OF *Fighting Fires* AND Firefighters

Sex Stereotyping in *Smith v City of Salem*

FAST FACTS:

"[E]mployers who discriminate against men because they… wear dresses and makeup, or otherwise act femininely, are…engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."

Smith expands coverage from relatively immutable personal characteristics to any type of behavior a court finds nonstereotypical.

By Paul E. Gugel

Smith v City of Salem[1]

The city of Salem, Ohio suspended one of its firefighters, Smith, for a minor infraction. Smith, a transsexual, viewed the infraction as a pretext for sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964.[2] The trial court dismissed the suit on the grounds that Title VII protection is unavailable to transsexuals. On August 5, 2004, the Sixth Circuit Court of Appeals reversed the decision on the theory of "sex stereotyping" sex discrimination.

The Definition of "Sex Stereotyping"

The United States Supreme Court outlawed the practice of sex stereotyping in the landmark case of *Price Waterhouse v Hopkins*.[3] Ms. Hopkins was a senior manager for a national public accounting firm. She was under consideration for promotion to partner—a process requiring review and approval by the existing partners, overwhelmingly male in number.

The partners voted against her promotion for two consecutive years, at which point she resigned and filed suit, alleging sex discrimination under Title VII. She claimed that she had been sex stereotyped by the partners, both supporters and detractors, who made comments implying that she was or had been acting masculine. A plurality of the Court stated that "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."[4] The Court concluded that such an action violated Title VII.

Sixth Circuit Background

The *Smith* court, the Sixth Circuit Court of Appeals, has been understaffed since the Clinton administration. There were four vacancies on the 16-member panel at the time *Smith* was argued.

The Sixth Circuit "has been declared a 'judicial emergency' by the Administrative Office of the U.S. Courts because of the length of the vacancies and the workload."[5] As a result, the Sixth Circuit was the slowest appellate court to dispose of cases, taking an average of almost 17 months to do so in fiscal year 2003, compared to less than 11 months for the other 11 appellate courts. Given the vacancies and the caseload, judges from the other federal courts have been "on loan" to the Sixth Circuit. One of the judges sitting in the *Smith* case, the Honorable William W. Schwartzer, was a Senior United States District Judge for the Northern District of California. Not surprisingly, then, the *Smith* panel drew a significant amount of precedent from cases decided by the Ninth Circuit—the circuit court of appeals with jurisdiction over California. The Ninth Circuit is a circuit in which plaintiffs such as Smith have had more success with the argument that the *Hopkins* holding protects transvestites and transsexuals than plaintiffs in other circuits. For instance, in *Schwenk v Hartford,* the Ninth Circuit opined that "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[6]

Characterizing Equal Rights for Transsexuals and Transvestites

The *Smith* decision noted early in its background section that the plaintiff suffered from gender identity disorder, a mental disorder recognized by the American Psychiatric Association.[7] Why, then, did the plaintiff not file the case as a disability discrimination lawsuit under the Americans with Disabilities Act of 1990 (ADA)? Because the ADA specifically excludes transvestism and transsexualism from the definition of disabilities under that statute: "Under this Act, the term 'disability' shall not include—(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders…."[8]

An equally intriguing question is, How did Smith's counsel and the Sixth Circuit convert an otherwise unrecognized disability claim into a cognizable Title VII sex discrimination claim? By extending the *Hopkins* sex-stereotyping

The Smith *decision noted early in its background section that the plaintiff suffered from gender identity disorder, a mental disorder recognized by the American Psychiatric Association.*

argument to a plaintiff's behaviors, rather than a classification that Congress saw fit—in a 1990 statute passed *after* the 1989 *Hopkins* decision—to specifically exclude from the protections of the federal civil rights laws.

The lower court in *Smith* had concluded that "'Title VII does not prohibit discrimination based on an individual's transsexualism.'"[9] The Sixth Circuit recharacterized the mental disorder as a choice of clothing and mannerisms:

> 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. 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.[10]

Some view the ADA as underinclusive because it specifically excludes certain mental disorders from the definition of disabilities and thereby deprives the sufferers of civil rights protection. But Congress—having added sex as a protected basis on which discrimination was prohibited under Title VII of the 1964 Civil Rights Act—specifically excluded transvestism and transsexualism from the ADA's coverage. The Sixth Circuit has made the ADA's mandated exclusion from civil rights protection for transvestites and transsexuals a nullity by minimizing (if not ignoring) the underlying mental disorders while simultaneously elevating their symptomatic behaviors to grounds for sex discrimination. Under the *Smith* rationale, there is no longer a need to exclude certain mental disorders from ADA civil rights coverage if those same disorders are reduced to mere sex/gender norms (i.e., behaviors) entitled to protection from *Hopkins* Title VII sex stereotyping. *Smith* thus overreached in defining sex discrimination and, in doing so, emasculated the ADA by granting civil rights protection to the transsexual plaintiff.

This is not to say that transvestites and transsexuals should not be treated the same as other employees as long as they can perform their jobs adequately. But federal law does not yet require employers to do so, contrary to the Sixth Circuit's view in *Smith.*

Conclusion

In its effort to shoehorn the plaintiff into a classification protected by the Civil Rights Act, the *Smith* court opened the proverbial Pandora's Box for discrimination jurisprudence. No longer must successful plaintiffs be members of a protected class; all they must now show is behavior stereotypical to that class to qualify for protection as a member of that class. Smith wore women's clothes. The court said that his employer could not take action against him for his choice of feminine clothing. So, if a 50-something white male reports for work in dreadlocks and gold chains, speaking Ebonics, or if a white woman of Scandinavian descent shows up for work with her face almost completely covered by a veil, claiming religious freedom, the employer will not be able to base an adverse employment decision on the person's nonstereotypical behaviors. *Smith* suggests to employers that they cannot enforce a reasonable (read: stereotypical) code of conduct because to do so will unlawfully infringe on the individual's right to self-expression as a member of a protected class to which he or she does not belong, but merely aspires to belong—or chooses to mock. Employers cannot, however, concede to an ill-reasoned court decision. The best way to prohibit undesirable work behaviors is to draft an employee code of conduct reasonably, to train the workforce on it regularly, and to enforce it diligently.

Smith serves to enlarge the class of potential civil rights litigants by expanding coverage from relatively immutable personal characteristics to any type of behaviors a court finds nonstereotypical. ■

Paul E. Gugel is CFO and general counsel for NeuroHealth, a mental-health organization headquartered in Troy, Michigan, specializing in the treatment of traumatic brain injuries and childhood affective disorders. He is a corporate, employment, and tax law attorney and a CPA. He earned his J.D. from Thomas M. Cooley Law School and his M.B.A. in personnel administration from Michigan State University. He lives in Rochester Hills.

FOOTNOTES

1. *Smith v City of Salem,* 378 F3d 566 (CA6, 2004).
2. 42 USC 7000 *et seq.*
3. *Price Waterhouse v Hopkins,* 490 US 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989).
4. *Id.* at 250 (opinion by Brennan, J.).
5. Ryan, Richard A., *Michigan judge inches closer to seat,* Detroit News, June 18, 2004, p 1B.
6. *Schwenk v Hartford,* 204 F3d 1187, 1202 (CA 9, 2000).
7. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (rev 4th ed), pp 576–582.
8. 42 USC 12211(b).
9. *Smith, supra* at 571.
10. *Id.* at 574.