



FEDERAL CASES RECOGNIZING THAT 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

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)).

Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2nd 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.”)

Back v. Hastings on Hudson Union Free School Dist., 365 F.3d 107, 119 (2nd 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 (2nd Cir. 2003) (noting that discrimination based on a failure to conform to gender norms is prohibited by the Equal Protection Clause)

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

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3rd 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”)

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”)

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”)

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”)

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)

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”)

Jespersen v. Harrah's Operating Company, Inc., -- F.3d --, 2006 WL 962533, at *7 (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”)

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))

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”)

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))

District Courts

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

Schroer v. Billington, -- F. Supp. 2d --, 2006 WL 845806, at *7 (D.D.C. 2006) (“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”)

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)

Jones v. Pac. Rail Servs., 2001 WL 127645, at *2 (N.D. Ill. 2001) (noting that sex discrimination claims have “long included harassment based on a woman’s failure to meet stereotyped expectations of femininity” and citing *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997), for the proposition that “Title VII does not permit an employee to be treated adversely because his or her appearance does not conform to stereotypical gender roles”)

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”)

Theno v. Tonganoxie Unified School District No. 464, 377 F. Supp. 2d 952, 965 (D. Kansas 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.”)

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”)

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)

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”)

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)

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)

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)

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”)

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)

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”)

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”)

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”).

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’)”)

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”)

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”)

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”)

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)

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’)”)

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))

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))

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))