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# 11th Circuit Rules for Transgender Employee in Sex Discrimination Case

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The typically conservative Eleventh Circuit Court of Appeals recently found in favor of a transgender employee claiming sex discrimination when her employer fired her after she announced plans to undergo a gender transition. The Georgia General Assembly's Office of Legislative Counsel (OLC) hired Plaintiff Vandiver Elizabeth Glenn in 2005 as an editor.[1] At that time, Glenn presented as a man named Glenn Morrison. Approximately one year into her employment with the OLC, Glenn told her supervisor that she was a transsexual and came dressed to the office's Halloween party as a woman. In 2007, Glenn announced she would be transitioning from a male to a female. For Glenn, this meant she would be coming to the office dressed as a woman and would legally adopt a female name. Following this announcement, the head of the OLC, Brumby terminated Glenn's employment.[2]

## The District Court Case

Glenn sued Brumby under the Equal Protection Clause of the U.S. Constitution, claiming Brumby discriminated against her on the basis of her sex, including both her gender identity and her failure to conform to the male sex stereotype (*i.e.*, behave and dress in "traditional male" ways) that Brumby expected. Unlike a typical sex discrimination case where a plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, Glenn claimed government action (*i.e.*, her state employer's termination decision) resulted in her discharge. Consequently, Glenn was entitled to sue her employer under the Equal Protection Clause on the basis that the state denied rights she was entitled to under the Fourteenth Amendment.[3] Glenn was successful on her claim in the district court and Brumby appealed to the Eleventh Circuit Court of Appeals.[4]

## The Appeal to the Eleventh Circuit Court of Appeals

On appeal, the Eleventh Circuit first examined whether discrimination against an individual because of his or her gender nonconformity constitutes sex discrimination under the Equal Protection Clause. The court, citing the U.S. Supreme Court and several other appellate courts, concluded the answer to this question is "yes."[5] The court reasoned that:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define

> transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.[6]

The court also pointed to a long line of holdings finding that all persons, whether transgender or not, are protected from discrimination based on gender stereotypes. Courts have held that women cannot be discriminated against for being "macho" and men cannot be penalized for dressing effeminately or holding the role of primary caregiver for children.[7] Thus, where a transgender individual is discriminated against simply because he or she identifies with a gender that is not perceived to be his or her own, this constitutes sex discrimination.

Following its conclusion that discrimination against an individual because of his or her gender nonconformity constitutes sex discrimination, the court was faced with the question of whether this particular plaintiff's employment was terminated because of gender stereotyping. To answer this inquiry, the court first examined whether there was proof that discriminatory intent motivated Glenn's termination.[8] Glenn provided direct evidence of discriminatory intent through Brumby's testimony regarding the termination of her employment.[9] Brumby testified that he thought it "inappropriate" for Glenn to come to work dressed as a woman and that it was "unsettling" and "unnatural."[10] Brumby also testified that his decision to terminate Glenn's employment was based on "the sheer fact of the [gender] transition."[11] Given these admissions, it is easy to understand why the court concluded that Brumby's testimony alone was ample evidence to find that the termination decision was based on Glenn's gender nonconformity.

The court then examined whether Brumby's discriminatory act could be excused because it was substantially related to a sufficiently important governmental interest.[12] Unlike a discrimination case under Title VII, where direct evidence like the above would likely resolve the issue of whether discrimination took place, the government is given an opportunity in an Equal Protection case to provide a sufficient justification for the discriminatory action.[13] According to the Eleventh Circuit, Brumby offered only one justification for the termination – his fear of litigation arising out of Glenn's use of the female restroom at the OLC. This justification, however, was weak in light of the fact that the restrooms at the OLC are single-occupancy. This substantially reduces the likelihood that a born-female and a genetically transitioned female (born-male) would encounter each other in the OLC restroom and it therefore makes complaints regarding the same unlikely. Furthermore, no such claims had been raised at the time Brumby terminated Glenn's employment. The Eleventh Circuit noted that the U.S. Supreme Court has held that the government's burden is demanding and "cannot be met by relying on a justification that is 'hypothesized or invented post hoc in response to litigation.'"[14] Thus, Brumby failed to provide a sufficient justification or "governmental purpose" for his actions. Accordingly, the court found that the government failed to establish any justification for the termination of Glenn's employment, and ruled in favor of Glenn.

## Implications for Employers

*Glenn v. Brumby* directly impacts government employers in the Eleventh Circuit and now stands as possible persuasive authority for other jurisdictions. Importantly, while *Glenn* deals specifically with a public employer and employee, it also is conceivable that the court could apply the same reasoning to a transgender employee's sex discrimination claim against a private employer under Title VII. The breadth of the court's definition of sex discrimination is not necessarily restricted to a constitutional analysis. Therefore, both types of employers should review their anti-discrimination policies and revise them if necessary in order to comply with *Glenn*. The following types of policies should be reviewed and revised:

- Equal opportunity, anti-discrimination, anti-harassment and anti-retaliation policies;
- Dress code and appearance standard policies;
- Codes of conduct between employees, constituents or customers;
- Policies regulating the use of gender-segregated areas such as bathrooms; and
- Policies regarding respect for the individual or manager-subordinate relations.

Employers should also consider how they would like their managers to respond to employees who announce their intention to undergo a gender transition or sex change. Where such circumstances arise, managers should be trained on the appropriate response to such an

announcement and how to have a discussion with the employee about the implications of such a transition or change on his or her work environment. Consequently, employers may also want to consider developing the following plan for responding to gender transition or sex change announcements when a transgender employee situation arises:

- Training for managerial employees on transgender terminology and the employer's process for assisting and training employees undergoing a gender transition or sex change;
- Developing a compilation of all relevant policies (*i.e.*, dress code, bathroom usage, etc.) that should be reviewed with the transgender employee before gender transition/sex change;
- Providing the transgender employee with the materials needed for changing his or her name on all important work place documents (if a name change will take place);
- Appropriately managing adverse reactions to the transgender employee within workplace guidelines and codes of conduct;
- Following the gender transition or sex change, appropriately manage the transgender employee within workplace guidelines and codes of conduct; and
- Providing refresher anti-discrimination, anti-retaliation, anti-harassment, dress code, code of conduct, etc. training to the workforce if needed.

Employers are encouraged to take the appropriate steps necessary to integrate transgender employees into the workforce and simultaneously to guard against discrimination, harassment, and retaliation claims. Above all, communication is key – talk to employees, including managers, and do not hesitate to bring in labor and employment counsel to provide guidance on the above legal issues.

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[1] *Glenn v. Brumby*, 2011 U.S. App. LEXIS 24137, at **2-3 (11th Cir. Dec. 6, 2011).

[2] *Id.*

[3] The Equal Protection Clause of the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. 42 U.S.C. § 1983 ("Section 1983") establishes a cause of action for any person who has been deprived of constitutional rights by a person acting under state law:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[4] Glenn also alleged a second basis of discrimination based on the medical condition Gender Identity Disorder (GID). *Glenn*, 2011 U.S. App. LEXIS 24137, at *4. The district court ruled against Glenn on this claim, which Glenn cross-appealed to the Eleventh Circuit. Id. The court of appeals, however, did not address this claim on cross-appeal as it provided Glenn all the relief she sought on her sex discrimination claim. *Id.* at *25.

[5] *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (comments that female manager was acting like a man to compensate for being a woman evidenced sex discrimination based on gender-stereotyping); *Schwenk v. Hartford*, 204 F.3d 1187, 1198-1203 (9th Cir. 2000) (sex discrimination claim stood because perpetrators' actions were based on belief that plaintiff was a man who "failed to act like one"); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (transgender-based sex discrimination claim upheld); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender firefighter could not be suspended for failing to conform to gender stereotypes).

[6] *Glenn*, 2011 U.S. App. LEXIS 24137, at **9-10 (internal citations and quotations omitted).

[7] *See Price Waterhouse*, 490 U.S. at 235; see also *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001 (1998); *Knussman v. Maryland*, 272 F.3d 625, 642-43 (4th Cir. 2001).

[8] *Glenn*, 2011 U.S. App. LEXIS 24137, at *22 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

[9] At this stage of the inquiry, the plaintiff can provide either direct or circumstantial evidence of discriminatory intent. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999) (outlining methods of proof).

[10] *Glenn*, 2011 U.S. App. LEXIS 24137, at *22.

[11] *Id.* at *23.

[12] *Id.* at *22. In U.S. Constitutional law, there are three different tests applied by courts to decide due process or equal protection issues. The lowest to highest levels of scrutiny are called: (1) rational basis review; (2) intermediate scrutiny; and (3) strict scrutiny. Intermediate scrutiny applies to gender-based equal protection challenges, and so this test was applied here to determine whether Brumby's actions were substantially related to a sufficiently important government interest.

[13] *Id.* at **23-24.

[14] *Id.* at **23-24 (citing *United States v. Virginia,* 518 U.S. 515, 533 (1996)).