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**Appendix 6**  
**EMPLOYMENT LAW REPORT**  
DEDICATED TO THE MEMORY OF KAREN ULANE, 742 F.2d 1081

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**TRANSGENDER LAW AND EMPLOYMENT POLICY**

I. Legal Issues

A. Federal non-discrimination laws.

Courts have uniformly held that federal non-discrimination laws do not apply to transsexuals, transgenderists or crossdressers.

To date no court has found Title VII of the 1964 Civil Rights Act applicable to discrimination cases brought by transsexuals. See, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Holloway v. Arthur Anderson and Company, 566 F.2d 659 (9th Cir. 1977). Both courts concluded that there was no legislative history to support broadening the definition of "sex" to include transsexuals. In other words, you cannot discriminate against men because they are men or women because they are women but you can legally discriminate against transsexuals because they are transsexuals.

Some courts have indicated that transsexuals may state a cause of action under Title VII if they can prove their status as "women" and allege discrimination as a "woman." Would this require medical affidavits supporting a transsexual's claim to status as a "woman"?

Consider Sommers v. Budget Marketing, Inc., 667 F.2d (8th Cir. 1982) wherein the Court of Appeals held that the word "sex" in Title VII ban on sex discrimination in employment is to be given its "plain meaning" and does not encompass transsexuals. In this case the employer 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 rest room facilities. Sommers' attorney alleged that she had been discriminated against because of her status as a female with the anatomical body of a male and the fact that she had not yet had sexual conversion surgery should not prevent her from being classified as female.

The court agreed that Title VII did not have sufficient legislative history to indicate that Congress intended for the term "sex" to have anything more than its plain meaning. ("Sex" is not defined anywhere in the Act, nor did the court attempt to define it). The legislative history clearly indicates that the major thrust of Title VII was toward providing equal opportunities for women. However, it is interesting to note 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 its 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 rest room, the male rest room, or one for Sommers' own use?

Perhaps some reasonable accommodation could be worked out between the parties.

Unfortunately, the issue of whether or not such an accommodation could be reached was not before the court, and the court held that Title VII did not protect transsexuals from discrimination.

Some cases have been brought under the Civil Rights Act of 1870, 42 U.S.C. Sec. 1981. Again, courts that have considered this statute have uniformly held it to be inapplicable to transsexuals. See Grossman v. Bernards Township Board of Education, 538 F.2d 319 (3rd Cir. 1976).

In 1979, a prospective transsexual, employed in a beauty salon, was terminated for not dressing and acting as a man while at work. Suit was filed claiming a denial of equal protection, equal privileges, and equal immunities under 42 U.S.C. Sec. 1985(3). The court held that her complaint failed to state a cause of action under this statute because there was no allegation that other employees that were biologically men were protected, privileged or immune so as to have the right to work while dressed and acting as a woman, or visa versa. The court further stated that transsexuals were not a suspect class for purposes of equal protection analysis and that there was a rational basis for the employer requiring its employees who dealt with the public to dress and act as persons of their biological sex since (in the court's opinion) allowing employees to do otherwise would disturb customers and cause them to take their business elsewhere. Kirkpatrick v. Seligman & Latz, Inc., 475 F.Supp. 145 (M.D. FL 1979), aff'd 636 F.2d 1047 (5th Cir. 1980).

Observation: It should be clear that up to now courts have gone out of their way to find that existing federal non-discrimination laws do not apply to transgendered individuals.

Query: What if the Third Circuit and other courts that have considered this issue were fully educated with respect to who the transgendered are, had the knowledge that is available today, and were aware of our ability and our potential to make meaningful contributions to society.

The Rehabilitation Act of 1973.

In Doe v. USPS 37 FEP Cases 1867 (D.C. DC 1985) the court denied a discrimination claim under Title VII, but held that a cause of action was stated under the Rehabilitation Act where a transsexual claimed that the USPS denied her a promised job when it learned of her intention to undergo gender reassignment. Furthermore, this court held that the applicant had stated a claim for denial of equal protection.

I was unable to find any follow-up case or disposition of this matter.

In Blackwell v. Treasury Dept. 41 FEP Cases 1586 (D.C. DC 1986), plaintiff alleged that the Treasury Department eliminated his position because of the fact that he is a transvestite. The court held that plaintiff stated a cause of action under the Rehabilitation Act and concluded that while homosexuals are not handicapped under the Rehabilitation Act, transvestites are because many experience strong social rejection in the work place as a result of their "mental ailment" made blatantly apparent by their cross-dressing lifestyle. I was unable to find a further report on this case.

B. State non-discrimination laws.

The only reported case I could find dealing with state non-discrimination laws was Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (8th Cir. 1983). This is the same plaintiff involved in Sommers v. Budget Marketing, Inc. The Iowa Supreme Court held that an Iowa statute prohibiting discharge of an employee because of that employee's sex or disability did not prevent discrimination against transsexuals.

Eight states (CA, CT, HI, MA, MN, NJ, VT, WI) and the District of Columbia have passed laws protecting persons from discrimination based on sexual orientation in employment, housing, and public accommodations. 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 indicating that it is the intent of the statute to apply to all persons, in order to ensure equal opportunity for every citizen.

In 1993, Minnesota enacted the first state non-discrimination statute that specifically includes transgendered persons within a "protected class." Minnesota statutes, 1992, section 363.01 was amended to add sexual orientation as a protected class along with race, color, creed, religion, sex, age, etc.

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 or being perceived as 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.

There are exceptions for employment in domestic service, employment by an individual's parent, grandparent, spouse, child or grandchild, and non-public service organizations whose primary function is to provide services to minors such as youth sports organizations.

While this is a gigantic step forward in that the definition of sexual orientation was written in a way to clearly include transgendered individuals, Is transgenderism or gender dysphoria a matter of sexual orientation? If this is the road to being included within the class of persons protected by nondiscrimination laws does it really matter whether the definition is technically correct or not? Experience has taught us that most of society does not comprehend the distinction between sex and gender. Is it not better to "hop on the bus that gets us there" and worry about educating the legislature and other policy makers on the distinction between sex and gender after we have acquired protected status?

Others involved in the transgender legal movement have suggested adding the words "gender identity" or "gender identification" to the definition of protected persons. Is this a better approach than the Minnesota approach? Does it make a difference? Are we better off joining forces with the gay and lesbian community and riding their coattails on this issue, or, in the long run, are we better off going alone?

The 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.

Governors of nine states (CA, CO, MN, NM, NY, OH, PA, RI, and WA) have issued executive orders prohibiting discrimination in state employment based on sexual orientation.

#### C. Local non-discrimination ordinances.

There may be protection on a local level for transgendered individuals. Approximately 110 cities and counties in twenty-five states have passed legislation protecting persons from discrimination in employment, housing, and public accommodations. Most are very comprehensive; for example, Denver recently adopted a non-discrimination ordinance that includes "gender" as a protected class. The clear intent of the ordinance is to apply to "every individual." Caveat: there is a minimum employee threshold of 20 before the ordinance applies.

Members of the Gender Identity Center of Colorado, Inc. worked with the Colorado Equal Protection Ordinance Committee and the gay and lesbian community in drafting the final ordinance. It was through GIC's efforts that the word gender is included. The first draft contained both sex and gender, but several council members argued that they were one and the same. Rather than draw attention to what we were trying to accomplish at that time, we opted for the word gender as being broader than sex.

Santa Cruz, CA recently voted on a new non-discrimination ordinance that specifically applies to transgendered individuals and the definition section contains a definition of gender specifically stating that

it is to be interpreted broadly to apply to transgendered individuals.

I am sure there are many more examples of local non-discrimination ordinances that would protect, or could be construed to protect, transgendered individuals. Unfortunately, time constraints prevented an exhaustive research. It is recommended that you check with your local municipality to determine the content of their non-discrimination ordinance.

Nationally, approximately 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

## II. The Americans With Disabilities Act (ADA)

Thanks to former Senator William Armstrong (R-CO) transsexuals and transvestites, as well as homosexuals, are specifically excluded from protected class status under the ADA. While it would be nice to have legal protection, I don't mind being excluded from the application of the ADA because I do not consider transgenderism to be a disability.

## III. State Disability Laws

In late 1985, Jane Doe, a transsexual, filed a handicap discrimination action against Boeing Co. pursuant to RCW 49.60, Washington's Law Against Discrimination. She was fired from her position at Boeing because she violated Boeing's directives not to appear "excessively" feminine at work.

The trial court held that she was "temporarily handicapped", but that Boeing's actions reasonably accommodated her condition and, thus, ruled in favor of Boeing on liability. She had been told by Boeing not to use the women's rest room, and not to dress excessively feminine. The court found that her transsexualism did not interfere with her ability to perform her job as a software engineer at Boeing and there was no measurable decline in either her own job performance or her work group's performance.

On appeal, the Washington Court of Appeals found that Doe was handicapped and that Boeing failed to accommodate her condition. The trial court's judgement was reversed and the case was remanded for a determination of damages and attorneys fees. Jane Doe v. Boeing CO., 823 P.2d 1159 Wn Ct. App. (1992).

On appeal to the Washington Supreme Court, the decision of the Court of Appeals was reversed. The Washington Supreme Court found that her gender dysphoria was not a handicap under the Washington Law Against Discrimination. Washington law required a factual finding of: (1) The presence of an abnormal condition, and (2) Employer discrimination because of that condition. While the court agreed that gender dysphoria was an abnormal condition, they found that she was not handicapped because Boeing did not discharge her because of her gender dysphoria.

The Washington Supreme Court also found that an employer's duty to reasonably accommodate an employee's abnormal condition is limited to those steps necessary to enable the employee to perform his or her job. Under this standard the supreme court held that Boeing did not discriminate against Jane Doe because of her abnormal condition.

It is interesting to note that the Washington Supreme Court found that Boeing discharged Doe because she violated their directives on acceptable attire, not because she was gender dysphoric. The court found that Boeing's dress code was not discriminatory and that "Boeing reasonably accommodated Doe in the matter of dress by allowing her to wear unisex clothing." The court further stated "despite this accommodation, Doe determined unilaterally, and without medical confirmation, that she needed to dress as a woman at her

place of employment in order to qualify for sex reassignment surgery.”

The court also discussed, with approval, the trial court's finding that Boeing developed and reasonably enforced a dress policy which balanced its legitimate business needs with those of its employees. **IT IS A MATTER OF BALANCING THE LEGITIMATE NEEDS AND RIGHTS OF AN EMPLOYER WITH THE LEGITIMATE NEEDS AND RIGHTS OF AN EMPLOYEE TO DEFINE THEIR GENDER ROLE AND GENDER EXPRESSION.**

Doe also argued “perceived needs”, but the Washington Supreme Court ruled against her on that claim also. See Jane Doe v. Boeing Co., 121 Wn.2d 8 (Sup. Ct. 1993).

Now, note the importance of the following language from the Minnesota Statute: “Having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness.”

It is submitted that this is a classic example of bad facts making bad law. On the evidence presented, the court reached the right result. What went wrong? The first breakdown occurred in Jane Doe's attitude. She failed to recognize that employment, as well as life, is a two way street. She tended to be her own worst enemy.

Second, and perhaps most importantly, she failed to assemble a good support team of experts. I cannot imagine a well informed and caring doctor or therapist testifying that Boeing's dress code, rest room policy and other “accommodations” were reasonable. How can a doctor who knows anything at all about transsexualism and the Harry Benjamin Standards testify that it is not important for the M-F transsexual to wear feminine clothing during the real life test?

The transsexual must have a good team of experts. This cannot be overemphasized! If you are having trouble putting together such a team, then you need to take the time and make the effort to educate them and help create your own team of experts. Make sure they are on your side.

#### IV. Laws That Permit or Promote Discrimination

The religious right has a well organized and financed campaign which seeks to enact laws which permit and/or promote discrimination against gays, lesbians and bi-sexuals. Probably the only reason transgendered people aren't included in their effort is because they haven't figured out who we are yet, or they assume that all transgendered people are gay drag queens.

In 1992 measures appeared on the ballot in two states, Oregon and Colorado, which would allow and promote discrimination against gays, lesbians and bi-sexual persons. The most heinous of these proposals was Proposition 9 in Oregon which was defeated. This proposal declared homosexuality to be abnormal and essentially against God's creation.

A more moderate version was passed by the voters of Colorado with 53% of the vote. This amendment did not pass because Colorado voters are prejudiced or because Colorado is a “hate state”, it passed because Colorado for Family Values conducted a very good campaign of confusion and misinformation and convinced most of the voters that the issue was “special rights”.

The amendment was very confusing and most people did not understand how they were supposed to vote if they wanted to vote against the amendment. Also, the gay and lesbian power structure spent their time, effort and money “preaching to the choir” in the Denver, Boulder and Aspen areas and did not take their message that discrimination in all forms is abhorrent to a free society to rural Colorado and the Western

Slope.

Fortunately, a Denver District Court Judge issued an injunction against the amendment taking effect and declared that the burden of proof was on the state to prove the constitutionality of the amendment. The judge held that the state had to show a compelling need rather than a rational basis in order to support the amendment.

The state appealed this decision to the Colorado Supreme Court. The Colorado Supreme Court affirmed the trial court on a 6-1 vote and declared that it was unconstitutional to put any class of persons' civil rights to a vote of the people.

See Evans, et.al. v. Romer, et. al. (93SA17, CO 1993) published in *The Colorado Lawyer*, Vol.22, No. 9, September, 1993. This decision is published in these Proceedings at the end of this paper.

The case is scheduled for trial on the constitutionality of the amendment beginning this October. Virtually everyone who has followed and analyzed the case agrees that both the trial court and the Colorado Supreme Court will hold the amendment unconstitutional.

The religious right has not taken this lying down. In Oregon, they concentrated on the counties that supported Proposition 9 and were successful in passing statutes that permit discrimination against gays, lesbians and bi-sexual persons similar to the Colorado amendment. In the next few weeks Cobb County, GA will be voting on a similar measure after the Board of Alderman passed an ordinance declaring homosexuality incompatible with the mores of the residents of Cobb County.

It is going to take a lot of work to win this battle. It is important that all persons who have been oppressed by society for any reason join together in this fight. A society cannot truly be a free society as long as discrimination is permitted against any person for any reason.

Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital, or family status, does no more than protect persons from discrimination and guarantee their basic human rights. The proposed amendments in Colorado and Oregon may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears.

#### V. Where Do We Go From Here? STRATEGIES FOR THE FUTURE.

While there are a few, well reasoned dissenting opinions in some of the cases, (see, e.g., Judge Goodwin's dissenting opinion in Holloway v. Arthur Anderson and Company, cited above) the important thing to learn from an analysis of the cases is that the best solution to the dilemma of the transgendered employee is not court battles for legal protection, rather awareness, education and the development of a mutually beneficial, common sense policy. One that enables an employer to maximize the return of their investment in an employee and allows a perfectly good, productive employee to remain employed.

Through education, policy makers will become aware of the important contributions transgendered persons have made and will make. Through education we alleviate the fear of the unknown, which is the single greatest stumbling block transgendered individuals have.

During this Second Conference we developed the following strategies for achieving freedom from discrimination in employment and, hopefully, a successful on the job gender transition:

The guiding principles for our employment law strategies are set forth in our International Bill of Gender Rights. Understand that employment and life is a two way street. Be open to compromises and be careful about picking your battles. The most important thing you can do is establish your value to

your employer, to your industry and to society.

Have a plan of action and stay focused on the goal of a successful transition or acquiring good employment. Establish support systems both within the transgendered community, and more importantly outside and with co-workers. Be willing to risk--no risk, no reward.

When you talk about civil rights and freedom from discrimination, focus on all humanity, not just your narrow segment. Use broad, all encompassing language. Network with other minority groups. Build on each others strengths and learn from each others failures. There is no need to constantly re-invent the wheel. Learn to be inclusive, not exclusive. Share your experiences and your knowledge in order to help others and to help make the world a better place.

Education is the key. Work hard to educate your friends, your co-workers, your employers, the politicians, legislators, judges, policy makers, doctors and therapists. Remember, education and awareness eliminate the fear of the unknown.

Consider the argument that your transgenderism can contribute to your productivity, to your creativity, to doing your best, **AS LONG AS YOU DON'T HAVE TO WASTE YOUR CREATIVE ENERGY HIDING AND DENYING YOUR TRUE SELF OUT OF FEAR OF DISCRIMINATION.**

Work hard, and encourage others to work hard to make sure that gender identification/orientation is included in all federal and state civil rights and nondiscrimination laws. Memorize the language from the Minnesota statute quoted above. Lobby and write letters to your legislators. Tell them why the transgendered community must be included. Argue the benefits to society, to productivity, to staying off government assistance. A free society is not truly free as long as discrimination in any form is tolerated against one human being.

### **GET OUT OF THE CLOSET!**

You are not going to obtain basic human and civil rights as a transgendered person as long as you remain in the closet. It implies that you are embarrassed and that you believe you are not worthy of basic civil rights protection. Remaining in the closet implies that you believe something is wrong with you.

Staying in the closet helps perpetuate discrimination. The world needs to know who the transgendered are. That they come from all walks of life, all economic backgrounds, that they come in all sizes, shapes, and colors, and that they might even be your next door neighbor.

How can you educate policy makers, legislators, friends and society as long as you remain in the closet? The best way to educate is to be honest with yourself and let the world know who you really are, what you are all about, and that you are proud!

You can come out of the closet in many ways. The best way is to come out as a transgendered person. However, we must be realistic and recognize that not everyone is ready or willing to come out this way. If you aren't ready, then you can "come out" by using your talents, skills, and abilities to help achieve basic civil rights and freedom from discrimination for all people, including the transgendered.

**YOU CANNOT BE ALL THAT YOU WERE MEANT TO BE, YOU CANNOT REACH YOUR TRUE POTENTIAL AS A HUMAN BEING, YOU CANNOT FIND INNER PEACE AND HAPPINESS, YOU CANNOT BE HONEST WITH YOURSELF, YOUR FRIENDS, YOUR EMPLOYER, YOUR ASSOCIATES, AND SOCIETY, AND YOU CANNOT BE THE BEST EMPLOYEE YOU ARE CAPABLE OF BEING AS LONG AS YOUR TRUE SELF IS IN THE**

CLOSET.

WE CANNOT WIN THIS BATTLE FOR BASIC HUMAN DIGNITY AND CIVIL RIGHTS AS LONG AS YOU ARE IN THE CLOSET.... SO GET OUT OF THE CLOSET, JOIN THE BATTLE AND HELP MAKE THIS A WIN, WIN, WIN, SITUATION FOR ALL OF HUMAN KIND!

VI. Development of an Employer's Policy Manual and Guidebook for Handling Transgendered Individuals Transitioning on the Job.

In early 1993, the International Foundation for Gender Education (IFGE) published an employer's guidebook for working with an employee involved in an on-the-job gender transition. Authored by Dana Joyce Cole, the manual was fine tuned and approved at the First International Conference on Transgender Law and Employment Policy. The first part of this manual explains gender dysphoria, the transgender community, and attempts to give the employer some basic knowledge as to what is going on with the transgendered individual and why.

The second part of the manual deals with a practical approach to handling such issues as which rest room to use, what types of work disruption to anticipate, the effect on co-workers, and the possible effect on the performance of work teams.

The manual is based on the proposition that the transgendered employee is a valuable employee, that the employer has invested a lot of time, money and training in this employee, and it is in the best interest of all concerned to keep the employee employed and productive.

Establishing your value as a productive, loyal, and hard working employee before you approach your employer seeking to transition on the job is perhaps the single most important thing you can do. If you are not considered to be a valuable employee, your chances for a successful transition are greatly reduced.

A companion manual for co-workers is currently in the drafting stage and was reviewed and critiqued at this Second Conference. We found that it does a very good job of explaining what being transgendered is all about and why you, the co-worker is seeing the changes that are taking place. It is written to elicit understanding, acceptance, and to help establish a co-worker support system. Hopefully, it will soon be published by IFGE.

VII. Gender Change Employability Issues, Including Transsexual Employment Survey Results by Christine WG Burnham, Vancouver, B.C., Canada

This is outstanding research work and it references the First Law Conference and the Employer's Guide to Gender Transition. The author surveyed m2f and f2m, pre-transitional, transitioning, and post transitional transsexuals as well as employers and social workers. It contains valuable data that should help transgendered employees and their lawyers. It is the only known and published survey on these issues.

Among its findings and recommendations:

Many transitioning individuals don't have the resources to pay the medical and other necessary expenses resulting in high or potentially high unemployment in these situations.

Transsexuals' perceived problems to a successful gender transition include poor self esteem (being read, outed, discriminated against), facial hair on m2f, fear of transition, and vocal presentation



Essential characteristics of a successful transition, according to the Transsexual respondents, include a good attitude, positive self-esteem, having sexual reassignment surgery, good work conditions, availability and affordability of medical and other support services, e.g., electrolysis.

Employer and social worker objections cited were that people feel uncomfortable, poor self esteem, they look strange, inappropriate voice.

On a positive side, 87% of the employers interviewed believe transsexuals make reasonably good employees, none had moral objections (although 8 social workers did), personal contact with someone in the transgendered community definitely helps make employers more favorable to an on the job transition.

Establish your value as a human being and as an employee before transition. Also obtain electrolysis, hormones, breast reduction, voice therapy before transitioning. Availability of support services is essential.

Establish a support system among co-workers and non transgendered community friends.

Recommendations for a successful transition and employability after a gender change include:

Being employed, having the income to maintain your standard of living, or at least a minimum standard.

What is your goal — to be accepted in the transitional role or to be accepted in the new role

Have a plan of action and pay attention to the timing of your changes.

Support services must be available

Establish a transsexual consumer lobbying group, housing programs, and an employer referral service. Put transsexuals in touch with employers who are favorable, **AND YOUR EMPLOYER IN TOUCH WITH EMPLOYERS WHO ARE FAVORABLE.**

Establish strong self esteem and a strong role identity.

Gender acceptability of your presentation is very important.