inferior to maleness. In other words, by necessity, trans activism must be at its core a feminist movement.

. . .

It is no longer enough for feminism to fight solely for the rights of those born female. That strategy has furthered the prospects of many women over the years, but now it bumps up against a glass ceiling that is partly of its own making. Though the movement worked hard to encourage women to enter previously male-dominated areas of life, many feminists have been ambivalent at best, and resistant at worst, to the idea of men expressing or exhibiting feminine traits and moving into certain traditionally female realms. And while we credit previous feminist movements for helping to create a society where most sensible people would agree with the statement "women and men are equals," we lament the fact that we remain light-years away from being able to say that most people believe that femininity is masculinity's equal.

. . .

But it is not enough for us to empower femaleness and femininity. We must also stop pretending that there are essential differences between women and men. This begins with the acknowledgment that there are exceptions to every gender rule and stereotype, and this simply stated fact disproves all gender theories that purport that female and male are mutually exclusive categories. We must move away from pretending that women and men are "opposite" sexes, because when we buy into that myth it establishes a dangerous precedent. For if men are big, then women must be small; and if men are strong then women must be weak. And if being butch is to make yourself rock-solid, then being femme becomes allowing yourself to be malleable; and if being a man means taking control of your own situation, then being a woman becomes living up to other people's expectations. When we buy into the idea that female and male are "opposites," it becomes impossible for us to empower women without either ridiculing men or pulling the rug out from under ourselves.

It is only when we move away from the idea that there are "opposite" sexes, and let go of the culturally derived values that are assigned to expressions of femininity and masculinity, that we may finally approach gender equity. By challenging both oppositional and traditional sexism simultaneously, we can make the world safe for those of us who are queer, those of us who are feminine, and those of us who are female, thus empowering people of all sexualities and genders.

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# The Evolution of Employment Discrimination Protections for Transgender People

*Kylar W. Broadus*

Employment discrimination is a pressing issue for transgender people. In a recent survey, the Transgender Law Center found that nearly one of every two respondents had experienced gender identity discrimination on the job. A 1999 study by the San Francisco Department of Public Health reached a similar result, finding that 46 percent of transgender people



reported workplace discrimination. The circumstances under which transgender people encounter discrimination at work are varied. Many transgender people are fired when they transition on the job. A transgender candidate may not be hired because the gender reflected in the person's documents or work history may differ from the person's current gender. A transgender employee may be terminated if an employer or coworker becomes aware of the person's transgender status. Finally, many transgender people have lost jobs because of prejudice and irrational fears about bathroom access. Just as was true for many other marginalized groups in the past, some employers and coworkers do not wish to share a bathroom with a transgender person.

While workplace discrimination against transgender people is common, transgender people increasingly are receiving support and assistance during their on-job transition. . . . [A]ccording to the Human Rights Campaign, more than two hundred employers have adopted nondiscrimination policies that protect transgender workers. Documenting these success stories is important, both as a source of hope for other transgender people and as evidence that, with a little support and guidance, employers can behave in a nondiscriminatory manner toward their transgender employees. Nonetheless, the brutal reality is that many transgender people still will face unemployment or severe underemployment solely because they are transgender. . . .

As an African American FTM (female-to-male transsexual) who lost my career after transitioning on the job at a private company in Missouri, I have experienced this reality firsthand. Like many other transsexual people, I repressed my transgender identity and struggled to live in my birth sex for many years. For me, that meant trying to live as a masculine-appearing black woman. Despite the challenges I faced in that identity, I was able to build a successful career as a claims adjustor for State Farm Insurance, where I worked for eight years, from 1989 to 1997. During that time, I was promoted on several occasions and eventually worked as a claims specialist—not a glamorous job, but one that I enjoyed and at which I excelled.

In 1995, at the age of thirty-two, I came out to my employer as transsexual. As part of my medically supervised transition, I began to dress and live as a man, including at my job. From that point forward, I faced a constant barrage of criticism about my appearance, dress, demeanor, and performance. While my superiors could tolerate a somewhat masculine-appearing black woman, they were not prepared to deal with my transition to being a black man. With growing despair, I watched my professional connections, support, and goodwill evaporate, along with my prospects for remaining employed. Before fully accepting that reality, however, I tried everything possible to save the career I had worked so many years to build, including filing a lawsuit alleging sex discrimination against State Farm in federal court. Like the vast majority of other transsexual plaintiffs in that era, I lost.

Had I brought my case today, it is possible, though far from certain, that the outcome would have been different. In the past few years, transgender plaintiffs have been successful in sex discrimination cases in a growing number of jurisdictions and courts. The following is an overview of how the legal landscape for transgender plaintiffs alleging workplace sex discrimination has begun to change.

The first reported cases in which transsexual plaintiffs sought protection under sex discrimination statutes date to 1975. In that year, two different federal district courts in California and New Jersey held that Title VII, a federal law prohibiting sex discrimination in employment, does not protect transsexual employees. In *Voyles v. Ralph K. Davies Medical Center*, a hemodialysis technician was fired shortly after she informed her supervisor that she was transsexual and intended to undergo sex reassignment from male to female. The employee filed a lawsuit under Title VII, alleging that the hospital had discriminated against her on the basis of sex. The court dismissed her case, holding that

Congress had enacted Title VII to protect women, not transsexuals, and that nothing in the legislative history of Title VII indicated any congressional intent "to embrace 'transsexual' discrimination, or any permutation or combination thereof."

Similarly, in *Grossman v. Bernards Township Bd. of Educ.*, a teacher who was fired after she underwent sex reassignment surgery filed a lawsuit alleging that the school had violated Title VII. Like the court in *Voyles*, the court dismissed her case, concluding that she was fired "not because of her status as a female, but rather because of her change in sex from the male to the female gender." Also as in *Voyles*, the court noted "the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII," concluding that the term "sex" must be given "its plain meaning."

In the decades following *Voyles* and *Grossman*, most courts adopted the reasoning in those early decisions. With few exceptions, courts dismissed claims by transgender people on the grounds that (1) sex discrimination laws were not intended to protect transgender people; and (2) the "plain" or "traditional" meaning of the term *sex* refers only to a person's biological identity as male or female, not to change of sex. . . .

Over time, however, these two rationales have become increasingly anachronistic and difficult to reconcile with the increasingly expansive interpretation of sex discrimination laws in cases involving nontransgender plaintiffs. In 1989, for example, the U.S. Supreme Court [in *Price Waterhouse v. Hopkins*] expressly rejected the notion that the term *sex* in Title VII refers only to a person's biological status as male or female, holding that it also includes stereotypical assumptions and preconceptions about how men and women are supposed to behave, dress, and appear. Ann Hopkins, the plaintiff in the case, was denied a partnership in an accounting firm, in part because her demeanor, appearance, and personality were deemed insufficiently "feminine." To improve her chances for partnership, Hopkins was told that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court rejected the employer's argument that Title VII should be applied to prohibit only discrimination against women for being women or against men for being men, as opposed to prohibiting employers from enforcing stereotypical assumptions based on gender. "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

After *Price Waterhouse*, courts increasingly have been hard-pressed to explain why the reasoning in that decision would not apply equally to a transgender person. Logically, if Title VII prohibits an employer from discriminating against an employee because of her allegedly "unfeminine" personality or appearance, then must it not also prohibit an employer from discriminating against a transsexual person, either for retaining some characteristics of his or her birth sex or for assuming a masculine or feminine identity? In either case, the employer has discriminated on the basis of sex by "assuming or insisting that employees match the stereotypes associated with their group." . . .

Most recently, in a case decided in 2004, the Sixth Circuit held that Title VII protected a transsexual police officer who was fired for being insufficiently "masculine," after more than twenty years of service on the force. In the past, as described above, most courts dismissed such claims out-of-hand, despite the precedent of *Price Waterhouse*, based on the notion that simply by definition, a transgender person is not entitled to protection. In *Smith*, the court rejected this categorical exclusion of transgender people as unprincipled, holding: "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."



In addition to these groundbreaking federal precedents, state courts also have become more receptive to sex discrimination claims brought by transgender plaintiffs under state sex discrimination laws. In New Jersey, for example, an appellate court held that transgender people are protected under a New Jersey law prohibiting sex discrimination in employment. . . . Holding that "sex" is "broader than anatomical sex" and "comprises more than a person's genitalia at birth," the court concluded that the New Jersey statute protected the plaintiff "from gender stereotyping and discrimination for transforming herself from a man to a woman."

Similarly, in 2000 the Connecticut Human Rights Commission held that transsexual people are protected under a Connecticut law prohibiting sex discrimination in employment. . . . Other states with positive administrative or court decisions on this issue include Massachusetts and New York. The European Court of Justice and courts in other countries also have reached similar results.

These recent positive decisions may be the harbinger of a new trend. As we enter the twenty-first century, it is possible that federal and state courts generally will be more receptive to transgender plaintiffs and more willing to construe sex discrimination statutes to include them. From a purely legal perspective, it is perhaps too soon to tell, and we would do well to remember that a single negative U.S. Supreme Court decision on this issue could bring these recent positive developments to a screeching halt, at least in the federal courts. From a broader perspective, however, there can be no doubt that this judicial shift is an indicator of a much broader and more important change than any mere evolution in legal doctrine. . . . Rather than seeing transgender people as lurid oddities, both the public and the courts have begun to view transgender people as a legitimate minority and to see us as human beings who are entitled to equal dignity and equal protection under the law.

As a former litigant in a transgender discrimination case, I am keenly aware of the law's tremendous power to reflect and shape larger societal messages of acceptance or rejection. When I lost my case, I was devastated not only by the loss of my job and my career but, even more profoundly, by the terrible message that loss conveyed—that as a transgender person, I was not worthy of legal protection or recognition. . . .

Rights both empower transgender people to contest discrimination and allow us to envision ourselves, and to be seen by others, as fully human. As lawyers and litigants continue to struggle to win individual cases and to set precedents that will benefit the community as a whole, we must not lose sight of this fundamental dimension of legal advocacy.