The Emperor Has No Clothes

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Posted by bugbrennan in National

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Female, Lesbian, Sex Discrimination, Title VII, Transgender, Transsexual

December 6 stands out as a significant date in history for many reasons, chief among them the Montréal Massacre in 1989. That day, an anti-feminist, female-hating man murdered 14 women at the École Polytechnique for daring to study engineering. Because, you know, females aren't supposed to study engineering. Rigid adherence to sex stereotypes allowed that murderous man to think women who "transgress" stereotypes deserve death – an adherence that oppresses females every day.

On December 6, 2011, the U.S. Court of Appeals for the 11th Circuit decided *Glenn v. Brumby*. In *Glenn*, Vandy Glenn, a male-to-female transsexual, prevailed in her unlawful termination lawsuit against her boss at the Georgia General Assembly's Office of Legislative Counsel. Glenn claimed that Brumby discriminated against her based on sex in violation of the Equal Protection Clause of the U.S. Constitution. There is no dispute that Brumby fired Glenn because of her transition.

In a decision authored by Clinton-appointee Rosemary Barkett, the court held that a government agent violates the Equal Protection Clause's prohibition against sex-based discrimination when the agent fires a transgender or transsexual employee based on the employee's "gender nonconformity."

To raise this claim, Glenn alleged that Brumby fired her because of her sex, which included her "female gender identity" and her failure to conform to the sex stereotypes "associated with the sex [Brumby] perceived her to be." In other words, Brumby thought Glenn was a man, and, thus, should "act like a man."

This is sex stereotyping, which the U.S. Supreme Court banned in the groundbreaking case of *Price Waterhouse v. Hopkins*. Price Waterhouse denied Ann Hopkins partnership because Hopkins acted too "macho." Hopkins, being macho, sued the firm under Title VII, the federal statute that bans discrimination in employment based on sex. The high court held in 1989 that Title VII barred not only discrimination based on "biological sex," but also "gender stereotyping" – that is, failing to act and appear according to expectations we have of how a male or female should act or be. Since 1989, numerous courts have also held that discrimination against a transgender individual constitutes unlawful sex stereotyping in violation of Title VII.

You might not know this, given the relentless emphasis placed on "gender identity" antidiscrimination legislation by LGBT Organizations. You might not know that the Ninth Circuit, First Circuit and Sixth Circuit have held that discrimination against a transgender person because of "gender identity" constitutes *sex discrimination*.

One can longer deny that gender identity discrimination is based on sex. Justice Barkett notes that transgender people are perceived to engage in "behavior (that) transgresses gender stereotypes." For years, gay activists have pressed LGBT Organizations to pursue litigation to fulfill the full

meaning of the *Hopkins* case, only to be hailed as bigots and "trans-exterminationists." Ironically, some LGBT Organizations have pursued this litigation strategy while simultaneously pushing gender identity legislation. *Glenn* demonstrates the power of sex stereotyping theory and will hopefully eliminate the pursuit of gender identity legislation, as these two strategies irreconcilably conflict.

Glenn highlights the fact that gender identity legislation enshrines into law that "ways of being" correspond to your biological sex. *This is actually sex stereotyping*. Courts view gender-based classifications with suspicion because they flow from stereotyped distinctions between the sexes. So, how would courts view an act by a government agent – say, the Maryland General Assembly – that enshrines such stereotypes into law?

Glenn demonstrates that advocates have the current ability to make their statewide antidiscrimination agencies accept sex discrimination cases from transgender folks in all states. The U.S. Supreme Court has held that such laws go beyond the principal evil to cover reasonably comparable evils, as "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." In other words, notwithstanding legislative intent, if a law says sex discrimination is unlawful, discrimination that flows from sex, such as discrimination based on sex stereotyping or "gender expression," is equally unlawful.

Where are these advocates? Why haven't they pushed this strategy in Maryland? I understand that it is arguably cheaper to pass a law of broad applicability than to require individual litigants to front money to assert their rights – which is why it is unconscionable that LGBT Organizations have not paved the way for acceptance of these complaints by statewide antidiscrimination agencies.

It's no less sex stereotyping when you engage in sex stereotyping for a benevolent cause. No reasonable person favors discrimination based on gender identity. No reasonable person should think that "gender identity" laws constitute anything other than sex stereotyping. One can only hope that *Glenn* will provide the "Emperor Has No Clothes" moment LGBT Organizations need to stop their foolish march towards animating such odious – and, in some cases, life-threatening – stereotypes with the force of law.

http://www.baltimoreoutloud.com/k2-fetch-latest/ladybugs-political-smackdown/item/945-the-emperor-has-no-clothes

Friday, 16 December 2011



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