldn't actually meet the job requirements without help. The issue of whether the transsexual exclusion clause is constitutional could be decided either way. Local government laws have given transsexuals little more protection.

LOCAL LAWS

State Non-Discrimination Laws

Some cases dealing with state non-discrimination laws have found against the transsexual. In Sommers v. Iowa Civil Rights Commission⁴⁴, the Iowa Supreme Court upheld an Iowa Civil Rights Commission's interpretation of the Iowa Civil Rights Act statute⁴⁵, prohibiting discharge of an employee because of that employee's sex or

⁴⁴ 337 N.W. 2d 470 (Iowa 1983).

⁴⁵ Iowa Code § 601A.6 (1981).

disability, because the statute did not prevent discrimination against transsexuals⁴⁶.

The court was not persuaded by Sommers' argument that sex should include transsexuals or that transsexualism was an impairment that substantially limited her ability to work. In ruling on Sommers' disability claim the court concluded that "transsexualism is more likely to have an adverse effect because of attitudes of others toward the condition⁴⁷" than the condition itself limiting her ability to work. This is the same plaintiff involved in Sommers v. Budget Marketing, Inc.⁴⁸ There have been other local cases that have found for the transsexual's disability claim.

In Underwood v. Archer Management Services, Inc.⁴⁹, the court held that a post-operative transsexual employee, who alleged she was dismissed because her employer felt that she retained some masculine traits, stated a claim of personal appearance discrimination under the D.C. Human Rights Act⁵⁰. However, the court dismissed Sommers claims of discrimination on the basis of sex and sexual orientation. The court said, in ruling on Sommers claim for sex discrimination, that federal cases interpreting Title VII were to be used as authority in interpreting the D.C. statute⁵¹.

In dismissing the sexual orientation discrimination claim, the court noted that

⁴⁶ "We hold that in the context of employment transsexualism is not a disability . . . " Sommers, 337 N.W. 2d 470, 474 (Iowa 1983).

⁴⁷ Sommers at 476

⁴⁸ 667 F.2d 748 (8th Cir. 1983).

⁴⁹ 857 F.Supp. 96 (D.C. Cir. 1994).

⁵⁰ D.C. Code Ann. § 1-2512(a) (1992 & Supp. 1993).

⁵¹ "From time to time in the course of this opinionm, therefore, we shall cite as authority federal cases arising under the federal act in interpreting similar provisions of the DCHRA." Underwood at 98.

"the DCHRA defines 'sexual orientation' to mean 'male or female homosexuality, heterosexuality and bisexuality, by preference or practice.'⁵²" The court went on to state, "courts have firmly distinguished transsexuality from homosexuality."⁵³

State Disability Laws

A recent Washington state supreme court case, Doe v. Boeing⁵⁴, held that while transsexualism is an abnormal condition the particular plaintiff was not handicapped under the applicable Washington statute because she was not discharged because of her condition. Doe, a pre-operative male to female transsexual, alleged that she was handicapped under Washington's Law Against Discrimination⁵⁵ because she was gender dysphoric and that Boeing failed to reasonably accommodate her handicap. Boeing defended the action saying that Doe was not handicapped under Washington law and that Boeing had reasonably accommodated her by allowing her to dress in unisex clothing. Boeing claimed that the real reason Doe was fired was because she violated Boeing's directives not to appear excessively feminine at work until after her sex reassignment surgery.

The court held there must be findings of fact on two elements before it can be determined if a person is handicapped under Washington's Law Against Discrimination, "both the presence of a handicapping condition and evidence that this

⁵² Underwood at 98.

⁵³ Underwood at 98.

⁵⁴ 846 P.2d 531 (Wash. 1993).

⁵⁵ Wash. Rev. Code §§ 49.60.010 - 49.60.320(1992); Wash. Admin. Code § 162-22 (1992) (handicapped persons).

condition was the reason for the discharge.⁵⁶ In ruling on the first element, the court held that though Doe's gender dysphoria was an abnormal condition there was no evidence that Doe had been discharged because she was a transsexual. The court concluded that Doe had been discharged because she had failed to comply with Boeing's dress code policy on pre-operative transsexuals⁵⁷. Therefore since Doe did not meet the second element the court held that "Doe is not handicapped for the purposes of pursuing an unfair practice claim under RCW 49.60.180.⁵⁸"

In ruling on the Doe case the Washington Supreme Court held that "the scope of an employer's duty to accommodate an employee's condition is limited to those steps reasonably necessary to enable the employee to perform his or her job."⁵⁹ Since Boeing allowed Doe to dress in unisex clothing and since her own doctor had testified that unisex clothing was an acceptable style to comply with her medical need to live in her new gender role the court concluded, "that Boeing had reasonably accommodated Doe's abnormal condition."⁶⁰

But there is a state case from Florida that illustrates how state disability laws can be successfully applied in cases of transsexual employment discrimination.

In Smith v. City of Jacksonville, (Case No. 88-5451 Fla. Div. Admin. Hearings 1991) Belinda Joelle Smith⁶¹, a pre-operative male to female transsexual, was

⁵⁶ Doe at 535.

⁵⁷ "Inasmuch as Boeing did not discharge Doe based on her abnormal condition but on her refusal to conform with directives on acceptable attire." Doe at 536.

⁵⁸ Doe at 536.

⁵⁹ Doe at 537.

⁶⁰ Doe at 537.

discharged as a correctional officer because the city felt that as a known transsexual Smith would not be able to command the respect of her co-employees and intimates and would discredit the City. The Civil Service Board upheld the City's decision to dismiss Smith.

On appeal, the Administrative Hearings Officer recommended that the Human Relations Commission order reinstatement, award back pay and attorney's fees and costs. The Hearings Officer ruled that Smith had been subjected to unlawful employment discrimination in violation of the Florida Humans Rights Act⁶². The issue before the Hearings Officer was whether transsexualism constitutes a handicap under Florida law. The Hearing Officer concluded that:

based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with gender dysphoria is within the coverage of the Human Rights Act of 1977 in that such individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties . . ."⁶³

The Hearing Officer also concluded that "apart from [an] actual handicap, Smith was handicapped because of the attitudes with which she was confronted by her employer."⁶⁴

SHORT TERM STRATEGY

The lower federal courts and the United States Congress have effectively closed off any

⁶¹ Belinda Smith died in 1994 in a freak boating accident off the coast of Florida.

⁶² Fla. St. 1983, Chapter 760, Discrimination in the Treatment of Persons.

⁶³ Smith v. City of Jacksonville, Case # 88-5451, Recommended Order pages 23-24, (Florida, Div. of Administrative Hearings, October 2, 1991).

⁶⁴ Smith at 24.

chance a transsexual has of making a case under federal law but there are some states where transsexuals have been able to obtain relief under state rehabilitation laws. In the end however the best course would be to not have to litigate the issue in the first place. Since the vast majority of discharges occur when the pre-operative transsexual begins to live and work in the opposite sex the best option available for the transsexual would be to first educate the employer before showing up to work in the new gender role. One way to educate the employer would be to show the employer how they can accommodate the transsexual and maintain an efficient workplace.

A good educational resource is a handbook published by the International Foundation for Gender Education (IFGE) titled "Why Is S/He Doing This To Us?". This handbook was approved by the Employment Law Committee of the First International Conference on Transgender Law and Employment Policy, held in 1992 in Houston, Texas. The IFGE handbook is written in laymen's terms and takes the reader through the transsexual phenomenon; answering questions from "Just what is it we are dealing with here?" to "What do we do about the bathroom issue?". When an employer is faced with a completely new and unique situation she needs practical advice on how to deal with it. Its no wonder that many employers have opted to discharge the employee rather than try to reinvent the wheel, a wheel they don't even understand. Even in Doe v. Boeing, Boeing had a policy in place to deal with transsexuals. The only reason Doe was fired was because she violated that policy. One of the reasons for Boeing's policy was to help employees accept the transsexual on a gradual basis.

Besides educating the employer the employees need to be educated so that an efficient workplace may be maintained. An educational resource for co-workers is a

handbook published by the International Conference on Transgender Law and Employment Policy titled, "What Is S/He Doing?". The handbook uses a story vignette to explain transsexualism with explanations inserted at various points in the narrative. Again one of the major sticking points in the transsexual transition, what bathroom will s/he use, is covered. Through education and cooperation a transsexual stands a better chance of retaining her job than trying to win it back through litigation. But not all employers are willing to be reasonable.

LONG TERM STRATEGY

There are two long term strategies available for the transsexual. One is to seek to overturn on constitutional grounds the laws that specifically exclude her from coverage. The other is to seek to have laws passed to protect the transsexual. Currently the transsexual community is following the second course and in the end that may be the more rewarding avenue.

A transsexual political action committee has been formed, It's Time America. The committee was formed after the third International Conference on Transgender Law and Employment Policy. Committee members and the executive Director of the conference have been to Congress to lobby for inclusion in ENDA (Employment Non-Discrimination Act) an Act meant to cover sexual orientation that currently specifically excludes transsexuals.

Six states⁶⁵ and the District of Columbia⁶⁶ have passed laws protecting persons

⁶⁵ Connecticut, Conn. Gen. Stat Ann. §4a-60a (West Supp. 1995); Hawaii, Haw. Rev. Stat. Ann. § 378-2 (1994); Massachusetts, Mass. Ge. Laws Ann. ch. 151B § 4 (West Supp. 1995); Minnesota, Minn. Stat. Ann. § 363.03 (West Supp. 1995); New Jersey, N.J. Stat. Ann. §10:5-4 (West

from employment discrimination based on sexual orientation. Most of these statutes include "gender" as a protected class and some of them include both "gender" and "sex" as protected classes. There is usually a preamble to the statute saying that it is the intent of the statute to apply to all persons, in order to ensure equal opportunity for every citizen.

However, the Underwood⁶⁷ case clearly highlights the need to specifically include transsexuals in the definitions of sexual orientation legislation⁶⁸. Transsexuals are not included within the traditional definitions of sex, gender or sexual orientation.

An excellent example of how sexual orientation can be defined to include transsexuals is the Minnesota non-discrimination statute⁶⁹. Subdivision 45 defines sexual orientation as:

"Sexual orientation" means having or being perceived as having an emotional, physical or sexual attachment to another person without regard to the sex of that person or having an orientation for such attachment, or having or being perceived as having a self image or identity not traditionally associated with ones biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.

In 1993, the Transgender Employment Law and Policy Committee agreed that the Minnesota statute should be used as the model language for use in the Federal Civil Rights legislation, other states and municipalities.

1993 Supp. 1995); Vermont, Vt. Stat. Ann. tit. 3, § 961 (West Supp. 1995); Wisconsin, Wis. Stat. Ann. §111.36 (West Supp. 1995).

⁶⁶ See supra note 47.

⁶⁷ 857 F.Supp. 96 (D.C. Cir. 1994).

⁶⁸ See discussion page 18.

⁶⁹ Minn. Stat. Ann. § 363.01 (West 1994),

CONCLUSION

The courts have not been good avenues for transsexuals to seek relief from when they have been fired for being a transsexual. The current federal laws and most state laws are too restrictive for transsexuals to use to protect their jobs. A transsexual's two best hopes are to try to obtain their employers voluntary cooperation and to get the laws changed to specifically include transsexuals.

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A LETTER FROM JOANNA

JoAnna Erin McNamara

Dear Diane:

The past nine months have brought much change to my life. Most of the changes have been for the better. Some of you are familiar with what has gone on in my life, and most of you may be largely in the dark. This letter is for all of you, to bring you up to date on the most important transition in my life.

There are many of you who do not recognize my new name, recalling only the McNamara. What follows is the story of just what has happened.

It all started years ago, before I was even born. Doctors and researchers have concluded that the condition that I have has as its origin a failure of some of the normal processes of fetal growth and differentiation. It seems that in about 1 in 10 or 15 thousand births, a baby is born with the anatomic sex of one gender and the brain system and self identity of the other. The name for this condition is Gender Dysphoria Syndrome. No one fully understands the cause of this hidden

birth defect, but the syndrome is well understood. The common name for this condition is Transsexualism. Unfortunately, there is no cure for the disease. Many years of research have gone into trying to find a method of therapy that would alleviate the feelings of incongruity with ones own body, but none have ever been found. The only course of action that has met with success is that of bringing the body identity into line with the identity of the self or psyche. After long evaluation, my doctors have prescribed this course of action for me. The process was started in 1976. I stopped it in 1979 when my father died and I promised him as he lay dying that I wouldn't go thru with it. I have tried for 13 years to keep that promise because it was very important to me. I cannot any longer live with myself in the physical state I was in. Prior to finally making the decision to go forward with the changes recommended by the doctors I had put a gun to my mouth on three separate occasions, I pulled the trigger to just before the point of discharge. I could not kill myself. I restarted the process of physical change recently and physical as well as mental changes, as a result of medical hormone therapy, are taking place very rapidly.

I am neither ashamed of or proud of being a Transsexual. I just am the way I am. In all other ways I am a regular person with the same feelings, hopes, aspirations, and values that any other person has. I know that this change in my body **IS** the right thing for me. As time has passed and my life goes on, almost everything is getting better and better. The relief I feel from the sense of entrapment in my own body, the release to feel correct in my self image, has opened up a whole new world of happiness and joy, a sense of internal peace and contentment I might never have known. My life now holds promise for a future of enthusiasm and love, and freedom from the pain and dis-ease I felt from my earliest memories on.

I deeply regret that I may have caused any one anguish or discomfort in the change I have to make. I have only sought to alleviate my own extreme anguish, not to induce it in others.

Some of you have come to know me as I really am. To the rest of you for whom this is news, I hope that you can make the adjustment as easily as some of my friends have.

There is an excellent book on Gender Dysphoria Syndrome, written to help friends and family understand more of what this is all about. I have copies available to loan to anyone of you who wishes to read and learn more. I will also speak to anyone on a personal basis to answer questions. All you need do is ask.

I have prepared a short list of commonly asked questions and their answers:

Is transsexualism something you choose? Absolutely not. This is a congenital birth defect. An individual has no more choice in this than they do about having any other diseases or deformities.

Is transsexualism hereditary? There has been little evidence of heredity as a factor. No one is sure what causes this condition, although some cases have been linked to fetal exposure to abnormal hormones or drugs (in my case it was DES).

Is social environment a factor in transsexualism? The social environment has an effect only

as far as how well or how poorly an individual may adapt to their living with the cross gender feelings. Social environment does not cause gender dysphoria.

Are transsexuals really homosexuals looking for social legitimacy?

No and twice no. Transsexuality has little to do with sexual orientation, sexual activities, or the gender of the sex partner. The "sex" root refers to gender and body identity, not to sexual preferences or activities. Transsexuals, both before and after gender correction may, like all other persons, be heterosexual, bisexual, homosexual or celibate.

Are there other groups of people who look like or behave like transsexuals? To some extent yes. Many homosexual men crossdress as part of their courting rituals, these homosexual men are known as "drag queens". Many heterosexual men, often happily married, feel compelled to wear women's clothing. These straight men are known as transvestites. Neither group suffers from the gender and body identity dilemma that the transsexual does and they would never seek surgical sex reassignment, being happy just to be men.

Are transsexuals an AIDS risk? Transsexuals are not specifically an AIDS high risk group.

Is there a religious reason not to undergo gender correction? There is no specific mention in the Bible of sex reassignment. There is a specific mention of men wearing women's clothing and women wearing men's clothing, but the context of this prohibition was in regard to prostitutes of the day. The Catholic Church has specifically ruled that sex reassignment is a medical treatment that is not contrary to any Biblical prohibition.

Does the sex change, properly known as sex reassignment, cure the patient? It depends on how you define "cure". In most cases, the patient is finally able to function in society and in personal relationships successfully and with joy and love in their life.

I sincerely hope that as time passes you can come to an acceptance of me as the woman I really am. I do understand that at first it might be difficult for some of you, but please try, it is all I ask. Just please try.

In peace, love and understanding,

JoAnna Erin McNamara

*My thanks to a special friend who helped me write this letter.
She has blazed a trail for me to follow.*