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Psychosexual Difference between Gender and Sexual Identities: Courts Construct the Title VII Female, 18 J. Marshall L. Rev. 783 (1985)

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RECENT DEVELOPMENTS

PSYCHOSEXUAL DIFFERENCE BETWEEN GENDER AND SEXUAL IDENTITIES: COURTS CONSTRUCT THE TITLE VII FEMALE

Since 1966, a year which marked legal acceptance of sex reassignment surgery, society has witnessed significant clinical and diagnostic advances to treat the gender dysphoric.¹ With the ability to create one sex from the anatomy of another, medical science has obliged lawyers and courts to address issues of sexual identity, gender identity, and enforceable redress from employment discrimination.² Recently, employees claiming to have been wrongfully discharged have demanded judicial recognition of unforeseen, emerging forms of sex-based discrimination. Notwithstanding the remedial nature of Title VII of the 1964 Civil Rights Act, most courts have defined "sex" according to the traditional notions of biological sex.³

Title VII proscribes unlawful employment practices in all conditions of employment because of an individual's "sex."⁴ Specifi-

1. Gender dysphoria, commonly referred to as transsexualism, is being recognized, accepted, and treated in increasing numbers. There are an estimated five thousand postoperative transsexuals and forty to fifty thousand preoperative transsexuals in the United States. Kopka, *The Legal Status of the Postoperative Transsexual*, 1983 MED. TRIAL TECH. Q. 456, 469. It is also estimated that over one thousand sex conversions are performed annually on Americans. Twardy, *Medicolegal Aspects of Transsexualism*, 1980 MED. TRIAL TECH. Q. 249, 253.

2. "Gender identity" is defined as one's mental perception of oneself as a man or a woman, and functions as one's intrinsic guideline to appropriate behavior. "Sexual identity" is defined by the anatomic attributes of the individual as a man or a woman. See Stoller, *A Contribution to the Study of Gender Identity*, 45 INT'L J. OF PSYCHOANAL. 220 (1964).

3. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), cert. denied, 105 S. Ct. 2023 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), cert. denied, 429 U.S. 897 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978).

4. Title VII of the 1964 Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972, provides:

cally, this provision was enacted to remedy disparate treatment based upon stereotypical concepts of the sexes, conditions common to only one sex, or status as related to sex. Because the language of Title VII is broadly phrased, it has warranted sweeping, reformative interpretations. In determining whether the sex-related factors of gender dysphoria and sex reassignment invoke the protections of the "sex" provision, however, courts have been disinclined to extend Title VII relief to the gender dysphoric. Clearly, whether the legal sex of the gender dysphoric is the sex of the assumed gender role, or even whether Title VII is viable based upon this sexual consideration, generates sensitive legal issues, and therefore calls for judicial construction of the "Title VII female."

Questions of sexual deviation frequently provoke inimical responses. That matter cannot be corrected through the courts. Title VII could conceivably be operated, however, to counteract "the negative ostrich-like position"⁵ that exists in some employers towards their affected employees. The American Psychiatric Association has diagnosed transsexualism as a psychosexual disorder which features "a persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex."⁶ The gender dysphoric suffers, essentially, from a conflict between his gender identity and sexual identity, both of which are fundamental components of one's personality. Hence, the individual seeks to alter his or her anatomic, genital appearance in an effort to achieve harmony between mind and body. Such apparently drastic treatment is not capricious or freakish; rather, sex reassignment is generally accepted as "a

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- (a) It shall be an unlawful employment practice for an employer
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Because "sex" was added as a floor amendment one day before the House approved Title VII, there are no legislative hearings or debates on that significant word. See *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971).

5. *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 830 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2023 (1985).

6. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 261-62 (3d ed. 1980).

medical necessity."⁷

In determining the viability of Title VII in this context, courts have been influenced by medical and psychiatric experts' opinions concerning a fitting definition of "sex." One of the primary inquiries focuses on the distinction between psychological sex and chromosomal sex. Surgical ablation or alteration of the patient's genitals changes the patient to assume the phenotype of the opposite sex. The procedure, however, does not change the patient's chromosomal sex. Many mental health doctors declare that psychological sex, rather than chromosomal sex, is the single most important consideration in determining the social and legal sex of an individual.⁸ Moreover, many courts have found that sex is not determined solely by physical attributes, such as chromosomes, but also by other factors, such as external genitalia, hormonal balance, and social orientation.⁹

In *Richards v. United States Tennis Association*,¹⁰ for instance, a postoperative, male-to-female transsexual was denied admittance into the women's division of the United States Open Tennis Tournament because she failed to pass the sex-chromatin test. The *Richards* court held that the defendant's exclusive reliance on the sex-chromatin test violated New York's Human Rights Law because chromosomal structure is not the sole factor involved in determining an individual's sex. The court additionally found that when a male undergoes a sex conversion, society's "unfounded fears and misconceptions . . . must give way to the overwhelming medical evidence that this person is now female."¹¹ Therefore, when an individual's gender identity and physical characteristics are no longer discordant, but are harmonized through surgery, the gender dysphoric's "sex" should be legally recognized as that of the assumed sex role. Most courts, however, in determining the viability of Title VII to gender dysphorics, have reasoned that sexual gender is a simple matter of immutable characteristics, specifically focusing on chromosomal composition.¹²

7. Wein & Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075, 1081 (1979).

8. Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 290-92 (1975).

9. See *M.T. v. J.T.*, 140 N.J. Super. 77, 83, 355 A.2d 204, 210, cert. denied, 71 N.J. 345, 364 A.2d 1076 (1976); *Anonymous v. Mellon*, 91 Misc. 2d 375, 377, 398 N.Y.S.2d 99, 101 (Sup. Ct. 1977); *In re Anonymous*, 57 Misc. 2d 813, 817, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968).

10. 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

11. *Id.* at 717, 400 N.Y.S.2d at 272.

12. For a list of cases which have confronted the issue, see *supra* note 3. The *Holloway* court did concede one key point, however, when it observed that "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII." 566 F.2d at 664.

One district court rejected that analysis and theorized that sex-based discrimination emerged in matters concerning discharge based on gender identity and based on sex reassignment. In departing from conventional judicial reasoning regarding gender dysphoria and Title VII, the United States District Court for the Northern District of Illinois, in *Ulane v. Eastern Airlines, Inc.*,¹³ found that a postoperative, male-to-female gender dysphoric had been discriminated against based on her status as a transsexual and as a female. Although First Officer Ulane had received a medical certificate of physical and mental fitness from the Federal Aviation Administration following the sex conversion, Eastern discharged Ulane from employment. The district court was persuaded that but for being a transsexual and but for having had sex reassignment, the plaintiff would not have been discharged. The court additionally held that Title VII coverage should be extended because the term "sex" literally and scientifically applied to transsexuals.¹⁴

Three federal circuit courts, including the Seventh Circuit which reversed *Ulane* on appeal, have published opinions holding that the term "sex" in Title VII does not provide relief for transsexuals.¹⁵ In denying a remedy, the courts' reasoning has been consistent and analytical. These courts have concluded that "sex" should be given its "plain meaning," and thus be limited to its traditional notions. The district court in *Ulane*, however, found such a construction inconsistent with Title VII's broad language, remedial purpose, and legislative history.

Although not yet adopted in the gender dysphoric context, there is a definite trend among courts to construe Title VII in a broad and liberal manner. For example, the Title VII prohibition of sex-based discrimination in employment was successfully invoked by a male who was discharged for resisting the homosexual advances of his supervisor.¹⁶ Title VII has also been held operative based upon other sex-related factors, including marriage,¹⁷ bearing

13. 581 F. Supp. 821, 839-40 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2023 (1985).

14. *Ulane*, 581 F. Supp. at 825. This holding was based on the court's finding that "sex is not a cut-and-dried matter of chromosomes," but also triggers psychological and social considerations. *Id.* For instance, Judge Grady was motivated in part by an Illinois statute which authorized the issuance of a change of sex designation, subsequent to sex reassignment, on birth certificates. *Id.* at 824. See ILL. REV. STAT. ch. 111-1/2, § 73-17 (1981). The court reasoned that the statute manifested a strong social policy in favor of protecting the integrity of transsexuals. *Ulane*, 581 F. Supp. at 824.

15. *Ulane*, 742 F.2d at 1087; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (*per curiam*); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

16. *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

17. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

or adopting children,¹⁸ and matters of sexual harassment.¹⁹ Certainly, Congress did not specifically express an intention to proscribe discrimination of that nature when it passed Title VII. Some courts have observed, however, that a liberal construction is consistent with the statute's broad language and wide-ranging remedial purpose. Because Congress did not enumerate particular discriminatory practices and did not limit "sex" to certain classes of persons protected, it must follow that Congress intended to define sex discrimination in the broadest possible terms.

Those courts denying Title VII relief to gender dysphorics, however, reason that Congress did not intend to provide redress because of various legislative bills which, if passed, would have extended the protective purview of Title VII to matters of "affectional or sexual preference."²⁰ Although Congress has explicitly declared that the sexual preference legislation operates to principally fashion a remedy for homosexuals, the federal circuit courts contend that the defeated bills make the narrow interpretation of "sex" proper; consequently, transsexuals cannot recover under Title VII. In relying on legislation that would have extended Title VII redress to homosexuals to deny relief to transsexuals, the circuit courts' reasoning may derive from an unduly cautious, prescriptive stance.

Discrimination against transsexuals, which is based on gender identity, and discrimination against homosexuals, which is based on sexual practices, differ intrinsically. Moreover, when a court approves of the analogy between the transsexual condition and the homosexual condition, the transsexual's claim is doomed to defeat because courts have consistently applied the "plain meaning" rule and have held that homosexuals are not protected by Title VII's "sex" provision. Because Congress has restricted the recent legislation to matters of sexual preferences, and because the transsexual condition is not similar to that of the homosexual, courts which have relied on those considerations may have misconstrued Title VII's legislative purpose.

Giving "sex" its common meaning, one would probably define the term based on the traditional considerations of physical appearance. This construction has been adopted by a majority of courts and has accordingly provided for a consistent denial of relief to the gender dysphoric under Title VII. Two opinions have indicated that

18. *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp. 784 (N.D. Iowa 1975).

19. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

20. The term "affectional or sexual preference" means "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults." *Civil Rights Act Amendments of 1981: Hearing on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1-2 (1982).

because Title VII was implemented to give greater protection to all individuals against sex-based discrimination in employment, "sex" emerges as a much broader term. The statute, therefore, should function to prohibit discrimination where there is a causal connection to any sex-related factor, and should not simply be dependent upon whether an individual happens to be recognized as a female or a male.²¹ The minority opinions insist that Title VII's remedial purpose can only be effected when courts read the statute liberally and, consequently, give "sex" its manifest denotation: discrimination based upon any sexual consideration.

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21. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting); *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2023 (1985).