

June 2004

## Sixth Circuit Holds That a Transsexual Plaintiff May State a Claim Under Title VII

On June 1, 2004, the Sixth Circuit reversed and remanded a decision of the Northern District of Ohio dismissing a claim of sex discrimination brought by a transsexual plaintiff against his employers. The decision sends a strong message that courts are becoming increasingly comfortable with expanding Title VII protection as our society redefines gender's role in self-identity.

In *Smith v. City of Salem*, a transsexual plaintiff diagnosed with Gender Identity Disorder (GID) claimed that his employers discriminated against him on the basis of sex after he began expressing a more feminine appearance at work and confidentially informed his supervisor about both the GID and the likelihood of a future physical transformation from male to female. After the supervisor notified city officials, they planned to require Smith to undergo three separate psychological evaluations and terminate his employment if he refused. Smith was eventually suspended for violating an unenacted municipal policy.

Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Smith contended that he was a victim of sex discrimination both because of his gender non-conforming conduct and appearance, and because of his self-identification as a transsexual. The Sixth Circuit found that both bases of discrimination were actionable under Title VII.

To establish a *prima facie* case of employment discrimination pursuant to Title VII, 42 U.S.C. § 2000e *et seq.*, a plaintiff must show that: (1) he or she is a member of a protected group; (2) he or she suffered from an adverse employment action; (3) he or she was qualified for the position in question; and (4) he or she was treated differently from similarly situated members of the protected class.

In regards to the gender non-conforming conduct and appearance, the Court likened Smith's treatment to the plaintiff in *Price Waterhouse*. There, the female plaintiff was denied partnership in an accounting firm. She was told her chances for partnership would improve if she were to go to "charm school", walk, talk and dress more femininely, wear makeup, have her hair styled and wear jewelry. Likewise, Smith alleged that he did not conform with his coworkers' and supervisors' sex stereotypes of how a man should behave. His coworkers commented that his appearance and manners were not masculine enough and his supervisors allegedly schemed to force psychological testing upon him. The Sixth Circuit found that Smith sufficiently pleaded a claim of sex stereotyping and that the district court erred in relying upon a series of pre-*Price Waterhouse* cases refusing to extend Title VII protection to transsexuals. After *Price Waterhouse*, an employer cannot discriminate against a woman because she does not wear makeup or dresses, because the discrimination would not occur but for the victim's sex. The Sixth Circuit followed this logic and concluded that an employer cannot discriminate against a man because he *does* wear dresses or act in a feminine manner, as this discrimination also would not occur but for the victim's sex. The Court stated:

[D]iscrimination against a plaintiff who is a transsexual- and therefore fails to act like and/or identify with the gender norms associated with his or her sex- is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*....[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.

Further, the Court went on to hold that if Smith had alleged discrimination based only on his self-identification as a transsexual, the claim would still be actionable under Title VII. Because identification as a transsexual is the admission that one wishes to be the opposite sex, such an admission itself violates sex stereotypes. Discrimination based on transsexualism, therefore, is based on the insistence that sex and gender coincide, the "very essence of sex stereotyping."

Additionally, the Court found that Smith had suffered from an adverse employment action, even though the court of common pleas reversed his suspension. A negative employment action is not considered “adverse” when the decision is subsequently reversed by the employer. There is no legal authority, however, for the proposition that a judicial body’s reversal acts in the same way. The district court erred by using these grounds to conclude that Smith had not suffered an adverse employment decision.

Employers should note, however, that the *Smith v. City of Salem* decision may create tension with last year’s decision in *King v. Super Service*, 2003 U.S. App. LEXIS 13250. In that case, male employees harassed a male coworker because they believed that he was homosexual. The Sixth Circuit declined to extend Title VII protection to King, stating that because the harassers were not motivated by sexual desire, did not harass other males in the same way or treat males worse than females, the harassers’ conduct did not violate the law. The Court noted that under *Price Waterhouse*, a sexual discrimination plaintiff must show that the employer actually relied on gender in making its decision, which King could not do. *Smith v. City of Salem* and *King v. Super Service* are at least facially distinguishable on that basis, as the *Smith* decision focused on gender characteristics and sex stereotyping instead of perceived sexual orientation. In *King*, the plaintiff was not harassed because he was male or because he failed to exhibit masculine characteristics, but instead because his coworkers thought he was homosexual. The Sixth Circuit declined to extend Title VII protection to those harassed because of (perceived) sexual orientation. In contrast, the discrimination in *Smith* took place because the plaintiff exhibited non-conforming gender conduct. He failed to act like and/or identify with the gender norms associated with his sex. The Court focused on the sexual stereotyping involved in the claim, never mentioning sexual orientation. Nevertheless, the two decisions may come into conflict at a future date.

Many view the *Smith v. City of Salem* case as opening a door previously thought firmly shut, paving the way for other discrimination cases based upon gender-identity and sex stereotyping. In light of the case, employers should refrain from making judgments based upon an employee’s “feminine” or “masculine” characteristics, or lack thereof. *Smith v. City of Salem* sends a clear signal that employers need to be increasingly sensitive to society’s expanding understanding of the differences between gender and sex.

*This Law Alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. Please consult your attorney for specific advice regarding your particular situation. Porter Wright attorneys who have experience with these issues include the following:*

Fred G. Pressley, Jr.	(614) 227-2233	fpressley@porterwright.com
Bradd N. Siegel	(614) 227-2238	bsiegel@porterwright.com
Marc L. Fleischauer	(614) 227-2171	mfleischauer@porterwright.com
Jaime T. Landrum	(614) 227-2030	jlandrum@porterwright.com
Peggy M. Koesel	(216) 443-2530	mkoesel@porterwright.com
Jeffrey J. Weber	(216) 443-2533	jweber@porterwright.com
R. Bruce Snyder	(937) 449-6704	bsnyder@porterwright.com
David T. Croall	(513) 369-4240	dcroall@porterwright.com
Rachel E. Burke	(513) 369-4236	rburke@porterwright.com

## Porter, Wright, Morris & Arthur LLP Office Locations

**Cincinnati, Ohio**  
(800) 582-5813

**Cleveland, Ohio**  
(800) 824-1980

**Columbus, Ohio**  
(800) 533-2794

**Dayton, Ohio**  
(800) 533-4434

**Naples, Florida**  
(800) 876-7962

**Washington, D.C.**  
(800) 456-7962

[www.porterwright.com](http://www.porterwright.com)

© 2004 Porter, Wright, Morris & Arthur LLP. All rights reserved.