

# **SEX STEREOTYPING:**

## **A LOOK AT GENDER DIFFERENCES**

by

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In Smith v. City of Salem, No. 03-3399 (6th Cir. 06/01/2004), Jimmie Smith was employed by the City of Salem, Ohio, (the "City") as a lieutenant in the Salem Fire Department. Smith had worked for the Fire Department for seven years without any negative incidents.

However, Smith, who was born biologically a male, had been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. In short, Smith was a transsexual.

After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis," including while he was at work, as part of his treatment for GID.

Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyre, Chief of the Fire Department. However, Eastek almost immediately told Greenamyre about Smith's behavior and his GID.

Greenamyre then met with City of Salem officials in order to terminate Smith because of his transsexualism. On April 18, 2001, the City's executive body met to discuss Smith and devise a plan for terminating his employment. (NOTE: Every living member on the City's executive body was also named in this lawsuit.)

The City then decided to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, the City officials reasoned, they could terminate Smith's employment on the grounds of insubordination.

However, one of the City officials telephoned Smith after the meeting to inform him of the plan, calling the City's scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's attorney telephoned City officials and advised them of the potential legal ramifications for the City if it followed through on the plan devised during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, the City suspended Smith for one twenty-four hour shift.

Smith then filed suit in the federal district court, claiming sex discrimination and retaliation by the City in violation of Title VII of the 1964 Civil Rights Act. Smith contended that he was the victim of "sexual stereotyping," claiming that the City had discriminated against Smith because he was not acting "manly" enough.

The Sixth Circuit examined whether Smith was in fact the victim of sex stereotyping in violation of the Supreme Court's pronouncements in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

In Price Waterhouse, the plaintiff, Ann Hopkins, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The U.S. Supreme Court held that such comments constituted gender discrimination against Ms. Hopkins, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping - that is, discrimination because she failed to act like a woman.

The Supreme Court in Price Waterhouse therefore made it clear that Title VII prohibits discrimination because of "sex," which includes gender discrimination:

"In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."

After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. Therefore, it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

The Sixth Circuit then held that Smith had stated a bona fide claim based upon sex stereotyping by the City of Salem due to his non-conforming behavior and appearance. Smith's conduct and mannerisms did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave due to his feminine appearance and manner. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind the City's actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

### **MORE SEX STEREOTYPING IN CINCINNATI**

In Philecia Barnes, formerly known as Phillip W. Barnes v. City of Cincinnati, Case No. 00-CV-780 (U.S. District Court for the Southern District of Ohio February 26, 2003) Phillip Barnes had been an officer with the Cincinnati Police Department since July 1981. Barnes had always received good evaluations and earned both a B.S. and a Master of Social Work degrees. In January 1999, Barnes was promoted to the rank of sergeant and began a six-month probationary period. Within a month of his promotion, his direct supervisor reported that Barnes was having difficulties fulfilling his sergeant duties.

The police department developed a more intensive training and evaluation program exclusively for Barnes, which included daily written evaluations and a requirement that he not go into the field unless accompanied by another sergeant. After six months as a sergeant, the City decided he had failed his probationary period and demoted him to a police officer.

However, Barnes was also in the process of a gender transformation before he received his promotion to sergeant. Throughout his probationary period, he was recognized as a male in public and while on duty and adhered to the male dress code of the Cincinnati Police Division. As an expression of his transsexuality, however, he would at times dress as a woman during his off-hours. After he was demoted to the rank of police officer, he changed his first name from Phillip to Philecia and assumed a female identity in public and while on duty, adhering to the female dress code of the Cincinnati Police Division.

In his lawsuit, Barnes claimed that the city had discriminated against him because of his sex in violation of federal and state law. The City argued that the laws against sex discrimination did not protect Barnes against discrimination on the basis of his sexual orientation or transsexuality and asked the court to dismiss the case.

The federal district court judge hearing Barnes' case denied the City's request, noting that the sex discrimination laws prohibit discrimination against a man because he fails to conform to the stereotypes associated with being male. The judge found that Barnes had produced enough evidence to raise a jury issue about whether he was treated differently because the city thought he wasn't masculine enough to be a police sergeant.

The judge noted that Barnes had been told before his promotion that wearing makeup did not present a sufficiently masculine image. He also was repeatedly criticized during his probationary period for failing to establish an adequate "command presence," a term that the judge viewed as possible code for the City's perception that Barnes was not masculine enough to be a police sergeant.

At trial, Barnes presented evidence that no other Cincinnati police sergeant had ever been demoted during the six-month probationary period and that various police command officers had made negative remarks about his lack of masculinity.

The jury unanimously agreed that Barnes had proven that his failure to conform to sex stereotypes was a motivating factor in the City's decision to demote him from sergeant to back to police officer. It further found that the City failed to prove that it would have demoted Barnes even if his failure to conform to sexual stereotypes had played no role in the employment decision. Barnes was awarded \$150,000.00 in compensatory damages and \$140,000.00 in front pay, which, combined with his agreed-on back pay award, totaled \$320,000.00.

This is an example of the potential reach of discrimination laws. The lesson to be learned is an old one, however. Evaluate your employees on their ability to meet your legitimate job requirements, not on stereotypes or irrelevant personal characteristics.

## **WHAT DOES THIS MEAN TO EMPLOYERS?**

These decisions will have **vast** far reaching affects. If there was ever any question that the age of Diversity/Tolerance for others was here... **THIS IS IT!!!** How would your employees treat a cross-dresser? A masculine female? A male who wears eye shadow?

If your employees are not prepared to accept people in the workplace for who they are...you can expect to find yourself explaining why your organization allowed such harassment to occur, which will cost you **MANY** zeros.

**THE ANSWER: ADOPT A TOLERANCE PROGRAM...AND ENFORCE IT!!!**

Also, this decision will more than likely affect our Dress Code Policies. The days of requiring “men to dress like men” and “women to dress like women” are gone. If a man wants to wear a dress to work one day, it will most likely be a situation you will have to allow if you allow women to wear dresses. In short, if you allow one gender to dress in a certain way, you will have to allow the other gender to do the same.

**THE BOTTOMLINE:** Evaluate employees on their abilities and legitimate requirements of the job...not on the person’s appearance.

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## SAMPLE DRESS CODE POLICY

### Appearance In General

All employees are expected to wear clothing that is appropriate, neat, clean, and conducive to the safe and effective performance of required job duties, as determined by management. Employees should therefore check their appearance before reporting to work. Employees should exercise good judgment in determining appropriate dress and appearance. A well groomed appearance and good body hygiene is important and gives confidence to an employee’s overall effectiveness.

In short, employees should dress in accordance with accepted community standards for business attire for each work location and the job being performed, as determined by management. If employees have any questions regarding what constitutes appropriate attire within community standards, they should ask their \_\_\_\_\_.

Some examples of **unacceptable** attire include: \_\_\_\_\_

Employees in certain positions may be required to wear uniforms or to wear attire that meets certain health and/or regulatory standards. \_\_\_\_\_ will inform employees if these requirements apply to their area. The Company reserves the right to make the final determination as to whether particular apparel is appropriate for the workplace.

If the appropriate Company official determines that an employee is dressed inappropriately, the employee may be instructed to go home and change, in addition to receiving a disciplinary notice for the offense. Any time missed from work may result in work without pay.