

Justice Welch?

To the Editor:

I read with some dismay about Janet K. Welch being selected as executive director of the State Bar. Ms. Welch has extensive legislative and judicial experience. She has high intellect, the grace of a dancer, and sharp diplomatic skill. She slowed the self-destructive course of a critical institution for which she toiled. She has an unquenchable thirst for fairness and justice, regardless of the financial means, business connections, or social status of the parties involved. I hope her tenure at the State Bar is short. Ms. Welch would better fill the next seat on the Michigan Supreme Court.

Bradley Geller
Ann Arbor

Smith Critique is Unwarranted

To the Editor:

Paul E. Gugel's critique ("Of Fighting Fires and Firefighters: Sex Stereotyping in *Smith v City of Salem*," June 2007) of the *Smith v Salem* decision, finding that employment discrimination on the basis of gender identity disorder (GID) is a form of sex discrimination under Title VII, is unwarranted. Contrary to the author's assertion that *Smith* represents an aberrant decision, the decision has been repeatedly affirmed in the Sixth Circuit (with different panels of judges) and is the majority approach throughout the country. See, for example, *Barnes v City of Cincinnati*, 401 F3d 729 (CA 6, 2005); *Myers v Cuyaboga County, Ohio*, 182 Fed Appx 510 (CA 6, 2006); see also *Schroer v Billington*,

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424 F Supp 2d 203, 210 n 3 (DC 2006). The Supreme Court in *Price Waterhouse v Hopkins*, 490 US 228 (1989) first established that Title VII's reference to sex encompasses discrimination based on a failure to conform to stereotypical gender norms. Contrary to Mr. Gugel's assertion that the *Smith* decision rests on a too-expansive reading of *Price Waterhouse*, in *Schroer*, the Court recognized that even without the rationale of *Price*, recent advances in the understanding of GID lead to the conclusion that discrimination on the basis of GID could indeed be because of sex in violation of Title VII. Lastly, Mr. Gugel's flip contention that *Smith* would expand the class of potential claimants under Title VII who do not have "immutable personal characteristics" ignores the fact that, according to the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (rev 4th ed), pp 576–582, GID is very much an immutable personal characteristic.

Jay Kaplan
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Access Issues

To the Editor:

As a member of the State Bar practicing out of state and almost exclusively in federal courts, I don't often feel it appropriate to comment on articles in the *Michigan Bar Journal*, but two points in the July President's Page ("Access to Justice") caught my attention. The first is President Cahill's apparent conclusion that it is an access to justice issue if current law makes a person's case nonviable. But a claim, however sympathetic, that has no substance under the law should be brought, if at all, only if there is a reasonable basis for contending for a change in the law. Whether one agrees with the substance of the law we argue is a question of substance, not access. We should not conflate these two separate concerns.

The other concern that President Cahill's reflections raised in my mind is one that she did not state directly. That is the extent, if at all, that our profession has itself priced justice beyond the reach of many of our fellow citizens. I had occasion to recall the oath I took—more years ago than I care to remember—on being admitted to the Bar. Try as I might, I could not find the clause by which I swore to amass riches for my family or myself. Perhaps we should consider whether as a profession we need to take further action on our own in that respect as well as in efforts to secure greater funding from overstrained government budgets.

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