



ISSN 1935-0007

Cite as: 2007 (6) AELE Mo. L. J. 201

Employment Law Section - June, 2007

Legal Rights of Transsexual Public Safety Employees

Contents

- Background
- Earlier Wrongful Termination Cases
- 2003: Cincinnati Police Sergeant Litigation
- 2004: Salem, Ohio, Fire Lieutenant Litigation
- 2006: Washington, D.C., Terrorism Analyst Litigation
- Locker Rooms and Toilets
- Insurance Issues
- Employer Actions
- References and Resources
- Definitions

This article addresses the legal rights of public employees who cross-dress or undergo sexual reassignment surgery (SRS). It does not examine the rights of gay males or lesbians who are content to wear the clothing and continue the lifestyle of their anatomical gender. See *Definitions* in the Appendix.

Background

Although federal law does not prohibit job discrimination against homosexuals, it does protect them from sexual harassment. [Oncale v. Sundowner Offshore Servs., Inc.](#), 523 U.S. 75 (1998).

Sexual orientation employment rights may be protected under state law or local ordinances. At least five states specifically protect transsexuals. A few states have enacted reactive legislation designed to prohibit same-sex marriages, to de-recognize domestic partnerships, or even to repeal local antidiscrimination ordinances, such as Colorado Constitutional Amendment 2 of 1992 -- later struck down in [Romer v. Evans](#), 517 U.S. 620 (1996).

Except for the military, most public employers are not concerned with a worker's sexual orientation. Few school boards in the 21st Century would try to fire a gay teacher, and most law enforcement agencies are unconcerned about hiring gay or lesbian officers. Management focuses on performance and conduct, not romantic preferences.

Cross-dressing and gender change is another matter. Coworkers in some occupations have less tolerance than others, especially if a male police officer or firefighter becomes a woman.

While surgical intervention is of recent origin, it no longer is uncommon (estimated a 1 in 12,000 in the U.S.). Nevertheless, it strains *esprit de corps* and prompts some administrators to separate the employee from active service.

The current edition of the [Diagnostic and Statistical Manual of Mental Disorders](#) has five criteria that must be met before a diagnosis of Gender Identity Disorder (302.85) is proper:

1. There must be evidence of a strong and persistent cross-gender identification.
2. This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex.
3. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.
4. The individual must not have a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia).
5. There must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.



Transgender Flag

Earlier Wrongful Termination Cases

In 1977 a transsexual plaintiff lost a Title VII and equal protection claim brought

against the employer following job termination after the employee announced an intention to undergo sexual reassignment surgery.

The Ninth Circuit dismissed the Title VII claim because "sex" does not extend to transsexuals and also dismissed the equal protection claim because transsexuals do not constitute a "suspect class." Holloway v. Arthur Anderson & Co., 566 F.2d 659, 663 (9th Cir. 1977). But see Schwenk v. Hartford, #97-35870, 204 F.3d 1187 (9th Cir. 2000), where relief was granted to a transsexual inmate by the same circuit.

The Seventh Circuit also denied relief a few years later in the case of a commercial air pilot. Ulane v. Eastern Airlines, #84-1431, 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985). The panel reasoned that the plaintiff was not discriminated against as a woman, but was fired because of the male-to-female reassignment procedure, which was not protected under Title VII.

In 1989 the Supreme Court expanded the protection of Title VII by recognizing gender stereotyping, and upheld the complaint of a woman who was the victim of discrimination because she was perceived as being too masculine. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

That case has changed the landscape, and while transsexuals are not a protected class under Title VII or the ADA, they can raise claims of sex discrimination because of unlawful gender stereotyping.

2003: Cincinnati Police Sergeant Litigation

As a British newspaper dryly noted, gender dysphoric persons who have completed sexual reassignment surgery are an "under-represented group in policing." *The Evening Standard*, 18 Feb. 2003.

In 1998 a male Cincinnati police officer scored 18th out of the 105 who took the sergeant's exam. The 22-year veteran then underwent hormone therapy in preparation for sexual reassignment surgery.

He was promoted to sergeant but allegedly was told by a lieutenant colonel that he "was not masculine enough and that he needed to change his demeanor." Eventually, he failed his probationary period, and was the only person to fail the probationary period in the history of the agency.

He changed his name from Phillip to Philecia, and sued under federal and state discrimination laws after the demotion -- allegedly the result of the plaintiff's transsexuality and failure to conform to gender stereotypes.

The jury awarded the plaintiff \$150,000 in compensatory damages and \$140,000 in front pay. An additional \$30,511 in stipulated back pay and \$553,726 in attorney's fees. [Barnes v. Cincinnati](#), #C-1-00-780, 41 (2001) G.E.R.R. (BNA) 294 (S.D. Ohio 2003).

On appeal, a three-judge panel has affirmed the awards. They noted that a jury found that Philecia Barnes was demoted from a sergeant's training program for not conforming to male stereotypes.

The evidence showed that another sergeant with lower probationary scores passed probation while Barnes failed, and that she was the only sergeant between 1993 and 2000 who had failed probation.

During the period when Barnes was transitioning from male to female, he worked as a male while on duty but lived as a woman while off duty. Sometimes he came to work wearing lipstick, makeup, and arched eyebrows.

Nearly every evaluator who had reviewed Barnes's performance during probation commented on the lack of a "command presence," which an expert said was a code-word for sexual stereotyping.

The panel said that Barnes had standing to sue under the Equal Protection Clause as either a man or a woman. [Barnes v. City of Cincinnati](#), #03-4110, 401 F.3d 729, 2005 U.S. App. Lexis 4607, 2005 FED App. 0142P (6th Cir. 2005).

2004: Salem, Ohio, Fire Lieutenant Litigation

After a male fire lieutenant in a small Ohio town announced that he planned to change his gender by surgery, city officials agreed to arrange for the Civil Service Commission to require the lieutenant to undergo three separate psychological evaluations with physicians of the City's choosing. They apparently hoped that he would either resign or refuse to comply. If he refused to comply, they could terminate him for insubordination.

The lieutenant sued in federal court claiming sex discrimination and retaliation, along with state law claims of invasion of privacy and civil conspiracy. The district court granted judgment on the federal claims to the defendants and dismissed the state law claims without prejudice.

On appeal, a three-judge panel noted that to prevail on a sex discrimination claim, a plaintiff must show that he is a member of a protected group, he suffered an adverse employment action, he was qualified for the position in question, and that

he was treated differently from similarly situated members of the protected class.

The panel found that the plaintiff is a member of a protected class, i.e., a male with [Gender Identity Disorder](#). As a lieutenant in the fire dept. for seven years, without any negative incidents, he was qualified for the position in question. He also showed that he was treated differently from other males because of his non-masculine behavior and Gender Identity Disorder (DSM-IV 302.85).

To prevail on a retaliation claim, a plaintiff must show that he engaged in an activity protected by federal law, the employer knew he engaged in this activity, the employer took some action adverse to him; and there was a causal connection between the protected activity and the adverse employment action.

The panel cited the Supreme Court's decision in [Price Waterhouse v. Hopkins](#), 490 U.S. 228 (1989), where a female was denied a promotion because she was considered "macho." She had been told that she could improve her chances for advancement if she were to take a course at charm school, walk, talk and dress more femininely, wear make-up, have her hair styled, and wear jewelry. Six members of the Court held that such comments constituted gender discrimination because Title VII also bars gender stereotyping.

Here, the lieutenant claimed that because his mannerisms did not conform with sexual stereotypes" of how a man should look and behave," management allegedly schemed to compel his resignation "by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior." The panel said:

"After [Price Waterhouse](#), an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex. ...

"Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping."

Because the plaintiff "successfully stated claims for relief pursuant to both Title VII and 42 U.S. Code §1983," the judgment of the district court was reversed and the case was remanded for trial. [Smith v. City of Salem](#), #03-3399, 378 F.3d 566, 2004 U.S. App. Lexis 10611, 2004 FED App. 0160P (6th Cir. 2004).

2006: Washington, D.C., Terrorism Analyst Litigation

In D.C. a man applied for a position as a terrorism research analyst with the *Congressional Research Service*, an arm of the Library of Congress. The plaintiff was a twenty-five year veteran of the U.S. Armed Services, a graduate of the National War College and the Army Command and General Staff College, and has master's degrees in history and international relations.

The applicant spent the last seven plus years with Special Operations Command, which "plans, directs, and executes special operations in the conduct of the War on Terrorism." The plaintiff also headed a 120-person unit that tracks and targets high-threat international terrorist organizations.

When offered the new job, the applicant used his male legal name and wore male clothing. As part of a treatment for gender dysphoria, the plaintiff was about to begin the initial stages of the sex-reassignment protocol. This meant using a feminine name, dressing full-time in traditionally feminine attire, and to begin living as a woman.

On learning about the impending gender change a CRS official informed him that, "for the good of the service," the plaintiff would not be a "good fit" at CRS. A suit was filed in federal court alleging unlawful sex discrimination.

The District Court examined the Complaint in light of the Supreme Court's decision in [Price Waterhouse v. Hopkins](#), 490 U.S. 228 (1989). The District Judge wrote that neither the logic nor the language of Price Waterhouse establishes a cause of action for sex discrimination in every case of sex stereotyping.

Here, the plaintiff was not seeking acceptance as a man with feminine traits. The judge wrote:

"She seeks to express her female identity, not as an effeminate male, but as a woman

"The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave -- she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex."

The judge concluded, after a long discussion of gender dysphoria, that there are facts that would support a claim that management refused to hire the plaintiff solely because of his/her sexual identity, and that in so doing, the agency discriminated against the plaintiff because of sex.

[Schroer v. Billington](#), #05-1090, 424 F. Supp. 2d 203, 2006 U.S. Dist. Lexis 14278, 97 FEP Cases (BNA) 1506 (D.D.C. 2006).

Locker Rooms and Toilets

Problems arise when a worker dresses as a female (or male) and has not completed surgical reassignment procedures. Which locker rooms and toilet facilities should a cross-dressing employee use? The ones that correspond to the employee's clothing and lifestyle, or the one that matches his or her genitals?

In Minnesota, female coworkers objected to the plaintiff, a biological male, using the women's toilets. To complicate matters, a Texas court had granted the plaintiff's petition for a name and gender change "from genetic male to reassigned female," apparently without requiring reassignment surgery. Justin thus became Julienne.

To avoid potential claims from distressed female workers, the personnel office ruled that restroom use would be according to biological gender and that Julienne must use a single-occupancy restroom on a different floor or in another building.

Julienne refused to comply with the restroom use policy and was threatened with disciplinary action. Although she was offered a promotion, with a substantial salary increase, if she accepted a transfer -- she resigned, citing job-induced stress and hostility.

She sued the employer for maintaining a hostile environment in violation of state discrimination laws. The trial court ruled for the employer, but a three-judge appeals panel disagreed, concluding that she had established a prima facie sexual orientation discrimination claim and had alleged a hostile work environment claim sufficient to preclude a summary judgment. See 619 N.W.2d 424, 2000 Minn. App. Lexis 1152 (2000).

The Minnesota Supreme Court reversed. State law "neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender."

The justices said that although an employer "may elect to offer education and training" as an alternative, "it is not for us to condone or condemn the manner in which [the employer] enforced the disputed employment policy."

Her hostile work environment claim was predicated on allegations that she "was the subject of scrutiny, gossip, stares, glares and restrictions on the use of the

restroom near her workstation" because of her sexual orientation.

The restroom policy, said the justices, was not based on sexual orientation and that claim must fail. [Goins v. West Group](#), #CX-00-706, 635 N.W.2d 717, 2001 Minn. Lexis 789 (2001).



In New York, a federal court awarded \$193,551 in attorney's fees in a civil rights action brought by transvestites who were refused the use of gender-denominated toilets of their choice. [McGrath v. Toys "R" Us](#), #CV-01-3071, 2002 U.S. Dist. Lexis 22610 (E.D.N.Y. 2002); modif. 356 F.3d 246, 2004 U.S. App. Lexis 1129 (2d Cir. 2004).

In Utah, another federal court rejected a suit by a **pre-op** transsexual public employee who was terminated because of a lack of available unisex toilets.

The court distinguished [Smith v. City of Salem](#), 378 F.3d 566 (6th Cir. 2004), where a male firefighter began treatment for Gender Identity Disorder. The Utah court found no parallel. The judge wrote:

"There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman."

Noting that if the plaintiff's desire to use the toilets of the opposite sex is required by law, "then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms ..." The judge added:

"There is no evidence that the defendants required [the] plaintiff's appearance to conform to a particular gender stereotype, only that they required her 'to conform to the accepted principles established for gender-distinct public restrooms.' ...

"Defendants also points out, and the court agrees, that no study is necessary to conclude that many women would be upset, embarrassed, and even concerned for their safety if a man used the public restroom designated exclusively for women."

[Etsitty v. Utah Transit Auth.](#), #2:04CV616, 2005 WL 1505610, 2005 U.S. Dist. Lexis 12634, 95 FEP Cases (BNA) 1836 (D. Utah 2005).

Insurance Issues

In general, insurance carriers have excluded medical coverage for cosmetic surgery, which is likely to include reassignment surgery and medical problems arising from surgical complications. They also require the procedure to be "medically necessary" to qualify for benefits. [Davidson v. Aetna Life & Casualty Insur. Co.](#), 101 Misc.2d 1, 420 N.Y.S.2d 450 (N.Y. Sup. Ct. 1979).

In those few states that prohibit discrimination against transsexuals, the state's Insurance Board (or Commission) is more likely to reject an insurance carrier's exclusion as contrary to public policy than in other states.

Employer Actions

A number of issues are important to discuss at the time the employee announces an intent to undergo reassignment surgery, including:

- the expected timeframe;
- the amount of time off for treatment and therapy, if known;
- whether the employee wishes to personally inform supervisors and coworkers or would prefer this to be done by management;
- what amendments will need to be made to records;
- agreeing on a procedure for adhering to dress codes; and
- agreeing on the point at which the employee will commence using facilities in their new gender (such as toilets).

References and Resources (chronological)

Wikipedia, "[Legal aspects of transsexualism](#)" and "[List of transgender-related](#)

[topics](#)," (2007).

Gender Transition Guidelines for Large Organizations, by Prof. Jillian T. Weiss, Ph.D. (2006) viewable at <http://phobos.ramapo.edu/~jweiss/policy.pdf>

Gender Stereotyping: Expanding the Boundaries of Title VII, Panel discussion of the 2006 annual meeting of the Assn. of American Law Schools, Travis, Leonard, Williams and Cherry, 10 Empl. Rts. & Employ. Pol'y J. (NERI & Kent) 271, viewable at: http://www.nyls.edu/pdfs/leonard_genderstereotyping.pdf

Gender Reassignment - A Guide for Employers, issued by the U.K. Dept of Trade and Industry (2005) viewable at http://www.womenandequalityunit.gov.uk/publications/gender_reassignment_guide05.pdf

Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law, Saru Matambanadzo, 12 Cardozo J.L. & Gender 213, Yeshiva University (2005).

Expanding Rights of Transsexuals in the Workplace (The), Neil Dishman, 21 The Labor Lawyer (ABA) 121 (2005) viewable at: <http://www.bna.com/bnabooks/ababna/laborlawyer/21.2.pdf>

Homosexuality, Transvestism and Transsexuality Reflections on Their Etiology and Differentiation, C. V. Prince Ph.D., 8 (4) International Journal of Transgenderism 17-20 (2005).

Lancashire [U.K.] Constabulary Trans[sexual] Staff Policy (2005), viewable at: <http://www.lancashire.police.uk/fileadmin/users/documents/transstaffpolicy.doc>

Responsible Representation of Your First Transgendered Client, Phyllis Frye & Katrina Rose, 66 Tex. B. J. 558 (2003).

Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals, 11 Colum. J. Gender & L. 88, Kari E. Hong (2002).

Gender Assessment: A Legal Approach to Transsexuality, Jennifer Marie Albright, 55 SMU L. Rev. 593 (2002).

Defining Male and Female: Intersexuality and the Collision Between Law and Biology, Julie A. Greenberg, 41 Ariz. L. Rev. 265 (1999).

Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law,

Patricia A. Cain, 75 Denver Univ. L.R. 1321 1336-42 (1998).

Appendix

Definitions *

Gender: Sometimes used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex, but often used interchangeably with the noun "sex." "The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered." Wise, Transsexualism: A Clinical Approach to Gender Dysphoria, 1983 *Medic. Trial Tech. Q.* 167, 170, as quoted in Ulane v. Eastern Airlines, #84-1431, 742 F.2d 1081, n.5 (7th Cir. 1984).

Gender Identity Disorder/Gender Dysphoria: DSM-IV defines it as a "strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex," American Psychiatric Assn. *Diagnostic and Statistical Manual of Mental Disorders* 532-38 (4th ed. 1994).

Homosexual: A person who is sexually attracted to members of his or her gender, but has no desire to wear the clothing of or to become another gender.

Intersex: Persons who were born with mutated, incomplete, or dual genitals.

Transgender: An umbrella term encompassing all forms of gender change.

Transsexual: A person who has altered his or her genitals or intends to.

Transvestite: A person who always or sometimes wears the clothing of the other gender for pleasure with no intention to alter his or her genitalia.

* There is some definitional disparity among various authors.

AELE Monthly Law Journal
Wayne W. Schmidt
Employment Law Editor
841 W. Touhy Ave.
Park Ridge IL 60068-3351 USA
E-mail: wws@aele.org
Tel. 1-800-763-2802

© 2007, by the AELE Law Enforcement Legal Center

Contents may be downloaded, stored, printed or copied,

but may not be republished for commercial purposes.

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)