

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA HOLLOWAY,

Plaintiff-Appellant,

vs.

ARTHUR ANDERSEN AND COMPANY,

Defendant-Appellee.

FILED

OCT 28 1976

EMIL E. MELE, JR. CLERK
U. S. COURT OF APPEALS

APPELLANT'S REBUTTAL BRIEF

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

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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-

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

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

12 In her verified complaint Ms. Holloway alleged that in
13 her status as a transsexual she was discriminated against in vio-
14 lation of the terms of Title VII banning from employment discrim-
15 ination because of sex. After the plaintiff filed a motion for
16 partial summary judgment supported by her affidavit, the defendant
17 then filed an affidavit by Marion Passard, the plaintiff's super-
18 visor, controverting Ms. Holloway's factual contentions pertaining
19 to the basis for her termination. Because the trial court ruled
20 on the issue of jurisdiction, it did not reach the factual issues
21 concerning the basis of termination, and they are not before this
22 court.

23 Thus, the appellee may not now argue that the plaintiff
24 was terminated because she "was in the process of transformation
25 from a male to a female." It was the plaintiff's contention in
26 the District Court that she was terminated because she is a trans-
27 sexual; she denies that any circumstances attendant to the process
28 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 precede 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 Catholicism 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 permissible 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)

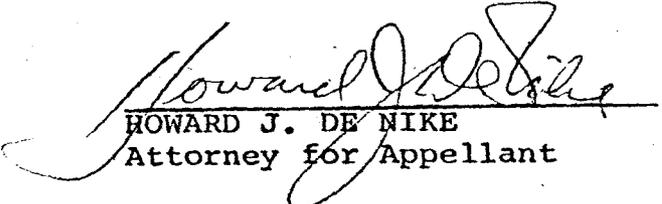
Accordingly, this Court may not now hold that the appellee was entitled consistent with the prohibitions of Title VII to discriminate against Ms. Holloway, even if we assume the correctness of the appellee's narrow interpretation of the District Court's decision.

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,

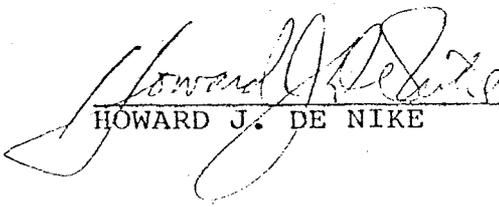

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CERTIFICATE OF SERVICE BY ATTORNEY

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
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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