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Roberta's Back: Transgenderism in the Workplace Revisited

By Warren E. Buliox, Esq.

Some of you may recall my article a few years back entitled "What About Roberta? Transgenderism in the Workplace." (If not, please click [here](#).) In "What About Roberta," we followed Bob, a long-term employee who came into your office seeking support as he went through the process of transitioning from male to female. We went through the state of the law, including several issues and challenges Bob's situation presented, and discussed the steps employers should take regarding company policies and supervisor training, including reminding employers of the importance of treating Bob, like all employees, equally and with respect. Well, now a recent case before the United States Court of Appeals for the Eleventh Circuit (covering Alabama, Florida, and Georgia) gives us additional insight into how courts view and address gender identity issues.

Vandiver Elizabeth Glenn, formerly known as Glenn Morrison, began to take steps to transition from male to female in 2005. Part of the process required Glenn to live as a woman outside of the workplace. In October of 2005, Glenn was hired as an editor by the Georgia General Assembly's Office of Legislative Counsel ("OLC"). In 2006, Glenn informed her boss that she was in the process of becoming a woman. On Halloween in 2006, OLC employees were allowed to come to work dressed in costumes. Glenn came to work presenting as a woman. Sewell Brumby, the head of the OLC and the person responsible for the office's personnel decisions, told Glenn that her appearance was not appropriate and asked Glenn to leave the office. Brumby testified that he found it "unsettling to think of someone dressed in women's clothing with male sex organs inside

that clothing" and that it was "unnatural." In 2007, Glenn informed her direct supervisor that she planned to proceed with the gender transition, would be coming to work as a woman, and would be changing her legal name. Glenn's direct supervisor informed Brumby, and Brumby subsequently terminated Glenn on the grounds that the intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make coworkers uncomfortable.

After being terminated, Glenn filed suit alleging that the discharge was the result of sex discrimination in violation of the Equal Protection Clause. Glenn also alleged that constitutional rights were violated because her employment was terminated due to her medical condition, Gender Identity Disorder ("GID"), a diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders with which Glenn was diagnosed in 2005. A federal district court ruled in Glenn's favor on the sex discrimination claim but in Brumby's favor on the medical condition claim. From there, the case went to the Court of Appeals for the Eleventh Circuit.

In *Glenn v. Brumby*, 2011 WL 6029978 (11th Cir., Dec. 6, 2011), the appellate court addressed Glenn's sex discrimination claim under the Equal Protection Clause. In analyzing the issue, the Court turned to *Price Waterhouse v. Hopkins*, 490 US 228 (1989), the Supreme Court decision mentioned in my "What About Roberta" article. *Price Waterhouse* involved a female employee who was denied partnership in an accounting firm because she was considered too "macho." As you may recall, the Supreme Court in *Price Waterhouse* concluded that discrimination based on sex stereotypes about how a man or woman should behave was in violation of Title VII's prohibition against sex discrimination. Although *Price Waterhouse* was in the context of Title VII, the appellate court found the case instructive and ultimately concluded that there is "congruence between discrimination against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." As such, the Court went on, "a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."

This ruling is undoubtedly instructive for federal employers. It is also, however, quite instructive for private employers and companies. What is perhaps most interesting and instructive about the case for private employers and companies is the Court's reliance on a diverse mix of cases involving various laws, such as Title VII, the Equal Protection Clause, and the Gender Motivated Violence Act. In reaching its conclusions, the Court noted the following:

[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held. For example, in *Schwenk v. Hartford*, the Ninth Circuit concluded that a male-to-female transgender plaintiff who was singled out for harassment because he presented and

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defined himself as a woman had stated an actionable claim for sex discrimination under the Gender Motivated Violence Act because "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like one.'" 204 F.3d 1187, 1198-1203 (9th Cir. 2000). The First Circuit echoed this reasoning in *Rosa v. Park West Bank & Trust Co.*, where it held that a transgender plaintiff stated a claim by alleging that he "did not receive [a] loan application because he was a man, whereas a similarly situated woman would have received [a] loan application. That is, the Bank ... treat[s] ... a woman who dresses like a man differently than a man who dresses like a woman." 214 F.3d 213, 215-16 (1st Cir. 2000). These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*.

[emphasis added]

The takeaway from the Court's reference to and reliance on these cases as well as *Price Waterhouse* appears to be that, whether inside or outside the workplace or whether Title VII can be alleged or not, treating an employee or customer differently because of his/her gender identity or "gender non-conformity" may run afoul of the law and lead to liability. As such, private employers and companies would be well-served by taking steps to make sure all individuals, regardless of their gender identity, are treated equally and fairly. The suggestions we offered in the last few paragraphs of "[What About Roberta](#)" on how to accomplish this for employees inside the workplace can and should be applied to non-employees (i.e. customers or clients) as well.

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