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Verdict

May 1, 2012

[Joanna L. Grossman](#)

The EEOC Rules That Transgender Discrimination Is Sex Discrimination: The Reasoning Behind That Decision



In a recent adjudication, **the EEOC concluded** (<http://www.washingtonblade.com/content/files/2012/04/90910497-EEOC-Ruling.pdf>) that discrimination against a transgendered individual is sex discrimination. To many readers, this conclusion may seem obvious, but in fact, most courts that have considered the anti-discrimination rights of transgendered employees have taken a narrower approach.

Under that narrower approach, transgender discrimination is only actionable if the employer acted on sex stereotypes to punish gender non-conformity. But the EEOC takes the position that any sort of transgender discrimination is sex discrimination, because it inherently involves taking gender—and therefore sex—into account. This is true even if the employer takes an action that simply reflects animus against transgender individuals or a desire to exclude them from the workplace, rather than a concern, specifically, about gender non-conformity.

As I will argue in this column, the EEOC has the better of the argument. Its ruling takes an honest, straightforward look at the nature of transgender discrimination and the natural scope of Title VII's broad prohibition of sex discrimination in employment.

***Macy v. Holder*: A Jurisdictional Conundrum With Substantive Importance**

The case that led the EEOC to reach its result is that of Mia Macy, a transgender woman who worked as a police detective in Phoenix. In 2010, she relocated to San Francisco and began seeking employment. At the time of the move, Mia was still presenting as a man, but had plans to transition to a female identity. Her supervisor in Phoenix told her that the federal Bureau of Alcohol, Tobacco, Firearms and Explosives had an opening for a ballistics expert in a crime laboratory near San Francisco, for which she was well-qualified.

Macy spoke with the Director in that office by telephone around January 2011 about her credentials for the position, as well as the position's salary and benefits. According to Macy, the Director told Macy that she would get the position so long as no problems were identified in her background check, and that the position would be

filled via a staffing firm, Aspen of DC. After that initial conversation, there were a variety of back-and-forths among Macy, the Director, and Aspen, during which time her background check was underway.

On March 29, 2011, Macy informed Aspen via e-mail that she was in the process of transitioning from male to female and asked Aspen to share this information with the Director. On April 3, Aspen informed Macy that the information about her gender transition had been passed along to the Director. Five days later, Macy received an e-mail from the staffing firm stating that, due to federal budget reductions, the position in the ATF lab was no longer available.

On May 10, 2011, Macy contacted an EEO counselor within the federal government to discuss her concerns. The counselor revealed that, in fact, the lab had not cut the position, but instead had filled it with someone else.

On June 13, 2011, Macy filed a formal discrimination complaint with the federal agency at issue, ATF. On a preprinted form, she checked off “sex” and “female,” and typed in “gender identity” and “sex stereotyping” as the basis for the complaint. In a narrative portion of the form, she wrote that she was not hired on the basis of “my sex, gender identity (transgender woman) and on the basis of sex stereotyping.”

Why does it matter, readers may wonder, exactly what Macy wrote on the form? Because federal government employees (and applicants) have different means of recourse depending on the nature of the discrimination that they allege. According to the EEOC’s order in *Macy*, The Department of Justice has “one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees.” The latter system provides fewer rights and remedies. Notably, for example, it does not grant a complainant the ability to request a hearing before an EEOC administrative judge or to appeal the final Agency decision to the EEOC.

The key question in this case was whether Macy had alleged sex discrimination or gender identity discrimination, because the answer to that question, and that question alone, would dictate through which system her claims would be processed. The agency issued a notice that it was accepting the complaint based “on the basis of sex (female) and gender identity stereotyping,” but that it would process only the sex discrimination claim, and not the transgender discrimination claim, under Title VII and the corresponding EEOC regulations.

In order to render the agency’s ruling appealable, Macy dropped the remaining claims and appealed to the EEOC for a ruling on a jurisdictional issue: could a gender identity/transgender discrimination claim qualify as a claim of sex discrimination under Title VII?

Title VII, Sexual Orientation Discrimination, and Transgenderism

Title VII broadly prohibits discrimination by employers on the basis of a variety of protected characteristics, including sex. It does not expressly prohibit discrimination on the basis of sexual orientation. It also does not expressly prohibit discrimination on the basis of transsexualism or gender identity.

An easy way to protect against the myriad forms of discrimination that are experienced by both homosexuals and transgender people at work would be to amend Title VII to include these categories. The Employment Non-Discrimination Act (ENDA), a bill that has been regularly and repeatedly introduced in Congress since 1993, would do that just that. Every version of ENDA Congress has considered would ban employment discrimination on the basis of sexual orientation; some versions, including the one most recently introduced in both houses of Congress, would also ban discrimination on the basis of gender identity and expression. A sexual-orientation-only version passed the House of Representatives in 2007, but no version of ENDA has ever made it through the Senate.

Still, in the two decades during which ENDA has been debated, but not enacted, many court cases have been litigated over whether Title VII is broad enough to encompass any claims of sexual orientation or gender identity discrimination.

Part of the reason litigants seek to rely on Title VII in this context is that there is currently no other federal law that bans sexual-orientation or gender-identity discrimination in any context—workplace or otherwise. Many

courts have thus been asked to rule whether Title VII's ban on sex discrimination could be interpreted to encompass a ban on sexual-orientation or gender-identity discrimination.

On the issue of whether sexual-orientation discrimination comes within Title VII, every federal court to consider the issue has said no. Even the liberal U.S. Court of Appeals for the Ninth Circuit so held, in its well-known ruling in *DeSantis v. Pacific Telephone & Telegraph* (1979).

On the issue of whether gender-identity discrimination comes within Title VII, almost every federal court to consider the issue has also said no. The U.S. Court of Appeals for the Seventh Circuit's 1984 ruling in *Ulane v. Eastern Airlines* was among the first such rulings, and set the tone for a pattern of exclusion of all discrimination claims raised by transsexuals under Title VII.

Despite these rulings, however, both gays and lesbians and transgender individuals have been able to find some protection, at least indirectly, under Title VII. One way in which gay and lesbian employees have used Title VII is in the sexual-harassment context. The Supreme Court held in *Oncale v. Sundowner Services* (<http://supreme.justia.com/cases/federal/us/523/75/case.html>) (1996) that Title VII prohibits same-sex sexual harassment, as long as the plaintiff is able to prove that the harassment occurred because of the victim's sex. Sexual harassment of a male (straight or gay) by a gay male would fit this model.

Title VII and Sex-Stereotyping Theory

Transgender employees have also found indirect protection under Title VII, but through a different theory—the theory that the discrimination they experience is a form of illegal sex stereotyping. The Supreme Court ruled in a 1989 case, *Price Waterhouse v Hopkins* (<http://supreme.justia.com/cases/federal/us/490/228/case.html>), that sex-role stereotyping can be an actionable form of employment discrimination. In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied partnership in an accounting firm, at least in part because she was too aggressive; cursed like a truck driver; and did not walk, talk, or dress in a feminine manner. In short, she was a woman who acted like a man, and for that, she was dealt a career-stunting blow.

Ruling on Hopkins's sex-discrimination lawsuit, the Court held that Title VII forbids employers from discriminating against an employee for failing to live up to gender-role expectations. You can't, in other words, punish a female employee for not being feminine enough, especially when the job itself might demand more typically masculine personality traits. That sort of gender policing, the Court ruled, violates Title VII. In an oft-quoted line, the majority observed that: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

This case has been used by some effeminate gay men, for example, who claim they have been singled out for adverse treatment not because they are gay, but because they do not live up to their employers' or co-workers' sex-role expectations of masculinity. But just being gay—and being discriminated against—is not enough. Courts do not view having sex with a person of the same sex as sufficient defiance of gender roles to qualify for protection under this theory.

Transgender individuals have made use of this same theory—and met with even greater success. After all, the very essence of being transgender is expressing gender in a manner that is inconsistent with our expectations, given a person's biological sex. (“Transgender” is a broad term that encompasses anyone whose gender identity or expression differs from his or her biological sex, whether or not sexual-reassignment surgery is contemplated or undertaken.)

In a spate of cases in the last decade, transgender plaintiffs have relied on *Price Waterhouse*'s sex-stereotyping theory. In a few bizarrely-reasoned cases, courts have refused to apply sex-stereotyping theory to transsexual plaintiffs, suggesting that their transsexual status deprives them of a “sex” altogether, and thus also deprives them of any protection from “sex discrimination.” But the more recent cases tend to rule in favor of transsexual plaintiffs, by applying *Price Waterhouse* to claims of sex stereotyping.

For example, in 2004 the Sixth Circuit, in *Smith v. City of East Salem* (http://scholar.google.com/scholar_case?

[case=988234023344471066](#)), ruled in favor of a transsexual firefighter who claimed that he had suffered employment discrimination because of his gender-identity disorder. The court relied on *Price Waterhouse* to hold that discrimination against a male who assumes a female identity is a form of unlawful gender policing.

Likewise, in 2008, a federal district court in the District of Columbia joined the Sixth Circuit in applying *Price Waterhouse* to validate a discrimination claim brought by a transsexual plaintiff. In *Schroer v. Billings*, which I have written about [elsewhere \(http://writ.news.findlaw.com/grossman/20080930.html\)](#), the Congressional Research Service withdrew an offer of employment to Diane Schroer, once it learned that she was in the process of transitioning from male to female status.

When Schroer sued, the court ruled that Schroer was a victim of illegal sex-stereotyping, though not in the usual way that transsexuals might experience. The supervisor who reacted negatively to her disclosure of transsexualism did not seem to care that Schroer was a man taking on the appearance of a woman—something a “real” man would not do. Rather, the supervisor admitted that her concern was that Schroer did not look feminine enough—that she looked like a man dressed as a woman. Thus, it was not the disjunction between anatomy and appearance that bothered the supervisor, but rather Schroer’s failure, as a woman, to live up to the expectations for her assumed gender.

The court in *Schroer* made use of sex-stereotyping theory, but also went one step further. It ruled that discrimination against individuals who change their sex is itself a form of sex discrimination. In so holding, the court analogized to discrimination against religious converts. If an employer discriminated against someone because she converted from Christianity to Islam and harbored bias only against “converts,” the judge reasoned, “that would be a clear case of discrimination ‘because of religion.’” So, too, the court concluded, it is a clear case of discrimination when an employer singles out for adverse treatment an individual who converts from male to female.

Macy v. Holder: The EEOC’s Ruling

Let’s return now to the question posed to the EEOC—does the sex discrimination protocol apply to a claim of gender-identity discrimination? The EEOC said yes. The Agency processing Macy’s complaint wrongly separated it into two separate claims—a claim of sex discrimination and a claim of gender identity discrimination. These both are facets of sex discrimination. Thus, no matter how Macy describes her claim, she is alleging sex discrimination, plain and simple.

To reach this conclusion, the EEOC first noted that Title VII has been interpreted to ban discrimination on the basis of both sex—that is, the biological and anatomical differences between men and women—and gender—that is, the social and cultural expectations that attach to biological sex. *Price Waterhouse* certainly supports this position, as do a variety of lower court rulings.

Next, the EEOC focused on the nature of transgender discrimination. Regardless of the exact form such discrimination takes, the EEOC reasoned, it is always “related to the sex of the victim.” This is so “whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.” In each case, the employer is “making a gender-based evaluation,” and “violating the Supreme Court’s admonition” in *Price Waterhouse* that “an employer may not take gender into account in making an employment decision.”

At this stage of its analysis, the EEOC relied on *Smith* and *Schroer*, the cases I discussed above, as well as *Schwenk v. Hartford* (2000), a Ninth Circuit opinion ruling that a prison guard’s assault against a transgender prisoner violated the Gender Motivated Violence Act. There, the guard, who assaulted the prisoner after learning of her transsexualism, was “motivated, at least in part, by [her] gender.” The EEOC also relied on *Glenn v. Brumby* (2011), an Eleventh Circuit ruling in favor of a transgendered employee who was fired because her supervisor thought it was “inappropriate,” “unnatural,” and “unsettling,” for a biological male to appear at work dressed as a woman. Applying equal-protection principles because the plaintiff was a public employee, the court

noted that the very nature of transgenderism is to defy gender stereotypes, and thus, discrimination against transgender plaintiffs inherently involves gender discrimination. (Justia’s David Kemp has written [here](http://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause) (<http://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause>) about *Glenn* and the application of the Equal Protection Clause to transgender discrimination involving public employees.)

Finally, the EEOC made clear that discrimination against transgender employees (or applicants) is always unlawful, whether or not it involves gender-based stereotyping. Sex-stereotyping under *Price Waterhouse* is not a separate cause of action under Title VII. It is simply “one means of proving sex discrimination.” The application of a gender stereotype—such as the stereotype that Ann Hopkins rejected, under which she should have done more “womanly” things like wearing makeup and being polite—is simply proof that an employer had gender in mind when making an employment decision. That is what violates Title VII. Employers cannot take sex or gender into account when making employment decisions, unless they do so pursuant to a formal policy that can be justified as a bona fide occupational qualification. As the EEOC notes:

Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort. (citations omitted)

Although the discrimination that a transgender person may experience may be proven through a variety of “different formulations,” the EEOC continued, these are “simply different ways of describing sex discrimination” rather than “different claims of discrimination that can be separated out and investigated within different systems.”

For example, regardless of whether Macy can prove that she did not get the position because the Director believed anatomical males should assume a masculine appearance, or because the Director would have hired her as a man, but not as a woman because he preferred male employees, the Director is equally engaging in sex discrimination. The burden on the complainant is simply to prove that the employer took sex or gender into account when deciding not to hire her.

It’s important to be clear here about what the EEOC did not do and well as what it did: It did not, as many media outlets have reported, declare transsexuals or transgendered persons to be a protected class. Only Congress has the power to add a protected class within Title VII’s ambit. What the EEOC held, in the final analysis, is that discrimination against a transgender person “because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”

Whether by the EEOC’s Approach, the Courts’ Approach or Both, Transgender Employees Must Be Protected From Discrimination

The EEOC’s ruling in *Macy* takes an honest, straightforward look at Title VII’s ban on sex discrimination and the nature of discrimination against transgender individuals. Its conclusion is in some ways obvious: Singling out people with ambiguous or non-conforming expressions of gender for adverse treatment violates the fundamental tenet of anti-discrimination law that sex cannot be taken into account when hiring, firing, or setting conditions of employment. Yet, most courts have focused exclusively on sex-stereotyping theory and forced plaintiffs to pigeonhole their allegations to reflect the application of unlawful gender stereotypes.

Because many instances of transgender discrimination do involve gender stereotyping, the outcome in many cases may be the same under either approach. But the EEOC’s approach will encompass more instances of discrimination (an important benefit, given that survey data I cited above, showing that the vast majority of transgender employees will experience workplace discrimination), and allow for a more genuine depiction of the problem alleged in any individual case.

Because this order originates from the EEOC, the agency charged with implementing Title VII, as well as most other federal anti-discrimination laws, it is entitled to some deference. But whether or not administrative law requires courts to follow the EEOC’s reasoning, courts should do so, because the conclusion is inescapable:

discrimination against transgender individuals is about gender and thus, such discrimination is unlawful when it occurs in the employment context. Maybe progress in this direction will help to finally prove true the Supreme Court's then-premature declaration, made more than twenty years ago in *Price Waterhouse*, that we are "beyond the day" in which employers assign gender roles to employees based on biological sex.



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