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G. Thomas Harper, Editor
www.HarperGerlach.com

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Workplace Safety

Under the Occupational Safety and Health Act, all employers — from large factories to small offices — are required to provide a safe working environment for their employees. At www.HRhero.com, you can find the following tools to help make sure your workplace is in compliance with the law:

- HR Sample Policy — Injury/Illness on the Job, www.HRhero.com/lc/policies/601.html
- HR Sample Policy — Licensed Equipment Operators, www.HRhero.com/lc/policies/605.html

DISCRIMINATION

'Transgender' and 'sexual identity disorder' now protected classes!

In a case involving a government employee, the Eleventh U.S. Circuit Court of Appeals (which includes Florida) found that the U.S. Constitution protects an employee who is terminated based on gender identity disorder and the employee's failure to conform to the stereotypes associated with the gender that his employer perceived him to be. Confused? Just keep reading! Though the case involved the firing of a worker employed by the Georgia Legislature, the reasoning behind the court's opinion would appear to apply to similar cases filed by private-sector employees in Florida.

Background

Glenn Morrison was born male. However, when he reached puberty, he felt he was a woman. In 2005, he was diagnosed with gender identity disorder, a condition listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. At that time, he began taking steps to transform himself from male to female. He visited health care providers who recommended that he begin living as a woman outside of work as a prerequisite for sex reassignment surgery. In October, he presented himself as a man when he interviewed for a job with the Georgia General Assembly's Office of Legislative Counsel (OLC), which is a government office. He was hired by Sewell Brumby, the head of the OLC, who is responsible for hiring and all personnel decisions.

In 2006, Morrison told his supervisor, Beth Yinger, that he was a transsexual and was in the process of becoming a woman. After the transition was complete, he planned on taking the name Vandiver Elizabeth Glenn.

A Halloween to remember

On Halloween, OLC employees were allowed to come to work in costume. Morrison came to work dressed as a woman. When Brumby saw him dressed as a woman, he remarked that his appearance was inappropriate and asked him to leave the office. Brumby later testified that he deemed Morrison's appearance inappropriate "because he was a man dressed as a woman and made up as a woman." He added that for him, it was "unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing" because it's "unnatural" for a man to dress as a woman.

After Halloween, Brumby met with Yinger to discuss Morrison's appearance. It was during their conversation that Yinger revealed Morrison's plan to undergo gender transition surgery. A year later, in the fall of 2007, Morrison informed Yinger that he was ready to proceed with gender transition and would begin coming to work as a woman. Additionally, he would be changing his legal name to Vandiver Elizabeth Glenn. Yinger conveyed the

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AGENCY ACTION

Annual report shows record year for EEOC. The Equal Employment Opportunity Commission (EEOC) finished fiscal year 2011 with a 10 percent decrease in its pending-charge inventory, the first such reduction since 2002. The annual Performance and Accountability Report released in November also shows the agency achieved the highest-ever monetary amounts through administrative enforcement, and it received a record number of discrimination charges. The fiscal year ended with 78,136 pending charges, a decrease of 8,202 charges. The agency received 99,947 discrimination charges during the fiscal year and delivered more than $364.6 million in monetary benefits in workplace discrimination cases.

New union-reporting rule takes effect. The U.S. Department of Labor's (DOL) new rule on reports filed by union officials — the Labor Organization Officer and Employee Report (Form LM-30) — became effective in November. The DOL said the new rule requires union officials to disclose payments and interests that involve actual or likely conflicts between their personal financial interests and their duties to the union. The statement also says the new rule removes requirements to report transactions "that create no actual or likely conflicts of interest." The new rule reverses one published in 2007 that expanded the LM-30.

NLRB sees increase in activity for fiscal year. The National Labor Relations Board (NLRB) issued 368 decisions in contested cases during fiscal year 2011, according to year-end figures from the agency. The numbers, which include 272 unfair labor practice cases and 96 representation cases, show an increase of 17 percent over the previous year. The number of pending cases at the end of the fiscal year dropped from 236 in the previous year to 209.

Agency releases pension projections. The Pension Benefit Guaranty Corporation (PBGC) has released its long-term exposure report, which shows financial deterioration in some pension plans and increased deficits for the PBGC. The exposure report provides projections on the future status of private pension plans and their effect on the PBGC's financial status. The projection, as of September 30, 2010, in the PBGC's single-employer program was for a deficit of $24 billion in 2020, an increase from the program's $21.6 billion deficit on September 30, 2010. For the multiemployer program, the deficit was projected in the same period to reach $9.4 billion, up from $1.5 billion. Projections in the report show a nearly 30 percent chance that the PBGC's multiemployer program will run out of money within 20 years. The PBGC performed 5,000 computer simulations on the future of the single-employer program, and none projected the program running out of money in the next 10 years. ✤

information to Brumby, who later terminated Morrison because his "intended gender transition was inappropriate [and] . . . would be disruptive." He added that "some people would view it as a moral issue," which would make Morrison's coworkers "uncomfortable."

From 'he' to 'she'

After her discharge, Glenn filed suit against Brumby, alleging discrimination under the Equal Protection Clause of the U.S. Constitution. It's important to note that her claims weren't based on Title VII of the Civil Rights Act of 1964 or any state antidiscrimination laws typically used to pursue a discrimination claim against a private-sector employer. A federal district court ruled in Glenn's favor on her sex discrimination claim, and Brumby appealed.

The court's decision was reviewed by federal appeals court judge Rosemary Barkett, a former chief justice of the Florida Supreme Court. The court defined the issue as whether discriminating against someone based on gender nonconformity constitutes sex-based discrimination under the U.S. Constitution. The court found that it does.

The court based its decision that transgendered employees are a protected class on the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. In that case, the Court held that discrimination on the basis of gender stereotype is sex-based discrimination. Specifically, the Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered "macho" and "overcompensated for being a woman."

In the decision, six of the nine Supreme Court justices agreed that the comments were indicative of gender discrimination and held that Title VII barred not only discrimination based on biological sex but also gender stereotyping (*i.e.,* failing to act and appear according to expectations defined by gender). According to the Court, "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 match the stereotypes associated with their group."

In this case, Brumby attempted to justify his actions by stating that other women in the office might object to Glenn's use of their restroom. However, the court found that he produced insufficient evidence to show that he was actually motivated by concern over potential litigation as a result of which restroom Glenn used. The district court had found it was unlikely that another female employee would sue the OLC since the office where Glenn worked had only single-occupancy restrooms.

In reaching its decision, the appellate court noted that Brumby testified that the termination decision was based on his perception of Glenn as a man dressed and "made up" as a woman. Further, he admitted that his decision to fire Glenn was based on "the sheer fact of the transition." In the court's view, those statements were direct evidence that Brumby acted on Glenn's gender nonconformity as the basis for the termination decision.

The Eleventh Circuit found that discrimination against a transgendered individual because of gender nonconformity is sex discrimination. According to the court, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." The court added that "all persons, whether transgender[ed] or not, are protected from discrimination on the basis of gender stereotype."

To support its reasoning, the court noted that other courts have held that employees cannot be discriminated against for wearing jewelry that is deemed "too effeminate" or taking too active a role in child-rearing activities. An employee simply cannot be punished because she is perceived not to conform to gender norms. Since that protection is afforded to all people, it cannot be denied to a transgendered person. *Vandiver Elizabeth Glenn, f/k/a Glenn Morrison v. Sewell R. Brumby*, Case No. 10-14833 (11th Cir., Dec. 6, 2011).

Conclusion

This is the first case that establishes protection for Florida employees who are transgendered or suffering from sexual identity disorder. Neither the Florida Human Rights Act nor Title VII specifies protection for transgendered individuals or individuals with sexual identity disorder.

Although this case was filed against a government entity and was based on the U.S. Constitution, the reasoning behind the court's decision would appear to apply to private-sector employers, and it may be used by employees who file charges with the Equal Employment Opportunity Commission and later file suit under Title VII and Florida law for sex discrimination. Thus, you would be wise to treat employees who don't meet gender stereotypes and/or are transgendered as belonging to a new protected class in Florida. If you aren't familiar with all of Florida's protected classes, e-mail your editor at gth@harpergerlach.com for a complete list. ✤

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