

# ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES

## A Compliance Guide for Employers and Employment Law Attorneys

A joint publication of:



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### **I. Background**

According to all available data, transgender employees have historically faced nearly unchecked amounts of discrimination in the workplace. This discrimination has included negative employment actions including failure to hire or promote, demotions, terminations, restrictions on a person's gender expression, and hostile environments resulting from basic bias against people who transition from one gender to another on the job or are known, or discovered, to have done so in the past.

For a number of decades, whether legal protection existed for transgender employees was somewhat unclear. In the 1970s, for example, some federal courts held that Title VII of the 1964 Civil Rights Act did not protect transgender employees from discrimination.<sup>1</sup>

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<sup>1</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, . . . a person born with a female body who believes herself to be a male"). See also *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995) (same); *Somers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (same); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) (same); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Calif. 1975) (same).

Over the past decade, however, the rationales in these decisions have been undercut by the Supreme Court's increasingly expansive interpretation of Title VII in other contexts.<sup>2</sup> As a result, the Ninth Circuit, the First Circuit, and as is discussed in more detail later in this publication, the Sixth Circuit have issued favorable decisions holding that transgender, or more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes.<sup>3</sup> In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.<sup>4</sup> The Sixth Circuit also upheld a nearly \$1,000,000 judgment in the case of an Ohio police officer demoted due to transition.<sup>5</sup>

During this same time period, courts and administrative agencies in Connecticut,<sup>6</sup> Massachusetts,<sup>7</sup> New Jersey,<sup>8</sup> and New York<sup>9</sup> have all found that transgender plaintiffs,

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<sup>2</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); see also *Oncale v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the "principal evil" Congress intended to combat when it enacted Title VII).

<sup>3</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). See also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1<sup>st</sup> Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire"). Finally, see *Smith v. City of Salem*, 369 F.3d 912 (6<sup>th</sup> Cir. 2004) later amended and superceded by *Smith v. City of Salem, Ohio* 2004 WL 1745840 (6<sup>th</sup> Cir. Aug 5, 2004).

<sup>4</sup> See, e.g., *Doe v. United Consumer Financial Services*, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, "at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize her as male or female 'just from looking')"). *Schroer v. Billington* F.Supp.2d ----, 2006 WL 845806 (D.C.,2006) (preliminary ruling finding right of action under Title VII). For an exception to this trend, see *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job) and *Etsitty v. Utah Transit Authority Not Reported in F.Supp.2d*, 2005 WL 1505610 (D.Utah, 2005) (District Court dismissed claim brought by terminated bus driver, case is on appeal to the 10<sup>th</sup> Circuit).

<sup>5</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729, C.A.6 (Ohio 2005) (court affirmed jury award of \$150,000 in compensatory damages, \$140,000 in front pay and \$30,511 in back pay; and the district court's award of \$527,888 in attorneys fees and \$25,837 in costs)

<sup>6</sup> *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

<sup>7</sup> *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under state law prohibiting employment discrimination).

who had been discriminated against because of their gender identity, had a right of action under existing state and/or local anti-discrimination laws.

This guide apprises California employers and employment law attorneys of federal and state developments and provides guidance on steps that can be taken to create a non-discriminatory environment. It also includes basic information about the transgender community and highlights one of the main issues that transgender employees face: restroom access. Both NCLR and TLC regularly offer on-site trainings to California based employers, firms, and attorney associations. On a case-by-case basis, we also provide technical assistance to employers and who are trying to create non-discriminatory workplaces and employment attorneys bringing a cause of action based on gender identity related discrimination.

## II. Title VII of the 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... 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."<sup>10</sup>

In *Smith v. City of Salem*, the 6<sup>th</sup> Circuit found that this language includes protection for transgender employees because discrimination based on sex-stereotyping is unlawful:

“Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. 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.

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<sup>8</sup> *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 777 A.2d 365 (N.J. Super.), cert. denied, 170 N.J. 211, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination).

<sup>9</sup> *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law).

<sup>10</sup> 42 U.S.C. § 2000e-2(a)

Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."<sup>11</sup>

As you'll see from reading the full opinion in *Smith* (included in Appendix 1), the Court in that case favorably cited a 9<sup>th</sup> Circuit Opinion, *Schwenk v. Hartford* that analyzed Title VII in a post *Price Waterhouse* environment. Therefore, while *Smith* does not apply directly to California employees, employers would be wise to expect California based Federal District Courts and the 9<sup>th</sup> Circuit to follow the reasoning of this landmark decision.

### III. California's Fair Employment and Housing Act

Beginning in 2004 California's Fair Employment and Housing Act (FEHA) explicitly protects all applicable transgender employees. FEHA was amended through the Gender Nondiscrimination Bill of 2003 (AB 196). AB 196 changed the California Government Code in two places. First, it amended California Government Code 12926(p) which defines sex to read:

(p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. *"Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code. California Government Code 12926* (Italicized portion is the amended language)<sup>12</sup>

For the sake of statutory consistency, AB 196 did not create a new definition of gender to add to the statute. Instead it incorporated the definition from California's Hate Crimes Statute. That statute defines gender as:

"Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. **California Penal Code 422.56(c)**<sup>13</sup>

Second, AB 196 added new language to FEHA pertaining to dress codes. Again, in order to bring California in line with trends seen in other states and in local jurisdictions within

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<sup>11</sup> *Smith*, 2004 WL 1745840 at 8

<sup>12</sup> This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. The original AB 196 language was: "Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.76 of the Penal Code, except that, for purposes of this part, the reference in that definition to the "victim" shall mean the employee or applicant and the reference in that definition to the "defendant" shall mean the employer or other covered entity or person subject to applicable prohibitions under this part.

<sup>13</sup> This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. Until that time, the definition in Penal Code section 422.76 is: "gender" means the [individual's] actual sex or the defendant's perception of the [individual's] sex, and includes the defendant's perception of the [individual's] identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the [individual's] sex at birth.

the state, AB 196 clarified the effect of this new language on an employer's existing ability to set standards for workplace appearance:

Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. **California Government Code 12949**

Section 12949 simply makes clear that in order to comply with state law, any such appearance or grooming policy must judge a transgender person's compliance by the standards appropriate for that person's gender identity.

#### **IV. Changing Workplace Environments**

While many employers have already been proactively creating workplaces that are free of gender identity discrimination, others need to take strong steps in order to do so. Gender identity discrimination is premised on the idea that the sex a person was assigned at birth is always accurate and/or unchangeable. However, as many transgender people can attest, it is not.

Therefore, employer policies and practices must incorporate the needs and experiences of transgender people in order to comply with state law. Aside from meeting the legal duties under federal and state law, updating such policies make for a better working environment, demonstrate respect for diversity, alleviate wasteful and counter-productive stress, and set clear standards for workplace behavior.

Following are examples of areas in which employers should make clear, understandable policies. As workplaces can vary widely, this publication only seeks to identify the most common changes employers need to make. Individual employers are again encouraged to contact either NCLR or TLC at the numbers or emails above to get answers to specific questions.

##### **A. Anti-Discrimination Policies**

Employers who have not already done so, should bring their employment policies in line with state law by clearly defining "sex" or "gender" to include gender identity or by adding the phrase "gender identity and expression" to their existing policy. Such modifications are important in order to put all employees on notice that transgender employees are respected and protected in the workplace.

Such policies obviously apply to hiring, promoting, training, and retaining employees. Managers and other decision makers should be explicitly trained about the employer's duty to not allow gender identity bias to play a role in any of these areas.

## **B. Names and Pronouns**

An employee who transitions on the job has the right to be addressed by the name and pronoun that corresponds to the employee's gender identity. Employee records and identification documents should be changed accordingly. While state law does not likely prohibit other employees from making inadvertent slips or honest mistakes about a person's name or gender, it does outlaw intentional or persistent refusal to respect a co-worker's or employee's gender identity. Intentionally addressing a co-worker or employee by the incorrect name or pronoun after having been informed of that person's gender identity is an actionable form of discrimination.

While some employers believe that an employee must get a court order to legally change the employee's name, this is not correct. California explicitly recognizes "common law" name changes for a majority of people in the state.<sup>14</sup> Furthermore, an employee does not need to get court recognition of a change of gender prior to requesting that an employer change the employee's gender marker in records and on identity documents. An employer also should not require such an order prior to effectuating such a request. To do so, would run counter to the policies of the majority of government agencies that keep records on a person's gender. For instance, a transgender person can get the gender marker changed on their state identification or drivers license without having first gotten a court order. The same is true of a person's gender marker in their social security records and on their passport.

## **C. Restroom accessibility**

All employees have a right to safe and appropriate restroom facilities. This includes the right to use a restroom that corresponds to the employee's gender identity, regardless of the employee's sex assigned at birth. No other employee's privacy rights are compromised by such a policy. While no such case has been heard in California (likely because of the ridiculous nature of the arguments involved), the only known case anywhere in the nation of a non-transgender person seeking legal remedy to the presence of a transgender person in the same restroom was dismissed for lack of a cause of action.<sup>15</sup>

In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. In fact, a private restroom of this type can be utilized by an employee who does not want to share a multi-restroom with a transgender co-worker or employee. Clearly, though, use of a unisex single stall restroom should always be a matter of choice for an employee. No employee should be compelled to use one either as a matter of policy or due to continuing harassment in a gender appropriate facility.

## **D. Dress Codes**

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<sup>14</sup> see California Code of Civil Procedure, section 1279.5 and affirmed in *In re Ritchie* 206 Cal.Rptr. 239 (Cal.App. 1 Dist.,1984) and *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App. 2 Dist.,1992).

<sup>15</sup> *Cruzan v. Special School Dist., #1*, 294 F.3d 981 (8<sup>th</sup> Cir. 2002).

As clarified above in section III, California state law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. While the most efficient way to avoid liability on this issue is to do away with all dress codes based on gender, any employer who does enforce gender based dress codes must do so in a non-discriminatory manner. This means not only allowing a transgender woman (for instance) to dress the same as other women, but that her compliance with such a dress code cannot be judged more harshly than the compliance of non-transgender women.

#### **E. Sex segregated job assignments**

AB 196 does not prohibit an employer from making job assignments based on sex so long as those assignments are otherwise in compliance with state law. However, in most cases, transgender employees must be classified and assigned in a manner consistent with their gender identity.

#### **F. Training**

Training employees in transgender sensitivity is clearly one way to improve the work environment and reduce liability. While transgender people in the workplace are certainly not a new phenomenon, many non-transgender people have questions when they find out that a fellow employee is transgender. Creating a space for these employees to ask such questions in a controlled environment is an incredibly helpful way to prevent bias related incidents. More and more professionals and government agencies are acquiring the skills necessary to provide trainings of this sort and employers are strongly recommended to avail themselves of these services.

# **ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES**

## **Attachments**

1. *Smith v. City of Salem*
2. The Transgender Umbrella: One View
3. Definition List
4. A Bathroom Conversation



2004 WL 1745840  
 --- F.3d ----  
 6th Cir.(Ohio), 2004

United States Court of Appeals,  
 Sixth Circuit.

Jimmie L. SMITH, Plaintiff-Appellant,  
 v.

CITY OF SALEM, OHIO, Thomas Eastek, Walter  
 Greenamyre, Brooke Zellers, Larry D.  
 DeJane, James A. Armeni, Joseph Julian, and Harry  
 Dugan, Defendants-Appellees.

**No. 03-3399.**

Argued: March 19, 2004.  
 Decided and Filed: Aug. 5, 2004.

Before COLE and GILMAN, Circuit Judges;  
 SCHWARZER, Senior District Judge. [FN\*]

### AMENDED OPINION

COLE, Circuit Judge.

\*1 Plaintiff-Appellant Jimmie L. Smith appeals from a judgment of the United States District Court for the Northern District of Ohio dismissing his claims against his employer, Defendant-Appellant City of Salem, Ohio, and various City officials, and granting judgment on the pleadings to Defendants, pursuant to Federal Rule of Civil Procedure 12(c). Smith, who considers himself a transsexual and has been diagnosed with Gender Identity Disorder, alleged that Defendants discriminated against him in his employment on the basis of sex. He asserted claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1983. The district court dismissed those claims pursuant to Rule 12(c). Smith also asserted state law claims for invasion of privacy and civil conspiracy; the district court dismissed those claims as well, having declined to exercise pendent jurisdiction over them.

For the following reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

### I. BACKGROUND

In reviewing a motion for judgment on the pleadings pursuant to Rule 12(c), we construe the complaint in the light most favorable to the plaintiff and accept the complaint's factual inferences as true. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir.2001). The following facts are drawn from Smith's complaint.

Smith is--and has been, at all times relevant to this action--employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department (the "Fire Department"). Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. Smith--biologically and by birth a male--is a transsexual and has been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576-582 (4th ed.2000). After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis"-- including at work--in accordance with international medical protocols for treating GID. Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith had approached Eastek in order to answer any questions Eastek might have concerning his appearance and manner and so that Eastek could address Smith's co-workers' comments and inquiries. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyre, Chief of the Fire Department. In short order, however, Eastek told Greenamyre about Smith's behavior and his GID.

\*2 Greenamyre then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his

employment. On April 18, 2001, Greenamyer and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. The executive body included Defendants Larry D. DeJane, Salem's mayor; James A. Armeni, Salem's auditor; and Joseph S. Julian, Salem's service director. Also present was Salem Safety Director Henry L. Willard, now deceased, who was never a named defendant in this action.

Although Ohio Revised Code § 121.22(G)--which sets forth the state procedures pursuant to which Ohio municipal officials may meet to take employment action against a municipal employee--provides that officials "may hold an executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of [considering such matters]," the City did not abide by these procedures at the April 18, 2001 meeting.

During the meeting, Greenamyer, DeJane, and Zellers agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, Defendants reasoned, they could terminate Smith's employment on the ground of insubordination. Willard, who remained silent during the meeting, telephoned Smith afterwards to inform him of the plan, calling Defendants' scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's counsel telephoned DeJane to advise him of Smith's legal representation and the potential legal ramifications for the City if it followed through on the plan devised by Defendants during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, Greenamyer suspended Smith for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire Department policy.

At a subsequent hearing before the Salem Civil Service Commission (the "Commission") regarding his suspension, Smith contended that the suspension

was a result of selective enforcement in retaliation for his having obtained legal representation in response to Defendants' plan to terminate his employment because of his transsexualism and its manifestations. At the hearing, Smith sought to elicit testimony from witnesses regarding the meeting of April 18, 2001, but the City objected and the Commission's chairman, Defendant Harry Dugan, refused to allow any testimony regarding the meeting, despite the fact that Ohio Administrative Code § 124-9-11 permitted Smith to introduce evidence of disparate treatment and selective enforcement in his hearing before the Commission.

\*3 The Commission ultimately upheld Smith's suspension. Smith appealed to the Columbiana County Court of Common Pleas, which reversed the suspension, finding that "[b]ecause the regulation [that Smith was alleged to have violated] was not effective[,] [Smith] could not be charged with violation of it."

Smith then filed suit in the federal district court. In his complaint, he asserted Title VII claims of sex discrimination and retaliation, along with claims pursuant to 42 U.S.C. § 1983 and state law claims of invasion of privacy and civil conspiracy. In a Memorandum Opinion and Order dated February 26, 2003, the district court dismissed the federal claims and granted judgment on the pleadings to Defendants pursuant to Federal Rule of Civil Procedure 12(c). The district judge also dismissed the state law claims without prejudice, having declined to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(3).

## II. ANALYSIS

On appeal, Smith contends that the district court erred in holding that: (1) he failed to state a claim of sex stereotyping; (2) Title VII protection is unavailable to transsexuals; (3) even if he had stated a claim of sex stereotyping, he failed to demonstrate that he suffered an adverse employment action; and (4) he failed to state a claim based on the deprivation of a constitutional or federal statutory right, pursuant to 42 U.S.C. § 1983.

We review *de novo* the dismissal of a complaint pursuant to Rule 12(c). *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir.1998). A motion for judgment on the pleadings shall be granted only where, construing the complaint in the light most favorable to the plaintiff, and accepting all of its factual allegations as

true, the plaintiff can prove no set of facts in support of the claims that would entitle him to relief. *Id.* (citation omitted).

### A. Title VII

The parties disagree over two issues pertaining to Smith's Title VII claims: (1) whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and (2) whether Smith alleged that he suffered an adverse employment action.

Defendants do not challenge Smith's complaint with respect to any of the other elements necessary to establish discrimination and retaliation claims pursuant to Title VII. In any event, we affirmatively find that Smith has made out a *prima facie* case for both claims. To establish a *prima facie* case of employment discrimination pursuant to Title VII, Smith must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly situated individuals outside of his protected class. *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir.2000). Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination "because of ... sex" protects men as well as women. *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983). The complaint also alleges both that Smith was qualified for the position in question--he had been a lieutenant in the Fire Department for seven years without any negative incidents--and that he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

\*4 To establish a *prima facie* case of retaliation pursuant to Title VII, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action. *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir.2004) (citation omitted). Smith's complaint satisfies the first two requirements by explaining how he sought legal

counsel after learning of the Salem executive body's April 18, 2001 meeting concerning his employment; how his attorney contacted Defendant DeJane to advise Defendants of Smith's representation; and how Smith filed a complaint with the EEOC concerning Defendants' meeting and intended actions. With respect to the fourth requirement, a causal connection between the protected activity and the adverse employment action, "[a]lthough no one factor is dispositive in establishing a causal connection, evidence ... that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000); *see also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir.1988) (employee's discharge "soon after" engaging in protected activity "is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir.1986) ("Causation sufficient to establish a *prima facie* case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."). Here, Smith was suspended on April 26, 2001, just days after he engaged in protected activity by receiving his "right to sue" letter from the EEOC, which occurred four days before the suspension, and by his attorney contacting Mayor DeJane, which occurred six days before the suspension. The temporal proximity between the events is significant enough to constitute direct evidence of a causal connection for the purpose of satisfying Smith's burden of demonstrating a *prima facie* case.

We turn now to examining whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and whether Smith alleged that he suffered an adverse employment action.

#### 1. Sex Stereotyping

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... 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." 42 U.S.C. § 2000e-2(a).

In his complaint, Smith asserts Title VII claims of retaliation and employment discrimination "because of ... sex." The district court dismissed Smith's Title VII claims on the ground that he failed to state a claim for sex stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The district court implied that Smith's claim was disingenuous, stating that he merely "invokes the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,'" as an end run around his "real" claim, which, the district court stated, was "based upon his transsexuality." The district court then held that "Title VII does not prohibit discrimination based on an individual's transsexualism."

\*5 Relying on *Price Waterhouse*--which held that Title VII's prohibition of discrimination "because of ... sex" bars gender discrimination, including discrimination based on sex stereotypes--Smith contends on appeal that he was a victim of discrimination "because of ... sex" both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual.

We first address whether Smith has stated a claim for relief, pursuant to *Price Waterhouse*'s prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping--that is, discrimination because she failed to *act* like a woman. *Id.* at 250-51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258-61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof). As Judge Posner has pointed out, the term "gender" is one "borrowed from

grammar to designate the sexes as viewed as social rather than biological classes." Richard A. Posner, *Sex and Reason*, 24-25 (1992). The Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S.Ct. 1775.

Smith contends that the same theory of sex stereotyping applies here. His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

\*6 Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir.1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). *See, e.g., Ulane*, 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661-63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex;" and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*)--as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity--were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.

However, the approach in *Holloway*, *Sommers*, and *Ulane*--and by the district court in this case--has been eviscerated by *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir.2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane* ] has been overruled by the logic and language of *Price Waterhouse*."). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex"

encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *See Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775; *see also Schwenk*, 204 F.3d at 1202 (stating that Title VII encompasses instances in which "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one" and that "sex" under Title VII encompasses both the anatomical differences between men and women and gender); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir.2002) (en banc) (Pregerson, J., concurring) (noting that the Ninth Circuit had previously found that "same-sex gender stereotyping of the sort suffered by Rene--i.e. gender stereotyping of a male gay employee by his male co-workers" constituted actionable harassment under Title VII and concluding that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping"); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir.2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874- 75 (9th Cir.2001) (holding that harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex, in violation of Title VII), *overruling DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir.1979); *Doe v. Belleville*, 119 F.3d 563, 580-81 (7th Cir.1997) (holding that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles" and explaining that "a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex' "), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

\*7 After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination,

because the discrimination would not occur but for the victim's sex. *See, e.g., Nichols*, 256 F.3d 864 (Title VII sex discrimination and hostile work environment claim upheld where plaintiff's male co-workers and supervisors repeatedly referred to him as "she" and "her" and where co-workers mocked him for walking and carrying his serving tray "like a woman"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity." (internal citation omitted)); *see also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir.2000) (applying *Price Waterhouse* and Title VII jurisprudence to an Equal Credit Opportunity Act claim and reinstating claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because was dressed in "traditionally feminine attire").

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of ... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. *See, e.g., Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants' discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith's well-pleaded claims concerning his transgender behavior, but rather accounted for that

behavior only insofar as it confirmed for the court Smith's status as a transsexual, which the district court held precluded Smith from Title VII protection.

\*8 Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. 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. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Finally, we note that, in its opinion, the district court repeatedly places the term "sex stereotyping" in quotation marks and refers to it as a "term of art" used by Smith to disingenuously plead discrimination because of transsexualism. Similarly, Defendants refer to sex stereotyping as "the *Price Waterhouse* loophole." (Appellees' Brief at 6.) These characterizations are almost identical to the treatment that *Price Waterhouse* itself gave sex stereotyping in its briefs to the U.S. Supreme Court. As we do now, the Supreme Court noted the practice with disfavor, stating:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by *Price Waterhouse* of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.

*Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775.

## **2. Adverse Employment Action**

Despite having dismissed Smith's Title VII claim for failure to state a claim of sex stereotyping--a finding we have just rejected--the district court nevertheless

addressed the merits of Smith's Title VII claims *arguendo*. Relying on *White v. Burlington Northern & Sante Fe Ry. Co.*, 310 F.3d 443 (6th Cir.2002), the district court held that Smith's suspension was not an adverse employment action because the Court of Common Pleas, rendering the "ultimate employment decision," reversed the suspension, and that accordingly, Smith's Title VII claim could not lie. Because this Circuit has since vacated and overruled *White*, 364 F.3d 789 (6th Cir.2004) (en banc), and joined the majority of other circuits in rejecting the "ultimate employment decision" standard, we hold that the district court erred in its analysis and that Smith has successfully pleaded an adverse employment action in support of his employment discrimination and retaliation claims pursuant to Title VII.

\*9 Common to both the employment discrimination and retaliation claims is a showing of an adverse employment action, which is defined as a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). A "bruised ego," a "mere inconvenience or an alteration of job responsibilities" is not enough to constitute an adverse employment action. *White*, 364 F.3d at 797 (quoting *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 886 (6th Cir.1996)). Examples of adverse employment actions include firing, failing to promote, reassignment with significantly different responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *White*, 364 F.3d at 798. Here, the Fire Department suspended Smith for twenty-four hours. Because Smith works in twenty-four hour shifts, that twenty-four hour suspension was the equivalent of three eight-hour days for the average worker, or, approximately 60% of a forty-hour work week. Pursuant to the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8, this allegation, at this phase of the litigation, is sufficient to satisfy the adverse employment requirement of both an employment discrimination and retaliation claim pursuant to Title VII. [FN1]

It is irrelevant that Smith's suspension was ultimately reversed by the Court of Common Pleas after he challenged the suspension's legality. In *White*, this Court recently joined the majority of other circuits in rejecting the "ultimate employment decision" standard whereby a negative employment action is

not considered an "adverse employment action" for Title VII purposes when the decision is subsequently reversed by the employer, putting the plaintiff in the position he would have been in absent the negative action. *White*, 364 F.3d 789 (holding that the suspension of a railroad employee without pay, followed thirty-seven days later by reinstatement with back pay, was an "adverse employment action" for Title VII purposes). Even if the "ultimate employment decision" standard were still viable, the district court erred in concluding that, because the Court of Common Pleas overturned the suspension, it was not an adverse employment action. There is no legal authority for the proposition that reversal by a *judicial* body--as opposed to the employer--declassifies a suspension as an adverse employment action.

Accordingly, Smith has stated an adverse employment action and, therefore, satisfied all of the elements necessary to allege a *prima facie* case of employment discrimination and retaliation pursuant to Title VII. We therefore reverse the district court's grant of judgment on the pleadings to Defendants with respect to those claims.

#### **B. 42 U.S.C. § 1983 Claims**

The district court also dismissed Smith's claims pursuant to 42 U.S.C. § 1983 on the ground that he failed to state a claim based on the deprivation of a constitutional or federal statutory right.

\*10 42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law. Smith has stated a claim for relief pursuant to § 1983 in connection with his sex-based claim of employment discrimination. Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *Davis v. Passman*, 442 U.S. 228, 234-35, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). To make out such a claim, a plaintiff must prove that he suffered purposeful or intentional discrimination on the basis of gender. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). As this Court has noted several times, "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983."

*Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir.1988) (citing *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 (6th Cir.1987)); *Daniels v. Bd. of Educ.*, 805 F.2d 203, 207 (6th Cir.1986); *Grano v. Dep't of Dev.*, 637 F.2d 1073, 1081-82 (6th Cir.1980); *Lautermilch v. Findlay City Schs.*, 314 F.3d 271, 275 (6th Cir.2003) ("To prove a violation of the equal protection clause under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII.") (quotation and citation omitted). The facts Smith has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117-21 (2d Cir. 2004) (holding that claims premised on *Price Waterhouse* sex stereotyping theory sufficiently constitute claim of sex discrimination pursuant to § 1983).

Defendants urge us to hold otherwise, on the ground that Smith's complaint fails to refer specifically to the Equal Protection Clause of the U.S. Constitution. But the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. Fed.R.Civ.P. 8(a). A plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Claims made pursuant to 42 U.S.C. § 1983 are not subject to heightened pleading standards. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165-66, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (rejecting heightened pleading standard for § 1983 claims); *Jones v. Duncan*, 840 F.2d 359 (6th Cir.1988) (holding that § 1983 claims need not set forth in detail all the particularities of a plaintiff's claim against a defendant). Moreover, legal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated in the pleadings; in considering motions pursuant to Fed.R.Civ.P. 12(c), we ask not whether a complaint points to a specific statute, but whether relief is possible under any set of facts that could be established consistent with the allegation. Because Smith's sex discrimination claim so thoroughly and obviously sounds in a constitutional claim of equal

protection, Defendants had fair notice of his claim and the ground upon which it rests. As such, we hold that Smith has satisfied the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8 with respect to his claim of sex discrimination, grounded in an alleged equal protection violation, and we therefore reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

\*11 In his appellate brief, Smith also contends that his complaint alleges a violation of his constitutional right to due process, based on the City's failure to comply with the state statutory and administrative procedures that an Ohio municipality must follow when taking official employment action against a public employee. His complaint outlines the statutory procedures, governed by O.R.C. § 121.22(G), pursuant to which members of an Ohio municipality may meet for purposes of taking official employment action against a public employee, and it alleges that those procedures were not followed. The complaint also discusses O.A.C. § 124-9-11, which would have permitted Smith to call witnesses at his post-suspension hearing in front of the Salem Civil Service Commission; and the complaint alleges that he was barred from calling witnesses. Smith contends that these allegations implicate his right to due process pursuant to the Fourteenth Amendment of the U.S. Constitution.

However, it is well-settled that state law does not ordinarily define the parameters of due process for Fourteenth Amendment purposes, and that state law, by itself, cannot be the basis for a federal constitutional violation. See *Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1423 (6th Cir.1996) ("Violation of a state's formal [employment grievance] procedure ... does not in itself implicate constitutional due process concerns."). Neither Smith's complaint nor his brief specifies what deprivation of property or liberty allegedly stemmed from the City's failure to comply with state procedural and administrative rules concerning his employment. Accordingly, he has failed to state a federal due process violation pursuant to § 1983.

In sum, we hold that Smith has failed to state a § 1983 claim based on violations of his right to due process. However, he has stated a § 1983 claim of sex discrimination, grounded in an alleged equal protection violation, and, for that reason, we reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.



### III. CONCLUSION

Because Smith has successfully stated claims for relief pursuant to both Title VII and 42 U.S.C. § 1983, the judgment of the district court is REVERSED and this case is REMANDED to the district court for further proceedings consistent with this opinion.

FN\* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

FN1. Smith's complaint does not state whether he was suspended with or without pay. Because we must construe the complaint in the light most favorable to the plaintiff, *Ziegler*, 249 F.3d at 512, and given the liberal pleading standards of Federal Rule of Civil Procedure 8, we do not find this failure dispositive. A "materially adverse change" in employment conditions often involves a material loss of pay or benefits, but that is not always the case, and "other indices that might be unique to a particular situation" can constitute a "materially adverse change" as well. *Hollins*, 188 F.3d at 662. Because no discovery has been conducted yet, we do not know the full contours of the suspension. For now, however, for the reasons just stated, we find that Smith has sufficiently alleged an adverse employment action.

# The Transgender Umbrella: one view

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Transgender people have been around for a long time. However, the term transgender, as it is currently used, is a relatively new term. It has only been in general, popular use since the early 1990s. As currently used, “transgender” is an umbrella term that is analogous to other umbrella terms like people of color or people with disabilities.

Like those terms, the word transgender was deliberately designed to create and foster a sense of commonality and common purpose between otherwise different and specific groups. The same way that the term “people of color” includes a variety of specific racial groups, such as African-Americans, Asian-Americans, Native-Americans and so forth, the term “transgender” also includes a variety of more specific identities.

It includes transsexual people, cross-dressers, transvestites, drag queens, butch lesbians, feminine gay men, and even more generally any women who have so called masculine characteristics and any men who have so called feminine characteristics.

The underlying idea or concept is that “transgender” includes anyone whose behavior, appearance, or identity falls outside of gender stereotypes or outside of stereotypical assumptions about how men and women are supposed to be. It is a very broad term that includes a very wide range of people.

For the transgender community, gender identity might be thought of as the core concept that is equivalent to sexual orientation for lesbian, gay and bisexual people. Gender identity refers to a person’s internal, deeply felt sense of being male or female (or both or neither). It is a person’s psychological identification as masculine or feminine. For most people, your gender identity corresponds to your physical body, to your anatomical sex. The whole premise of transgender identity is that this is not necessarily true for everybody.

Transsexual people might be thought of as the most extreme example of people whose gender identity does not correspond to the body they were born with. In my case, I was born with a female body and raised as a girl, but my gender identity is male. Like a lot of other transsexual people, I underwent medical treatment to change my body to correspond with my gender identity.

It’s important to make it clear, however, that not all transgender people choose to undergo any medical treatment. Not even all transsexual people do. There are female bodied people who identify as male and as transsexual without any medical treatment, and then there are some of us who really need the medical treatment.

That diversity is really the key to the liberating aspect of transgender identity and politics. We have been taught that if you are born in a female body, you should dress and behave in a feminine way, and you should be attracted to men. Lesbian and gay people know that is not true when it comes to sexual orientation. The transgender community shows another different, but similar kind of truth. Gender characteristics can be combined in any number of different ways. Helping people to see and understand that is really the heart of the liberating aspect of transgender identity.

# Transgender Definitions<sup>16</sup>

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## **Transgender**

An umbrella term that can be used to describe people whose gender expression is nonconforming and/or whose gender identity is different from their birth assigned gender.

## **Gender Identity**

A person's internal, deeply-felt sense of being either male, female, something other, or in between. Everyone has a gender identity.

## **Gender Expression**

An individual's characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine.

## **Sexual Orientation**

A person's emotional and sexual attraction to other people based on the gender of the other person. A person may identify their sexual orientation as heterosexual, lesbian, gay, bisexual, or queer. It is important to understand that sexual orientation and gender identity are two different things. Not all transgender youth identify as gay, lesbian, bisexual, or queer. And not all gay, lesbian, bisexual, and queer youth display gender non-conforming characteristics.

## **LGBTQ**

An umbrella term that stands for "lesbian, gay, bisexual, transgender, and questioning." The category "questioning" is included to incorporate those that are not yet certain of their sexual orientation and/or gender identity.

## **Female or Male Cross Dressers**

Individuals who occasionally wear clothing that is perceived to be conflicting with their anatomical genital structure.

## **Drag Queens or Kings**

Female or male cross dressers who are lesbian, gay, or bisexual.

## **Masculine Females**

Biological females who have or are perceived to have masculine characteristics. They may

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<sup>16</sup> The following definitions were excerpted from two sources. The San Francisco Human Rights Commission's *Compliance Guidelines to Prohibit Gender Identity Discrimination* and *Beyond the Binary: A Tool-Kit for Gender Identity Activism in Schools*.

have either a feminine or masculine gender identity, and will usually identify with their body if asked to specify.

### **Feminine Males**

Biological males who have or are perceived to have feminine characteristics. They may have either a masculine or feminine gender identity, and will usually identify with their body if asked to specify.

### **Transsexual**

A term most commonly used to refer to someone who transitions from one gender to another. It includes people who were identified as male at birth but whose gender identity is female, people who were identified as female at birth but whose gender identity is male, and people whose gender identity is neither male nor female. Transition often consists of a change in style of dress, selection of a new name, and a request that people use the correct pronoun when describing them. Transition may, but does not always, include necessary medical care like hormone therapy, counseling, and/or surgery.

### **Gender Non-Conforming**

A person who is or is perceived to have gender characteristics and/or behaviors that do not conform to traditional or societal expectations. Gender non-conforming people may or may not identify as lesbian, gay, bisexual, transgender, or queer.

### **Genderqueer**

People who do not identify as, or who do not express themselves as, completely male or female. Genderqueer people may or may not identify as transgender.

## **Bathroom Conversation:** A discussion with a Human Resources Manager about bathrooms and transsexual employees.

By Jamison Green

The HR manager of a San Francisco subsidiary of a major New York-based corporation received advice from his New York legal department to instruct a local newly-transitioning FTM employee that he couldn't use the men's bathroom until he had had genital reconstruction (which many transmen never have) and until he was listed with the health insurance carrier as male.

The HR manager had called me at the request of the very agitated and frustrated FTM employee. I told him that it would soon be highly inappropriate for the young man to be using the women's room, and that he would be using a stall in the men's room, so there was no forced or required nudity (as in a shower situation), and no violation of privacy. The manager seemed to understand me, and he was relieved that I had a sense of humor about the matter while I explained to him about the puberty-like nature of hormonal transition and its biochemical processes, surgery issues, and the fact that social maleness is really more important on a day-to-day basis than the shape of one's genitals. But somehow I had to bring the point home, because I wasn't sure he was getting it in a way that would resolve the young man's problem and solidify the HR manager's position with respect to his corporate legal department.

"How many men do you meet every day, feel comfortable with, do business with, etc., etc.?" I asked him rhetorically. "And how many of those men do you know for a fact has a penis?" He was stunned.

"So how important would you say a man's penis is in your employer/employee relationship?" I inquired. He was contrite.

"You assume all the men you meet have penises and started their lives in male bodies. This may not be true. And if that is so, what difference does it make to you?"

"I see," he said, thoughtfully.

"So the difference in the case of this employee," I went on, "is that you actually know an intimate detail of his life that you are not privileged to know in other cases. Transsexualism is a medical condition, treated by doctors to improve the quality of life for their patient. It is difficult, at best, to go through this process at all, and virtually impossible without some social support, unless one does it in secret, obliterating their past and cutting all ties with people who had any knowledge of their previous embodiment. Many people have lived that way and made their transitions a secret. What your employee is doing now is a courageous act, worthy of your respect. He has thought long and hard about this transition he is making, and he is not hiding, masquerading, or playing games. He is required by established medical standards to live completely as a man before he can have surgery. Your corporate refusal to cooperate feels like a game to him and is highly frustrating and demoralizing. You acknowledge that he gets along with his co-workers and they accept him as a man, so your refusal to accept him becomes a productivity obstacle for your

entire staff. Your resistance unnecessarily calls attention to a personal situation that should be none of your business beyond your privileged awareness that it exists and is a condition of his life."

The outcome of this conversation was that the company permitted the young man to use the men's restroom. They also changed his employment records to reflect his sex as male in correspondence with his newly issued legal California driver's identification, which was supported by his medical records. No incidents of complaint arose from other employees. In addition, the company installed a single-occupant unisex restroom for any employee to use, and the young man was NOT REQUIRED to use that facility.

This outcome is fully in compliance with San Francisco Public Ordinances prohibiting adverse discrimination on the basis of gender identity, though other forms of mitigation may have been negotiated had a complaint been filed with the San Francisco Human Rights Commission.

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