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Transgender Employment Rights, Discrimination & Litigation: Expanding Understandings and Opening Doors

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TRANSGENDER EMPLOYMENT RIGHTS, DISCRIMINATION & LITIGATION:
EXPANDING UNDERSTANDINGS AND OPENING DOORS

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Legal Rights of the Disadvantaged
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Introduction

The United States' legal history shows a record of minorities being disenfranchised simply because of who they are. Humans do not have control over certain features, such as race, nationality, sex, gender, or physical ability. However, those who fall outside the "norm" of all of these things are treated as if they do, as if they choose to inhabit a specific race, sex, or disabled body. Given that lawyers and judges are just as much social beings as everyone else, they are not immune to these prejudices. Therefore, these sentiments often linger in courtrooms and are used in arguments to deny peoples some of their most basic rights.

People within the transgender community tend to fall outside of society's neatly constructed gender binary and, like so many other groups, face marginalization in various areas of social life for being different. From education to employment and marriage to incarceration, the trans community encounters discrimination almost every step of the way. In attempts to remedy these wrongs, many transgendered individuals have begun turning to litigation in recent years. There has been, and continues to be, a particularly high volume of cases filed regarding employment discrimination. While discrimination still runs rampant throughout society, the purpose of this paper is to introduce a brief history of the transgender movement and trace the extent to which four decades of litigation have redefined *sex* and subsequently improved employment rights for transgendered citizens in the United States of America.

Understanding the Transgender Community

Terminology and history are important to understanding the legal struggles of any group of people, but imperative to those of the transgender community. First and foremost, a distinction

must be made between sex, gender, and gender identity. In almost every case pertaining to trans rights, courts have to “consider new concepts of sex and gender developing in the medical and social sciences, instead of relying only on “traditional” definitions of man and woman, male and female.”¹ It is no longer enough to define sex as biological and gender as cultural. Rather, *sex* should be used only to refer to the chromosomes, physical attributes, and reproductive potential a person possess. *Gender* differs between cultures, but “refers to the behaviors, activities, roles, and actions that are socially attributed to men, women, and transgendered people in a given society.”² It is something that will develop over time and place through socialization. *Gender identity* further complicates matters, but should be defined as “a subjunctive sense of fit with a particular gender category.”³ Matters of sex and gender should both be treated as spectrums with various possibilities. Being transgendered is a gender identity that signifies a transgression from, or a desire to be the opposite of, the gender assigned to a person at birth based entirely on their sex. Being transsexual can be viewed as a subcategory of transgendered people who have taken the additional step of having sex reassignment surgery to more closely align their sex with their gender identity. Although society has largely managed to keep gender and gender identity intrinsically fused to sex, knowing that there is a difference is crucial to understanding complications in transgender employment discrimination cases.

Contemporary understandings of sex and gender can be attributed at least partially to the evolution of the transgender community over time. Additionally, to study any disadvantaged group, one must first have an understanding of that group’s history before being able to comprehend their legal struggles. To many people in America, the transgender community and movement may appear to be quite young, but, in reality, they actually have a rich history dating

¹ Norgren and Nanda, *Family Values: Gays and Marriage*, 199-200.

² Garbacik and Lewis, *Gender & Sexuality for Beginners*, 7.

³ Stryker, *Transgender History*, 13.

back over several centuries and cultures. Nevertheless, the actual study of trans people and trans identities really didn't begin until the late 19th century. Victorian taxonomist, Richard von Krafft-Ebing, studied social deviation. His “most extreme category for deviation, which he called *metamorphosis sexualis paranoiac*,”⁴ was defined very similarly to how we currently understand the term *transgender*. In 1910, German doctor and sexologist, Magnus Hirschfeld, coined the term *transvestite* to describe people who enjoyed cross-dressing. Additionally, he was arguably the first person to recognize “that every human being represented a unique combination of sex characteristics, secondary sex-linked traits, erotic preferences, psychological inclinations, and culturally acquired habits and practices.”⁵ Harry Benjamin, a German endocrinologist, joined the field in the 1950s and created the term *transsexual* for those who sought reassignment surgery. Though he was a strong advocate for tolerance of such individuals, he believed that attempting to treat or cure patients of their Gender Identity Disorder (GID) was the best course of action for doctors to take. This unfortunately planted the seeds of discrimination by making trans identified persons inferior and synonymous with being diseased.

Hirschfeld's studies began to reach America by the 1930s, with others gradually following. Whether American society was prepared or not, everyone was introduced to Christine Jorgenson, the first American male-to-female transsexual person to have sex reassignment surgery, in 1952. Soon thereafter, trans activist, Virginia Prince, coined the word *transgenderist*, to distinguish transsexuals from individuals who live “full-time in the role of the “opposite” gender, without sex reassignment surgery.”⁶ Though it is hardly mentioned in the history of the Civil Rights Movement, the 1950s and 1960s were important decades for making the transgender movement known. Boycotts, sit-ins, and organizations sprung up across the nation as the

⁴ Garbacik and Lewis, *Gender & Sexuality for Beginners*, 157.

⁵ Stryker, *Transgender History*, 39.

⁶ MacKenzie, *Transgender Nation*, 2.

transgender community began advocating for their rights. Although the Stonewall Riots were a turning point for the gay rights movement in 1969, the trans rights movements suffered from a lull in the 1970s and early 1980s. These decades were riddled with multiple failed attempts at litigating rights under claims of sex discrimination and a subsequent deterioration of morale and in-the-streets activism. A new wave of activism emerged in the 1990s and has carried the movement into the 21st century capitalizing on various legislative victories and the gradual expansion of rights and visibility over time. Building enough “sufficient political clout to have gender identity and gender expression provisions added to the language of the [the Employment Non-Discrimination Act (ENDA)],”⁷ has served as a sort of rallying call across the transgender community over the last two decades. It is likely that ENDA will continue to play an important role in the movement until an inclusive bill without religious exemptions is passed through Congress.

Are Transgender Rights Civil Rights?

Under the U.S. Constitution, every American citizen is supposed to be equally protected against infringements upon their inalienable rights to life, liberty and property. However, as the legal history of the nation demonstrates, what sounds good on paper is not always honored in practice. A great deal of American law is based on English Common Law, which maintains very traditional, and now outdated, understandings of different aspects of personhood, such as sex. Science writer Deborah Rudacille observes that “deeply rooted assumptions about our bodies keep us locked into the belief that there are only two sexes...and that the sex on the body is always consistent with the sex of the brain.”⁸ From there, the same binaries are projected on to gender in a way that polices identity and “controls the psychological, sociological, and economic

⁷ Stryker, *Transgender History*, 151.

⁸ Rudacille, *The Riddle of Gender*, 9-10.

choices that are available to individuals in contemporary society.”⁹ The problem is not that transgender people don’t deserve to have the same civil rights, status and protections as every other American citizen; they do. As Dr. Anne Fausto-Sterling states in her article *The Five Sexes*, “if the state and the legal system have an interest in maintaining a two-party sexual system,” it is they who “are in defiance of nature.”¹⁰ It is the legal system’s desire to hold steadfast to traditional understandings of sex and gender that is the most pervasive problem to securing equal recognition and protection of trans people.

The Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex, or national origin and contains protections against violations of this nature. Title VII of this act specifically addresses employment discrimination and established the Equal Employment Opportunities Commission (EEOC) to handle any claims and implement the law. Transgender author and historian, Susan Stryker spoke on behalf of so many trans people when she stated that they spend “years being marginally employed because of other people’s discomfort, ignorance, and prejudice.”¹¹ Therefore, in the 1970s, individuals began filing claims under Title VII’s sex discrimination provision in the hopes of securing greater employment protections and rights. While the Civil Rights Act explicitly prohibits discrimination, it fails to clearly define what Congress intended by *sex*. Unfortunately, American legal system took full advantage of that fact and used tradition as a means of continuing to suppress the rights that could be enjoyed by the transgender community.

A Record of Failed Litigation

The 1970s and 1980s were difficult decades for the transgender community, which makes

⁹ MacKenzie, *Transgender Nation*, 14.

¹⁰ Feinberg, *Transgender Warriors*, 103.

¹¹ Stryker, *Transgender History*, viii.

it all the more fitting that “the first reported cases in which transsexual plaintiffs sought protection under sex discrimination statutes date to 1975.”¹² One of the original two cases is that of *Voyles v. Ralph K. Davies Medical Center*. Carol Lynn Voyles, the plaintiff and a male-to-female transsexual, worked as a hemodialysis technician for the defendant. After notifying her supervisor that she would be undergoing a sex reassignment surgery, the plaintiff was discharged on that account and “that such a change might have a potentially adverse effect on both the patients receiving treatment...and the plaintiff's co-workers.”¹³ She filed a lawsuit alleging a violation of Title VII’s sex discrimination statute, but the court dismissed her case. They stated that she had not been fired for being a female, but for changing her sex and according to “legislative history,” there was no indication “that "sex" discrimination was meant to embrace "transsexual" discrimination.”¹⁴

Case after case followed suit with plaintiffs filing claims and having them dismissed because of the limited definition of sex that the court was holding to (See *Grossman v. Board of Education*, 11 FEP Cases 1196, 1199 (D.N.J.1975), *aff'd*, 538 F.2d 319 (3d Cir.); *Holloway v. Arthur Anderson & Co.*, 566 F. 2d at 662-63; *Powell v. Reads*, 436 F. Supp. 369, 371 (D.Md,1977); and *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. Jan. 8, 1982) (per curium)). The 1984 case, *Ulane v. Eastern Airlines, Inc.*, is worth noting in greater detail. The plaintiff was hired by the defendant as Kenneth Ulane in 1968 and fired as Karen Ulane in 1981. She filed a case under Title VII alleging two counts of discrimination; one against her as a female and the other against her as a transsexual. The court cited many of the aforesaid cases in their ruling in favor of the defendant on the first count and a dismissal on the second. However, the language used in *Ulane* is of particular interest because it demonstrates how courts held

¹² Broadus, "The Evolution of Employment Discrimination Protections for Transgender People," 94.

¹³ *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (Dist. Court 1975).

¹⁴ *Ibid*.

steadfast to their traditional assumptions as justification for denying citizens of equal employment protections. The court acknowledged that while some may extend the definition of sex to include “sexual identity,” their “responsibility [was] to interpret...and determine what Congress intended when it decided to outlaw discrimination based on sex.”¹⁵ As the 1980s continued to pass by, prospects of securing employment rights and protections for transgendered individuals only seemed duller.

Landmark 1: *Price Waterhouse v. Hopkins*

Just before the end of the decade, an unlikely beacon of hope for the trans community came from the 1989 case, *Price Waterhouse v. Hopkins*. Interestingly enough, the case is considered to be a landmark victory for transgender employment rights, despite the fact that plaintiff, Ann Hopkins, is not transgendered. Hopkins filed a suit, under Title VII, alleging unlawful sex discrimination and sex stereotyping after having been denied a partnership at the Price Waterhouse accounting firm because she didn’t fit others’ stereotype of what it meant to be feminine. They claimed that she needed to “walk more femininely, talk more femininely, [and] dress more femininely”¹⁶ if she wanted the position. The Supreme Court ruled in favor of Hopkins and prohibited “employers from enforcing stereotypical assumptions based on gender”¹⁷ on the grounds that, under Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹⁸

Given that it struck down the narrow view of sex that had been stifling court decisions over the preceding decades, the ruling in this case opened the floodgates for transgender individuals to file claims under Title VII and secure greater employment rights. If an employer

¹⁵ *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081 (Court of Appeals, 7th Circuit 1984).

¹⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) at 235.

¹⁷ Broadus, "The Evolution of Employment Discrimination Protections for Transgender People," 96.

¹⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) at 251 (internal citations omitted).

claimed that a trans person did not fit their understanding of masculine or feminine in one way or another, there were now grounds to file suit for sex discrimination and people took advantage of it. In the 1996 case, *Oncale v. Sundowner Offshore Oil Services, Inc.*, protections against sexual harassment were in question and the courts ruled that the definition of *sex* “must extend to [sex-based] discrimination of any kind that meets the statutory requirements.”¹⁹ With these rulings secured, the stage was set for the widespread success that transgender people had in employment discrimination cases throughout the first decade of the 21st century.

In the cases *Smith v. City of Salem* and *Glenn v. Brumby*, plaintiffs claimed to have been released from their positions because of a failure to comply with their employers’ gender-based behavioral norms. Using the precedent set by and language of *Price Waterhouse v. Hopkins*, the court ruled in favor of the plaintiffs in both cases.²⁰ The ability to broadly define sex under *Price Waterhouse* allowed for another extension of the definition in the 2008 case, *Schroer v. Billington*. Colonel Diane Schroer is a decorated Army veteran and transgender woman. She was denied a job at the Library of Congress after informing her supervisor that she would be undergoing a transition on account of suddenly “not [being] a good fit,”²¹ even though she was highly qualified for the position. The court ruled in Schroer’s favor and extended to definition of sex discrimination “to encompass discrimination because of change of sex.”²² The shift in litigation trends following the ruling in *Price Waterhouse v. Hopkins* demonstrate how beneficial it has been, and continues to be, in extending greater employment rights and protections to trans individuals.

¹⁹ *Oncale v. Sundowner Offshore Services*, 523 (U.S. 75 1998) at 79-80.

²⁰ *Smith v. City of Salem, Ohio*, 378 F. 3d 566 (Court of Appeals, 6th Circuit 2004); *Glenn v. Brumby*, 663 F. 3d 1312 (Court of Appeals, 11th Circuit 2011).

²¹ “Congressional Hearing on Transgender Discrimination.”

²² *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

Landmark 2: *Macy v. Holder* and Current Policy

As instrumental as the *Price Waterhouse* ruling was in securing an unprecedented amount of success for trans employment cases, it still left trans rights defined under discrimination based on sex. Though sex and gender are related, they are inherently different concepts and should be treated as such in the law. In the 2012 landmark EEOC decision, *Macy v. Holder* (also known as *Macy v. Department of Justice*), this was finally achieved. Mia Macy, plaintiff, is a transgender woman who was denied a position in a new bureau after disclosing her plans of transitioning, even though she had previously been guaranteed the position. She filed suit on the account of discrimination because of her “sex, gender identity (transgender woman) and on the basis of sex stereotyping.”²³ The court ruled in her favor stating that, for the first time, “discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII.”²⁴

Following this ruling, courts charged the EEOC with adopting and aligning their policies with these new provisions. Subsequently, “in January 2013, the EEOC began tracking information on charges filed alleging discrimination related to gender identity.”²⁵ Between January 2013 and March 2015, the EEOC received 461 cases regarding discrimination based on “Sex-Gender Identity/Transgender” and resolved 308 of those cases (See Appendix A).²⁶ Furthermore, two cases were successfully litigated specifically in relation to [the recently protected] employment discrimination based on the person’s transgender status (See *Finkle v. Howard Cnty., Md.*, 122 Fair Empl. Prac. Cas. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10,

²³ *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. 2012)

²⁴ *Ibid.*

²⁵ “What You Should Know: EEOC and Enforcement Protections for LGBT Workers.”

²⁶ *Ibid.*

2014); and *Lewis v. High Point Regional Health System*, ___ F. Supp. 3d ___, 2015 WL 221615 (E.D.N.C. Jan. 15, 2015)).

The ruling in *Macy v. Holder* secured protections against gender identity employment discrimination, something that so many had only dreamt of achieving one day. Unfortunately employment discrimination will most likely continue to affect transgender individuals, but the Department of Justice (DOJ) took significant steps before the close of 2014 to provide further grounds for laying claim to Title VII violations. In a memorandum, they “explicitly clarified that gender identity discrimination claims are covered under Title VII of the Civil Rights Act.”²⁷ As the American Civil Liberties Union notes, “this change in policy by the DOJ vindicates” so many individuals’ battles “against workplace discrimination and provides protection for transgender Americans as they struggle for the respect and dignity they deserve.”²⁸

Conclusion

As Richard Juang stated, “being recognized within a liberal democracy means being valued, having one’s dignity protected, and possessing some access to public self-expression.”²⁹ Although every rights movement develops its own unique mission, each is ultimately seeking the recognition spoken of here. The transgender rights movement is no different. Throughout the history of the movement, trans individuals have fought to break free of the definitions inscribed on them by society. Rather than being perceived as deviant anomalies with mental disorders, transgendered people in the United States want to be recognized for who they really are; American citizens. Discrimination plagues much of social life, but groups can fight it by gaining traction with specific rights. Over the last four decades, litigation of employment rights, under

²⁷ “DOJ Solidifies Protection for Transgender Rights.”

²⁸ Ibid.

²⁹ Juang, “Transgendering the Politics of Recognition,” 242.

Title VII of the Civil Rights Act of 1964, has served as an arena for transgendered individuals to do just that. The two landmark cases challenging workplace discrimination and recent DOJ memorandum should demonstrate to all naysayers that “traditional definitions” of sex are no longer valid grounds for denying transgendered people equal protection rights. By recognizing and protecting *gender* identity as being inherently different than sex, the American legal system has helped bring the transgender community more recognition. The successful expansion of employment rights through litigation, since their first case 1975, should “empower transgender people [to continue] to contest discrimination and allow [them] to envision [themselves], and to be seen by others, as fully human.”³⁰

³⁰ Broadus, "The Evolution of Employment Discrimination Protections for Transgender People," 99.

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Appendix

	FY2013*			FY2014			FY2015**		
	Total LGBT	Sex-Gender Identity/ Transgender	Sex-Sexual Orientation	Total LGBT	Sex-Gender Identity/ Transgender	Sex-Sexual Orientation	Total LGBT	Sex-Gender Identity/ Transgender	Sex-Sexual Orientation
Total Receipts	765	147	643	1,093	202	918	603	112	505
Total Resolutions	337	74	272	846	153	717	506	81	433

*As found in “What You Should Know: EEOC and Enforcement Protections for LGBT Workers.”