

What is discrimination?

“But for” causation: “But for” a certain attribute, the alleged discrimination would not have happened.

“But for” causation need not be proven exclusive to all other factors. This is a difficult issue to adequately address. It depends on the specific law and the court looking at it. Most courts get into a “balancing test” if there is some question as to whether the person was discriminated against solely because of a prohibited reason or because of the combination of a prohibited reason and a permissible reason. For example: race and, say, being a fan of a certain sports team. One is prohibited and the other is permissible.

Historical Reality

Historically, transgendered people have been systematically denied civil rights.

I will not address Littleton, Gardiner, or similar cases as these are State-level court decisions, and are, in theory at least, only binding upon the states/state districts within which they were issued. However, Gardiner was based, in part, upon the flawed reasoning of a federal employment rights decision, so the issues are never really separated from one another

Likewise, I will not address issues relating to marriage, or legal standing as a member of the transitioned gender for the purposes of marriage, as that is too fluid and dynamic within the Federal/State construct.

EEOC (Equal Employment Opportunity Commission)

It is important to note that the EEOC is not tasked to be a fact-finding agency, nor do the results of their investigations have any bearing on the weight of a discrimination case.

The EEOC is tasked with investigating claims of discrimination that violate the general tenets of the Civil Rights Act of 1964 (a.k.a. Title VII). Upon filing a claim of discrimination, the EEOC will investigate your claim and respond to that claim in a timely manner. As a result of the investigation, the EEOC will likely respond in one of two manners.

If, upon completion of the investigation, the EEOC finds that the employer or other entity has discriminated in violation of Federal law, they will initiate legal action against the employer on your behalf. On the other hand, if the EEOC does not find enough evidence to substantiate a claim of discrimination, they will send a response informing you of this, and close the case. At this time, they will also provide you with a “Right to Sue” letter that gives you 90 days to file suit in a court of law before you forfeit your rights to do so.

As has historically been the case, the EEOC rarely, if ever, takes a case on behalf of transgendered persons. As a result, if you file a claim with the EEOC, your claim will likely be dismissed, and you will be left to secure legal representation and file suit on your own.

Legislative Opposition to Laws Protecting “Gender Identity”

“Existing laws, and not new laws to give them ‘special rights,’ should protect Transgenders.”

“Civil rights laws are not designed to protect people who make personal choices which offend the ordinary sensibilities of society.”

Protected Rights

Employment

Public vs. Private Employment – Private employers are typically any company operating in the private sector – the usual employment arrangement – which does not include government service. Public employers are government or government-run agencies. Certain employment policies for public employers may be promulgated in accordance with bona fide qualifications.

Private employers are bound by anti-discrimination laws. They may discriminate in certain isolated situations where they must be given latitude to run their business as they see fit. These isolated exceptions are based on bona fide qualifications, and may not be instituted arbitrarily.

Public employers are bound by the letter of the law, and may not institute workplace policies not in accordance with existing applicable laws. Certain agencies involved with issues of national defense and national security may promulgate seemingly discriminatory practices at their discretion in order to meet their stated objectives and assigned duties.

Education

Everyone is entitled to access to an education – at least from any government-funded institution. This does not mean that the government has to pay for your education.

Finance and Credit

When determining creditworthiness, a financial institution may not take into account your sex, or even your presentation.

Federal Law

42 USC §1983

Section 1983 is the general civil rights act which prohibits discriminatory action "under color of law."

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 2000e-2 (Title VII)

Provides anti-discrimination statutes in employment. Applies to all employers with 15 or more employees.

(a) Employer practices

It shall be an unlawful employment practice for an employer -

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex....

It is significant to note the exceptions of Title VII because even a transgender-inclusive version of ENDA will not help a transgendered person employed by a small business if there is no TG-inclusive state or local law that addresses employment discrimination by employers not covered by federal law.

- Legislative history of "sex"

The term "sex" was introduced into the Civil Rights Act of 1964, the day before Congress voted, in an attempt to derail the legislation. Because of this, there is no debate in the Congressional record to demonstrate the intent or scope of Congress' addition of the word "sex."

The bill amendment was introduced both in committee and on the floor – but evidence strongly suggests that both instances were for the same reason. There was some marginal debate, but some of it seemingly “in favor” of the amendment was by people who were opposed to it and the entire bill, hoping to kill all of it.

- Definition of “sex”

Historically, “sex” has been defined to include only male or female, and has not taken into account the various permutations or deviations from the standard male/female binary. This was the case when the courts interpreted the word “sex” in *Holloway*, *Sommers*, and *Ulane*. Additionally, no acceptable concrete definition of “male” or “female” has been arrived at.

Recent court decisions, such as *Schwenk* and *Price Waterhouse*, have used the terms “sex” and “gender” interchangeably.

20 USC §§ 1681-88 (Title IX)

Provides anti-discrimination statutes in education. Applies to all educational institutions receiving federal monies.

(a) Prohibition against discrimination;

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

(Americans with Disabilities Act [ADA])

Provides anti-discrimination statutes for people with disabilities. Applies to all public and private accommodations.

14th Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is important to note that the 14th Amendment to the Constitution provides equal protection of the laws for all U.S. Citizens, and prohibits States from enacting laws restricting individual freedoms. This is not an absolute guarantee, but it does, in effect, ensure that every citizen is provided equal protection and equal consideration under the law.

It is the 14th Amendment which provides the ground to nullify the *Ulane* ruling.

Case Law

1977

- *Holloway v. Arthur Andersen*; 9th Circuit Court of Appeals

"Sex as a basis of discrimination [under Title VII] was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."

The determination that transsexuals were unprotected by federal law was based, in part, on the failure of Congress to enact the early attempts to amend Title VII to include sexual preference / orientation. The fallacy of this is that, as with today's HRC-backed ENDA, those bills were written so as not to include transsexuals - meaning that, even if any of them had been enacted, transsexuals still would have been unprotected by federal law.

1982

- *Sommers v. Budget Marketing*; 8th Circuit Court of Appeals

1984

- *Ulane v. Eastern Airlines*; 7th Circuit Court of Appeals

"Other courts have held that the term 'sex' as used in [Title VII] is not synonymous with 'sexual preference.'"

"...[E]ven though some may define 'sex' in such a way as to mean an individual's 'sexual identity,' our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex." See Legislative History of "Sex," *above*.

"While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."

"[The] sex amendment [to Title VII] was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination."

"The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation."

"...Congress had a narrow view of sex in mind when it passed the Civil Rights Act..."

"It is clear from the evidence that if Eastern did discriminate against *Ulane*, it was not because she is female, but because *Ulane* is a transsexual – a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."

1989

- Price Waterhouse v. Hopkins; Supreme Court

"Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,' or to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex.' We take these words to mean that gender must be irrelevant to employment decisions."

"An employer may not...condition employment opportunities on the satisfaction of...tests or qualifications that...are not required for performance of the job."

"As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

"[It] does [not] require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."

1997

- Doe v. Belleville; 7th Circuit Court of Appeals

This case centers around same-sex harassment under Title VII, but the facts of the case reveal that the discrimination was, in part, based upon deviation from gender stereotypes, and not homosexual attraction.

One of the workers harassing Doe repeatedly asked "are you a boy or a girl?" and called Doe his "bitch."

In one incident, Doe was threatened by a drunken worker who claimed he would "find out if you're a girl or a guy," and then grabbed Doe's crotch.

Price Waterhouse was referenced in determining 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."

2000

- Schwenk v. Hartford; 9th Circuit Court of Appeals

"According to Mitchell, Schwenk has alleged only that the attack occurred because of Schwenk's transsexuality, which, Mitchell contends, is not an element of gender, but rather constitutes gender dysphoria, a psychiatric illness. We disagree."

"Congress intended proof of gender motivation under the GMVA [Gender Motivated Violence Act] to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII."

"In the context of Title VII, federal courts (including this one) initially adopted the approach that sex is distinct from gender, and, as a result, held that Title VII barred discrimination based on the former but not on the latter." See *Holloway v. Arthur Anderson*

“Male-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet social definitions of masculinity, were denied the protection of Title VII by these courts because they were the victims of gender, rather than sex, discrimination.”

“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse*, which was decided after *Holloway* and *Ulane*, the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins 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.”

“Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII. Accordingly, the argument that the GMVA parallels Title VII and applies only to sex is in part right and in part wrong. The GMVA does parallel Title VII. However, both statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms ‘sex’ and ‘gender’ have become interchangeable.”

- Rosa v. Park West Bank & Trust; 1st Circuit Court of Appeals

A male-to-female cross-dresser entered Park West Bank and requested a loan application. The bank representative told Rosa he would have to go home and change into more gender-appropriate attire before she would provide him with a credit application.

The court referenced *Price Waterhouse* extensively, and reversed a lower court’s ruling that Rosa’s suit be dismissed for failure to state a claim.

2002

- Kosilek v. Maloney; US District Court, MA

This is an interesting case involving transgender prisoner rights. The effects of this decision were two-fold. The Court ruled that while transgendered prisoners are not necessarily entitled to sex-reassignment surgery while incarcerated, it did state that a prison has a legal liability to provide adequate medical care to transgendered prisoners in accordance with prevailing medical opinion.

The Court allowed the Warden, Maloney, to escape liability under the auspices of “qualified immunity.” But the Court also stated that, with their decision, such “qualified immunity” no longer existed.

- Rene v. MGM Grand Hotel; 9th Circuit Court of Appeals

This case, an en banc ruling of the 9th Circuit Court of Appeals, reinforced the interpretation of the definition of sex stereotypes falling within the scope of the definition of the term “sex” in regards to Title VII and other Federal legislation. This decision also reinforces the weight of *Price Waterhouse* in consideration of that definition.

Conclusion

There are no state level laws within the State of Arizona, nor are there any Federal laws which specifically call out transsexual, transgender, gender identity, or sexual orientation as a protected class in regards to anti-discrimination laws. However, Federal law does protect against discrimination based on "sex," which includes discrimination based on sex stereotypes.

Resources

TGNet Arizona

516 N. 5th Avenue, Room 222
Tucson, AZ 85705
(520) 622-4700
www.tgnetarizona.org

Arizona Human Rights Fund (AHRF)

P.O. Box 25044
Phoenix, Arizona 85002-5044
(602) 650-0900

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These are not the only resources available, but they are the ones with which you will likely have the greatest amount of success.