CASE NOTES

Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit

I. INTRODUCTION

On Halloween 2006, rather than coming to work in costume, Vandiver Elizabeth Glenn came dressed as whom she felt herself to be since puberty: a woman.[1] Born a biological male, Glenn was diagnosed with gender identity disorder (GID), and decided to transition from male to female under medical supervision.[2] One year earlier, she was hired as an editor at the Georgia General Assembly Office of Legislative Counsel (OLC) while still presenting as a man.[3] In 2006, Glenn explained her plans to transition to her supervisor, Beth Yinger.[4] Nevertheless, when she appeared on Halloween dressed for the first time at work as a woman, OLC head Sewell Brumby asked her to leave the office.[5] Brumby then met with Yinger, who explained Glenn's plan to transition.[6]

A year later, Glenn had progressed with her transition and notified Yinger that she would change her legal name and begin coming to work as a woman.[7] When Yinger notified Brumby, who was in charge of personnel decisions at the OLC, Brumby fired Glenn.[8] Glenn sued, claiming discrimination under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because of her sex and medical condition of gender identity disorder (GID).[9] The United States District Court for the Northern District of Georgia granted summary judgment to Glenn on the sex discrimination claim and

1. Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

summary judgment to Brumby on the medical discrimination claim.[10] On cross-appeal, the United States Court of Appeals for the Eleventh Circuit *held* that Glenn's termination constituted sex-based discrimination, and that Brumby failed to prove a sufficiently important governmental interest to justify the discrimination. *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011).

II. BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[11] The United States Supreme Court has frequently applied this clause to protect individuals from sex-based discrimination, absent a legitimate government interest. For instance, the Court overturned an Idaho statute giving males preference over females when deciding control of an estate.[12] The Court found the statute discriminatory on the basis of sex where sex was "wholly unrelated to the objective of that statute."[13] Over time the Court heightened its scrutiny of purported justifications for sex-based discrimination, eventually requiring "an exceedingly persuasive justification" to defeat an equal protection claim.[14] The Court has long used this standard to protect not only women, but also men, from sex-based discrimination.[15]

The Court further raised the existing "exceedingly persuasive justification" standard in *United States v. Virginia* by holding, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[16] In that case, Virginia attempted to justify excluding women from admission to the state-funded Virginia Military Institute because the institute provided the benefits of a single-sex institution and an "adversative approach" to education and development that would have to be modified for women.[17] The Court found these justifications unpersuasive under the standard it set forth.

Courts, however, distinguished sex-based discrimination from discrimination against transsexuals. In sex-based discrimination suits

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10. *Id.* at 1315.
11. U.S. CONST. amend. XIV, § 1.
12. Reed v. Reed, 404 U.S. 71, 77 (1971).
13. *Id.* at 76.
14. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).
15. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 735 (1982) (holding the exclusion of men from a state-funded nursing school was unconstitutional).
16. United States v. Virginia, 518 U.S. 515, 533 (1996); *see also* 1 FEDERAL CIVIL RIGHTS ACTS § 1:55 (3d ed. 1994 & Supp. 2011) (discussing the significance of *Virginia*).
17. *Virginia*, 518 U.S. at 535.

brought by transsexuals, courts would not even reach the "exceedingly persuasive justification" analysis because transsexuals simply were not protected from discrimination. The United States Court of Appeals for the Seventh Circuit, for example, found the law did not protect a pilot fired for being a transsexual in *Ulane v. Eastern Airlines, Inc*. The court held "discrimination based on sex" refers only to "discriminat[ion] against women because they are women and men because they are men," not discrimination against transsexuals because they are transitioning from one sex to another.[18]

In a watershed case that paved the way for protection of transgender people, the Court expanded the definition of sex-based discrimination to include discrimination based on nonconformity with gender stereotypes in *Price Waterhouse v. Hopkins*. A female senior manager at Price Waterhouse was denied partnership because she "overcompensated for being a woman." She was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to advance to partnership.[19] She sued under Title VII,[20] which requires the same elements as an equal protection claim.[21] The Court found in her favor, holding that discrimination against an employee for failing to act in accordance with the stereotypes associated with the employee's gender is sex-based discrimination.[22]

Though circuits are split on the issue of whether *Price Waterhouse* protects transsexuals from discrimination, several circuits have applied *Price Waterhouse* to grant relief on transsexuals' discrimination claims. Relying in part on the above case, the United States Court of Appeals for the Sixth Circuit found the petitioner had stated a valid claim where a transsexual fire department employee brought a sex-discrimination claim under Title VII after being fired.[23] After *Price Waterhouse*, the court concluded, "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup . . . are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[24] The First Circuit and Ninth Circuit granted relief to transsexuals on similar claims.[25]

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18. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).
19. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
20. *Id.* at 232.
21. Gutzwiller v. Fenik, 860 F.2d 1317, 1332 (6th Cir. 1988).
22. *Price Waterhouse*, 490 U.S. at 250.
23. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).
24. *Id.*
25. *See* Schwenk v. Hartford, 204 F.3d 1187, 1192-93 (9th Cir. 2000) (holding discrimination against transsexual plaintiff was gender-based discrimination); *see also* Rosa v.

In contrast, the United States Court of Appeals for the Tenth Circuit held the Equal Protection Clause does not protect transsexuals.[26] That court found against an employee who transitioned from male to female and was fired after using female restrooms on her route as a Utah Transit Authority employee.[27] The court, relying in part on *Ulane*, concluded "sex" refers only to male and female in its strict binary sense, not to transsexuals.[28] The court acknowledged that the defendant's actions may constitute discrimination on the basis of her "transsexuality *per se*," but nonetheless found no sex-based discrimination—and no protection from discrimination.[29] It acknowledged that some circuits had extended *Price Waterhouse* to protect transsexuals, but declined to do so itself. The court further stated that even if the petitioner established a case for gender stereotyping, the defendant offered a "legitimate, nondiscriminatory" justification for firing Etsitty—because her use of female restrooms while she had male genitalia could result in liability for the employer.[30] Similar restroom defenses against transsexuals' discrimination claims have found success in other circuits as well.[31]

In a case progressing past reliance on *Price Waterhouse*, the United States District Court for the District of Columbia found in favor of a transsexual petitioner where the defendant revoked a job offer once the petitioner disclosed her plan to transition. In that case, the court recognized discrimination against transsexuals because of their transsexuality per se, deeming it inconsequential whether the defendant withdrew its offer "because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[32]

Not until the noted case has the Eleventh Circuit addressed whether discrimination against a transsexual is sex-based discrimination, and the Supreme Court has not yet examined this issue.

III. COURT'S DECISION

In the noted case, the Eleventh Circuit followed the Sixth Circuit's *Smith* decision and the several other circuits that have applied *Price*

Park W. Bank & Trust Co., 214 F.3d 213, 216 (1st Cir. 2000) (holding bank unjustly discriminated against plaintiff, denying him a loan because he was a man dressed as a woman).

26. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).
27. *Id.* at 1219.
28. *Id.* at 1222.
29. *Id.* at 1224.
30. *Id.*
31. *See* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009).
32. Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

Waterhouse to grant recovery to a transsexual for sex-based discrimination.[33] The court held government discrimination against a transsexual employee based on his or her gender nonconformity constitutes sex-based discrimination under the Equal Protection Clause, and accordingly is subject to heightened scrutiny.[34] It further held that the defendant's testimony that he fired petitioner because he considered it "inappropriate" and "unsettling" for a man to dress as a woman was sufficient to prove the defendant's action was based on the petitioner's gender nonconformity.[35] Finally, the court rejected the defendant's restroom defense, holding it was not an "exceedingly persuasive justification" for firing the petitioner.[36] The court declined to address the petitioner's claim on cross-appeal that she was discriminated against based on a medical condition.[37]

First, the court examined whether government discrimination against a transsexual employee based on the employee's gender nonconformity constitutes sex-based discrimination. The court pointed to the Supreme Court's language in *City of Cleburn v. Cleburne Living Center, Inc.*, in which the Court outlined the bounds of the Equal Protection Clause—using the terms "gender" and "sex" interchangeably.[38] In addition, the court noted the Supreme Court's holding in *Price Waterhouse*: discrimination based on gender stereotypes qualifies as sex-based discrimination.[39] Agreeing with the opinions of several other circuits in similar cases, including *Smith*, the court reasoned the definition of transgender matches the transgression of gender stereotypes discussed in *Price Waterhouse*.[40]

The court expanded on this idea, referencing cases in which courts held that discrimination based on gender stereotypes qualified as sex-based discrimination.[41] For instance, the court analogized the instant case to *Nichols v. Azteca Restaurant Enterprises*, where the United States

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33. Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).
34. *Id.* at 1316.
35. *Id.* at 1314.
36. *Id.* at 1321.
37. *Id.*
38. *Id.* at 1315 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985)).
39. *Id.* at 1316 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989)).
40. *Id.* (using the terms "transsexual" and "transgender" interchangeably).
41. *Id.* at 1319 nn.6 & 8 (citing Doe v. City of Belleville, 119 F.3d 563, 566-68 (7th Cir. 1997)) (holding boy who wore an earring and was repeatedly sexually taunted by his coworkers had a sexual harassment claim); *see* Knussman v. Maryland, 272 F.3d 625, 641-42 (4th Cir. 2001) (holding in favor of employee who brought Equal Protection Clause claim when employer would not allow him to take statutory leave from work as "primary caregiver" for his child).

Court of Appeals for the Ninth Circuit found in favor of a waiter who was harassed at work because he effeminately carried his tray, which it found to be gender-nonconforming behavior protected from discrimination under Title VII.[42] In light of this precedent, the court held discrimination against a transsexual employee based on the employee's gender-nonconforming behavior is indeed sex-based discrimination and that such behavior, therefore, is protected by the Equal Protection Clause.[43]

Second, the court examined whether Brumby fired Glenn based on her gender nonconformity. Brumby testified that he fired Glenn because of "the sheer fact of the transition."[44] He also testified that he acted based on his belief that, because Glenn was a man, it was "unsettling" and "unnatural" that Glenn was dressed and made up as a woman.[45] Given Brumby's testimony, the court found "ample direct evidence" that Brumby acted on the basis of Glenn's gender nonconformity in terminating Glenn.[46]

Third, because this was an Equal Protection Clause claim against Brumby as an extension of the state, the court examined whether Brumby proved an "exceedingly persuasive justification" for the discrimination.[47] Because the discrimination proved to be based on gender nonconformity, the court applied the standard of heightened scrutiny as required under *United States v. Virginia* for claims of sex-based discrimination.[48] Under this standard, Glenn's claim would succeed unless the defendant proved the classification is "substantially related to a sufficiently important government interest"—one that is authentic and not contrived in response to petitioner's claim.[49]

Brumby's sole justification was his concern about litigation arising from Glenn's use of a women's restroom at work.[50] The court found this purported concern was mere speculation not based on any actual event or conversation.[51] In light of Brumby's conflicting testimony that he was

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42. *Glenn*, 663 F.3d at 1319 n.7 (citing Nichols v. Azteca Rest. Enter., 256 F.3d 864, 869 (9th Cir. 2001)).

43. *Id.* at 1321.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1315; *see also* United States v. Virginia, 518 U.S. 515, 554 (1996) (citing the Court's use of intermediate scrutiny to reach its decision).

49. *Glenn*, 663 F.3d at 1315 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985)).

50. *Id.* at 1321.

51. *Id.*

motivated only by his own discomfort working with a man dressed as a woman, the court found this justification particularly unpersuasive.[52] The court held that, given the heightened standard of scrutiny required of justifications for gender-based discrimination, Brumby's restroom defense fell short.[53]

Accordingly, the Eleventh Circuit affirmed the district court's ruling of summary judgment in favor of Glenn on her claim of sex-based discrimination.[54] Because this judgment granted Glenn all the relief she sought, the court declined to address her second claim of discrimination based on her medical condition: gender identity disorder.[55]

In sum, the Eleventh Circuit held (1) government discrimination against a transsexual employee based on his or her gender nonconformity constitutes sex-based discrimination, and is therefore subject to a heightened standard of scrutiny under the Equal Protection Clause; (2) where the employer testified he terminated the employee because she was a biological man dressed as a woman, the termination constituted discrimination on the basis of gender nonconformity; (3) the government employer's justification of concern about hypothetical litigation arising from a transgender employee's use of an opposite-sex restroom in the workplace did not satisfy the heightened scrutiny standard.[56]

IV. ANALYSIS

On the whole, this holding is an important victory for transsexuals in the Eleventh Circuit, and perhaps in other jurisdictions that have not yet visited the issue and may later use this case as persuasive authority. As discussed above, circuits remain divided on whether discrimination based on gender stereotypes encompasses discrimination against transsexuals. An additional circuit validating a transsexual's discrimination claim as sex-based discrimination is a significant, positive development in this conflicting body of case law, especially if the U.S. Supreme Court visits circuit court decisions in deciding the issue on first impression in the future.

Furthermore, this holding may prove beneficial for the lesbian, gay, bisexual, and transgender (LGBT) community as a whole. Currently, lesbians, gay men and bisexuals are not entitled to protection against discrimination based on their corresponding classification in private

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

employment under Title VII.[57] Another court's recognition that discrimination against transsexuals qualifies as sex-based discrimination may also lead to recognition that discrimination against other members of the LGBT community because of their per se classifications is sex-based discrimination, and should therefore be protected against by both the Equal Protection Clause and Title VII. Sexual attraction to members of the same sex—the element defining lesbians, gay men and bisexuals—is also gender nonconforming. Courts may eventually extend the instant case to protect lesbians, gay men and bisexuals from workplace discrimination based on their per se classification by extending the instant holding.

Returning to transsexual discrimination, the instant case nonetheless raises two major concerns. First, transsexual plaintiffs must identify themselves as their biological sex, that with which they do not associate, to state a successful sex-based discrimination claim.[58] Second, by characterizing the plaintiff as suffering from gender identity disorder while simultaneously declining to address her claim of discrimination based on that medical disorder, the court muddles the gender nonconformity of transgender people and their possible GID diagnoses without ruling on the legal significance of GID in transsexuals' discrimination claims.[59]

In order to recover for discrimination claims based on their gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their biological sex.[60] While a male-to-female transsexual may self-identify as a woman, he will often need to identify as a man *dressed as* a woman to successfully state a sex-discrimination claim.[61] This is true of the plaintiff in the instant case, where the court found the plaintiff was fired for being a man presenting as a woman—not for being a transsexual per se.[62] Glenn's dress was actually *consistent* with gender stereotypes of women.[63] "He" wore professional female attire, make-up and hair styles within gender norms for women.[64] The assertion that a woman whom does not wear lipstick is

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57. *See* Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-30 (5th Cir. 1978).

58. *Glenn*, 663 F.3d at 1316.

59. *Id.* at 1313.

60. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 570 (6th Cir. 2004) ("His complaint asserts he is a male with Gender Identity Disorder . . . .").

61. Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 640 (2011).

62. *Glenn*, 663 F.3d at 1321.

63. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1290-91 (N.D. Ga. 2010).

64. *Id.*

the same as a male-to-female transsexual who does is incongruous.[65] This assertion allows courts to effectively analogize transsexuals to the gender-nonconforming petitioner in *Price Waterhouse*. It may not, however, accurately reflect transsexual petitioners' views of themselves, their ability to present themselves in society as the gender they believe themselves to be, and the distinct nature of the discrimination they encounter.

The court introduced Glenn in its opinion as a male suffering from GID.[66] It declined, however, to rule on Glenn's claim of discrimination based on this medical condition.[67] In so doing, the court presents a significant fact in its opinion without clarifying its bearing on its holding. This leaves an important question unanswered: would a person without a GID diagnosis dressed as a member of the opposite sex still enjoy protection from sex-based discrimination? Likewise, would a person suffering from GID, discriminated against strictly because of that fact, be protected from sex-based discrimination? More precise analysis of the effect of a GID diagnosis could potentially mend the circuits' split on the issue of transsexual discrimination. In holding that discrimination against a transsexual employee because of that employee's transsexuality was not protected as sex-based discrimination, the *Etsitty* court speculated, "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."[68] If courts begin to clarify the impact of a GID diagnosis on their holdings in transsexual discrimination cases, the meaning of "sex" may expand past the binary sexes. In fact, the United States District Court for the District of Columbia acknowledged such an expanded definition of sex in *Schroer v. Billington*.[69] The court upheld a transsexual plaintiff's Title VII and Equal Protection Clause claims against an employer who rescinded an employment offer after the plaintiff informed the employer of her plan to transition.[70] The court recognized sexual identity stems from "real variations in how the different components of biological sexuality . . . interact with each other, and in turn, with social, psychological, and legal

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65. *See City of Salem*, 318 F.3d at 574 ("It follows that employers who discriminate against men because they *do* wear dresses and makeup . . . are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.").

66. *Glenn*, 663 F.3d at 1313.

67. *Id.* at 1321.

68. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).

69. Schroer v. Billington, 424 F. Supp. 2d 203, 212-13 (D.D.C. 2006).

70. *Id.* at 213.

concepts of gender."[71] Courts should recognize these complexities and clarify the legal impact of a GID diagnosis in sex-discrimination cases. Clarification of the role GID plays in transsexuals' claims, coupled with recognition of the broader complexity of gender and sexuality, may eventually result in favorable rulings in those circuits that continue to leave transsexuals unprotected from sex-based discrimination.

V. CONCLUSION

This ruling is an important addition to a conflicting body of case law regarding the protection of transsexuals from discrimination as sex-based discrimination. Protecting against discrimination based on arbitrary factors such as transsexuality, particularly in the workplace, serves a social good that benefits not only transsexuals, but also society as a whole. As case law continues to advance in this area, courts may look to this case and find support for a position against unjust discrimination.

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71. *Id.* at 212-13.

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