

arbitration apparatus that served all types of civil disputes is an unusual example of judicial intervention designed to enlarge and support the arbitration process.

II. EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY

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In preparation for this presentation, we searched all reported labor arbitration decisions to locate those that include the terms “gender dysphoria,” “gender identity,” “transsexual,” or “transgender.” The search yielded no matches—a surprising result, given the active development of gender identity discrimination theories under Title VII.

To gain a better understanding of gender identity discrimination, it is useful to develop a working vocabulary.¹ Although the terms “sex” and “gender” often are used interchangeably in common parlance, we should distinguish them for purposes of this discussion. “Sex” refers to a person’s biological or anatomical identity as male or female. By contrast, “gender” refers to cultural characteristics that we associate with masculinity or femininity. “Gender expression” is the external and socially perceived manifestation of gendered characteristics and behaviors, such as dress, speech, grooming, and mannerisms. On the other hand, “gender identity” is not visible to others. It is an individual’s internal, deeply felt sense of being either male or female, or something other or in between. A “transsexual” person experiences a conflict between physical sex and gender identity. A person who is born with male anatomy, but has a female gender identity, might be referred to as “MTF,” or a male-to-female transsexual, with “FTM” describing the opposite circumstance. Many, but not all, transsexual people undergo medical treatment to change their physical sex to cor-

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¹The following discussion is borrowed in large part from Currah, Green & Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (2001). This well-written (and free) reference guide provides useful and accessible information about these issues. This handbook is among the references I have included in the resource list at the end of this paper.

respond with their internal gender identity through hormone therapy and sex reassignment surgery.²

“Transgender” is an umbrella term that has come to encompass individuals whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are “supposed” to be according to societal gender norms. Being transgender is not necessarily a statement about being at odds with one’s sex by birth. A man who dresses or behaves in a more feminine manner may still be perfectly content to be biologically male. Nor is there necessarily a connection between a person’s gender identity, gender expression, and sexual orientation. In our society, a person’s gender expression is often mistakenly assumed to reveal that person’s sexual orientation. Men with feminine characteristics often are assumed to be gay, but may well be straight. The same is true of women who dress or behave in a masculine fashion. The relationship between gender identity and sexual desire is very complex and individual. For example, a transgender individual who is female-bodied but who has a male gender identity, and who is partnered with a woman, may consider himself to be heterosexual, based on his gender identification as a man rather than his female genitalia.

There are now approximately 106 states, counties, and municipalities that have nondiscrimination laws explicitly prohibiting discrimination based on gender identity and expression.³ Many Fortune 500 companies also have policies that explicitly prohibit discrimination based on gender identity, including Wells Fargo, Hewlett-Packard, Charles Schwab, Raytheon, Ford, Whirlpool, IBM, Xerox, Kodak, Morgan Chase, Nike, Prudential Financial, General Mills, US Airways, and Pfizer, to name a few.⁴

²Persons with an acute conflict between biological sex and gender identity may suffer from gender dysphoria, a medical diagnosis with well-developed treatment standards of care that include extensive counseling, hormone therapy, a period of “real-life experience” living in one’s gender identity for a period of time, and sex reassignment surgery. See The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders (6th ed. 2001). The Maryland Supreme Court summarized the current state of scientific knowledge on gender dysphoria in *In re Heilig*, 372 Md. 692 (2003) (regarding a transsexual plaintiff’s ability to seek an order changing her gender identity from male to female on her birth certificate). The vast majority of individuals who undergo sex reassignment treatment for gender dysphoria are able to lead healthy, productive lives. See, e.g., Cole, Emery, Huang & Meyer, *Treatment of Gender Dysphoria (Transsexualism)*, 90 Tex. Med., No. 5 (May 1994).

³See *U.S. jurisdictions with laws prohibiting discrimination on the basis of gender identity or expression*, available online at <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions>.

⁴See *Corporate Equality Index 2006: A Report Card on Gay, Lesbian, Bisexual and Transgender Equality in Corporate America*, available online at <http://www.hrc.org/documents/HRCCoCorporateEqualityIndex2006.pdf>.

Modern Title VII jurisprudence has begun to acknowledge that discrimination against transgender people (like discrimination against gay, lesbian, and bisexual people) is rooted in sexism and gender stereotyping. Simply stated, people who do not conform to traditional gender norms are stigmatized *regardless* of their actual sexual orientation. In the past, the federal courts took a very formalistic and textual approach to transgender discrimination cases. For example, in *Ulane v. Eastern Airlines, Inc.*,⁵ a veteran pilot was fired after undergoing sex reassignment surgery. The Seventh Circuit held that Ms. Ulane could not state a claim for sex discrimination, because in enacting Title VII, Congress did not intend to protect transsexual people, and the statutory term “sex” refers only to a person’s biological status as male or female.

However, the Supreme Court subsequently handed down two key cases that have eroded the underpinnings of this type of reasoning. First, in *Price-Waterhouse v. Hopkins*,⁶ the Court acknowledged that Title VII prohibited discrimination not only based on biological status, but also based on gender stereotyping. The plaintiff had been denied partnership in the accounting firm in part because her demeanor, appearance, and personality were deemed insufficiently “feminine.” The Court held that “[i]n 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.”⁷

Later, in *Oncale v. Sundowner Offshore Services, Inc.*,⁸ the Court recognized that same-sex sexual harassment was covered by Title VII. In so doing, it eliminated the concept that the kind of sex discrimination prohibited by Title VII is restricted to what Congress specifically intended to cover; Title VII could be interpreted to apply to “reasonably comparable evils,” such as same-sex harassment.⁹

The Courts of Appeal have begun to recognize that Title VII protects discrimination based on gender identity.¹⁰ For example, in *Smith v. City of Salem*,¹¹ a long-time firefighter was suspended after beginning to undergo treatment for gender dysphoria. The

⁵742 F.2d 1081 (7th Cir. 1984).

⁶490 U.S. 228 (1989).

⁷490 U.S. at 251.

⁸523 U.S. 75 (1998).

⁹523 U.S. at 79.

¹⁰I submitted an April 2006 legal memorandum for distribution with the Conference materials. It is entitled “Federal Cases Recognizing that Discrimination Based on the Basis of Gender Identity and/or Transgender Status is a Form of Discrimination on the Basis of Sex,” and was prepared by the National Center for Lesbian Rights.

¹¹378 F.3d 566 (6th Cir. 2004).

Sixth Circuit held that Ms. Smith could allege a claim for sex stereotyping discrimination under *Price-Waterhouse*. In so doing, the court expressly rejected older decisions like *Ulane*, which held that Title VII did not protect transsexuals. The *Smith* court announced that *Price-Waterhouse* had “eviscerated” such cases, and went on to hold that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior. . . .”¹²

The growing awareness and acceptance by the courts that gender identity stereotyping often lies at the heart of discrimination against transgender and other gender non-conforming employees has provided much-needed protection for these individuals.

Resources

American Airlines Guidelines for Transgender Employees (available online at http://amrgleam.com/gleam_transgender_guidelines_32807.pdf)

Center for Gender Sanity (www.gendersanity.com)

Currah, Green & Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (2000) (this joint publication of National Center for Lesbian Rights (NCLR) and the Policy Institute of the National Gay and Lesbian Task Force (NGLTF) is available on both the NCLR and NGLTF Web sites)

Currah, Juang & Minter, eds., *Transgender Rights* (Univ. of Minn. Press 2006)

The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, Sixth Version (available online at <http://wpath.org/Documents2/socv6.pdf>)

Human Rights Campaign (HRC), *Transgender Americans: A Handbook for Understanding* (available online at <http://www.hrc.org/documents/TransgenderAmericans.pdf>)

Human Rights Campaign (HRC), *Transgender Issues in the Workplace: A Tool for Managers* (available online at <http://www.hrc.org/documents/transgenderworkplace.pdf>)

National Center for Lesbian Rights (www.nclrights.org/projects/transgenderproject.htm)

¹²378 F.3d at 573, 575.

The National Gay and Lesbian Task Force (www.thetaskforce.org/issues/transgender)

The Transgender Law Center (www.transgenderlawcenter.org)

The Transgender Law and Policy Institute (www.transgenderlaw.org)

Workplace Gender Transition Guidelines at Ernst & Young (available online at <http://www.hrc.org/documents/Sample-Gender-Transition-Guidelines-Earnst-Young.pdf>)

III. NEUTRALITY AGREEMENTS: WHAT'S SO BAD ABOUT EMPLOYERS BEING NEUTRAL?

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Nothing in the National Labor Relations Act requires an employer to oppose efforts by a union that is seeking to organize its employees; and nothing in the Act prevents an employer from voluntarily recognizing a union that represents a majority of its employees. In recent years, however, the National Labor Relations Board and its General Counsel have taken steps that may discourage neutrality agreements between employers and unions as well as voluntary recognition by employers.

Pursuant to the Act, employees have the right to self-organization and to form and join labor unions.¹ Employers are entitled to express their views as to whether their employees should join a union, as long as the expression of those views does not contain a threat of reprisal or force or a promise of benefit.² If an employer's speech crosses that line, it constitutes an unfair labor practice.³ Of course, employers are free to remain neutral during union organizing drives and, in recent years, unions have increasingly sought to obtain written neutrality agreements from employers.

Neutrality agreements can do more than set limits on what an employer will do and say during an organizing campaign. The agreements frequently contain detailed rules about both employer *and* union activities during such campaigns, and establish a pro-

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¹29 U.S.C. §157.

²29 U.S.C. §158(c).

³29 U.S.C. §158(a)(1).