



NATIONAL CENTER FOR LESBIAN RIGHTS

FEDERAL CASES ADDRESSING WHETHER DISCRIMINATION ON THE BASIS OF GENDER NON-CONFORMITY AND/OR TRANSGENDER STATUS IS A FORM OF DISCRIMINATION ON THE BASIS OF SEX

U.S. Supreme Court

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (“According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States’ gender discrimination in this area.”)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that harassment directed at a person because that person does not conform to traditional sex stereotypes is a form of sex discrimination prohibited by Title VII)

Craig v. Boren, 429 U.S. 190 (1976) (holding that state action is impermissible under the Equal Protection Clause if it perpetuates stereotypes about how men and women are expected to behave)

Circuit Courts

Kastl v. Maricopa County Cmty. College Dist. No. 06-16907, 2009 U.S. App. LEXIS 7833 (April 14, 2009, 9th Cir. 2009) (stating that it is unlawful to discriminate against a transgender employee because he or she does not behave in accordance with an employer’s expectations for men or women, but affirming dismissal of Title VII claim by transgender woman where the plaintiff failed to show that employer had denied her access to the women’s restrooms because of her gender)

Etsitty v. Utah Transit. Auth., 502 F.3d 1215 (10th Cir. 2007) (holding that transsexual woman who was fired as a public city bus driver had failed to show that her termination was based on gender stereotypes)

Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) (holding that male employee who was perceived as gay had failed to show that his harassment was based on gender stereotypes)

Miller v. City of New York, 177 Fed.Appx. 195 (2d Cir. 2006) (holding that there were material issues of fact that plaintiff, a “non-muscular man with a disability,” was

subjected to a hostile work environment where he alleged that his supervisor “made his life at work miserable by claiming that [plaintiff] was not a ‘real man’ or a ‘manly man’” and assigning plaintiff heavy manual labor tasks he could not perform because of his disability in order to ‘toughen [him] up’).

Jespersen v. Harrah’s Operating Company, Inc., 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) (holding that sex specific dress and grooming codes may constitute impermissible sex stereotyping if the evidence demonstrates that the “policy was adopted to make women [employees] conform to a commonly accepted stereotypical image of what women should wear”)

Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a party can state a claim for relief under Title VII “[b]y alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant’s actions”)

Medina v. Income Support Division, 413 F.3d 1131, 1135 (10th Cir. 2005) (noting that the Third Circuit has held that “a plaintiff may satisfy her evidentiary burden [of demonstrating discrimination because of sex] by showing that the harasser was acting to punish the plaintiff’s noncompliance with gender stereotypes,” citing *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001))

Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (“[s]ex stereotyping [by an employer] based on a person’s gender nonconforming behavior is impermissible discrimination.” *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004). That is, individual employees who face adverse employment actions as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.”)

Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (holding that Title VII bars “discrimination based on a failure to conform to stereotypical gender norms”)

Back v. Hastings on Hudson Union Free School Dist., 365 F.3d 107, 119 (2d Cir. 2004) (holding that it is impermissible discrimination under the Equal Protection Clause to suppose “that a woman *will* conform to a gender stereotype” as well as to suppose “that a woman is unqualified for a position because she does *not* conform to a gender stereotype”)

Zalewska v. County of Sullivan, 316 F.3d 314 (2d Cir. 2003) (noting that discrimination based on a failure to conform to gender norms is prohibited by the Equal Protection Clause)

Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (holding that a plaintiff can prove sexual harassment in violation of Title VII by showing that “his coworkers did not believe he fit the sexual stereotype of a man”)

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (holding that Title VII prohibits “gender stereotyping harassment”)

Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment “based upon the perception that [the plaintiff] is effeminate” is harassment because of sex, in violation of Title VII and the Washington Law Against Discrimination, and overruling *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979))

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (holding that a plaintiff may be able to prove a claim of sex discrimination under Title VII by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”)

Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that Title VII prohibits “[d]iscrimination because one fails to act in the way expected of a man or woman”)

Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) (noting that discrimination based on a failure to conform to gender norms might be cognizable under Title VII)

Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (noting that “sex stereotyping may constitute evidence of sex discrimination” under Title VII)

Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of a man who alleged that he was denied an opportunity to apply for a loan because he was not dressed in “masculine attire”)

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)).

Doe v. Belleville, 119 F.3d 563, 580 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (holding that “Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles” and explaining that “[a] man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex’”)

Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (holding that the plaintiff had stated a Title VII claim where the “harassment included rumors that falsely labeled him as homosexual in an effort to debase his masculinity”)

District Courts

Creed v. Family Express Corp., No. 3:06-CV-465RM, 2009 U.S. Dist. LEXIS 237 (N.D. Ind. Jan. 5, 2009) (holding that transgender employee who was terminated after being told that “she could no longer present herself in a feminine manner at work” had failed to prove that her gender, not grooming policy violations, actually motivated her termination).

Schroer v. Billington, 577 F. Supp.2d 293 (D.D.C. 2008) (holding that government employer violated Title VII when it withdrew offer of employment after learning that the plaintiff was transsexual and would be transitioning from male to female because the employer’s decision was infected by gender stereotypes and because discrimination based on a person’s transition from one sex to the other sex is “literally” because of sex)

Lewis v. Heartland Inns of Am., L.L.C., 585 F.Supp.2d 1046 (S.D. Iowa, 2008) (affirming summary judgment in favor of employer where female plaintiff did not show that employer’s statement that she did not have “the Midwestern girl look” was evidence that her gender played a motivating part in the decision to fire her)

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F.Supp.2d 653 (S.D. Tex. 2008) (holding that transgender individuals may bring discrimination claims based on sex stereotyping because Title VII and *Pricewaterhouse* “do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an “effeminate” male or “macho” female [who is not transgender]. . . There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII.”)

Doe v. Brimfield Grade School, 552 F.Supp.2d 816 (C.D. Ill. 2008) (male elementary school student stated a claim under Title IX for gender stereotyping where he alleged that when he complained that he was repeatedly struck in the testicles by other children, the school told him “to toughen up and stop acting like a little girl[]” and to “stick up for himself”)

Collins v. Cohen Pontani Lieberman & Pavane, No. 04 CV 8983, 2008 WL 2971668, at *9 (S.D.N.Y. July 31, 2008) (holding that a supervisor’s statement that plaintiff “was not ‘sweet’ enough and needed to use more ‘sugar’” could support a jury finding that the plaintiff was discriminated against because she failed to fulfill sex stereotypes)

Schroer v. Billington, 525 F.Supp.2d 58, 63 (D.D.C. 2007) (denying defendant’s second motion to dismiss because “Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”)

Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006) (denying defendant’s motion to dismiss and ordering development of a factual record because “[a] transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has

been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions")

Mowery v. Escambia County Utilities Authority, 2006 FL 327965, at *6 (N.D. Fla. 2006) (holding that "a claim under Title VII could be stated if Mowery was able to show that the harassment he allegedly suffered was based on his perceived failure to conform to a masculine gender role")

Abdul-Hakim v. Goodyear Tire & Rubber Co., 455 F.Supp.2d 1267, 1279 (D.Kan.2006) (statements indicating "antiquated notions concerning women in the workplace, including a belief that women were not to be taken seriously in the workplace and that women did not belong in the workplace but should remain in the home to raise children" could reasonably support a finding of discriminatory animus based on sex stereotyping)

Mitchell v. Axcan Scandipharm, Inc., 2006 WL 456173, at *2 (W.D. Pa. 2006) (holding that transsexual plaintiff "sufficiently pleaded claims of gender discrimination" under Title VII because the "facts show[ed] that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions")

Vargas-Caban v. Caribbean Transportation Services, 2005 WL 3560689, at *6 (D. Puerto Rico 2005) ("The [Supreme] Court had also previously determined that a sexual harassment claim could exist if the employee was harassed for not complying with socialized gender expectations ('sex stereotyping'")

Kahn v. Fairfield University, 357 F. Supp. 2d 496, 502 (D. Conn. 2005) ("Gender stereotyping can serve as evidence of pretext.")

Giannone v. Deutsche Bank Securities, Inc., 392 F. Supp. 2d 576, 588 (S.D.N.Y. 2005) (citing *Price Waterhouse* for proposition that "[s]tereotyped remarks can be evidence that gender play a part in an adverse employment decision")

Theno v. Tonganoxie Unified School District No. 464, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (holding that plaintiff had raised a genuine issue of material fact with respect to his Title IX claim where the evidence "reflects that plaintiff's harassers believed that he did not conform to male stereotypes . . . i.e., that he did not act as a man should act.")

Rhea v. Dollar Tree Stores, Inc., 395 F. Supp. 2d 696, 704 (W.D. Tenn. 2005) ("sex discrimination under Title VII bars gender discrimination, including discrimination on the basis of sex stereotypes") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989))

Zeuner v. Rare Hospitality International, Inc., 338 F. Supp. 2d 626, 638 (M.D.N.C. 2004) (holding that a plaintiff can state a claim of sex discrimination under Title VII if they can show that differential treatment was based on "sex stereotyping").

Allen v. Mineral Fiber Specialists, Inc., 2004 WL 231293, at *5 (E.D. Pa. 2004) (noting that valid Title VII claim can be made by producing “evidence that the defendant was retaliating against or penalizing the plaintiff for not complying with gender stereotypes”)

Howell v. N. Cent. College, 320 F. Supp. 2d 717, 722 (N.D. Ill. 2004) (noting that “discrimination or harassment motivated by gender stereotyping” is actionable under Title VII)

Sweet v. Mulberry Lutheran Home, 2003 WL 21525058, at *3 (S.D. Ind. 2003) (noting that Title VII provides relief for “discrimination on the basis of sex or gender stereotyping”)

Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 WL 22757935, at *4 (W.D.N.Y. 2003) (holding that transsexuals are “protected under Title VII to the extent that they are discriminated against on the basis of sex”)

Collins v. TRL, Inc., 263 F. Supp. 2d 913 (M.D. Pa. 2003) (noting that Title VII prohibits discrimination based on failure to conform to gender stereotypes)

Martin v. New York State Dep’t of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (noting that discrimination based on a failure to conform to gender norms might be cognizable under Title VII)

Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (holding that Title VII prohibits harassment based on a perception that a person does “not conform with their ideas about what ‘real’ men should look or act like”)

Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (holding that Title VII prohibits harassment based on a perception that the person “did not conform to [the defendant’s] stereotype of how a woman ought to behave,” and pointing out that the defendant perceived the plaintiff to be gender non-conforming because the plaintiff “is attracted to and dates other women, whereas [the defendant] believes that a woman should be attracted to and date only men”)

Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 735 (E.D. Pa. 2002) (holding that a Title VII claim can be made out by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”)

English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833 (E.D. Va. 2002) (noting in dicta that “a plaintiff may be able to prove same-sex discrimination by providing ‘evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.’”) (citing *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3rd Cir. 2001))

Doe v. United Consumer Fin. Servs., 2001 WL 34350174, at *4 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations

indicated that her termination may have been based, “at least in part, on the fact that her appearance and behavior did not meet United Consumer’s gender expectations (particularly in light of United Consumer’s alleged inability to categorize her as male or female ‘just from looking’)”)

Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 134 (D. Mass. 2001) (holding that discrimination based on “failing to meet the male gender stereotype” is prohibited by Title VII)

Snelling v. Fall Mountain Regional Sch. Dist., 2001 WL 276975, at *4 (D.N.H. 2001) (holding that harassment based on “sex-based stereotypes of masculinity” is actionable under Title IX)

Montgomery v. Local Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000) (holding that harassment based on “stereotyped expectations of masculinity” is prohibited by Title IX)

Broadus v. State Farm Ins. Co., 2000 WL 1585257, at *4 (W.D. Mo. 2000) (holding, in a case involving a transsexual plaintiff, that “[s]exual stereotyping which plays a role in an employment decision is actionable under Title VII”)

Bilunas v. Henderson, 2000 WL 639329 (D.N.H. 2000) (noting that discrimination on the basis that one does not “project, or dress in a manner consistent with the stereotypical male image” is unlawful discrimination on the basis of sex under Title VII)

Samborski v. W. Valley Nuclear Servs., Co., 1999 WL 1293351, at *4 (W.D.N.Y. 1999) (holding under Title VII that “evidence of sex stereotyping may provide proof that an employment decision or an abusive environment was based on gender”)

Miles v. New York Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding that Title IX prohibits sexual harassment of a transsexual woman)

SECONDARY SOURCES

Office of Civil Rights, Revised Sexual Harassment Guidance § III (Jan. 2001) (“[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond . . .”) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding sex-stereotyping is a form of sex discrimination prohibited by Title VII) (emphasis added))