Applicable Supreme Court Cases

Korematsu v. United States, United States Supreme Court, June 1, 1943: was a landmark United States Supreme Court case concerning the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II regardless of citizenship.

In a 6-3 decision, the Court sided with the government, ruling that the exclusion order was constitutional. The opinion, written by Supreme Court justice Hugo Black, held that the need to protect against espionage outweighed Fred Korematsu's individual rights, and the rights of Americans of Japanese descent. (The Court limited its decision to the validity of the exclusion orders, adding, "The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding.") During the case, Solicitor General Charles Fahy is alleged to have suppressed evidence by keeping from the Court a report from the Office of Naval Intelligence indicating that "there was no evidence Japanese Americans were disloyal, were acting as spies or were signaling enemy submarines."[3]

The decision in *Korematsu v. United States* has been very controversial.[2] Korematsu's conviction for evading internment was overturned on November 10, 1983, after Korematsu challenged the earlier decision by filing for a writ of *coram nobis.* In a ruling by Judge Marilyn Hall Patel, the United States District Court for the Northern District of California granted the writ (that is, it voided Korematsu's original conviction) because in Korematsu's original case, the government had knowingly submitted false information to the Supreme Court that had a material effect on the Supreme Court's decision.

The *Korematsu* decision has not been explicitly overturned, although in 2011 the Department of Justice filed official notice conceding that it was in error, thus erasing the case's value as precedent for interning citizens. However, the Court's opinion remains significant both for being the first instance of the Supreme Court applying the strict scrutiny standard to racial discrimination by the government and for being one of only a handful of cases in which the Court held that the government met that standard

The importance of this case to the transgender community is that the military needs to show only the flimsiest of reasons, and does not need to show evidence for those reasons, why transgender people, civilian or otherwise, can be singled out by the military.

Korematsu v. United States

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973): Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for

petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. The facts of the case are not germane to this document, other than the case lays out the four basic criterion for a complaint based on Title VII of the 1964 Civil Rights Act. These are:

1. Complainant is by a member of a protected class based on Title VII prohibitions against discrimination on the basis of race, color, religion, sex or national origin.
2. Complainant was qualified for the job
3. Complainant was discriminated against despite their qualifications (and because of their membership in a protected class – ed.)
4. After their rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (i.e the position wasn't simply eliminated)

McDonnell Douglas Corp. v. Green external link

City of Los Angeles Department of Water and Power v. Mahart et al, United States Supreme Court, April 25, 1978: The Power and Water department had been making female employees contribute larger relative amounts of their salaries to the pension fund because, on average, women live longer. The plaintiffs filed suit for violation of Title VII of the 1964 Civil Rights Act. The court agreed with the plaintiffs, stating: "It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females… If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."

Although the court found the practice unconstitutional, they did not award compensation from the pension fund, since a retroactive back pay would punish pensioners who had no part in the original decision to take more pay from women.

Los Angeles Department of Water and Power v. Mahart et al. external link

Rostker, Director of Selective Service v. Goldberg et al., Supreme Court of the United States, June 25, 1981: The question presented to the Supreme Court was whether the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.* (1976 ed. and Supp. III), violated the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females.

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

Registration for the draft under was discontinued in 1975. In early 1980. President Carter determined that it was necessary to reactivate the draft registration process. The immediate impetus for this decision was the Soviet armed invasion of Afghanistan. These events of breathed new life into a lawsuit which had been essentially dormant in the lower courts for nearly a decade. It began in 1971 when several men subject to registration for the draft and subsequent induction into the Armed Services filed a complaint in the United States District Court for the Eastern District of Pennsylvania challenging the MSSA on several grounds. A three-judge District Court was convened in 1974 to consider the claim of unlawful gender-based discrimination.

Three days before registration was to commence, the District Court issued an opinion finding that the Act violated the Due Process Clause of the Fifth Amendment and permanently enjoined the Government from requiring registration under the Act.

Turning to the merits, the court rejected plaintiffs' suggestions that the equal protection claim should be tested under "strict scrutiny," and also rejected defendants' argument that the deference due Congress in the area of military affairs required application of the traditional "minimum scrutiny" test.
The Supreme Court ruled that draft registration can remain male only, stating:

> *The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.*
>
> *Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration.*

This ruling effectively states that the military is immune from lawsuits which allege bias on the basis of sex, or sex stereotypes. Title VII, and the Fifth Amendment are not applicable to the military in matters of personnel decisions.

Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission.

Rostker v. Goldberg External Link

Goldman v. Weinberger et al. External Link

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

City of Cleburne v. Cleburne Living Ctr., Inc., 5th Circuit Court of Appeals, Upheld by Supreme Court on Appeal, July 1, 1985: The city of Cleburne enacted an ordinance specifically to prevent a living facility for mentally handicapped people from being built. The 5th Circuit Court of Appeals ruled, and the Supreme court upheld, that the Equal Protection Clause requires the State to avoid all laws and classifications that are "arbitrary or irrational" or reflect "a bare . . . desire to harm a politically unpopular group." To make a law that targets a group adversely, the state must show that the law is rationally related to a legitimate governmental purpose at an intermediate level of scrutiny.

City of Cleburne v. Cleburne Living Center, US Supreme Court Decision external link

Goldman v. Weinberger, Secretary of Defense, et al., Supreme Court of the United States, March 25, 1986

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner entered active service in the United States Air Force as a commissioned officer. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35-10. This regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties." AFR 35-10, ¶ 1-6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35-10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35-10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35-10 to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs.

The Supreme Court upheld the lower court ruling that the plaintiff had no right to wear the yarmulke, stating:

> *But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment….But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations…The First Amendment therefore does not prohibit them (regulations) from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.*

The impact of this decision is that the military does not need to show a rational need or negative impact to override an individual's constitutional rights.

Goldman v. Weinberger External Link

Price Waterhouse v. Hopkins, Court of Appeals for the District of Columbia Circuit, May 1, 1989: The plaintiff, Ann Hopkins (a cis woman), claimed she was postponed promotion to partnership at the firm for two years in a row based on sex-stereotyping against her gender nonconformity. After her promotion was postponed for the first year, Hopkins met with the head supervisor of her department, Thomas Beyer, who told her that to increase chances of promotion she needed "to walk more femininely, wear makeup, have her hair styled, and wear jewelry." Hopkins was well qualified for partnership, and frequently outperformed her co-workers. There were ample examples to show that she was denied promotion based on sex-stereotyping. Many male employees said they would not be comfortable having her as their partner because she did not act the way they believed a woman should.

Ann Hopkins resigned from the accounting firm when she was rejected for partnership for the second year, and sued Price Waterhouse for violating her rights under Title VII of the Civil Rights Act of 1964. The lower courts (District Court and the Appeals Court for DC) ruled that gender stereotypes cannot be used for discrimination. Upon appeal by Price Waterhouse, the Supreme Court upheld the lower court's ruling that using gender behavioral stereotypes was a violation of Title VII of the Civil Rights act of 1964.

Price Waterhouse v. Hopkins, US Supreme Court Decision external link

J.E.B. v. State of Alabama, United States Supreme Court, April 19, 1994: J.E.B. was taken to trial to determine paternity. The prosecution eliminated all the potential male jurors via peremptory

challenges. The J.E.B appealed the verdict (the baby's yours), based on the notion that you cannot eliminate jurors based on gender. The Supreme Court agreed, and ruled that gender, like race, cannot be used for jury selection decisions. The court ruled that it is illegal to make decisions based on the flawed, stereotypical perception that women think a particular way.

J.E.B. v. State of Alabama external link

Romer v. Evans, United States Supreme Court, May 20, 1996: The cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination on the basis of sexual orientation in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Voters in the state of Colorado passed an amendment to the state constitution in 1992 (hereafter referred to as Amendment 2) . Amendment 2 repealed these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." It also prohibited all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the fourteenth amendment because it infringed the fundamental right of gays and lesbians to participate in the political process.

On remand, the State advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. *Evans* v. *Romer*, 882 P. 2d 1335 (Colo. 1994) (*Evans II*).

The SCOTUS upheld the lower court ruling, but for different reasons. The SCOTUS ruled Amendment 2 to be unconstitutional because it violated the Fourteenth amendment. They stated:

> *"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 271" 272 (1979); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this*

conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group….

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of `equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)….

We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit….

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

This ruling draws on the same concept as Cleburn: you cannot use legislation to single out a specific group for unequal protection and rights.

Evans v. Romer External Link

Oncale v. Sundowner Offshore Services, Inc., United States Supreme Court, 1998: An oilfield worker was subjected to sexual harassment and humiliation on the job. He sued for sexual harassment and discrimination under Title VII of the 1964 civil rights act. His former employer argued that the authors of the 1964 civil rights act had not intended for men to be protected by the act. The Supreme Court ruled unanimously that original legislative intent must not be given controlling weight in interpreting Title VII. The Supreme Court wrote: "Statutory prohibitions [such as Title VII] often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws, rather than the principal concerns of our legislators, by which we are governed."

This ruling is key to future rulings on transgender issues, since it allows courts to ignore previous rulings such as *Ulane v. Eastern Airlines* and *Holloway v. Arthur Andersen*, which rejected plaintiff's complaints based on the premise that the original legislative intent of Title VII did not include males, transgender people, or transsexuals.

Oncale v. Sundowner Offshore Services US Supreme Court Decision external link

Nevada Department of Human Resources v. Hibbs, Unites States Supreme Court, May 27, 2003: Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated.

The Supreme Court upheld the appeals court ruling that FMLA was being applied inequitably between the sexes in Nevada, and held it a violation of the 14th Amendment. The court noted:

> *Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.*

Additionally, they note:

> *"According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States‟ gender discrimination in this area."*

State of Nevada Human Resources v. Hibbs external link

Case Law by District

1 (RI, NH, MA, ME, Puerto Rico)

Higgins v. New Balance Shoe Corporation, United States Court of Appeals, First Circuit, October 22, 1999: For ten years, beginning in 1986, the appellant worked on the production line at New Balance's factory in Norridgewock, Maine. Although he earned generally positive evaluations, he received two warnings in 1995 about his failure to comport himself as a team player.

Apparently due to his homosexuality, many of his fellow workers mistreated him: they called him vulgar and derogatory names, made obscene remarks about his imagined sexual activities, and mocked him (e.g., by using high-pitched voices or gesturing in stereotypically feminine ways). The appellant says that

he complained repeatedly to persons in authority, but nothing was done to ameliorate the situation. Indeed, Ron Plourde, who eventually became the appellant's supervisor, was one of his foremost tormentors.

A confrontation with yet another tormentor, Melanie Vitalone, precipitated the appellant's discharge. According to the appellant's account, Vitalone not only would ridicule him because of his sexual orientation but also would blame him when her work did not go well. He often griped about Vitalone's predilections, but without result. Indeed, his supervisor (Plourde) told him at one indeterminate point that he would be "out the door" if he complained one more time about Vitalone. On what proved to be the appellant's last day of work (January 4, 1996), Vitalone left the production line to socialize. When she returned, a backlog confronted her. She lashed out at the appellant, mouthing derogatory epithets and blaming him for the back-up. Vitalone called the matter to Plourde's attention, telling him that she had asked Higgins a question and that he had refused to reply. Plourde spoke with both protagonists. Then, citing the personnel reports of Higgins's failed communications, Plourde fired him for insubordination.

Higgins sued his former employer, defendant-appellee New Balance Athletic Shoe, Inc., claiming hostile environment sex discrimination (relating to actions of, and remarks by, his supervisor and co-workers, allegedly on account of his homosexuality), retaliatory discharge (relating to his frequent complaints about activities in the factory that he thought were unsafe or illegal), and disability discrimination (relating to a hearing impairment that impeded his ability to work comfortably in the factory). These were filed under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in New Balance's favor.

The First Circuit rejected Higgins hostile environment claim based on Title VII not specifically covering sexual orientation, while simultaneously noting how awful his work environment was. They stated:

> *The record makes manifest that the appellant toiled in a wretchedly hostile environment. That is not enough, however, to make his employer liable under Title VII: no claim lies unless the employee presents a plausible legal theory, backed by significantly probative evidence, to show, inter alia, that the hostile environment subsisted "because of such individual's race, color, religion, sex, or national origin."…. The Supreme Court has made clear in Oncale v. Sundowner Offshore Services that, in same-sex harassment cases as in all sexual harassment cases, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations," but in fact constituted discrimination "because of . . . sex."*

Higgins v. New Balance Athletic Shoe Co. external link

Rosa v. Park West Bank and Trust Co., United States Court of Appeals First Circuit, June 8, 2000: On July 21, 1998, Rosa came to the Bank to apply for a loan. A biological male, he was dressed in traditionally feminine attire. He requested a loan application from Norma Brunelle, a bank employee. Brunelle asked Rosa for identification. Rosa produced three forms of photo identification: (1) a

Massachusetts Department of Public Welfare Card; (2) a Massachusetts Identification Card; and (3) a Money Stop Check Cashing ID Card. Brunelle looked at the identification cards and told Rosa that she would not provide him with a loan application until he "went home and changed."

Rosa sued the Bank for violations of the ECOA and various Massachusetts antidiscrimination statutes, and cited *Hopkins v. Price Waterhouse* as justification. While the district court found for the defense, the First Circuit Court of Appeals found for Rosa, based on a finding that *Price Waterhouse v. Hopkins* does apply to transgender individuals. The Circuit Court ruled this was a form of sex stereotyping, and that a similarly dressed woman would not have been denied a loan.

Rosa v. Park West Bank and Trust Company external link

2 (CT, NY, VT)

Miles v. New York University, United States District Court S.D. New York, October 7, 1997: Plaintiff began a program of graduate studies in musicology at defendant New York University ("NYU") in September, 1990. Among the professors under whom plaintiff studied was one Cliff Eisen, with whom she was assigned a series of one-on-one tutorial sessions. Plaintiff claims that in February, 1993, Professor Eisen began making wholly unwelcome sexual advances during these sessions. The advances included the fondling of breasts, buttocks, and crotch, forcible attempts to kiss, and repeated propositioning for a sexual relationship.

The plaintiff sought action under Title IX of the Education Amendments of 1972 against defendant New York University for sexual harassment. The university moved for summary judgment on two grounds: (1) The facts are such that the university can't be held liable for the conduct of its professor; and (2) plaintiff Jennifer Miles is not protected under Title IX because, although admitted to the school as a female and at all relevant times treated as such, plaintiff is in fact a male-to-female transsexual who, at the time of the professor's alleged conduct, was in the process of becoming a female.

The court rejected both arguments by the University. Professor Eisen was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female. The court also stated that previous cases cited by the defense, such as *Holloway v. Arthur Andersen*, *Ulane v. Eastern Airlines*, and *Dobre v. AMTRAK* (see elsewhere in this document), do not prevent claims of sexual discrimination under Title VII, (and hence Title IX), and merely allow expressing disapproval of conduct involved in the transformation from one gender to another.

Miles v. New York University external link

Simonton v. Runyon, United States Court of Appeals, Second Circuit, October 23, 2000: Simonton was employed as a postal worker in Farmingdale, New York for approximately twelve years. He repeatedly received satisfactory to excellent performance evaluations. He was, however, subjected to an abusive and hostile work environment by reason of his sexual orientation. The abuse he allegedly endured was so severe that he ultimately suffered a heart attack.

Simonton's sexual orientation was known to his co-workers who repeatedly assaulted him with such comments as "go fuck yourself, fag," "suck my dick," and "so you like it up the ass?" Notes were placed on the wall in the employees' bathroom with Simonton's name and the name of celebrities who had died of AIDS. Pornographic photographs were taped to his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home. Pictures of an erect penis were posted in his work place, as were posters stating that Simonton suffered from mental illness as a result of "bung hole disorder." There were repeated statements that Simonton was a "fucking faggot."

Plaintiff-appellant Dwayne Simonton sued the Postmaster General and the United States Postal Service under Title VII of the Civil Rights Act of 1964 for abuse and harassment he suffered by reason of his sexual orientation.

The United States District Court for the Eastern District of New York dismissed Simonton's complaint, reasoning that Title VII does not prohibit discrimination based on sexual orientation. The Second Circuit agreed with the lower court's ruling, albeit reluctantly when stating: "Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation." In their decision the court cited *Ulane v. Eastern Airlines* and *Higgins v. New Balance Shoes*.

The court rejected Simonton's arguments which cited *Hopkins v. Price Waterhouse* that his treatment was due to gender stereotyping.

Simonton v. Runyon external link

Tronetti v. TLC Healthnet Lakeshore Hospital, United States District Court Western District of New York, September 26, 2003 (Unpublished Decision): In an unpublished opinion, citing *Oncale v. Sundowner Offshore Services Inc.*, the court in Tronetti found that "although Title VII does not protect people on the basis of sexual preference / orientation… it nonetheless covers transsexuals to the extent that they have been discriminated against on the basis of sex, as opposed to transsexuals who have been discriminated against on the basis of sexual preference / orientation.

No Citation

Dawson v. Bumble & Bumble, United States Court of Appeals, Second Circuit, February 17, 2005: Dawson, a self-described "lesbian female, who does not conform to gender norms in that she does not

meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman," claims that she suffered discrimination on the basis of sex, sex stereotyping, and/or sexual orientation in violation of federal, state, and municipal law. *See* Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.;* New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*

Dawson was terminated after failing the training syllabus at the Bumble and Bumble Salon. She alleged that it was due to her lack of gender conformity and open lesbianism. Bumble and Bumble countered they had a diverse work environment, and that her termination was entirely due to her inconsistent performance as an assistant stylist.

The court ruled for Bumble & Bumble, and the Second Circuit upheld it. They both believed that Dawson failed to make a consistent case that her termination was not work related, and not related to her sexual orientation. They cited *Smith v. Salem*, and concurred, but offered the following insight into legal difficulties with the subject matter:

> *"[S]ex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination." …That is, individual employees who face adverse employment actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII… When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."*

Dawson v. Bumble & Bumble external link

Morales v. ATP Health & Beauty Care, Inc., United States District Court, District of Connecticut, August 18, 2008: On June 17, 2004, ATP hired Morales to work as a machine operator at its manufacturing plant in Stamford, Connecticut. Lizette Rosado-Martinez ("Rosado-Martinez"), ATP's Human Resources Manager, was aware of Morales' transgendered status at the time she was hired. Morales was frequently screamed at and subjected to unwanted sexual comments while working. Eventually she was terminated for having too many unexcused absences.

Morales sued under Title VII and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60 et seq. ("CFEPA") and for retaliation against her for exercising her rights under Title VII and CFEPA. The court ruled against her, stating that there was sufficient grounds to justify her termination by her absences, and did not prove a connection between her termination and her gender identity disorder.

The court also stated that she could not show the harassment was due to gender, only her sexuality, which is not protected by Title VII. The defense was granted a summary judgment and dismissal.

Note: This case give lots of room to dismiss employees for their orientation, since no matter how you look at a transsexual, they're homosexual from one point of view. (i.e. a MTF who likes women is by some legal definition a lesbian, a MTF who likes men is still biologically male, and therefor gay.)

Morales v. ATP Health and Beauty Care Inc. external link

3 (DE, NJ, PA)

Grossman v. Bernards Township Board of Education, Superior Court of New Jersey, Appellate Division, February 16, 1978: Paul M. Grossman, a transsexual, underwent sex reassignment surgery in March 1971. After the operation Grossman was known as Paula M. Grossman and began to live openly as a woman. On August 19, 1971 the Bernards Township Board of Education, her employer, filed written charges against Grossman and suspended her without pay. The State Commissioner of Education found that Grossman was incapacitated to teach children because of the potential psychological harm to her students. He therefore directed that she be dismissed "for reason of just cause due to incapacity."

Pursuant to the order of the Commissioner and the State Board of Education, the Bernards Township Board of Education filed an application for ordinary disability retirement on Grossman's behalf. The hearing officer recommended that the application be denied and the board of trustees of the Teachers' Pension and Annuity Fund agreed with his recommendation and denied the disability pension.

The Superior court's agreed with the lower court that Grossman was no longer fit to teach, based strongly on Dr. George Socarides testimony, stating:

> *We think it would be wrong to measure a teacher's fitness solely by his or her ability to perform the teaching function and to ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency. We are convinced that where, as has been found in this case, a teacher's presence in the classroom would create a potential for psychological harm to the students, the teacher is unable properly to fulfill his or her role and his or her incapacity has been established within the purview of the statute.*

The superior court was primarily concerned with pension related issues, and if a physical or mental condition prevented Ms. Grossman from teaching. They reversed lower court rulings and granted Ms. Grossman a medical disability pension, stating:

> *However, the plain fact is that no school district will employ her because of her transsexual status and the feared effect that may have on pupils she might be called upon to teach….If Grossman cannot be said to have the capacity to teach, as we held in the tenure proceedings, it is apparent that she lacks the capacity because of her physical condition following the sex change operation. Accordingly, it seems reasonable to us to conclude that if she cannot teach because of that physical condition she is obviously incapacitated both for tenure and pension purposes.*

Grossman v. Bernards County Board of Education external link

Wood v. C.G. Studios Inc., United States District Court, E.D. Pennsylvania, April 24, 1987: Plaintiff Wilma Wood instituted this suit in the Court of Common Pleas claiming that defendant C.G. Studios discriminated against her on the basis of sex in violation of Section 5 of the Pennsylvania Human Relations Act, 43 P.S. § 955(a). Specifically, she claimed that defendant failed to promote her and terminated her employment solely because it learned that she had undergone surgery to correct her hermaphroditic condition prior to working for defendant. Defendant moved for summary judgment. E.D. Pennsylvania District Court granted the motion based on the anticipation that Supreme Court of Pennsylvania would find, as a matter of law, that discrimination on the basis of gender-corrective surgery does not constitute discrimination on the basis of sex under Section 5(a) of the PHRA.

Wood v. C.G. Studios Inc. external link.

Dobre v. AMTRAK, United States District Court, E.D. Pennsylvania, December 1, 1993: Dobre, a transsexual, was employed by AMTRAK from May, 1989 until March 28, 1990. When she was hired by AMTRAK, Dobre presented herself as a man. After several months, she informed her supervisors that she was receiving hormone injections in order to begin the process of becoming female. The plaintiff asserts that she was discriminated against because of her new gender while in the process of transforming her body to conform with her psychological sexual identity.

Dobre contends that after she informed her supervisors of the hormone treatments she was discriminated against in the following respects, among others: (1) she was told that a doctor's note was required in order to dress as a female; (2) she was required to dress as a male; (3) she was not permitted to use the women's restroom; (4) the plaintiff's supervisors referred to her by her male name; and (5) her desk was moved out of the view of the public. On June 30, 1993, she filed a complaint alleging in Count I that AMTRAK's actions constitute sex-based discrimination under Title VII of the Civil Rights Act of 1964.

Dobre's case was dismissed on the grounds that all the previous cases preventing Title VII from applying to transsexuals (*Holloway v. Arthur Andersen*, *Ullane v. Easter Airlines*, *Sommers v. Budget Marketing Inc*, *Wood v. C.G Studios Inc*, *Grossman v. Bernards Township Board of Education*) were all correct. See these cases elsewhere in the document for their individual justifications.

Note: this case decision came AFTER *Hopkins v. Price Waterhouse*.

Dobre v. AMTRAK external link

Bibby v. Philadelphia Coca Cola Bottling Company, United States Court of Appeals, Third Circuit, August 1, 2001: John J. Bibby (A gay man – ed.) claimed to have been subjected to same-sex sexual harassment at the hands of his employer, the Philadelphia Coca-Cola Bottling Company, in violation of Title VII. The District Court granted summary judgment to the employer, and Bibby appealed. The Third Circuit Court of Appeals upheld the lower court ruling, concluding that the harassment wasn't about

what gender Bibby was, it was based on his sexual orientation. While the court agreed with previous courts that "harassment on the basis of sexual orientation is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace," and "harassment because of sexual orientation is a noxious practice, deserving of censure and opprobrium," the court concluded that Title VII does not protect sexual orientation.

Bibby v. Philadelphia Coca Cola Bottling Company external link

Mitchell v. Axcan, United States District Court, W.D. Pennsylvania, February 17, 2006: Plaintiff was employed as a Sales Representative for defendant from 1999 through 2003. For the first four years of his employment with defendant, the plaintiff presented in public as a male. In November 2003, the plaintiff informed defendant of his GID and began to present in public as a female. Plaintiff claims that from November through December 2003, he was subjected to harassment by defendant as a result of his sex and disability

On December 29, 2003, plaintiff was involved in a motor vehicle accident while operating a company vehicle. Defendant claims that it terminated plaintiff for misconduct in relation to the motor vehicle accident. Plaintiff claims that this reason was fabricated, pointing out that other employees who had similar accidents were not terminated from defendant's employ as a result. Plaintiff claims that he was fired because he began to present as a female. He claims that he was the victim of discrimination and a hostile work environment created by defendant due to plaintiff's appearance and gender-related behavior.

Plaintiff alleges that he was discriminated against based on his sex and condition in violation of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act ("PHRA"). Specifically, plaintiff alleges that defendant unjustly terminated his employment when he announced his intention to transition from male to female.

The court ruled in favor of the plaintiff, and overruling the defense's claim that Title VII does not apply to transsexuals while citing *Bibby v. Philadelphia Coca Cola Bottling*, *Smith v. City of Salem*, and *Barnes v. City of Cincinnati* as reasons for their ruling.

Mitchel v. AXCAN external link

4 (MD, NC, SC, VA, WV)

Powell v. Read's Inc., United States District Court, District of Maryland, August 30, 1977: Sharon M. Powell, a/k/a Michael D. Powell, born a male and still legally a male, a transsexual presently engaged in a trial venture of living as a woman as a prerequisite to having a sex change operation. As Sharon M. Powell, plaintiff applied for a job with defendant as a waitress at its store in Salisbury Mall, Salisbury, Maryland. On September 10, 1976, the first day of employment, plaintiff was fired. The alleged ground of dismissal was the return to employment of the woman plaintiff had been hired to replace. However,

plaintiff suggests the real ground was the supervisor's discovery that plaintiff was a man, through the report of a customer who had known plaintiff as a man. Plaintiff asks the Court to declare that employment discrimination directed toward transsexuals violates rights under 42 U.S.C. § 2000e, *et seq.* Defendant argues that discrimination against transsexuals is not a violation of Title VII, and, therefore, that plaintiff has failed to state a claim upon which relief can be granted.

The court granted the defendant's motion for dismissal based on transsexuality not being covered by Title VII, as well as murky legislative intent where the term "sex" was used by the 1964 Civil Rights Act. In support of this decision *Voyles*, *Grossman*, and *Smith v. Liberty Mutual Insurance Company* were cited.

Powell v. Read's Inc. external link

Knussman v. State of Maryland, United States Court of Appeals, Fourth Circuit, November 7, 2001: In 1994, Knussman learned that his wife Kimberly was pregnant. At the time, Knussman held the rank of trooper first class and served as a paramedic on medevac helicopters in the Aviation Division of the Maryland State Police ("MSP"). Unfortunately, Kim's pregnancy was difficult and ultimately resulted in her confinement to bed rest in the latter stages prior to delivery. In October 1994, Knussman submitted a written request to his supervisor asking that Knussman be permitted to take four to eight weeks of paid "family sick leave" to care for his wife and spend time with his family following the birth of his child. Eventually, Knussman was informed by the MSP Director of Flight Operations, First Sergeant Ronnie P. Creel, that there was "no way" that he would be allowed more than two weeks.

The Knussmans' daughter was born on December 9, 1994. Kimberly Knussman, however, continued to experience health problems. Before his authorized 10-day leave expired, Knussman contacted Sergeant J.C. Collins, one of his supervisors, and inquired whether his status could be changed to that of primary care giver and his paid sick leave extended to 30 days under section 7-508(a). Knussman explained to Collins that he was the primary care giver for the child because, given his wife's condition following delivery, he was performing the majority of the essential functions such as diaper changing, feeding, bathing and taking the child to the doctor.

The Fourth Circuit upheld liability under the Equal Protection Clause against the Maryland employee who prohibited Knussman from taking statutory leave as a "primary care giver" under the Family Medical Leave Act. The employer's rationale was that a father cannot act as primary caregiver because "God made women to have babies and, unless [the employee] could have a baby, there is no way he could be primary care giver." The court held that the employer's "irrebuttable presumption" that a father cannot act as the primary caregiver was incompatible with precedent prohibiting an individual's role in parenting to be limited based solely on gender.

Knussman v. State of Maryland external link

5 (TX, LA, MS)

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

City of Cleburne v. Cleburne Living Ctr., Inc., 5th Circuit Court of Appeals, Upheld by Supreme Court on Appeal, July 1, 1985: The city of Cleburne enacted an ordinance specifically to prevent a living facility for mentally handicapped people from being built. The 5th Circuit Court of Appeals ruled, and the Supreme court upheld, that the Equal Protection Clause requires the State to avoid all laws and classifications that are "arbitrary or irrational" or reflect "a bare . . . desire to harm a politically unpopular group." To make a law that targets a group adversely, the state must show that the law is rationally related to a legitimate governmental purpose at an intermediate level of scrutiny.

City of Cleburne v. Cleburne Living Ctr., 5th Circuit Decision external link

Oiler v. Winn-Dixie, United States District Court E.D. Louisiana, October 23, 2002: Peter Oiler was a driver for Winn-Dixie for 20 years, and also a part time cross dresser. After he was outed, he was terminated. Plaintiff argued his case is similar to *Price Waterhouse v. Hopkins* 490 U.S.228 (1989) in which the Supreme Court held that employment decisions based on "sexual stereotyping" are prohibited under Title VII as sex discrimination. The court differentiated this case from *Price Waterhouse* noting that plaintiff was not fired because he did not exhibit sufficiently masculine traits in the workplace. Rather the plaintiff was fired because of his off duty cross-dressing. As his supervisor informed him in the termination meeting, Winn Dixie was concerned its customers might discover plaintiff's off duty activities and as a result, the company would lose business.

The court granted the employer summary judgment stating there was nothing in the language or legislative history of Title VII indicating Congress intended "sex" to mean anything other than "biological sex" when passing the statute. The Louisiana court stated previous courts have uniformly held that Title VII does not prohibit discrimination based on sexual orientation, transvestism, transsexualism or gender identity issues.

Lopez v. River Oaks Imaging & Diagnostic Group Inc., United States District Court, S.D. Texas, Houston Division, April 3, 2008: Lopez applied for a job with River Oaks. During the interview process she believed that River Oaks was aware of her transgender status, based on two of her friends at River Oaks having told Lopez's interviewers. Lopez also gave both her given (male) name, and preferred female name on application document. Lopez was offered the job, and tendered her resignation at her existing job. When River Oaks finished her background check they found that she was biologically male, and rescinded the job offer based on Lopez having misrepresented herself at the interview as female.

Lopez filed a sex discrimination complaint with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC issued Lopez a "Notice of Right to Sue." This lawsuit followed, with Lopez alleging a single cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The district court sided with Lopez, finding that she met all the criteria for a lawsuit based on Title VII. The court rejected such cases *as Etsitty, Ulane*, and *Sommers* claims that Title VII does not apply to transgender people based on original legislative intent (*Ulane, Sommers*), or that discriminating on the basis of transsexuality is different than on the basis of gender stereotypes (*Ettsity, Hopkins*). The court

cites *Smith*, *Barnes*, and *Schroer*, declaring: Lopez's "transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."

This case is important to those in Texas, since it provides a basis for Title VII claims based on sex stereotype discrimination against transgender individuals. The court concluded: "applying Title VII as written and interpreted by the United States Supreme Court, that Lopez has stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes."

Lopez v. River Oaks Imaging & Diagnostic Group external link

6 (TN, KY, OH, MI)

Smith v. City of Salem, United States Court of Appeals, Sixth Circuit, August 5, 2004: Smith was employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department. Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. After revealing to his supervisor of an intention to transition, city and Fire Department leadership conspired to have Smith terminated based on Smith's intention to transition.

Smith then filed suit in the federal district court. In his complaint, he asserted Title VII claims of sex discrimination and retaliation, along with claims pursuant to 42 U.S.C. § 1983 and state law claims of invasion of privacy and civil conspiracy. In a Memorandum Opinion and Order dated February 26, 2003, the district court dismissed the federal claims and granted judgment on the pleadings to Defendants pursuant to Federal Rule of Civil Procedure 12(c). The district judge also dismissed the state law claims without prejudice, having declined to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(3).

However, upon appeal to the Sixth Circuit Court of Appeals, the court ruled that Title VII does apply to transsexual individuals on the basis of gender stereotype non-conformity, citing Hopkins v. Waterhouse. The court also ruled that Smith was a member of a protected class under Title VII (by virtue of gender in general). The appeals court also chided the lower district court for referring to pre-Hopkins cases such as *Ulane*, *Holloway*, and *Sommers*.

Smith v. City of Salem external link

Barnes v. City of Cincinnati, United States Court of Appeals, Sixth Circuit, March 22, 2005: Barnes started his career with the CPD in 1981 as a police officer. Barnes passed a promotional test to become a sergeant on July 13, 1998. Barnes placed eighteenth out of 105 officers who sat for the exam. At the time of his promotion, Barnes was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty. Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser. No other male sergeant was known to be gay or have a feminine

appearance.

During the probationary period Barnes was subjected to greater scrutiny than other probationary sergeants. Eventually Barnes failed the probationary period and was demoted. Barnes was the only sergeant to fail the probationary period between 1993 and 2000, despite having better scores than at least one individual who passed.

Barnes challenged his demotion from sergeant under Title VII and the Equal Protection Clause. The City filed a motion to dismiss and a motion for summary judgment, which were both denied by the district court. The City argued that a legitimate reason, poor performance, justified the demotion in this case. The claims were submitted to a jury, which returned a verdict in Barnes's favor. The Sixth Circuit Court of Appeals upheld the lower court ruling, finding that Barnes was a member of a protected class, and that Barnes had be discriminated against based on gender stereotypes. The court cites both *Price Waterhouse v. Hopkins* and *Smith v. City of Salem* it its ruling. This firmly establishes transgender individuals as a protected class, and as such subject to Title VII and the Equal Protection Clause within the Sixth Circuit.

Barnes v. City of Cincinnati external link

Hutchinson v. Cuyahoga County Board of Commissioners, United States District Court N.D. Ohio District, September 26, 2011: Hutchinson, a gay woman, claims that the Defendants violated her right to Equal Protection when—arguably on account of her sexual orientation—they refused to hire her for, or promote her to, a number of positions within the Cuyahoga County Child Support Enforcement Agency ("CSEA"). She brings her claim under 42 U.S.C. § 1983, which, among other things, provides a cause of action to plaintiffs whose federal rights have been violated by persons acting under color of state law. Hutchinson must therefore show: (1) that she is a member of a protected class; (2) that she was otherwise qualified for promotion or hire; (3) that she was denied promotion or hire; and (4) that she was treated differently from similarly-situated employees outside the protected class.

The court found that, "Homosexuals, while not a `suspect class' for equal protection analysis, are entitled to at least the same protection as any other identifiable group which is subject to disparate treatment by the state." Furthermore—and the Defendants do not claim otherwise—Hutchinson was qualified for each of the positions for which she unsuccessfully applied. Finally, each of those positions was filled by an otherwise-similarly-situated, yet heterosexual, applicant.

This case is significant, since it rules that homosexuals may be treated as a protected class in the 6th circuit, although subject to a higher burden of proof. The ruling was upheld by the 6th Circuit Court of Appeals in December 2011.

Hutchinson v. Cuyahoga County Board of Commissioners external link

7 (WI, IL, IN)

Ulane v. Eastern Airlines, United States Court of Appeals, Seventh Circuit, August 29, 1984: Plaintiff, as Kenneth Ulane, was hired in 1968 as a pilot for defendant, Eastern Air Lines, Inc., but was fired as Karen Frances Ulane in 1981. Ulane filed a timely charge of sex discrimination with the Equal Employment

Opportunity Commission, which subsequently issued a right to sue letter. This suit followed. Counts I and II allege that Ulane's discharge violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (1982): Count I alleges that Ulane was discriminated against as a female; Count II alleges that Ulane was discriminated against as a transsexual. The lower court judge ruled in favor of Ulane on both counts after a bench trial. The court awarded her reinstatement as a flying officer with full seniority and back pay, and attorneys' fees.

The Seventh Circuit overruled both on the grounds that concluding that discrimination against plaintiff was "not because she is female, but because she is transsexual". Essentially, the court ruled Eastern Airlines was not discriminating against her as a woman, but against her for the act of transitioning, which is not covered by Title VII. Additionally, this case cited *Holloway v. Arthur Andersen's* conclusion that "The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."

Ulane v. Eastern Airlines external link

Doe v. City of Belleville, United States Court of Appeals, Seventh Circuit, July 17, 1997: Twin brothers J. and H. Doe took summer jobs with the City of Belleville, Illinois. They quit after two months, fed up with the unrelenting harassment to which they had been subjected by their male co-workers. They subsequently filed suit against the city via their parents, contending that they were sexually harassed in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Protection Clause of the Fourteenth Amendment. They also contended they were constructively discharged in retaliation for protesting the harassment. The district court granted summary judgment in favor of Belleville, reasoning principally that because both the Does and their harassers were heterosexual males, the plaintiffs could not show that they were harassed "because of" their sex.

The Appeals court overruled the District Court, and found that sex, including males, was a protected class covered by both Title VII of the Civil Rights act of 1964, and the equal protection clause of the 14th Amendment.

Doe v. City of Belleville, IL external link

Creed v. Family Express Corporation, United States District Court of Northern Indiana, August 3, 2007: Amber Creed was born a male, but suffers from gender identity disorder – a condition in which her gender identity does not correspond to her birth sex. She was hired by Family Express to work as a sales associate. When she interviewed, she had a masculine demeanor and appearance, but after beginning work, she began to assume a more feminine look. Over time, she began to wear her hair longer and in a more feminine style and to wear nail polish and facial makeup. Like other employees, she wore the required unisex uniform – a polo shirt and slacks.

Creed received positive performance evaluations and had been selected as "Greeter of the Month" on several occasions. Ultimately, however, Creed's employment was terminated. She was told that all employees were required to follow the company's dress and grooming code, both the general portions and the sex-specific ones. At Family Express, men were required to maintain "neat and conservative hair that is kept above the collar" and forbidden from wearing makeup or jewelry. Employees were told that this code was a "non-negotiable part of employment," with no exceptions.

As part of her preparation for sexual reassignment surgery, Creed assumed a traditionally feminine appearance. But she was informed by a manager that she could no longer present herself in a feminine manner at work. She was given 24 hours to conform her appearance. Instead, she terminated her employment because of the ultimatum. She then filed a lawsuit alleging that she lost her job because the company perceived her "to be a man who did not conform with gender stereotypes associated with men in our society."

Creed filed a lawsuit based on Title VII of the 1964 Civil Rights Act. The court rejected her claims however, based on Creed failing to follow corporate rules regarding attire for men. It cited *Jespersen v. Harrah's* as justification for different dress codes for men and women.

Creed v. Family Express Corporation external link

8 (AR, MO, IA, ND, SD, MN, NE)

Pinneke v. Preissner, United States Court of Appeals, Eighth Circuit, June 27, 1980:

Pinneke began life as a male, but quickly became uncomfortable with the male gender identity. After extensive testing, doctors concluded that she had a transsexual personality, and required sex reassignment surgery. She underwent sex reassignment surgery on April 20, 1976. As a Supplemental Security Income recipient, Pinneke was eligible for benefits under the Medicaid program, 42 U.S.C. § 1396 (1976). She applied for funding of her sex reassignment surgery under the Medicaid program, but the Cerro Gordo County office of the Iowa Department of Social Services refused funding. The Commissioner of the Iowa Department of Social Services affirmed this decision on the basis that the State of Iowa's Medicaid plan specifically excludes coverage for sex reassignment surgery. Pinneke then filed this suit seeking remedial injunctive and declaratory relief from the denial of her constitutional rights to equal protection and due process and her statutory right to Medicaid benefits.

On May 11, 1979, the District Court declared that the policy of denying Medicaid benefits for sex reassignment surgery where it is a medical necessity for treatment of transsexualism is contrary to the provisions of Title XIX of the Social Security Act, 42 U.S.C. § 1396 (1976), and therefore violates the supremacy clause of the United States Constitution. It declared the relevant parts of the Iowa State Plan void, and permanently enjoined the administration and enforcement of the Iowa Medicaid program in a manner to deny benefits for medically necessary care and treatment incident to sex reassignment surgery or subsequent corrective surgery.

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

From this record, it appears that radical sex conversion surgery is the only medical treatment available to relieve or solve the problems of a true transsexual. As noted by the Minnesota Supreme Court in *Doe v. Minnesota Department of Public Welfare and Hennepin County Welfare Board,* 257 N.W.2d 816, 819 (Minn.1977):

The decision of whether or not certain treatment or a particular type of surgery is "medically necessary" rests with the individual recipient's physician and not with clerical personnel or government officials. And, as stated in *White v. Beal, supra,* 555 F.2d at 1152, "The regulations permit discrimination in benefits based upon the degree of medical necessity but not upon the medical disorders from which the person suffers." (Footnote omitted.) Here Pinneke proved a real need for the only medical service available to alleviate her condition, and the record indicates her condition has improved since the surgery.

Appellants lastly argue that transsexual surgery is excluded by the language of 42 U.S.C. § 1396d(a), providing two exclusions for mental diseases. The clear language of these exclusions, however, strictly limits them to situations involving payment for "services in an institution for tuberculosis or mental disease." Appellants' only attempt to fit within these exclusions is the suggestion that Pinneke's medical condition requiring surgery was a mental disease. The statutory limitations, however, do not apply to mental health problems in general. Pinneke's transsexual surgery thus comes within the medical assistance categories of "inpatient hospital services" and "physicians' services furnished by a physician," and must be covered under the state's Medicaid plan unless not medically necessary.

Pinneke v. Preissner

Sommers v. Budget Marketing Inc., United States Court of Appeals, Eighth Circuit, January 8, 1982: Audra Sommers, appellant, was hired by Budget on April 22, 1980, to perform clerical duties. On April 24, 1980, Sommers's employment was terminated. Budget alleged Sommers was dismissed because she misrepresented herself as an anatomical female when she applied for the job. (Note: Sommer's had not had gender reassignment surgery at the time of her employment – ed.) It further alleged that the misrepresentation led to a disruption of the company's work routine in that a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel. After exhausting administrative remedies, Sommers brought an action against Budget, alleging that she had been discharged on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

Both the lower court and the court of appeals rejected Sommer's claim. The appeals court used lack of legislative intent, as well as transsexualism falling outside of any traditional "the traditional definition" of sex under Title VII as the reason for deciding against the plaintiff. The court also cited the preceding cases of *Holloway, Grossman, Voyles,* and *Powell*.

Sommers v. Budget Marketing Inc. external link

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

Smith v. Rasmussen, 8th Circuit Court of Appeals, May 4 2001

The Iowa Department of Human Services (the Department or State) appeals from the district court's judgment that the Department violated the mandates of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (1992 & Supp.2000) (Medicaid Act or Act), when it refused to fund surgery for the plaintiff, John Smith (pseudonym).

Smith, now 41 years old, was born with the physiology of a female. He suffers from the psychiatric condition "gender identity disorder," which, when severe, equates with what is popularly known as transsexualism. Dr. Sharon Satterfield, Smith's primary treating psychiatrist and 757*757 a specialist in gender identity disorder, has determined that sex reassignment surgery (essentially a transition from female to male physical features) is the necessary treatment for Smith. This transformation involves several different surgical procedures, hormonal treatment, and psychological counseling. Smith has already undergone the surgery for breast reduction and contouring. At this stage, Smith seeks payment from the Department for the final surgical procedure, which is a phalloplasty, the creation of a body part that simulates a penis. The Department's administrator of the division of medical services, Donald Herman, testified at trial that the State's Medicaid program covers psychotherapy and medication prescribed for psychiatric conditions such as gender identity disorder, but that surgical procedures are not covered. The Department has funded procedures for Smith, such as a hysterectomy, that were medically necessary for diagnosed conditions other than his gender identity disorder.

Smith is within a covered "medically needy" classification of Medicaid recipients, 758*758 but the Department refused payment for a phalloplasty because the procedure is excluded by a state regulation that prohibits funding for plastic surgery for certain purposes and which specifically excludes sex reassignment surgery. On May 19, 1997, Smith brought suit under 42 U.S.C. § 1983, alleging that the Medicaid Act provides an enforceable federal right to "reasonable standards" for the determination of the extent and scope of services that a state will provide and contending that the regulation that excludes funding for surgery for gender identity disorder is unreasonable and thus violates his right under the Act.

The Department does not dispute that Smith is eligible for coverage under the medically needy classification of Medicaid or that he is ready for the phalloplasty. The Department contends that Smith does not have an enforceable right under section 1983, that the district court erred in an evidentiary ruling that limited the testimony of its expert witness, and that the district court erred when it concluded that the application of the regulation violated Smith's right. Assuming for the purposes of this case that Smith has an enforceable federal right, we reverse the district court's judgment because the Department's regulation does not violate that right.

In the light of the evidence before the Department questioning the efficacy of and the necessity for sex reassignment surgery, given other treatment options, we cannot conclude as a substantive matter that the Department's regulation is unreasonable, arbitrary, or inconsistent with the Act, which is designed to provide "necessary medical services to the greatest number of needy people," *Ellis,* 859 F.2d at 55, in

a reasonable manner. *See* *Weaver,* 886 F.2d at 200; *Beal,* 432 U.S. at 444, 97 S.Ct. 2366. "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs," as long as the care and services that the states provide "are provided in the best interests of the recipients." *Alexander,* 469 U.S. at 303, 105 S.Ct. 712 (internal quotation marks omitted). As described above, the Department's research demonstrated the evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery. Additionally, Herman, the Department's administrator, testified to the fiscal concerns inherent in the choice of which services to provide and stated that the State had access to literature indicating that Medicare refuses to cover this surgery. Although Dr. Satterfield's testimony generally supports the conclusion that sex reassignment surgery may be medically necessary in some cases, it is not as unequivocal an endorsement of the surgery as Smith argues. Indeed, Dr. Satterfield's testimony noted that the efficacy of the surgery has been questioned within the medical community. Accordingly, we conclude that the State's prohibition on funding of sex reassignment surgery is both reasonable and consistent with the Medicaid Act.

Smith v. Rasmussen

Goins v. West Group, Minnesota Supreme Court, November 29, 2001: Minnesota Supreme Court (not a federal court) rules that requiring an employee to use a bathroom that does not match their target gender, or to use an inconvenient facility (i.e. single hole far from their desk) does not constitute sexual orientation discrimination or a hostile workplace environment under existing Minnesota statutes. The Minnesota Supreme court ruled that Goins is a member of a protected class, but that she does not have a right to use a sex segregated bathroom (as designated by West Group).

Goins v. West Group external link

9 (AK, AZ, CA, HI, ID, MT, OR, WA, Guam, Marianas Islands)

Voyles v. Ralph K. Davies Medical Center, 9th Circuit Court of Appeals, February 8, 1978: Prior to January 1975 plaintiff was employed by defendant as a hemodialysis technician. During the last week in January plaintiff informed defendant's director of personnel that she, plaintiff, intended to undergo sex conversion surgery. Shortly thereafter plaintiff was discharged by defendant for the conceded reason that she intended to change sex and that such a change might have a potentially adverse effect on both the patients receiving treatment at the dialysis unit and on plaintiff's co-workers caring for those patients. Plaintiff sued on the basis of Title VII of the 1964 Civil Rights Act.

The United States District Court, N. D. California, decided against the plaintiff, stating

> *"It is this Court's opinion, however, that employment discrimination based on one's transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII of the Civil Rights Act of 1964…The legislative history of as well as the case law interpreting*

Title VII nowhere indicate that "sex" discrimination was meant to embrace "transsexual" discrimination, or any permutation or combination thereof. Indeed, neither party has cited, nor does research disclose, a single case which holds squarely that Title VII provides redress for claims of the sort raised here."

Affirmed by the 9th Circuit without additional opinion.

Voyles v. Ralph K. Davies Medical Center, United States District Court, N. D. California Decision external link

Holloway v. Arthur Andersen, 9th Circuit Court of Appeals, December 23, 1977: In November 1974, Ramona Holloway was terminated by Arthur Andersen after informing leadership she was beginning hormone treatment prior to gender reassignment surgery. She filed suit under Title VII of the Civil Rights Act of 1964. The district court issued a memorandum decision which held that transsexualism was not encompassed within the definition of "sex" as the term appears in in the 42 U.S.C. § 2000e-2(a)(1). Therefore, the court concluded that it lacked jurisdiction, so that judgment issued in defendant's favor. Holloway timely filed a motion to amend the judgment, which was denied. The 9th Circuit Court of Appeals upheld the District Court's decision. The 9th Circuit stated "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."

Note: Until Oncale v. Sundowner, "sex" under Title VII was generally held to protect women, since the legislative intent in 1964 of the Civil Rights act had been to protect women.

Holloway v. Arthur Andersen & Co. external link

Schwenk v. Hartford, 9th Circuit Court of Appeals, February 29, 2000: A male-to-female transsexual prisoner, Douglas ("Crystal") Schwenk, sought damages as a result of Mitchell's (a prison guard) alleged attempt to rape her. Following the alleged assault, Schwenk sued various prison officials including Mitchell both under Section 1983, for a violation of her Eighth Amendment rights, and under the Gender Motivated Violence Act (GMVA) of 1994. The defense asserted that the acts of which he was accused did not satisfy the statutory definition of a crime of violence. Second, he asserted that Schwenk was male and that the GMVA does not protect men who are raped or sexually assaulted by other men. Third, Mitchell argued that in general, transsexuals were not covered by the act.

The district court rejected all of Mitchell's contentions. The Supreme Court has clearly and repeatedly held that "when prison officials maliciously and sadistically use force to cause harm contemporary standards of decency are always violated." More importantly, though, the Court of Appeals ruled that *Price Waterhouse v. Hopkins* decision applies to transgender individuals, and upholds the reversal of *Holloway v. Arthur Andersen*.

Schwenk v. Hartford external link

Nichols v. Azteca Restaurant Enterprises, United States Court of Appeals, Ninth Circuit, July 16, 2001: Sanchez claimed that he was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype. Sanchez further asserted that he was terminated in retaliation for opposing the harassment. Following a bench trial, the district court entered judgment in favor of Azteca on all claims. Sanchez appealed.

Throughout his tenure at Azteca, Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as "she" and "her." Male co-workers mocked Sanchez for walking and carrying his serving tray "like a woman," and taunted him in Spanish and English as, among other things, a "faggot" and a "fucking female whore." The remarks were not stray or isolated. Rather, the abuse occurred at least once a week and often several times a day.

The Circuit court noted that "Sexual harassment is actionable under Title VII to the extent it occurs "because of" the plaintiff's sex." When someone is harassed because their behavior or appearance does not match their biological sex, it constitutes a Title VII violation. The Ninth Circuit found the harassment to be objectively objectionable, subjectively objectionable, and based on sex, and thus ruled for Sanchez.

Note – Sanchez only won this case because his sexual orientation at work was not "in the open", and is not mentioned in the previous court cases. If he had been homosexual, outed as gay, or openly so, it is unlikely he would have won this case based on previous rulings regarding Title VII and homosexuality. Again, this creates a giant loophole for defendants to use against lawsuits by the LGBT community.

Nichols v. Azteca Restaurant Enterprises external link

Jespersen v. Harrah's Operating Company, Inc., United States Court of Appeals, Ninth Circuit, April 14, 2006: The plaintiff, Darlene Jespersen, was terminated from her position as a bartender at the sports bar in Harrah's Reno casino not long after Harrah's began to enforce its comprehensive uniform, appearance and grooming standards for all bartenders. The standards required all bartenders, men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any. Jespersen refused to comply with the makeup requirement and was effectively terminated for that reason.

The district court granted summary judgment to Harrah's on the ground that the appearance and grooming policies imposed equal burdens on both men and women bartenders because, while women were required to use makeup and men were forbidden to wear makeup, women were allowed to have long hair and men were required to have their hair cut to a length above the collar. The district court also held that the policy could not run afoul of Title VII because it did not discriminate against Jespersen on the basis of the "immutable characteristics" of her sex. District court also held that *Hopkins v. Price Waterhouse* did not offer protection because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse*. The district court also cited *Nichols v. Azteca:*

*"*We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."

The Ninth Circuit Court of Appeals held in this same case that Jespersen failed to show that the appearance policy imposed a greater burden on women than on men. The panel did not agree with the district court that grooming policies could never discriminate as a matter of law. The panel also held that *Price Waterhouse* could apply to grooming or appearance standards only if the policy amounted to sexual harassment, which would require a showing that the employee suffered harassment for failure to conform to commonly-accepted gender stereotypes.

Upon appeal in 2006, the Ninth Circuit concluded Jespersen has failed to present evidence on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, they held that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping if the policy was adopted to make women [employees] conform to a commonly accepted stereotypical image of what women should wear.

Jespersen v. Harrah's 2004 external link

Jespersen v. Harrah's 2006 external link

Kastl v. Maricopa County Community College District, United States Court of Appeals for the Ninth Circuit, April 14, 2009: When Steven began teaching, he was diagnosed with Gender Identity Disorder (GID) and began transitioning from a male to a female. This process lasted from August 2000 until June 2003. During this time, Steven legally changed her name to Rebecca, presented as a female at work, and changed the sex designation on her driver's license to reflect her female identity. Kastl was an instructor for and a student of MCCCD. Following complaints that a man was using the women's restroom, MCCCD banned Kastl, who is transsexual, from using the women's restroom until she could prove completion of sex reassignment surgery. Kastl's contract was subsequently not renewed by MCCCD.

The court ruled in concurrence with *Hopkins* and *Schwenk* that it is unlawful to discriminate against a transgender employee because he or she does not behave in accordance with an employer's expectations for men or women. However, they denied the Title VII claims of discrimination based on bathroom access. The college indicated that students expressed concerns regarding their privacy and/or safety and that the college had "a compelling interest in protecting privacy rights of other individuals . . . by maintaining the sex-segregation of the restrooms." The plaintiff had provided her driver's license (which had an "F" for sex), but did not provide proof that she had had any kind of gender reassignment surgery.

The court agreed with the defense's claim, stating "MCCCD satisfied its burden of production under the second stage of the analysis set forth in **McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817,**

36 L. Ed. 2d 668 (1973), when it proffered evidence that it banned Kastl from using the women's restroom for safety reasons."

Notes - This is significant, since it essentially allows employers in the 9th circuit to demand their employees use the bathroom of their birth sex, or face termination. A driver's license is insufficient to use a women's restroom in the 9th circuit, and a birth certificate is debatable.

Kastl v. Maricopa County Community College District, United States District Court for Arizona Decision external link

Kastl v. Maricopa Count Community College District, 9th Circuit Decision external link

10 (NM, CO, UT, WY, KS, OK)

James v. Ranch Mart Hardware Inc., United States District Court Kansas, February 22, 1995: Mart Hardware, Inc. ("Ranch Mart"), terminated James employment under circumstances in which "a similarly situated female, living and working full time as a male," would not have been terminated. The court ruled against James based on failing to show that males were discriminated against at Ranch Mart, and that transsexuals were not a protected class. Summary judgment in favor of the defendant was issued.

James v. Ranch Mart external link

Etsitty vs. Utah Transit Authority, United States District Court for Utah, July 24, 2005: Plaintiff Etsitty filed suit against her former employer, Utah Transit Authority (UTA) and Betty Shirley, Director of Operations (Ms. Shirley), alleging that the Defendants terminated her employment on the basis of her gender non-conforming conduct and/or her status as a transsexual, in violation of Title VII and the Equal Protection Clause of the United States Constitution. Plaintiff describes herself as a "pre-operative transsexual." She has been taking female hormones that have changed her outward appearance in some ways. In 1999 she changed her name from Michael Etsitty to Krystal Sandoval Etsitty. She officially changed her Utah driver's license designation from male to female.

The transit authority acknowledged the reason for Etsitty's termination was based on the opinion "it would be impractical to arrange for a unisex restroom for one operator Transit authority officials expressed concern about potential UTA liability based on complaints that may result from Plaintiff using a female restroom, whether in a UTA facility or out in the field. Also, they both understood, based on their conversation with Plaintiff, that she had some kind of written direction that required that she use female restrooms. (As part of RLT – ed)

The Utah District Court made several rulings in the case:

1. Transsexuals and homosexuals are not a protected class, and cites *Ulane v. Eastern Airlines* as rationale.

2. *Hopkins v. Price Waterhouse* does not apply to transsexuals. ("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.")The Utah District Court disagreed with the ruling of *Smith v. City of Salem* (US 6th Circuit, described above).
3. *Price Waterhouse* does not apply, because Plaintiff was not fired for failure to conform to a particular gender stereotype. The district court stated "There is no evidence that the defendants required 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."

The court enacted summary judgment for the defense, denying both claims to Title VII and 14th Amendment protections.

*Note – Again, a transgender individual is given the choice of using a male restroom and violating their real life test conditions for GRS, or being fired. This case, in addition to **Goins** and **Kastl** highlight how lack of public accomidations legislation gives employers a backdoor method of terminating transsexual employees.*

Etsitty v. Utah Transportation Authority

11 (AL, GA, FL)

Smith v. Liberty Mutual Insurance Company, United States District Court, N.D. Georgia, June 3, 1975: Briefly, it appears that, on or about February 11, 1969, the plaintiff applied for employment with defendant in its mail room. He was interviewed by Mr. Nash, who was defendant's Supervisor of that department. Mr. Nash did not recommend him for hiring because in Mr. Nash's opinion the plaintiff was effeminate. Defendant has admitted that the plaintiff was not employed due to the adverse recommendations of Mr. Nash. Plaintiff, who has fulfilled complaint procedures before the Equal Employment Opportunity Commission, asserts sexual discrimination under Title VII of the Civil Rights Act.

The court ruled against Smith, granting dismissal of the plaitiff's claim. Their rationale lay in conflating effeminate behavior with homosexuality or transsexuality, which they held not to be covered by Title VII.

> *The intent of the Civil Rights Act insofar as it applies to sex discrimination in employment is "the guarantee of equal job opportunity for males and females." Whether or not the Congress should, by law, forbid discrimination based upon "affectional or sexual preference" of an applicant, it is clear that the Congress has not done so. The Civil Rights Act is not just the "starting point" for this Court's extension of limitations upon employers; it is both the starting point and the ending point.*

Smith v. Liberty Mutual Insurance Company external link

Glenn v. Brumby, 11th Circuit Court of Appeals, December 6, 2011: US 11th Circuit of Appeals rules that discrimination against an employee based on the employees' non-conformance to gender/ sex stereotypes is a violation of the equal protection clause of the 14th Amendment to the US Constitution. This ruling uses Hopkins v. Price Waterhouse as its primary guidance, stating: "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes…. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." The new ruling specifically addresses transgender non-conformity, and extends *Price Waterhouse v. Hopkins* to transgender individuals." This ruling only applies to government (federal, state, and local) employees in the 11th Circuit. If it had been argued as a Title VII violation, it would have applied to private employers. The court also rejected previous rulings such as *Ulane*, *Sommers*, and *Holloway*. The 11th circuit court did not rule whether GID is a medical issue subject to medical discrimination laws.

Note – This is one of the first cases that has upheld that the Equal Protection clause of the 14th amendment applies to transgender people. It is also notable that the three judge panel in this case was extremely conservative.

http://www.ca11.uscourts.gov/opinions/ops/201014833.pdf

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Price Waterhouse v. Hopkins, Court of Appeals for the District of Columbia Circuit, May 1, 1989: The plaintiff, Ann Hopkins (a cis woman), claimed she was postponed promotion to partnership at the firm for two years in a row based on sex-stereotyping against her gender nonconformity. After her promotion was postponed for the first year, Hopkins met with the head supervisor of her department, Thomas Beyer, who told her that to increase chances of promotion she needed "to walk more femininely, wear makeup, have her hair styled, and wear jewelry." Hopkins was well qualified for partnership, and frequently outperformed her co-workers.

There were ample examples to show that she was denied promotion based on sex-stereotyping. Many male employees said they would not be comfortable having her as their partner because she did not act the way they believed a woman should. Ann Hopkins resigned from the accounting firm when she was rejected for partnership for the second year, and sued Price Waterhouse for violating her rights under Title VII of the Civil Rights Act of 1964. The lower courts (District Court and the Appeals Court for DC) ruled that gender stereotypes cannot be used for discrimination. Upon appeal by Price Waterhouse, the Supreme Court upheld the lower court's ruling that using gender stereotypes was a violation of Title VII of the Civil Rights act of 1964.

Hopkins v. Price Waterhouse, Dist. Court, Dist. of Columbia 1985 Decision external link

Hopkins v. Price Waterhouse, United States Court of Appeals, District of Columbia Circuit 1987 external link

By Brynn Tannehill, SPART*A, spartapride.org, as provided to MAAF for publication, Sep 10, 2013

Hopkins v. Price Waterhouse, US District Court District of Columbia May 1990 Decision external link

Price Waterhouse v. Hopkins, US District Court District of Columbia December 1990 Decision external link

Schroer v. Billington, United States District Court, Washington D.C., September 19, 2008: Diane Schroer was a decorated Army veteran with a top secret clearance. While still presenting as a male, but already starting her transition, she interviewed for a top position with the Library of Congress. She was found to be the most qualified candidate by a committee and offered the position. After accepting the position, but before starting, she informed Charlotte Preece, one of the hiring authorities she had interviewed with,, that she was transsexual and would like to start work presenting as female. After Schroer's meeting with Preece, the job offer was withdrawn.

Schroer then filed a lawsuit claiming that she was denied employment by the Librarian of Congress because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). The District Court ruled in favor of Schroer, stating that the the Library's stated reasons for refusing to hire Schroer were not its "true reasons, but were ... pretext[s] for discrimination." The District Court also found that "In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination." The district court cited the *Hopkins v. Price Waterhouse*, *Oncale*, and *Smith v. City of Salem* cases as justification for the ruling, and held that cases such as *Etsitty*, *Holloway*, and *Ulane* were no longer justifiable.

Schroer v. Billington, 2006 external link

Schroer v. Billington, 2007 external link

Schroer v. Billington 2008 external link

EEOC Rulings

Macy v Holder (Bureau of Alcohol, Tobacco, Firearms, and Explosives), April 20, 2012: Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the

telephone conversation covered her experience, credentials, salary and benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check.

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011, she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation. Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency (EEOC).

The EEOC ruled in favor of Macy, stating:

> *To that end, the Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.*

The EEOC's ruling relied on Hopkins, Schroer, Smith, and Glenn in this decision. The Department of Justice accepted the ruling and did not appeal. This is essentially a formal recognition by the EEOC and DOJ that discrimination against transgender people in employment is a violation of the Title VII of the 1964 Civil Rights Act. However, the EEOC ruling applies only to federal employees filing complaints of sex discrimination based on being transgender.

Ruling