

## ***Recent Cases Offer Employment Discrimination Protection to Transgender People***

By Christina Bolmarcich (May, 2009)

***Transgender:*** A person having personal characteristics (such as [transsexuality](#) or [transvestism](#)) that [transcend](#) traditional gender boundaries and corresponding sexual norms.<sup>1</sup>

***Transsexual:*** A person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery and hormone therapy to obtain the necessary physical appearance (such as by changing the external sex organs).<sup>2</sup>

Many metropolitan areas are beginning to enact ordinances, codes, and general laws to extend unlawful discrimination protection in employment to persons considered transgender and transsexual. According to the Transgender Law & Policy Institute, nationally, ninety-three (93) cities and counties have enacted laws prohibiting discrimination based on gender identity and gender expression.<sup>3</sup> These laws offer an added protection beyond Title VII of the Civil Rights Act of 1964, which only forbids employment discrimination on the basis of race, color, religion, sex (gender), and national origin.<sup>4</sup>

Historically, courts and legislative bodies have been reluctant to offer protection to transgendered and transsexual employees. Only presently is the Maryland State Assembly

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<sup>1</sup> *Merriam-Webster Online Dictionary* (retrieved March 4, 2009) <<http://www.merriam-webster.com/dictionary/transgender>>.

<sup>2</sup> *Merriam-Webster Online Dictionary* (retrieved March 4, 2009) <<http://www.merriam-webster.com/dictionary/transsexual>>.

<sup>3</sup> Transgender Law and Policy Institute, *Non-Discrimination Laws That Include Gender Identity and Expression* (last updated September 2007 and retrieved March 4, 2009) <<http://www.transgenderlaw.org/ndlaws/index.htm>>.

<sup>4</sup> The Civil Rights Act of 1991 (Pub. L. 102-166) (“CRA”) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amends several sections of Title VII. In addition, section 102 of the CRA amends the revised statutes by adding a new section following section 1977 (42 U.S.C. §1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

considering legislation that would broaden the protections afforded to transsexual and transgender public employees. This legislation, S. Res. 566 (Md. 2009) and H. Res. 474 (Md. 2009), proposes to include the term “gender identity” for the purposes of prohibiting discrimination with regard to public accommodations, housing, and employment.<sup>5</sup> The proposed legislation does not seek to amend The Maryland Annotated Code of 1957, Article 49B, Maryland Commission on Human Relations, Section 16, Unlawful Employment Practices, which is directed at providing protection to all employees, and fails to include the term “gender identity.” Md. Ann. Code Art. 49B § 16 (2003).

By way of local progressive example of extending protection to transgender and transsexual employees, the Baltimore City Code, Article 4, Community Relations Commission, Subtitle 3, Unlawful Practices, Subsection 1, Employment, provides:

Except where a particular occupation or position requires, as an essential qualification, the employment of a person or persons of a particular race, color, religion, national origin, ancestry, sex, age, marital status, physical or mental capability, or gender identity or expression and that qualification is not adopted by means of circumventing the purposes of this article, it is an unlawful practice to: (1) for any employer to discriminate against an individual with respect to hire, tenure, promotion, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment.

*Baltimore City, Md., Code, Art. 4, § 3-1(1) (Feb. 28, 2009).*<sup>6</sup>

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<sup>5</sup> The legislation proposes defining “gender identity” as “gender-related identity, appearance, expression, or behavior, of an individual regardless of the individual’s assigned sex at birth,” and proposes adding the term to The Annotated Code of Maryland, State Government, Sections 20-101, 20-302, 20-304, 20-402, 20-501, 20-602, 20-603, 20-605, 20-606, 20-607, 20-702, 20-704, 20-705, 20-707, 20-1103 and State Personnel and Pensions, Section 2-302. The amendments are collectively aimed at “prohibiting discrimination based on gender identity with regard to public accommodations, housing, and employment” on the basis of “gender identity.”

<sup>6</sup> The Baltimore City Code defines “gender identity or expression” as “an individual’s having or being perceived as having gender-related self-identity, self-image, appearance, expression, or behavior, whether or not those gender-related characteristics differ from those associated with the individual’s assigned sex at birth,” *Id.* at Art. 4, §1-1(1-1).

Recently, a number of state administrative and court decisions have provided significant support and protection for transgender and transsexual employees. The following decisions demonstrate a marked trend in the direction of protecting transgendered and transsexual employees and highlight the continuous political struggle to provide equal rights to all employees regardless of their sexual orientation, gender identity, and gender expression.

**Massachusetts:** In *Robert Lie, also known as Allie Lie, v. Sky Publishing Corporation*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. Ct. 2002), the Superior Court of Massachusetts found that a male-to-female transsexual could maintain an action for unlawful discrimination based upon sex (gender), sexual orientation, disability, and retaliation.

In this case, the plaintiff, Lie, a biological male, suffered from “gender dysphoria,” a gender identity disorder.<sup>7</sup> In 1994, Lie was employed by the defendant, Sky Publishing Corporation (“Sky”), as an editorial assistant. Subsequent to her employment at Sky, Lie began to take hormones in response to her diagnosis of gender dysphoria. In May 1998, Lie began to wear “traditional female attire to work.” *Id.* at 1. Sky’s management personnel then met with Lie and requested that she “only wear traditional male attire while at work.” *Id.* She refused. In July 1998, Lie was discharged under the pretext that she violated Sky’s e-mail policy and had exhibited workplace hostility.

As part of the court’s opinion as to whether Lie had valid employment discrimination claims against Sky, it first discussed at length the differences between “transgendered individuals” and “transsexuals.” *Id.* The court stated that a “‘transgendered individual’ is also a distinct umbrella term used to describe any individual who exhibits a gender identity that does

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<sup>7</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, (“DSM-IV”) at 533 (1994).

not conform to societal expectations, including transsexuals, transvestites, and others who engage in gender expression that is different from that associated with their biological sex.” *Id.* citing Kristine W. Holt, *Reevaluating Holloway: Title VII Equal Protection and the Evolution of a Transgender Jurisprudence*, 70 Temp.L. Rev. 283, 290 (1997). A transsexual is a person born a male or female and whose physique “mark” that individual as male or female yet, in spite of the biology, the person is compelled, mentally and emotionally, to live as a member of the opposite gender. *Id.* (additional citations omitted).

The court found that Lie had alleged sufficient facts to establish that she was a transsexual. The court then analyzed whether she had a valid claim for unlawful discrimination based upon sex (gender), sexual orientation, disability, and retaliation under Mass. General Laws Chapter 151B that warranted the denial of Sky’s motion for summary judgment. The court divided its analysis into four parts.

First, it tackled the issue of discrimination on the basis of sex (gender) in violation of Mass. General Law Chapter 151B. Because this was a case of first impression, it heavily relied on the decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) and *Enriquez v. West Jersey Health System*, 342 N.J. Super. 501, 515, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

In *Price Waterhouse, Hopkins*, a woman, was employed as a senior manager by a nationwide professional accounting firm. When evaluating Hopkins for partnership, her supporters praised her abilities. However, a number of her evaluators criticized her interpersonal skills. Several of her evaluators commented that she was too masculine. She was denied partnership. She then resigned and brought an action against the accounting firm in the U.S. District Court for the District of Columbia. Her lawsuit asserted unlawful employment discrimination on the theory that her evaluations had been based on sexual stereotyping. The

District Court held the firm liable under that theory, as it found that (a) the firm and its partners had not intentionally discriminated on the basis of gender, but (b) the firm had consciously maintained an evaluation system influenced by sex (gender) stereotypes. On certiorari, the U.S. Supreme Court held that an employer commits actionable discrimination when it relies upon sex (gender) stereotypes in any decision making process concerning employees.

The court then referred to *Enriquez v. West Jersey Health Systems* regarding the application of discrimination laws to transsexuals. The *Lie* court, quoting the *Enriquez* court, observed that “It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed, or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender disorder. We conclude that sex discrimination under the [state’s anti-discrimination statute] includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.” *Enriquez*, 342 N.J. Super. at 515. Using the New Jersey Court’s interpretation of the legislative intent and the U.S. Supreme Court’s finding in *Price Waterhouse*, the Court found that Lie’s claim for sex (gender) discrimination was sufficient to survive summary judgment where Lie had presented evidence that Sky’s conduct was based on stereotypical notions of gender.

Second, it discussed the issue of discrimination based on a disability. The Court pointed to its analysis of gender identity disorder and noted that the disorder is listed in the diagnostic manual of the American Psychiatric Association, and that it is “arguably physical or mental impairment.” DSM-IV at 533. Lie alleged that this disorder, in its unmitigated form,

substantially limited her in the major life activities of working, relating to others, and caring for oneself. The Court found that the DSM-IV supported Lie's contention. The Court agreed with Lie and found that she had established a *prima facie* case of disability discrimination.

Third, it discussed whether Lie had a viable claim as to sexual orientation discrimination. The Court found that she could not establish this claim since she failed to present sufficient facts to support her claim that Sky terminated her based on her actual or perceived sexual orientation.

Fourth, the Court found that Lie has a meritorious claim for retaliation since Sky was aware of a pending claim by Lie with the Massachusetts Commission Against Discrimination at the time it discharged her. The Court stated that "Knowledge of the filing with the Commission creates an issue of material fact for the jury as to whether the plaintiff's termination was an act of retaliation based upon knowledge." *Lie*, 2002 WL 31492397 at 8.

**New York:** Using the same analytical construct as the *Price Waterhouse* Court, the Court in *Caillean McMahon Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003 WL 22757935 (W.D.N.Y. 2003), relied on the U.S. Supreme Court's finding that

Title VII barred not just discrimination based on the fact that [plaintiff] was a woman, but also discrimination based on the fact that she failed to 'act like a woman' - that is, to conform to socially-constructed gender expectations. [*Price Waterhouse*]. What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who failed to act like one. Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex - that is, biological differences between men and women - and gender.

*Id.* at 4.

The Court found that the plaintiff, Tronetti, a transsexual, could maintain a Title VII claim for alleged employment discrimination based on his employer's perceptions of male and female gender roles with respect to Tronetti's inability to "act like a man." *Tronetti*, 2003 WL 22757935 at \*4. In support of the Court's finding, it stated that "[t]ranssexuals are not genderless, they are either a male or a female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex." *Id.*

***Pennsylvania:*** The Third Circuit denied defendant's motion to dismiss in *Danny Lee Mitchell v. Axcan Scandipharm, Inc.*, 97 Fair Empl. Prac. Cas. (BNA) 960, 2006 WL 456173, (W.D. Pa. 2006) on the grounds that Mitchell, a preoperative transsexual, diagnosed with general identity disorder, presented sufficient evidence demonstrating that Mitchell's failure to conform to certain societal gender stereotypes regarding how a man should act and look was sufficiently pled. It also noted that discrimination, based on societal notions of gender was prohibited pursuant to the U.S. Supreme Court's decision in *Price Waterhouse*.

***New Jersey:*** The United States District Court for the District of New Jersey found that a transsexual employee stated a valid claim when he sued the Atlantic County for harassment that he alleges he endured while he was employed at The Atlantic County Justice Facility. In *DePiano v. Atlantic County, et al.*, 2005 WL 2142972 (D.N.J. 2005), DePiano sued the defendants pursuant to the New Jersey Law Against Discrimination ("LAD") claiming, *inter*

*alia*, that he was subjected to a hostile work environment based on his preference for cross-dressing<sup>8</sup> outside of work.

The court looked to *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445 (N.J. 1993) for the standard necessary to establish a claim for a hostile work environment under LAD. The *Lehman* court found that a successful claim involves establishing four elements: “[T]he complained-of conduct (1) would not have occurred but for the employee’s gender; and it was (2) severe or pervasive enough to make a (3) reasonable [person] believe that (4) the conditions of employment are altered and the working environment is hostile and abusive.” *Id.* at 453.

The *DePiano* court found that the “cumulative effects of frequent taunting” because of the revelation of “one of his embarrassing secrets,” subjected the plaintiff to “severe and pervasive harassment” in the workplace. As such, DePaino’s claim for harassment survived summary judgment. *DePiano*, 2005 WL 2142972, at 9.

**Florida:** The Florida Commission on Human Relations (“Commission”) issued two recent opinions championing the rights of the transgendered under state law. The first opinion was issued in the 2004 matter of *Connie Fishbaugh v. Brevard County Sheriff’s Dept.*, FCHR Order No. 04-103 (Fl. Comm. Human Rel. 2004). In *Fishbaugh*, the Commission found that the petitioner, a transsexual employee, had a viable state claim for discrimination based on transsexuality rather than strictly based on sex (gender). This finding was consistent with the U.S. Supreme Court’s opinion in *Price Waterhouse*.

The second opinion was issued in the 2006 matter of *Madalynn A. Shepley v. Lazy Days RV Center, Inc.*, FCHR Order No. 06-016 (Fl. Comm. Human Rel. 2006). In *Shepley*, the

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<sup>8</sup> Merriam-Webster Online defines cross-dressing as “the wearing of clothes designed for the opposite sex.” *Merriam-Webster Online Dictionary* (retrieved March 4, 2009) <<http://www.merriam-webster.com/dictionary/cross-dressing>>.

Commission found that the respondent discriminated against the petitioner, in violation of state law, when it fired her. The Commission applied the *Price Waterhouse* analysis and reasoned that although the employer made several accommodations to facilitate the employee regarding her gender reassignment, the employer discriminated against her by terminating her without a legitimate, non-discriminatory business reason.

### ***Conclusion***

The aforementioned cases and legislation demonstrate the shift towards expanding the current protections afforded to transgender and transsexual individuals. The protections once offered based on strict notions of biological gender are being replaced by protections offered regardless of gender but solely based on discriminatory acts against individuals in the workplace.