Why Transsexuals Are Paving the Way for Gender Equality

Joanna L. Grossman
Hofstra Law School

This paper will consider employment discrimination claims brought by transsexuals both to show how feminist legal theory can be actualized in practice and to ask, perhaps more importantly, why the same theories have not worked as effectively to eliminate the sex-stereotyping in gender discrimination cases.

In a recent spate of cases, transsexuals have successfully able to rely on classic anti-stereotyping arguments to challenge efforts by employers to confine employees to expected gender roles. In Schroer v. Billington (2008), for example, a federal district court ruled that a transsexual female had suffered sex discrimination when a supervisor withdrew a job offer after judging her female appearance “not feminine enough”. Likewise, in Smith v. City of East Salem (2004), the Sixth Circuit found illegal sex stereotyping when a transsexual female firefighter was penalized for failing to the gender role expectations of her birth sex. In both of these cases – and a handful of others – courts have correctly applied the gender-role policing theory of discrimination that the Supreme Court gave its imprimatur to in Price Waterhouse v. Hopkins: employers cannot penalize employees for failing to live up to gender-role expectations.

Price Waterhouse helped implement a core component of modern feminist legal theory – the eradication of sex stereotypes -- in the employment context. The transsexual cases reflect the actualization of that theory in practice. Yet, when that same theory is invoked by women, the results are more mixed. Courts, for example, have routinely upheld sex-differentiated dress and grooming codes, even though the very essence of such codes is to make men look masculine and to make women look feminine. The Ninth Circuit’s en banc ruling Jespersen v. Harrah’s, in which it upheld a grooming code that required men to be clean-cut and women to have teased hair, flashy makeup, and painted fingernails, is illustrative of the failure of courts to take sex-stereotyping theory seriously in the gender context.

This paper will consider the way courts respond to sex stereotyping claims when brought by transsexuals, on the one hand, or by women, on the other. It will also posit one basic explanation for the difference: sex stereotypes are so ingrained in our culture that courts have a hard time seeing that they exist. In cases involving transsexuals, the stereotypes are obvious – a man should not wear a dress – and thus courts have an easier time applying the anti-stereotyping theory.