NO. 76-2248

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA HOLLOWAY,

Plaintiff-Appellant,

vs.

ARTHUR ANDERSEN AND COMPANY,

Defendant-Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD J. DE NIKE

DE NIKE & HICKMAN
333 Franklin Street
San Francisco, California 94102

Attorney for Appellant
RAMONA HOLLOWAY

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I. ISSUE PRESENTED

The single issue before this Court is whether the District Court erred in ruling that the complaint herein failed to state a claim upon which relief can be granted; specifically whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. affords protection in employment to a person who is a transsexual.

II. STATEMENT OF THE CASE

This action was initiated under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. 2000e et seq., by a male-to-female transsexual, RAMONA HOLLOWAY, to enforce her right to continue employment with the appellee free from discrimination because of sex. The complaint, filed December 17, 1975, alleged that the sole defendant ARTHUR ANDERSEN AND COMPANY had terminated the plaintiff, employed as head multilith operator, in response to her expressed intention to undergo sex correction surgery.

On February 17, 1976, said defendant filed a Motion to Dismiss the cause of action. Said motion was made on the ground the protection of Title VII does not extend to transsexuals as transsexuals. This was urged upon the argument by defendant that in passing Title VII Congress intended to rectify historic discrimination against women in employment and coverage of transsexuals called for an improper judicial extension beyond the intentions of Congress.

On March 5, 1976, the plaintiff filed a Motion for Partial Summary Judgment, together with Points and Authorities in support thereof and in opposition to defendant's Motion to Dismiss. Contemporaneously the plaintiff filed affidavits from John Brown,

M.D., John Alden, M.D., and Norman Fisk, M.D. In summary, the medical affidavits set forth that Ramona Holloway is a medically diagnosed male-to-female transsexual, that transsexualism is a deeply-rooted gender condition found in individuals at the earliest recognition of gender identity in the child, that it is a condition of gender, which distinguishes it from homosexualism and transvestism.

This is a case of first impression in the Ninth Circuit. Nor, is counsel aware of a decision on the issue presented in any other Circuit of the United States Court of Appeals.

III. STATEMENT OF FACTS

The plaintiff was diagnosed as a genuine male-to-female transsexual by her physician, Dr. John Brown [CT 31]. As such she has always identified herself mentally and emotionally as a woman, although possessing male genitals (now surgically removed). [CT 45]

This is consistent with the classic textbook definition of transsexualism in which "gender reversal . . . is present as soon as any behavior that can be called masculinity or feminity begins, even as early as one year of age." [CT 80]

The appellant began employment with the appellee in 1969, at the age of 18, and was known as Robert Holloway. [CT 45] In 1970 appellant began to receive estrogenic hormone treatments for transsexualism which produced feminine physical traits to accord with her perception of her true gender. [CT 45]

The appellee found the appellant's work to be satisfactory and during the entire period of employment advanced her in pay and responsibility. [CT 45, 47] In February 1974, at the time of her promotion to Head Multilith Operator, the appellant first

disclosed her transsexualism to her employer, indicating that she intended to undergo sex correction surgery. [CT 45] In June 1974, at the time of the "annual review," Mr. James Gabbard, an official of the appellee, suggested to the appellant that she should look for a new job where her transsexualism would not be known. [CT 45] However, no dissatisfaction with job performance was expressed and the appellant was given a pay raise. [CT 45]

In November 1974, the appellant requested to haver her first name changed on the appellee's records to Ramona. [CT 45] Approximately two weeks later she was terminated by Mr. Gabbard; no reason for termination was stated. [CT 46]

IV. SUMMARY OF ARGUMENT

The term "sex" in Title VII of the Civil Rights Act of 1964 (hereinafter "the Act") refers to gender. Discrimination in employment based upon gender is prohibited by the Act. Transsexualism is a gender status or condition and as such is protected against discrimination under the Act.

The Court is aided in reaching this conclusion by a recognition that coverage of transsexuals is consistent with the Act and effectuates Congressional intent to remove gender as a permissable basis for discrimination in employment. It is further aided in arriving at the above-described interpretation of the term "sex" by the constitutional doctrine of construction requiring that legislation be contrued in a manner which avoids doubts as to constitutionality.

V. THE PROPER CONSTRUCTION OF TITLE VII PROVIDES PROTECTION FROM EMPLOYMENT DISCRIMINATION TO TRANSSEXUALS.

In analyzing the opinion of the court below several

factors emerge in the court's thinking as the basis for its ruling that Congress did not intend the ban against employment discrimination because of sex to extend to transsexuals. They are:

1. There is no reference to a ban of discrimination against transsexuals on the face of the statute.

2. There is no reference to inclusion of transsexuals within the statutory history of the Act.

3. The historical context of the passage of the Act was that of job discrimination against women.

4. Title VII is not designed to change other views held by society about sexuality.

The word "sex" has many meanings: it may mean gender, it may mean sexual intercourse, it may mean the great variety of sexual incidents by which gender itself may be manifested in a particular culture, viz., hair length, makeup, dress, etc. Despite the virtual absence of a legislative history for the inclusion of "sex" in Title VII,* in the historical setting of employment discrimination against women, it is submitted by the appellant that the term "sex" in Title VII means "gender". This resolves the ambiguity of the term. However, there remains the ambiguity of nature itself, for not all persons may be simply categorized as male or female. The undisputable fact is that nature produces a number of persons whose gender is not classifiable in the conventional categories of male and female.** The question is thus, whether

*See Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975), and Note, Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964, 46 So.Cal.L.R. 965, 968, which suggests that "sex" was added to the Act as a last minute floor amendment in the House of Representatives in an effort to sabotage passage of the provisions pertaining to racial discrimination in employment.

when understood as referring to "gender", the term "sex" in Title VII includes those persons who are not readily classifiable as male or female.

When, as in Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), the court declared that "[t]he need which prompted this legislation (Title VII) was one to permit each individual to become employed and to continue in employment according to his or her job capabilities," Id. at 896, it would appear that Title VII applies to all persons, including those whose gender is not clearly male or female. If the employee is subject to termination because of his or her gender, whether that gender be medically certain or uncertain, then clearly that individual has not been allowed "to continue in employment according to his or her job capabilities." Id.

Because transsexuals are unmentioned in the statutory history of the Act altogether, it begs the question to declare that an absence of any reference to transsexuals raises an inference against coverage under the Act. On its face the Act does not appear to exclude transsexuals. In this regard the Act is, at worst for the appellant, ambiguous. Thus, lack of express reference to transsexuals in the Act's statutory history, as a basis for the court's ruling, can be reduced to the reasoning that Title VII was not designed to change other views held by society about sexuality.

Likewise, the Court cannot have been materially aided in reaching its decision that transsexuals are not covered by conclud-

**In addition to transsexualism there are such anomalous gender conditions as Turner's syndrome, Klinefetter syndrome, adrenogenital syndrome, male pseudohermaphrodism, androgen insensitivity syndrome, temporal lobe abnormality. [CT 84]

ing that the historical context of the Act was one of employment discrimination directed against women. That the Act was intended to benefit persons other than women is evident in the decisions in those cases brought by men seeking to be relieved of discrimination in fields of employment previously occupied primarily by women. See Diaz v. Pan Am, 442 F.2d 385 (5th Cir. 1971)(male flight cabin attendant); Wilson v. Sibler Memorial Hospital, 288 F.2d 1338 (D.C.Cir. 1973)(male private duty nurse).

Thus, in the last analysis, the decision by the trial court is based exclusively on the reasoning that somehow a ruling which recognized coverage under Title VII for transsexuals would have the effect of imputing to Congress an intention to alter the views of society about sexuality, apart from the previously held views that gender was a permissable basis for employment discrimination, which Congress clearly did intend to overthrow. The Court below indicated an unwillingness to impute such an intent without a stronger expression of Congressional will. [CT 144]

The flaw present in such reaosning, however, is that coverage of transsexuals under Title VII does not serve to change other views society has about sexuality. In fact, those views would be unaffected by such a ruling, while the intention of Congress to erase gender as a basis for employment discrimination would be effectuated.

The mandate of Congress embodied in Title VII is that, with certain exceptions limited to bona fide occupational qualifications (BFOQ), an employer must accept a female or male in all jobs and at all levels, that the employer must accept a woman (and all that femaleness implies) in a job previously held by a man,

and vice versa. It is consistent, not inconsistent, with such a purpose for the court to hold that an employer must accept Ramona Holloway (as a woman) in the job previously performed by Robert Holloway. Nor would such a ruling imply that society must modify other notions which it generally holds concerning sexuality.

Transsexualism is the gender condition of a transsexual as much as clear cut maleness or femaleness is the gender of 99% of humanity. It is clearly distinguishable from homosexuality and transvestism which are not gender conditions. [CT 34, 50] A reference to the medical authorities supplied by the defendant in the court below confirms the plaintiff's position that transsexualism is a core gender phenomena. [CT 79, 80, 84] Incorporation of transsexuals under Title VII would imply nothing more than preclusion of employers from consideration of gender as a factor in employment, which all courts passing on the question agree was the purpose of the ban in Title VII. It would not require an employer to accept unconventional modes of dress, cosmetics, manners, etc. for there is nothing outwardly sexually unconventional about a transsexual following surgery.[CT 32-32*, and 82]

Having answered the questions of whether inclusion of transsexuals within the coverage of Title VII is consistent with the Act in the affirmative, the question remains whether the Congress intended such coverage.

"An author inevitably encompasses in what he says more than he specifically has in mind and often encompasses even more than he has generally in mind." Dickerson, The Interpretation and Application of Statutes, (1975) Little. Brown & Co., Boston, Mass.,

*Dr. Brown sets forth in his affidavit that the appellant presents herself as an attractive feminine person.

p. 80. The Honorable Judge Learned Hand stated, "I cannot believe that any of us would say that the 'meaning' of an utterance is exhausted by the specific content of the utterer's mind at the moment." The Bill of Rights, pp. 18-19 (1958). Thus, it is entirely proper for this Court in construing Title VII to derive the meaning of the term "sex" by determining which interpretations are consistent with the purpose of the Act, including those situations which may not have been foremost in the mind of Congress at the time of passage. J. Kohler, Judicial Interpretation of Enacted Law, in Science of Legal Method, 187, 188 (1921); E. Patterson, Jurisprudence: Men and Ideas of Law, 27 (1953); H. Hart, Positivism and the Separation of Law and Morals, 71 Harv.L.R. 593, 627-628 (1958).

As demonstrated above, inclusion of transsexuals not only does not do damage to the manifest intention of Congress, it is consistent with and effectuates that intention, namely to erase gender as a proper employment criterion.

Moreover, the narrow interpretation of the statute, i.e. the refusal of the court below to construe the ban against employment discrimination because of sex as covering transsexuals, gives unwarranted and improper importance to the power of employers to discriminate in employment generally in the absence of statute. It ignores altogether the critically important need which people have to be gainfully employed in positions which provide financial and personal rewards in keeping with their true capabilities. In ruling unconstitutional an Arizona statute restricting the employment of aliens, Truax v. Raich, 239 U.S. 33 (1915), the Supreme Court stated, "The assertion of an authority to deny to aliens the

opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." In short, great wight ought to be accorded to the social interest in Title VII to promote employment, weight which is equal in all respects to that power accorded an employer prior to passage of the Act to arbitrarily discriminate because of gender in hiring and firing.

The authorities relied upon by the trial court, Grossman v. Board of Education, 11 F.E.P. 1196 (D.N.J. 1975), Voyles v. Ralph K. Davies Medical Center, 403 F.Supp. 456 (N.D.Ca. 1975), Smith v. Liberty Mutual Insurance Co., 395 F.Supp. 1098 (N.D.Ga. 1975), and the dicta in Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975), and Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), view the Act as covering only those cases clearly falling with the statutory provision. This is the approach invoked by courts in construing statutes in derogation of a common right. The view seemingly relied upon most heavily by the trial court was perhaps that expressed by Judge James C. Hill in Smith v. Liberty Mutual Insurance Co., 395 F.Supp. 1098 (N.D.Ga. 1975):

> The Civil Rights Act is not just the starting point for the courts extension of limitation upon employers; it is both the starting point and the ending point. [CT 144]

The Act is thus viewed foremost as in derogation of the employer's right to discriminate in hiring, and, accordingly, is strictly construed.

However, such an approach is in error because it ignores

the socially ameliorative purpose of the Act which demands a liberal, not strict, construction. The doctrine that statutes in derogation of common law must be strictly construed is inapplicable to Title VII. Georgia Power Co. v. E.E.O.C., 412 F.2d 462 (5th Cir. 1969). See also Tipler v. E.I. DuPont, 443 F.2d 125 (6th Cir. 1971 Parham v. Southern Bell, 433 F.2d 421 (8th Cir. 1970), Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).

Coverage of transsexuals under Title VII strikes at the very evil intended to be eradicated, namely, employment discrimination based upon gender. No discernible reason appears, based either upon the wording of the Act or policy considerations, which should serve to justify a construction of Title VII which does not embrace transsexuals.

VI. TITLE VII SHOULD BE CONSTRUED IN A MANNER WHICH AVOIDS DOUBTS AS TO ITS CONSTITUTIONALITY.

The interpretation of Title VII adopted by the trial court excludes transsexuals as a class from coverage. This result is not circumvented by the assertion of the appellee that it would discriminate equally against all transsexuals, whether male-to-female or female-to-male. The fact remains that transsexuals and presumably all others whose gender is congenitally uncertain*, are without the protection from discrimination based on gender enjoyed by all other employees. In short, transsexuals stand as a "discrete and insular minority" outside the protection of the Act. (See United States v. Carolene Products Company, 304 U.S. 144, 152-153, n. 4 (1938).)

Had Congress chosen to expressly exclude transsexuals

*See footnote p. 5 supra.

from protection from discrimination in employment under Title VII, such action would clearly raise substantial equal protection problems. Whatever the etiology, even as viewed by the authorities submitted at trial by the appellee, the condidion of transsexualism is evident at the earliest moments at which gender identity is observable in a child. (See discussion supra herein at p. 2) Legislative classifications based on status over which the individual has no control such as race, nationality or color are "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971). Thus, transsexuals as a class are a prime example of a "discrete and insular minority", United States v. Carolene Products Company, supra, for whom such heightened judicial solicitude would be appropriate.

But, the situation is even stronger where Congress has not expressed an intention, either on the face of the statute or in its legislative history, to exclude transsexuals from the employment protection of Title VII. It is a long-standing and fundamental principal that legislative acts will be given a construction which avoids doubts as to their constitutionality. United States v. C.I.O., 335 U.S. 106 (1948); Schneider v. Smith, 390 U.S. 17 (1968); United States v. Rumley, 345 U.S. 41 (1953); United States v. Witkovich, 353 U.S. 194 (1957).

As Justice Brandeis stated, "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936),

concurring opinion.

Because the construction of Title VII urged by the appellees at the very least necessarily raises serious equal protection questions, the Court should adhere to the principle enunciated so clearly by Justice Brandeis by interpreting the law to provide freedom from employment discrimination to transsexuals, except where sex is a bona fide occupational qualification.

VII. CONCLUSION

Dr. Harry Benjamin (M.D. Tübingen University, Germany), the early pioneer in the study of transsexualism estimates there are about 10,000 transsexuals in the United States. Benjamin and Ihlenfeld, "Transsexualism," Journal of Nursing, Vol. 73, No. 3, March 1973, p. 458. Without the protections of Title VII this group lacks the fundamental employment protections enjoyed by all other employees to be free from discrimination based on gender. The consequence is that rather than being judged on capabilities and performance, the irrelevant consideration of gender becomes the basis for termination. In the case of Ramona Holloway this could not be clearer. Prior to termination upon the disclosure of her transsexualism she was considered an excellent employee who was promoted and given raises regularly. Even after termination she received a favorable reference from the appellee.

The factor of change from male to female should count for no more under the Act than change of religious affiliation or discovery and adoption of previously unknown racial ancestry by an employee. There are times when protection from discrimination based on gender, race or religion requires the court to protect the process by which such status is achieved. Such protection is

not only not contrary to the intentions of Congress, it accords with the fundamental intention of Congress to make race, religion, national origin and sex irrelevant in employment. Accordingly, the Court is urged to adopt the construction of Title VII of the Civil Rights Act which includes the appellant within those protected by the ban against discrimination in employment because of sex.

Dated: 9/15/76

Respectfully submitted,

HOWARD J. DE NIKE

CERTIFICATE OF SERVICE BY ATTORNEY

HOWARD J. DE NIKE certifies that he is an active member of the State Bar of California, and not a party to the within action. That his business address is 333 Franklin Street, San Francisco, California 94102. That he served two copies of the attached APPELLANT'S OPENING BRIEF by causing said copy to be placed in an envelope and addressed as follows:

VICTORIA DIAZ
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Said envelope was then sealed and postage fully prepaid thereon, and thereafter was on September 17, 1976, deposited in the United States Mail at San Francisco, California.

HOWARD J. DE NIKE