Etsitty v. Utah Transit Authority: Transposing Transsexual Rights Under Title VII

I. INTRODUCTION

Plaintiff Krystal Etsitty, a transsexual diagnosed with Gender Identity Disorder (GID), accepted a position with the Utah Transit Authority (UTA) working as a bus operator in October 2001.[1] A few years earlier, in 1999, she had changed her name from Michael Etsitty to Krystal Sandoval Etsitty.[2] She had also changed her driver's license designation from male to female, and, although she still possessed male genitals, she had been taking female hormones to change her appearance.[3] During the probationary period following her acceptance of the job, Ms. Etsitty had not yet completed her sex change and was still dressing in stereotypically male attire.[4] Shortly after the conclusion of a six-week training course, Etsitty informed her supervisor, Pat Chatterton, that she was transsexual and would begin to dress as a female at work.[5]

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1. *See* Etsitty v. Utah Transit Auth., No. 2:04CV616DS, 2005 WL 1505610, at *1 (D. Utah June 24, 2005). All new operators for the UTA are assigned as "extra-board" operators. *Id.* Extra-board operators take the shifts of regular operators who are absent from work. *See id.* These operators are not assigned to a permanent route. *See id.*

2. *See id.*

3. *See id.* At the same time she applied for the job with the UTA, Ms. Etsitty was dressing as a man.

4. *See id.* As a newly hired employee, Ms. Etsitty was required to complete a six-week training course. *See id.* As a result of her probationary status, she could have been fired at will. *See id.*

5. *See id.* A rumor then began to circulate about a man dressing as a woman. *See id.* Betty Shirley, manager of operations for UTA, heard about the rumor and met with Chatterton to confirm its validity. *See id.* When Chatterton confirmed that operator "Mike" was undergoing a sex change, Shirley expressed concern over his restroom usage. *See id.* UTA had arrangements with various businesses that allowed bus operators to use public restrooms along the bus route. *See id.* at *2. Shirley's concerns stemmed from the fact that an extra-board operator's routes would vary almost every day, resulting in the need for special arrangements for a unisex restroom along every one of UTA's routes. *See id.* Shirley and Bruce Cardon, UTA's Director of Human Resources, then spoke with Ms. Etsitty, who confirmed that she was taking hormones but had not undergone sex reassignment surgery to remove her male genitals. *See id.* at *1. Shirley and Cardon also expressed concern that UTA might open itself to liability from workers, transit customers, and the general public if Ms. Etsitty was allowed to use female restrooms. *See id.* at *2.

The UTA eventually fired Etsitty.[6] She then sued the UTA under Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Protection Clause of the Constitution.[7] Both the plaintiff and the UTA filed motions for summary judgment.[8] The United States District Court for the District of Utah *held* that Title VII does not protect transsexual employees claiming wrongful termination because of sex, on account of that employee's gender-nonconforming behavior. *Etsitty v. Utah Transit Authority*, No. 2:04CV616DS, 2005 WL 1505610, at *7 (D. Utah June 24, 2005).

II. BACKGROUND

Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[9] In recent years, the term "sex" and the scope of protection afforded by Title VII's "because of . . . sex" language have been the subject of much debate in the federal courts.[10] The first decision to address the applicability of the title to transsexuals claiming sex discrimination was *Ulane v. Eastern Airlines, Inc.*[11] In that case, the plaintiff claimed she was fired because she was a transsexual.[12] The United States Court of Appeals for the Seventh Circuit held that Ulane's status as a transsexual meant she could not avail herself of protection from sex discrimination under Title VII, because she was not a member of either protected sex.[13] By classifying transsexuals as neither male nor female, *Ulane* appeared to shut the door

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6. *See id.* at *2. Shirley noted in the termination record that Etsitty would be eligible to be rehired after completing the reassignment surgery to remove her male genitals. *See id.*

7. *See id.* at *2.

8. *See id.* at *1, 2. Summary judgment is proper only when the various pleadings and filings establish that there is "no genuine issue as to any material fact" and where the moving party is entitled to "judgment as a matter of law." FED. R. CIV. P. 56(c).

9. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (2000)). An employer covered by the title may not "discharge *any* individual . . . because of such individual's . . . sex." *Id.* (emphasis added).

10. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 568, 570-78 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 869,871-78 (9th Cir. 2001); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 997, 999-1002 (D. Ohio 2003); Doe v. United Consumer Fin. Serv., No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509, at *2, *6-7 (N.D. Ohio Nov. 9, 2001).

11. *See* 742 F.2d 1081, 1087 (7th Cir. 1984).

12. *See id.* 1084 & n.7. Plaintiff Kenneth Ulane, a licensed pilot with extensive experience, was hired by Eastern Airlines in 1968. *See id.* In 1980, Ulane underwent sex reassignment surgery, was certified by the Federal Aviation Administration as female, and had a revised birth certificate issued. *See id.* at 1083. Ulane attempted to return back to work after the surgery, but was fired, as Karen Frances Ulane, in 1981. *See id.* at 1082.

13. *See id.* at 1087; Thomas Ling, Smith v. City of Salem*: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 282 (2005).

on viable Title VII sex discrimination claims for transsexuals, whether or not they claimed to be discriminated against because of their transsexual status.[14]

After *Ulane*, transsexual and gay plaintiffs alleging sex discrimination adopted a new approach to secure protection under Title VII. Plaintiffs in these cases argued that the language "because of . . . sex" referred not only to sex, but also to sexuality. In *Spearman v. Ford Motor Co.*, the Seventh Circuit held that Title VII did not protect against discrimination based on one's sexuality.[15] The court reasoned that when *Ulane* referred to "sex," it meant to describe a "biological male or biological female."[16] Seventh Circuit precedent has thus played a pivotal role in defining the protections afforded by Title VII, barring claims by transsexuals alleging that they had been discriminated against either because of their transsexual status or their sexuality.[17]

In the years between the decisions in *Ulane* and *Spearman*, the landscape regarding sex discrimination in the workplace changed drastically. In 1989, the Supreme Court decided, in *Price Waterhouse v. Hopkins*, that sex discrimination included discrimination based on the fact that an individual did not conform to sex-based stereotypes.[18] In *Price Waterhouse*, a qualified female employee claimed that she was not promoted to a partnership position because she exhibited "macho" characteristics.[19] The Court reasoned that denial of the promotion because the plaintiff, a woman, possessed many allegedly male characteristics violated Title VII since those same characteristics, when

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14. *See Ulane*, 742 F.2d at 1086-87. The court also held that Ulane was not discriminated against as a postoperative female. *See id.* at 1087.

15. *See* 231 F.3d 1080, 1084 (7th Cir. 2000). Edison Spearman was a homosexual man who worked for Ford Motor Company. *See id.* at 1082. He was subjected to constant harassment at work and sued under Title VII, claiming that Ford subjected him to a hostile work environment and failed to investigate his sexual harassment claims as promptly as similar claims filed by female employees. *See id.* at 1084. The court granted summary judgment to Ford, stating that the harassment Edison received as a result of his "sexual preference or orientation" was not unlawful under Title VII. *See id.* at 1085-86, 1087.

16. *Id.* at 1084 (citing *Ulane*, 742 F.2d at 1087).

17. *See Ulane*, 742 F.2d at 1087; *Spearman*, 231 F.3d at 1084. Prior to the *Ulane* holding, the United States Courts of Appeal for the Eighth and Ninth Circuits had held that discrimination against transsexuals was not outlawed by Title VII. *See* Sommers v. Budget Mktg., Inc. 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977).

18. *See* 490 U.S. 228, 258 (1989).

19. *See id.* at 232-35. Plaintiff's supervisor advised her that in order to get the promotion she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

possessed by a male, would not have affected his chance for promotion.[20] Not only was *Price Waterhouse* groundbreaking in this manner, but it also represented the first time the Supreme Court found that gender was implicated in Title VII.[21] The Court recognized gender as a distinct concept, specifying that its meaning changes over time and involves "how society constructs the roles to be played by the different anatomical sexes."[22] The Court's ruling thus set a new precedent upon which gay, lesbian, and transsexual plaintiffs could challenge adverse employment actions.[23] They could argue they were treated differently because they did not conform to society's sex stereotypes.[24] However, the *Price Waterhouse* decision was not nearly as effective a precedent as these plaintiffs may have hoped.[25]

After 1998, the federal circuits began to split, with some applying the *Price Waterhouse* reasoning, and still others adhering to *Ulane*. The United States Court of Appeals for the Ninth Circuit followed the precedent set by *Price Waterhouse* and has continued to uphold many sex discrimination claims, using the sex stereotyping theory as a way to expand protection under Title VII.[26] In *Nichols v. Azteca Restaurant Enterprises*, the Ninth Circuit upheld a male plaintiff's claim of sex stereotyping, holding that he experienced sexual harassment when he was repeatedly accused of walking and carrying trays "like a woman."[27] Following the lead of *Price Waterhouse*, which addressed discrimination against females based on sex stereotypes, the court held that men could bring sexual stereotyping claims as well.[28] The Ninth Circuit has also upheld the distinction between gender and sex under Title VII, as established by *Price Waterhouse*. In *Schwenk v. Hartford*, the court

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20. *See id.* at 233-35; Ling, *supra* note 13, at 288 n.27.

21. *See* Arthur S. Leonard, *Twenty-First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 153-54 (Winter 2004-05).

22. *Id.* at 154.

23. *See id.* at 153-55.

24. *See id.*

25. *See* Erin Ekeberg & Ramona Tumber, *Sexuality & Transgender Identity Issues in Employment* 5 GEO. J. GENDER & L. 387, 393 (2004).

26. *See id.* at 155; *see also* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063-64, 1067-68 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003) (stating that an employee's sexual orientation is not relevant to a court's consideration of a Title VII claim for severe physical conduct of a sexual nature).

27. 256 F.3d 864, 870, 874 (9th Cir. 2001).

28. *See id.* at 874-75. Although the gay and lesbian community also hoped that *Nichols* would be a great victory for gay and lesbian individuals claiming discrimination based on sex stereotypes, it turned out not to be so, and the ruling only came to provide protection for a gay male plaintiff who acted "effeminate[ly]" or a lesbian female plaintiff that acted "manly." Ekeberg & Tumber, *supra* note 25, at 393.

stated that *Price Waterhouse* had overruled *Ulane*'s method of deciding remedial civil rights claims on the basis of biological sex without regard to gender.[29]

The United States Court of Appeals for the Sixth Circuit made the most recent and significant leap in Title VII discrimination cases involving transsexual plaintiffs.[30] In *Smith v. City of Salem*, in which a male-to-female transsexual firefighter accused her employer of sex discrimination, the Sixth Circuit became the first federal court to hold that gender-identity discrimination violated Title VII.[31] Furthermore, the court held that because gender identity was covered by the text in Title VII, one's status as a transsexual did not invalidate the claim.[32] *Smith* was a momentous case because it established a new gender-identity ground upon which a plaintiff could base a sex discrimination claim, and, at the same time, it placed discrimination based both on sex and gender within Title VII's protection.[33]

Other federal courts, however, have tried to deny that they are bound by any precedent established by *Price Waterhouse*. In *Johnson v. Fresh Mark, Inc.*, the United States District Court for the Northern District of Ohio refused to apply the sex stereotyping theory of *Price Waterhouse* and instead chose to follow pre-*Price Waterhouse* case law, namely *Ulane*.[34] In *Johnson*, the plaintiff, who was a male-to-female transsexual, was fired when she refused to use only the men's restroom as her employer requested.[35] The court held this was not an issue of sex stereotyping, but that it only required one to "conform to the accepted

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29. *See* 204 F.3d 1187, 1200-02 (9th Cir. 2000). Douglas (later Crystal) Schwenk, a male-to-female transsexual prisoner, sought damages for an alleged assault by a prison guard. *See id.* at 1192. Schwenk sued under the Gender Motivated Violence Act (GMVA). *See id.* In resolving the issue of whether gender motivated the attack, the court adopted *Price Waterhouse*, holding that both gender and sex were motivating factors under the GMVA. *See id.*

30. *See* Leonard, *supra* note 21, at 154.

31. *See* 378 F.3d 566, 575 (6th Cir. 2004). A transsexual firefighter born as a male had been diagnosed with GID. *See id.* at 568. He began showing up to work wearing makeup and stereotypically female clothes. *See id.* Soon after doing so, he claimed that city officials were trying to force him to resign. *See id.* Plaintiff made a claim under *Price Waterhouse* that he was discriminated against because he did not conform to sex stereotypes. *See id.* at 567-68, 571.

32. *See id.* at 574-75.

33. *See* Melinda Chow, Comment, Smith v. City of Salem*: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J.L. & GENDER 207, 208 (2005).

34. *See* 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003).

35. *See id.* The company first attempted to deal with the issue by asking which bathroom plaintiff should use, but when she could not provide a letter from her physician to support her request to use the women's restroom, Fresh Mark looked at her driver's license designation and required her to use the men's restroom. *See id.* at 998.

principles established for gender-distinct public restrooms."[36] The court tried to frame gender-nonconforming behavior by transsexuals, such as restroom usage, as a distinct and separate issue in order to get around the proper sex stereotyping analysis.[37] Other courts have also followed this faulty line of reasoning.[38] Still others have tried to distinguish winning plaintiffs from transvestites and individuals with GID by reasoning that Title VII did not afford protection to these latter groups.[39] Finally, some courts have denied relief to transsexuals by holding that Congress did not intend that psychological makeup be taken into the Title VII determination.[40]

III. COURT'S DECISION

In the noted case, the court applied *Ulane*'s reasoning to analyze the issue of transsexual sex discrimination under Title VII.[41] First, the court held that, unlike men and women, transsexuals are not members of a protected class.[42] According to the court, it was clear that Congress did not want to broaden Title VII's protection beyond the plain meaning of the text.[43] As evidence, the court stated that Congress could have amended the law to include a provision protecting against discrimination based on sexual orientation, but declined despite numerous attempts.[44]

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36. *Id.* at 1000.

37. *See* Chow, *supra* note 33, at 211.

38. *See* Leonard, *supra* note 21, at 154.

39. *See* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1067-68 (7th Cir. 2003) (Posner, J., concurring); Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. 2002). In *Oiler*, a male transvestite with gender identity disorder claimed he was fired from his job because he acted like and dressed as a female in public. *See* 2002 U.S. Dist. LEXIS 17417, at *24. To distinguish his case from *Price Waterhouse*, the court stated:

> [T]his is not a situation where the plaintiff failed to conform to a gender stereotype . . . . The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman.

Id. at *28.

40. *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749-50 (8th Cir. 1982); James v. Ranch Mart Hardware, Inc., No. 94-2235, 1994 U.S. Dist. LEXIS 19102, at *3 (D. Kan. Dec. 23, 1994).

41. *See* Etsitty v. Utah Transit Auth., No. 2:04CV616DS, 2005 WL 1505610, at *3 (D. Utah June 24, 2005).

42. *See id.*

43. *See id.* The court stated: "from 1981 through 2001, thirty-one proposed bills were introduced in the United States Senate and the House of Representatives which attempted to amend Title VII to prohibit employment discrimination on the basis of affectional or sexual orientation. None of them passed." *Id.*

44. *See id.*

Instead, the court construed discrimination on the basis of "sex" to mean only discrimination on the basis of one's biological sex, not one's sexual identity or orientation.[45]

Addressing *Price Waterhouse*, which prohibited discrimination based on sex stereotypes, the court then held that the Title VII's protection against sex discrimination did not apply to transsexuals because transsexualism went beyond a person's failure merely to conform to sex stereotypes.[46] GID, according to the court, entailed much more than just acting like a "manly" woman or effeminate male, because it was a medical disorder related to the person's sense of identity.[47] The court reasoned further that if the "sex" language in Title VII was broadened in its application, it would have to protect nontranssexuals as well, conceivably allowing a male employee who dressed as a woman to use the women's restroom.[48] The court noted that this "complete rejection of sex-related conventions" was very much beyond what the drafters of the statute intended.[49]

Finally, the court held that even if *Price Waterhouse* were interpreted to apply to transsexuals, the rule did not apply in Etsitty's case, because she was not fired for her failure to conform to a certain sex stereotype.[50] The court noted that Etsitty was fired because the UTA was afraid of liability resulting from her use of the women's restrooms, and that this was a legitimate reason for firing her.[51] Gender-specific restrooms are implemented, according to the court, to reduce concerns about privacy and safety and are a norm in our society.[52] Furthermore, the court explained that Etsitty's termination record noted that she would be eligible for rehiring after she completed her sex reassignment surgery, showing that the UTA did not harbor animosity towards her because she was a transsexual.[53] Although the court did not approve of the discrimination and expressed sympathy for Etsitty, it granted the UTA's

45. *See id.* at *4.
46. *See id.* at *4-5.
47. *See id.* at *5. "Gender Identity Disorder can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests, and activities." *Id.* (quoting AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 564 (4th ed. 1994)).
48. *See id.*
49. *Id.* at *6.
50. *See id.*
51. *See id.*
52. *See id.* at *6-7.
53. *See id.* at *6.

motion for summary judgment based on its reading of the present state of law under Title VII.[54]

IV. ANALYSIS

The decision and reasoning of the court in the noted case are emblematic of the great uncertainty and differing arguments that still exist among the federal courts regarding protection against discrimination for transsexuals under Title VII. In its opinion, the *Etsitty* court utilized two methods from prior case law to avoid upholding legitimate sex stereotyping claims for transsexuals.[55]

First, the court avoided giving such protection by incorrectly classifying the sex and gender of the plaintiff for the purpose of sex-stereotyping analysis.[56] It chose to define a preoperative transsexual in accordance with his biological sex.[57] The court, however, should have classified Etsitty as a female who was discriminated against because she happened to have male genitalia and was therefore treated differently from other females because she was not allowed to use the women's restroom.[58] Relying on this categorization of a transsexual's gender "effectively render[s] gender identity or any 'change' of sex irrelevant to [the] threshold determination of [a plaintiff's] sex [, making] a lawsuit for sex discrimination by any transsexual an exercise in futility."[59] A court's view of a transsexual plaintiff in biological terms thus makes it almost impossible for the plaintiff to garner a victory.[60]

Second, in order to avoid providing Title VII protection for transsexuals, the *Etsitty* court reasoned that transsexuals suffer from a gender identity disorder.[61] This disorder, the court explained, is distinguishable from a mere failure to conform to certain sex stereotypes.[62] *Etsitty* and other courts have claimed that transsexuals are

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54. *See id.* at *6-7.

55. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003).

56. *See* Richard F. Storrow, *The Current Legal Framework of Sex/Gender Discrimination Law: Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 117, 124-26 (2003).

57. *See id.*

58. *See id.* Instead, the court classified her as a male who should have been treated the same as all other males. *See Etsitty*, 2005 WL 1505610, at *6-7.

59. Storrow, *supra* note 56, at 126.

60. *See id.*

61. *See Etsitty*, 2005 WL 1505610, at *5.

62. *See id.*; *see also, e.g.*, Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. 2002) (holding that protection for gender-nonconforming behavior does not include protection for those with GID).

so "categorically different" from effeminate men or masculine women who are discriminated against that they represent an entirely different category of person.[63] However, "[b]y definition, transsexuals are individuals who fail to conform to stereotypes about how those of a particular biological sex should act, dress, and self-identify."[64] Transsexuals, thus, should be protected against sex discrimination regardless of the cause of their deviation from sex stereotypes.

Unfortunately, the *Etsitty* court did not create any new approaches for examining Title VII sex discrimination claims regarding transsexuals. Even after so many seemingly groundbreaking decisions in both the Supreme Court and the federal courts, it appears as if every time this issue arises, it is again up for interpretation.[65] The court's decision in the noted case represents another missed opportunity to provide transsexuals with guidance as to the approach that courts will use in deciding cases of sex discrimination. Unfortunately, transsexual employees who are honest with their employers may suffer adverse employment actions as a consequence of their revelation. Even where employers are aware of an employee's transsexuality, the success or failure of the employee's Title VII sex discrimination claim may depend on the extent to which the employee asserts discrimination resulting from a failure to act in a stereotypically masculine or feminine manner.

Ideally, the Supreme Court would hand down a ruling that definitively invalidates *Ulane* and its progeny, and that gives a clear application of Title VII to transsexuals that the various federal courts will be able to follow. Although the future may appear bleak, there is hope for this seemingly unlikely proposition given the current makeup of the Court. Justice Antonin Scalia has argued in favor of expanding the meaning of "sex" in Title VII to include sexuality, stating that although it was "assuredly not the principal evil Congress was concerned with when it enacted Title VII[,] . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[66] Taking this somewhat surprising view into consideration, this issue is ripe to reach the nation's highest court.[67] But until Congress amends the law or the

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63. Chow, *supra* note 33, at 210.

64. *Id.* at 213 (citing Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)).

65. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *Smith*, 378 F.3d at 566; *Etsitty*, 2005 WL 1505610, at *6-7.

66. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998).

67. Ms. Etsitty has appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, and several organizations, including the National Center for Lesbian Rights, Lambda Legal, and the American Civil Liberties Union, have filed amicus briefs

Court holds to the contrary, rights of transsexuals in the workplace will continue to vary drastically, depending on whether one happens to live near Sacramento or Salt Lake City.

Tracy Hoskinson*

on her behalf. *See* NCLR, *NCLR's Docket*, http://www.nclrights.org/cases/etsitty_v_utah_transit.htm (last visited Mar. 16, 2006).

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