In the United States Court of Appeals

for the Ninth Circuit

RAMONA HOLLOWAY, Plaintiff-Appellant, vs. ARTHUR ANDERSEN AND COMPANY, Defendant-Appellee.	No. 76-2248

On Appeal from the United States District Court

for the Northern District of California

FILED

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U. S. COURT OF APPEALS

APPELLEE'S BRIEF

NOBLE K. GREGORY
MICHAEL H. SALINSKY
VICTORIA S. DIAZ
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000

Attorneys for Appellee

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120

Of Counsel

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THE ISSUE PRESENTED

Appellant's formulation of the issue presented (App.Opn.Br., p. 1) is over broad. The issue is whether the district court properly determined that the discharge of an individual from employment during the period that that individual is in the process of transformation from a male to a female does not violate Title VII of the Civil Rights Act of 1964 as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. § 2000e, et seq.). This case does not present, and this Court need not decide, the issue of what rights

a transsexual has under Title VII after completion of the transformation and the individual has become an anatomical male or female.

STATEMENT OF THE CASE

Ramona Holloway, appellant, was hired by Arthur Andersen in 1969, at which time appellant was known as Robert Holloway (Cl.R., p. 2; App.Opn.Br., p. 2). Subsequent to the date of employment, appellant began receiving hormone shots to produce feminine physical traits (App.Opn.Br., p. 2). In February of 1974, appellant informed the supervisor of the transsexualism and of the intent to undergo sex-conversion surgery (Cl.R., p. 2). Appellant began to effect a feminine appearance through the use of makeup, clothing and jewelry (Cl.R., p. 45). It was suggested, for the best interests of all concerned, that appellant find another job where the sex change would not be known (Cl.R., p. 2). Several months later, prior to the performance of the sex-conversion surgery, appellant was discharged (Cl.R., pp. 2-3).

Based on the above, appellant filed a complaint alleging in pertinent part that the termination of employment violated Title VII (Cl.R., pp. 1-4). Arthur Andersen filed a motion to dismiss the action on the ground, among others, that the complaint failed to state a claim upon which relief could be granted (Cl.R., pp. 6-19). Appellant noticed a

cross-motion for partial summary judgment on the issue of liability (Cl.R., pp. 29-30). Along with that motion, appellant filed the affidavits of several physicians stating that appellant had been diagnosed as a transsexual, schematically outlining the treatment and advancing the theory that transsexualism was organically and biologically determined (Cl.R., pp. 31-34, 49-51). Appellant also filed an affidavit outlining appellant's job history, treatment for transsexualism, the fact that appellant began to use makeup and jewelry, and that appellant used the men's room and knew of no untoward incidents due to the conduct displayed (Cl.R., pp. 44-46).

In response, Arthur Andersen filed the affidavit of Marion D. Passard, appellant's direct supervisor (Cl.R., pp. 133-136). She stated that appellant wore red nail polish, glossy red lipstick, hair in a French twist and carried a purse, that embarrassment resulted when clients and prospective employees saw what appeared to be a woman enter the men's room, and that appellant's desire to use the ladies' room would have caused even greater problems with the female employees (Cl.R., p. 134). Also filed were documents showing that the nature and cause of transsexualism are really not known (Cl.R., pp. 74-127).

After hearing (Rep.Tr., March 22, 1976, pp. 3-20), the district court denied appellant's motion for partial summary judgment and dismissed the action (Cl.R., pp. 140-147).

following the entry of judgment (Cl.R., see second page after page 165, Docket Entry 18), appellant moved to alter or amend the judgment (Cl.R., p. 148), which motion was denied (Cl.R., p. 161). Thereafter appellant noticed the instant appeal (Cl.R., p. 162).

ARGUMENT

TITLE VII PROHIBITS DISCHARGE ON THE BASIS OF SEX, I.E., DISCHARGE BECAUSE ONE IS A MALE OR A FEMALE; IT DOES NOT PROHIBIT DISCHARGE OF AN INDIVIDUAL WHO IS IN THE PROCESS OF TRANSFORMATION FROM MALE TO FEMALE.

The sole question to be decided on this appeal is whether Title VII, which prohibits employment discrimination on the basis of sex, prohibits discharge of an individual because that individual is changing sex. That question has already been answered in the negative in Grossman v. Board of Education (D.N.J. 1975) 11 Fair Employment Practice Cases 1196, affirmed (3 Cir. 1976) 538 F.2d 319. Grossman held:

> "In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctnat [sic.] to ascribe any import to the term 'sex' other than its plain meaning. Accordingly, the Court is satisfied

that the facts as alleged fail to state a claim of unlawful job discrimination based on sex" (11 Fair Employment Practice Cases 1199).

That decision is clearly correct.

Appellant admits that there was a virtual absence of a legislative history with respect to the inclusion of "sex" in Title VII (App.Opn.Br., p. 4). Therefore, as this Court has often noted:

"'[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute'" (Van Hoomissen v. Xerox Corporation (9 Cir. 1974) 503 F.2d 1131, 1133; Spangler v. United States (9 Cir. 1969) 415 F.2d 1242, 1244; Gardner v. Sloane (9 Cir. 1968) 396 F.2d 641, 644).

Title VII provides in pertinent part that:

"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 * * * because of such individual's race, color, religion, sex or national origin" (42 U.S.C. § 2000e-2(a); emphasis added).

"Sex" is:

"One of the two divisions of organisms formed on the distinction of male and female; males or females collectively" (Webster's New International Dictionary (2d Ed. 1951) p. 2296).

In short, contrary to appellant's contention (App.Opn.Br., pp. 4-5), sex has an unambiguous meaning that is commonly understood. And the meaning of the statute is equally clear; one may not discriminate because an individual is a male or a female. Appellant was not discharged because appellant was a male or a female; at the time of the discharge, appellant was a transsexual in the process of transformation from male to female. Congress simply did not intend to extend Title VII coverage to such unusual conditions.

Furthermore, this Court has held in Baker v. California Land Title Company (9 Cir. 1974) 507 F.2d 895, 898, that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees without discriminating on the basis of sex under Title VII. A fortiori, it cannot be a violation of Title VII for an employer to discharge an anatomical male for appearing at work dressed and made up as a female.*

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* The weakness of appellant's case is demonstrated by the following statement: "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" (App.Opn.Br., p. 7). In the instant case, there had been no surgery; the situation was unconventional and the question of the rights of transsexuals subsequent to surgery is not at issue.

Nothing in appellant's brief refutes the above. Appellant apparently believes that if the Court were to replace the word "sex" with the word "gender" in the statute, it would somehow be of benefit (App.Opn.Br., pp. 4-5, 6). There is absolutely no indication that Congress intended sex to mean anything other than sex. But even if it did intend sex to mean gender, gender is generally defined as "sex" (Webster's Third New International Dictionary, p. 944). And, as shown above, sex means male or female and nothing else.

Nor is appellant aided by the contention that a court may in effect disregard the plain meaning of the language in interpreting a statute (App.Opn.Br., pp. 7-8). We know of no case which supports such a proposition and appellant cites none.

In an attempt to find support for appellant's position, appellant quotes out of context from Baker v. California Land Title Company (9 Cir. 1974) 507 F.2d 895 (App.Opn.Br., p. 5). However, appellant eventually admits, as appellant must, that Baker supports appellee and not appellant (App.Opn.Br., p. 9).

Appellant is reduced to arguing that a policy which prohibits job discrimination on the basis of unusual conditions is a good one which the Court should implement. Without passing judgment on the merits of that policy, it is sufficient to say that Congress did not choose to implement it.

Nor does the fact that Congress did not choose to include transsexuals within the coverage of Title VII raise doubt as to the constitutionality of the statute (App.Opn.Br., pp. 10-12). In raising the specter of unconstitutionality, appellant ignores two well-established principles of constitutional law: (1) a statute is not unconstitutional simply because it addresses itself to a phase of a problem which seems most acute to the legislative mind and fails to cover every evil that might conceivably be attacked (McDonald v. Board of Election (1969) 394 U.S. 802); and (2) a statute is constitutional if the classification involved has some rational relationship to a legitimate government interest unless it is based upon an inherently suspect classification (such as race or sex) requiring close judicial scrutiny (Frontiero v. Richardson (1973) 411 U.S. 677, 682-683).

The fact that transsexuals are not covered by Title VII does not render it unconstitutional. Title VII prohibits discrimination on the basis of sex. If the discharge here were based on sex, it would be covered by Title VII. But the point is that appellant's discharge was not based on sex and, therefore, there is no inherently suspect classification (Frontiero v. Richardson (1973) 411 U.S. 677, 682). And surely the prohibition of discrimination between males and females in employment is rationally related to a legitimate governmental interest.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the lower court should be affirmed.

NOBLE K. GREGORY

MICHAEL H. SALINSKY

VICTORIA S. DIAZ

?ILLSBURY, MADISON & SUTRO

Of Counsel

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APPELLANT'S REBUTTAL 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
(415) 863-4086

Attorney for Appellant
RAMONA HOLLOWAY

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I. APPELLEE MISCONSTRUES THE BASIS OF THE DISTRICT COURT'S DECISION

In its decision in Grossman v. Board of Education, (D.N.J. 1975) 11 Fair Employment Practice Cases 1196, affirmed (3d Cir. 1976) 538 F.2d 319, relied upon by both the District Court and the appellee, the court stated:

> The defendant vigorously denies the allegation of sex discrimination, arguing that such could not have occurred because the plaintiff, despite the medical and surgical procedures performed, remains a member of the male gender. The Court finds it unnecessary and, indeed, has no desire, to engage in a resolution of a dispute as to the plaintiff's present sex. Rather we assume that the plaintiff is a member of the female gender. (Emphasis added.) 11 F.E.P. Cases 1198.

Neither the trial court in Grossman, nor that in the instant appeal, based its decision upon the narrow question of whether "the discharge of an individual [i.e. a transsexual] from employment during the period that that individual is in the process of transformation from male to female [violates] Title VII of the Civil Rights Act of 1964 as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. 2000e, et seq.)" (Appellee's Brief, p. 1)

Rightly or wrongly the District Court concluded that "employment discrimination based on one's transsexualism neither was, nor was intended to be, proscribed by Title VII, and that there was no support for the proposition that sex discrimination under Title VII was meant to embrace transsexual discrimination as well." (Clerk's Record, p. 145)

Quite apart, however, from the basis of the court's decision, the appellee is not on solid ground in seeking to narrow the decision of the court, because in doing so it assumes the res-

olution of certain factual questions potentially before the trial court which were not reached by that court.

Following the District Court's decision the plaintiff moved to strike certain factual recitations which were included in the court's Memorandum of Decision. (Cl.R., p. 149) In denying this motion the District Court stated this clarification: "The material challenged in the court's Memorandum of Decision was included by way of background or chronology only; as was clear from the text of the Memorandum itself, the court's decision was not on the factual merits, but dealt instead with the legal issue of jurisdiction." (Cl.R., p. 161)

In her verified complaint Ms. Holloway alleged that in her status as a transsexual she was discriminated against in violation of the terms of Title VII banning from employment discrimination because of sex. After the plaintiff filed a motion for partial summary judgment supported by her affidavit, the defendant then filed an affidavit by Marion Passard, the plaintiff's supervisor, controverting Ms. Holloway's factual contentions pertaining to the basis for her termination. Because the trial court ruled on the issue of jurisdiction, it did not reach the factual issues concerning the basis of termination, and they are not before this court.

Thus, the appellee may not now argue that the plaintiff was terminated because she "was in the process of transformation from a male to a female." It was the plaintiff's contention in the District Court that she was terminated because she is a transsexual; she denies that any circumstances attendant to the process of her sex reassignment prompted her employer to terminate her.

This factual question was left unresolved by the ruling of the District Court which denied coverage of Title VII to transsexuals *per se*.

As much as it may suit the purposes of the appellee this is not a "grooming" case. Cf. Baker v. California Land Title, (9th Cir. 1974) 507 F.2d 895. The factual question of the plaintiff's adherence to the reasonable grooming standards imposed by the employer was simply not litigated in the District Court. It is improper for the appellee to seek, at this point, to rely upon its version of the facts which were clearly controverted by the appellant.

Moreover, it is logically invalid to maintain that the court could decide whether or not transsexuals during the "period of transformation" are covered without first having decided the general issue of coverage of transsexuals. (See discussion *infra*.)

II. TRANSSEXUALS IN THE PROCESS OF "TRANSFORMATION FROM MALE TO FEMALE" ARE PROTECTED BY TITLE VII

In Appellant's Opening Brief the arguments for coverage of transsexuals under Title VII are set forth. As enunciated *supra* this issue must logically preceed the question of coverage of transsexuals during the process of transformation. In its brief the appellee takes the incongruous position that Title VII may possibly permit an employer to discriminate against a transsexual before but not after sex reassignment has occurred. The absurdity of this position is evident in the statement itself.

An employer cannot demand from a transsexual adherence to conditions of employment which extend directly into areas insulated by Title VII. By analogy, an employer is not entitled to dis-

criminate against an employee for studying to convert to Catholocism or Judaism any more than it is entitled to discriminate against him or her for being a Catholic or a Jew. Nor can an employer require as a "reasonable grooming standard" that a black employee straighten his or her hair without violating Title VII.

If we assume Title VII coverage for completed transsexuals, it is inconceivable that a court rationally could hold that factors associated with the process of sex reassignment are permissable bases for employer discrimination consistent with Title VII.

It may be proper for some reasonable conditions, for instance in the area of grooming, to be required of a transsexual employee by an employer. But this issue was not litigated in the District Court. Until that question is examined, the appellee cannot categorically assert that "Congress simply did not intend to extend Title VII coverage to such unusual conditions (of transformation from male to female)." (Appellee's Brief, p. 6)

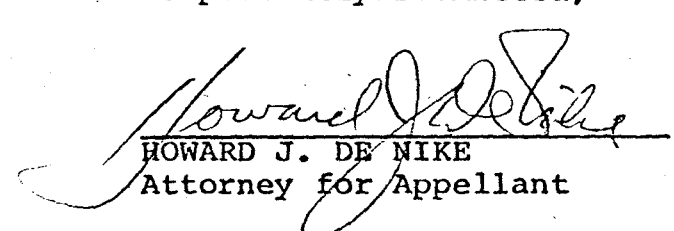
Accordingly, this Court may not now hold that the appellee was entitled consistent with the prohibitions of Title VII to discriminate against Ms. Holloway, even if we assume the correctness of the appellee's narrow interpretation of the District Court's decision.

CONCLUSION

For the foregoing reasons, the Appellant respectfully submits that the judgment of the District Court should be reversed.

Dated: October 27, 1976

Respectfully submitted,



HOWARD J. DE NIKE
Attorney for Appellant

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 REBUTTAL 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 October 28, 1976, deposited in the United States Mail at San Francisco, California.

Howard J. De Nike

HOWARD J. DE NIKE