

JUSTICE FOR ALL: AN INTERNATIONAL PERSPECTIVE
OF LEGAL PROTECTIONS FOR THE TRANSGENDERED

Bonnie L. Roach

roach@ohio.edu

Associate Professor

Department of Management Systems

308 Copeland Hall

Ohio University

Athens, OH 45701

(740) 593-2013 (Office)

(740) 593-9342 (FAX)

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I. Introduction

There is little debate that businesses are operating in a global community where differences of ethnicity, cultural beliefs and even philosophies of business are as varied as the countries they represent. Corporate America must actively embrace diversity if it is ever to effectively operate and compete in today's world economy. There is every sign that the United States is moving towards such tolerance except in one particular area. Sexual orientation and the transgendered community have remained disenfranchised from legal and social acceptance. Other countries are more inclusive in their legal protections of the transgendered worker. This paper attempts to briefly discuss the legal position of the United States on transgendered rights and how our domestic approach compares to the legal protections of other countries.

In the United States, the transgendered are not specifically protected by federal law. However, there is an evolving jurisprudence which suggests that the transgendered can be afforded protection under Title VII not because of their transgendered status, but because they do not fit the stereotypical roles of traditional male and female roles. Such employees are particularly susceptible to sexual stereotyping during the transitioning process whereby the employee prepares for surgical reassignment by living as one gender while being biologically and physically another.

This paper examines how the transgendered are protected from discrimination in the workplace in various countries who share the same legal foundations as that of the United States such as Canada, the United Kingdom, Australia and New Zealand to see how their laws and legal processes protect the rights of the transgendered.

II. United States and the Transgendered Employee

Despite the fact that transgendered employees participate in virtual every occupation, there is a dearth of federal protections of the transgendered. There have been discrimination cases for transgendered employees in the Library of Congress, a fireman who was terminated due to his transgendered status, and female transgendered employee of a tech firm who was fired when she informed her employer that she was beginning the transitioning process from male to female despite the fact that she had the most experience and seniority in the firm.

Although the cases involving transgendered discrimination are on the rise, the transgendered are not specifically protected by federal law, however, there is an evolving

¹ Associate Professor in the College of Business at Ohio University. Her Master's degree and Ph.D. is in Management and Human Resources and she also received her J.D. from the Moritz College of Law at Ohio State University. Her teaching and research concentrates on discrimination issues in employment.

jurisprudence which suggests that the transgendered can be afforded protection under Title VII not because of their transgendered status, but because they do not fit the stereotypical roles of traditional male and female roles. Such employees are particularly susceptible to sexual stereotyping during the transitioning process whereby the employee prepares for surgical reassignment by living as one gender while being biologically and physically another.

III. Title VII and Gender

The principal federal law which prohibits discrimination in the workplace is Title VII of the Civil Rights Act of 1964. Title VII prohibits an employer with 15 or more employees from discriminating on the basis of sex as well as race, color, religion and national origin. Gender was not one of the original protected classes and was added to the list of protected classes as a last-ditch attempt to defeat the pending bill. Howard Worth Smith and the other Southern Senators felt that by adding the protected class of gender, the bill would appear to be so controversial that it would have no possibility of being passed. The addition of gender was literally the day before the bill was passed thus allowing little time for debate as to what should be meant by “gender”. Nonetheless, Title VII was voted into law and afforded legal protection for individuals who may experience either disparate impact or disparate treatment based on gender.

The traditional view of gender is being challenged in the courts with the increase of lawsuits claiming gender discrimination against individuals who present themselves as one gender while genetically classified as the opposite gender, also known as transgender employees. The question that keeps arising is whether an employer should be accountable for discriminating against transsexuals, the transgendered, and individuals who will be receiving surgical reassignment. Recent developments in case law, especially in the Sixth Circuit, seems to suggest that the traditional legal views of gender is expanding from the traditional view of gender -- biological classification -- to one which includes psychological sexual identity. Transgendered individuals experience a psychological disconnect from their biological assignment. To put it simply, transgendered employees mentally identify themselves as the opposite gender than their biological gender. Many individuals experiencing dissonance with their mental sexual identity and their biological identity choose to have sex reassignment surgery and it is the pre-operation requirements of this particular surgery that gives rise to so many cases of transsexual discrimination since surgical sex-reassignment requires that the candidate lives for one year as a the gender to which they will be assigned.

Although the U.S. is still reluctant to actually codify legal protections for the transgendered, other countries with similar legal systems have afforded protections for the transgendered either statutorily or through regulatory action.

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² Vaas, Francis. Title VII: The Legislative History, 7 **B.C. Indus. & Com. L. Rev.** 431, 441-2 (1966). See also, **Whalen, Charles & Whalen, Barbara. The Longest Debate: A Legislative History of the 1964 Civil Rights Act.** pp. 115-116 (1985)

the bill was passed thus allowing little time for debate as to what should be meant by “gender”. Nonetheless, Title VII was voted into law and afforded legal protection for individuals who may experience either disparate impact or disparate treatment based on gender. The issue has been whether Title VII gender discrimination includes those diagnosed with gender dysphoria.

Gender dysphoria has been defined as “A psychological diagnosis, recognized by the American Psychiatric Association, of severe distress and discomfort caused by the conflict between one’s gender identity and one’s sex at birth. Some people who experience this condition are transsexual, but not all transsexual people experience gender dysphoria or are diagnosed with GID. Furthermore, not all people with GID are transsexuals”.³

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VI. Transgender Discrimination in the Workplace

Transsexual discrimination is one of the fastest growing issues related to sexual orientation or affinity discrimination.⁵ Transsexuals are required, as part of their sex-reassignment surgery, to live as members of the opposite sex for a period of at least one year.⁶ During that time, they must dress and act as members of the opposite sex; they will take hormones and will present themselves to the public as members of the opposite sex.⁷ The pre-op requirements are mandatory, so anyone seeking sexual reassignment surgery must physically present themselves as one gender while remaining biologically another gender in order to receive

³ **Human Rights Campaign Foundation, Transgender Issues in the Workplace: A Tool for Managers** at 5. available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf>.

⁴ See Franklin H. Romeo, Note, Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law, 36 Colum. Hum. Rts. L. Rev. 713, 725 (2005).

⁵ **Bennett-Alexander, Dawn D. and Hartman, Laura P. Employment Law for Business 4th Ed.** (McGraw-Hill /Irwin: Boston), 2004.

⁶ **The Harry Benjamin International Gender Dysphoria Association, Inc.** available at <http://www.hbigda.org/>. (HBIGDA) is a professional organization devoted to the understanding and treatment of gender identity disorders. The organization has published guidelines for treating gender dysphoria and guidelines for pre-op care. See also **Harry Benjamin Standards of Care for Gender Dysphoric Persons**, Standard 9 and §5.2.4, Revised Approved Draft January, 1990 available at <http://www.altsex.org/transgender/benjamin.html>.

⁷ *Id.* at §5.2.4.

the surgery. Few employers possess experience in providing acceptable accommodations for the transgendered, particularly with respect to with special restroom privileges and dress code enforcement.

The transition period is rife with difficulties for the transsexual employee since co-workers as well as employers lack understanding of the requirements for gender reassignment surgery and may react to the employee with fear, disgust and anger. The emotional reactions of employers and co-workers may lead to litigation over the discriminatory treatment of the transgender employee. The majority of cases involve Title VII discrimination against a transgender individual who is in the process of being in transition for the sex reassignment surgery.

The litigation of discrimination of the transgendered evolved from the early cases which strictly defined gender and were uniformly decided in favor of the employer to the more recent case developments in the Sixth Circuit which have upheld decisions in favor of transgender plaintiff under Title VII based on discrimination based on gender stereotyping that followed the case of *Price Waterhouse v. Hopkins*. The metamorphosis of transgender discrimination claims points to the inevitability that transgender employees will be afforded the same protections as their non-transgendered counterparts. Historically, the answer was no since gender discrimination was interpreted as being based on biological sex such as in *Ulane v. Eastern Airlines*,⁸ which viewed transsexualism:

. . . is a condition that exists when a physiologically normal person (i.e., not a hermaphrodite--a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia.⁹

While the court seemed to be cognizant of the process required for gender reassignment surgery, their view of discrimination was still bound by the biological definition of sex. Furthermore, it was argued that since the medical community was unable to create a uterus or ovaries, then the medical profession could conclude that an individual's "innate sex" can never

⁸ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

⁹ *Id.*. The Court examined other evidence regarding the definition of transsexualism. See Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 26, 1983, 10:00 a.m., at 35-37; See generally **American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders** § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, Psychological Considerations of Gender Reassignment Surgery, 9 *Clinics in Plastic Surgery* 355, 357 (1982); Comment, The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma, 7 **Conn.L.Rev.** 288, 288 n. 1 (1975); Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 **Cornell L.Rev.** 963, 963 n. 1 (1971).

be altered.¹⁰ On the other hand, evidence was presented that it is not merely the physical attributes of a person that makes up their gender, but their psychological orientation as well and thus, transsexuals should be regarded as genuine females post surgery and not just “facsimiles”.¹¹

The Ulane court’s plain reading of Title VII would lead one to believe that transsexuals have no federal recourse for discrimination they may face, but a more promising legal theory under Title VII is discrimination based on gender stereotyping which was first articulated in Price Waterhouse v. Hopkins¹²

VII. Gender Stereotyping and Transsexual Discrimination

Gender stereotyping is the perception that an individual fails to conform to preconceived notions of how someone of a particular gender should look and act. A male who is considered effeminate may be labeled as such because he appears or acts in nonconformance to society’s view of a male stereotype, may face adverse consequences in employment because of that nonconformity. This was true in Price Waterhouse,¹³ where a female candidate for partnership was considered too “macho” and the result was that her application for a partnership was placed on hold. The case was the first time that gender stereotyping was considered to be actionable under Title VII.

The Supreme Court carefully reviewed the text of Title VII and came to the conclusion that although Title VII would allow employers to consider gender when gender is a BFOQ, it is not permissible for gender to be a motivating factor in other employment decisions. It was held the if a plaintiff fulfilled their burden of proof by showing that gender was a motivating factor in the employment decision, then the defendant would have to demonstrate that they would have made the same decision absent the discriminatory factor through a preponderance of the evidence (rather than clear and convincing evidence).¹⁴

The Price Waterhouse case was to establish the possibility of bringing a Title VII claim for gender stereotyping and provided a roadmap as to how to present proof in a mixed-motive case. So, it is now possible to bring a discrimination suit when an employee’s behavior and appearance does not match up with their gender. It is only a short leap of logic gender

¹⁰ Id. See, e.g., Wise, Transsexualism: A Clinical Approach to Gender Dysphoria, 1983 Medic.Trial Tech.Q. 167, 170; Stoller, Near Miss: “Sex Change” Treatment and Its Evaluation, in Eating, Sleeping, and Sexuality 258, 259 & 273 (M. Zales ed. 1982); Shaw, Sex-change Capital: Surgeon is Town's Top Draw, Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.; Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 Cornell L.Rev. 963, 963 n. 1 & 970 n. 37 (1971).

¹¹ Id. Comment, The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma, 7 Conn.L.Rev. 288, 290-91 n. 1; 292 n. 6 (1975) (psychological sex may be most important factor); Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 Cornell L.Rev. 963, 963 n. 1; & 965 n. 3 (1971). At trial, the plaintiff’s expert stated “These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely “facsimiles.” E.g., Testimony of Dr. Richard Green, expert witness for Ulane, trial transcript for Sept. 27, 1983, 10:35 a.m., at 226 & 252.

¹² Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

¹³ Id.

¹⁴ Id. at 246-247 and 252-253.

stereotyping could be used for transsexuals who face discrimination. Transsexuals face discrimination because their outward appearance and manner does not comport with their biological gender, so gender stereotyping seems to be a promising avenue of litigation. The Sixth Circuit was presented with two cases involving transsexual plaintiffs who asserted that they were discriminated on the basis of gender stereotyping.

Two cases have been brought before the Sixth Circuit which involves discrimination against transsexuals because of their failure to conform to a particular gender stereotype. The decisions in these cases may pave the way for transsexuals and pre-op transgendered employees to successfully litigate claims for Title VII discrimination. In Smith v. City of Salem, Ohio,¹⁵ a firefighter, who was born genetically male and who was subsequently diagnosed as gender identity disorder, filed a discrimination suit against the city and city officials for TVII sex discrimination. The trial court dismissed the case, but the appellate court reversed.

One of the most interesting aspects of the case was that Smith based his claim of TVII discrimination on sex stereotyping, which was at issue in Price Waterhouse v. Hopkins.¹⁶ The Smith case was a very significant case for transgender employees. For the first time, an appellate court recognized gender stereotyping as actionable under Title VII and if any employer treated any individual because of their failure to conform to a gender stereotype, that employer would be guilty of gender discrimination. It wasn't long before the Sixth Circuit was presented with another claim involving gender stereotyping and a transsexual employee.

In Barnes v. City of Cincinnati,¹⁷ the issue was whether the City impermissibly discriminated against Barnes, who was on the Cincinnati police force, because of her transsexualism. The case was slightly different than that of Smith, since Barnes was forced to submit to an intensive probationary period which put her under scrutiny that no other employee had to endure and that the City was alleging that there were "legitimate" reasons for her failure of her probationary period.

Once again, the Sixth Circuit found grounds for discrimination when presented with evidence that the employer had treated the transsexual plaintiff in a discriminatory way because of nonconformance to a stereotype. It is not clear whether the other Circuits will follow suit, but it seems clear that ever since the Supreme Court found that gender stereotyping is akin to Title VII discrimination in Price Waterhouse, it is most probable that if the transsexual employee will be able to prevail if it can be shown that the impermissible stereotyping was a motivating factor in the adverse employment decision and if the employer fails to demonstrate that the same adverse decision would have been made absent the gender stereotyping. The door has been opened for Federal protection of transsexuals in the workplace, but U.S. jurisprudence still views gender discrimination in biological terms and doesn't seem to acknowledge the complexity of gender identity issues. Other countries have taken a much more progressive stance in legislating protections against employment discrimination of the transgendered.

VIII. International Law and the Transgendered

A. Canada

¹⁵ Smith v. City of Salem, Ohio, 378 **F.3d** 566 (6th Cir 2004), Rehearing en banc denied, Smith v. City of Salem, 2004 **U.S. App. LEXIS** 22668 (6th Cir October 18, 2004) (Case No. 03-3399).

¹⁶ Price Waterhouse v. Hopkins, *supra* note 28.

¹⁷ Barnes v. City of Cincinnati, 401 **F.3d** 729 (6th Cir. 2005) *cert. denied*, City of Cincinnati v. Barnes, 74 **U.S.L.W.** 3288 (U.S. November 7, 2005) (No. 05-292).

While there has been some progress regarding legal protections of the transgendered in the United States, some of the global community have made greater advancements and can serve as a model for future legislation. For example, much of American jurisprudence centers on defining sexuality based on one's biology, whereas Canadian jurisprudence seems to have a greater appreciation of the complexity of gender identity. A very careful examination of the concepts of gender and gender identity were articulated by the Quebec Human Rights Tribunal in *M.L. v. Maison Des Jeunes*.¹⁸ M.L. was a youth worker employed by the Montreal-based Maison Des Jeunes. M.L. had decided to undergo male to female sex-reassignment surgery and shortly after informing her employer of this decision, she was terminated along with another youth worker. She had been given good evaluations and there was no evidence that there was any substantial reason for her termination. In fact, the Chair of the center stated for the record that the reason for her termination was they acted on behalf of the youth saying that they would be too upset by the transformation and thus, M.L. could not efficiently perform her duties. The center further justified their position by claiming that should the matter go public their public funding would be at risk.

M.L. stated that her rights under the Charter had been violated, "fully equal, without distinction, exclusion or preference based on her sex or civil status". The Tribunal carefully examined the concepts of sex and gender identity and whether discrimination by sex encompasses discrimination against gender identity. The Tribunal seemed to understand that biological gender is not the determinative factor in formulating a person's gender identity and awarded M.L.

Writing for the Tribunal, Chair Michèle Rivet concluded that "transsexualism is clearly a matter of sexual identity. Contrary to what some might think," she held, "it does not involve a question of sexual orientation, sexual orientation is a choice of sexual partner and not identity."

Chair Rivet concluded that sexual identity is included in the definition of "sex" in the Québec *Charter* and is, thus, a prohibited ground of discrimination. In reaching its conclusion, the Tribunal relied on previous case law which has held that the term "sex" includes pregnancy and sexual orientation, at the same time referring to the Supreme Court of Canada's opinion that human rights laws be given a large and liberal interpretation. Moreover, Chair Rivet emphasized, human rights law, including the Québec *Charter*, is based on the principle of human dignity. Therefore, she concluded, discrimination on the ground of transsexualism is also a contravention of section 4 of the Québec *Charter*, which provides that everyone has the right to the safeguarding of his or her dignity. The Tribunal rejected the center's contention that being a nontranssexual was a BFOQ for the job of a youth worker and since transsexuals are protected in the Charter, the defendant was found guilty of impermissible job discrimination. The Tribunal awarded M.L. \$1,750 for the salary he would have earned if his contract were renewed, and \$4,000 in damages for injury to his dignity.

A case in British Columbia resulted in that Tribunal definitively concluding that transgender discrimination falls under the rubric of sex discrimination. In *Tawni Sheridan v. Sanctuary Investments Ltd. (d.b.a. B.J.s Lounge)*,¹⁹ where a male to female transsexual was denied entry into a bar because her photo ID did not match her appearance. Sheridan was

¹⁸ *M.L. v. Maison Des Jeunes*, (No. 2) 33 **C.H.R.R.** D/263 (Trib. Qué.), 1998.

¹⁹ *Sheridan v. Sanctuary Investment Ltd.*, [1998] 18 **B.C.H.R.T.D.** 464, [1999] 33 **C.H.R.R.D.** D/467.

undergoing the required period of time in which she was to live and dress as a woman as a precondition to her sexual reassignment surgery.

One of the common problems that transsexuals and transitioning individuals encounter is harassment when using the bathroom appropriate for their external appearance. Sheridan was no exception since she was subjected to harassment by the management for using the women's restroom. This happened to be a lesbian bar and the patrons who were complaining about Sheridan's choice of restroom were other woman who objected to her using the women's restroom because she was not a "real woman".²⁰ She filed a sex discrimination case and it was the British Columbian Tribunal's task to determine whether the Charter's category of discrimination based on sex included transgenderism.

The Tribunal used a couple of Canadian decisions as well as drawing upon American cases in trying to make the determination. The Tribunal reasoned that since the statute was a Human Rights statute meant to further human rights, then the construction of gender had to be a liberal construction so as not to exclude those individuals whose biological sex was not in congruence with their gender identity.²¹

"Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy (as in *P. v. S.*), or because male-to-female transsexuals are regarded a subgroup of females (and vice versa) (as in *Maffei*), the result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex."²²

It was the Tribunal's contention that if someone is in the state of transition to another gender, then that individual should be considered the gender that he or she is presenting to the public. Therefore, they round that the washroom policy discriminated against individuals who were undergoing transition. This view of the transgendered is much more progressive and inclusive ten years ago than the current U.S. case law is now.

B. The United Kingdom

In the Great Britain, there seems to be a strict interpretation of gender as reflected by actual biological sex when it comes to paternity or marriage issues, but a broader interpretation is used when a transsexual is discriminated against in the workplace. For example, in the groundbreaking case of *P. v. S. Cornwall County Council*²³ held that gender reassignment surgery is a matter of "sex" and hence any discrimination in the workplace in relation to such reassignment surgery would constitute prohibited sex discrimination.²⁴

In this particular case, P had decided to have gender reassignment surgery going from male to female and as part of that process, was required to live as a female for a specified period of time (known as a "life test"). P informed her employer, the defendant, of her decision to go forward with the sex reassignment surgery, and the life test requirements. Prior to her final

²⁰ *Id.* at 464

²¹ *Id.* [1999] 33 *B.C.H.R.T.D.* at para. 77.

²² *Id.* at para. 93.

²³ Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 *E.C.R. I-2143* (E.C.J.).

²⁴ Grenfell, Laura. *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*. 15 *Yale J.L. & Feminism* 51, 2003.

surgery she was terminated. P claimed it was due to sex discrimination, but the English Industrial Tribunal heard the matter but concluded the case saying that transsexual discrimination was not covered under the United Kingdom Sex Discrimination Act.²⁵ It was their contention that only discrimination based on biological sex was prohibited. Since the Tribunal concluded that P would have been treated in the same way even if she were biologically female, the Tribunal felt that she would be treated the same and thus there was no discrimination.

The case went to the European Court of Human Rights where it was to be determined if P's dismissal was a violation of Article 5(1) of Directive 76/207/EEC, which provides that "[a]pplication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."²⁶ The Court interpreted the Directive extremely broadly to ensure equality not just based on biological sex but also to transsexuals or those in transition seeking gender-reassignment surgery.²⁷ So, at least in the workplace, the EEC view of discrimination is much more inclusive than that in the U.S.

C. New Zealand

Even in New Zealand there was an active effort at getting an amendment to Section 21 of the Human Rights Act of 1993 which was known as the Human Rights (Gender Identity) Amendment Bill of 2004 to protect transsexuals. It states:

“...gender identity, which refers to the identification by a person with a gender that is different from the birth gender of that person, or the gender assigned to that person at birth, and may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description.”²⁸

Unfortunately, the amendment was withdrawn with the official explanation of the Crown Law Office was that “[t]here is currently no reason to suppose that ‘sex discrimination’ would be construed narrowly to deprive transgender people of protection under the HRA.”²⁹ It was the Crown's contention that protection against gender identity discrimination was included in the

²⁵ *Id.*, at footnote 85. Grenfell notes that after the decision in this case, “the U.K. introduced the Sex Discrimination (Gender Reassignment) Regulations 1999 (No. 1102 of 1999) pursuant to §2(2) of the European Communities Act 1972. They are intended to extend the Sex Discrimination Act 1975 (SDA) to cover discrimination on grounds of gender reassignment. They provide an exception where a person's sex is a genuine occupational qualification for that job and the employer can show that his/her treatment is reasonable.” So, while the case itself may have had limited impact on the European Community, it certainly provided the United Kingdom with an incentive to rethink the issue of gender and then to commit that broader conceptualization to statute.

²⁶ *Id.*, at 70 quoting Article 5(1) of the **Council Directive 76/207/EEC**, 1976 O.J. (L 39/40) 2.

²⁷ *Id.*, at 71 quoting *P. v. S.*, 1996 **E.C.R.** I-2143 at 2165.

²⁸ McDonald, Elizabeth, New Zealand Public Law and their Contributors. Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993, 5 **N.Z. J. Pub. & Int'l L.** 301, 2007

²⁹ *Id.*, quoting Crown Law Office, to the Attorney-General “Opinion on the Human Rights (Gender Identity) Bill” (2 August 2006) Opinion, para 30.

Act's protections regarding sex discrimination; however, the Bill's author did not view it that way. In fact, the Explanatory Note of the Bill states that gender identity:

'may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description.' This is intended to ensure that the labels that individuals may place upon themselves, or that which may be placed upon them by others, do not determine whether that individual comes within the provisions of the Act...Gender identity is defined as more than simply dressing in the clothes of the opposite gender.³⁰

The Crown's interpretation seems to make it clear that the construction of the term sex must be interpreted broadly and to include the transgendered.

It seems clear that at least in the employment arena, many English-speaking countries have acknowledged that gender is more than one's biological gender and those with gender identity disorder should be protected against discrimination. The question remains as to whether the United States will adopt Federal protections for the transgendered as other countries. This past November, the Employment Non-Discrimination Act passed the House of Representatives and might represent a step in the right direction.

D. Australia

Australia has some of the most extensive protections for the transgendered. The national law that applies to protection of the transgender is the Human Rights and Equal Opportunity Commission Act of 1988. (HREOC) A complaint falling under this law must be made in writing to the Discrimination Commission which will investigate the complaints if it is determined it has merit and if it does, an attempt will be made to conciliate. If the complaint is not dismissed after the investigation, the complaint is forwarded to the Federal Attorney General who will table the report in the Parliament. Discrimination is defined as any breaches of human rights by any Commonwealth body or agency and discrimination in employment on the basis of race, color, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference, trade union activity.

The Australian Capital Territory Discrimination Act of 1991 (ACT) provides protection of the transgendered in employment. Complaints filed under this particular act are submitted to the Discrimination Commissioner where they will be an investigation and possible conciliation. If conciliation fails, then the matter is heard by the Discrimination Tribunal which will render an enforceable decision on the matter. There are a variety of state and territory laws which protect the rights of the transgendered as well.³¹

In New South Wales, anti-discrimination law (Anti-Discrimination Act 1977, as amended) covers being transgender, being perceived as transgender, and associating with a

³⁰ Human Rights (Gender Identity) Bill, viewed at <http://www.georginabeyer.com/parliament/genderidentitybill.htm> last viewed on March 29, 2008.

³¹ The states and territories which specifically protect gender identity in employment are: New South Wales, Queensland, Victoria. Other laws which protect discrimination against sexual orientation are: Northwest Territory (sexuality), South Australia (sexuality), Western Australia (sexual orientation and gender history),

transgender person. Transgender here means living, having lived, or wanting to live, as a member of the opposite gender to your birth gender. No surgery or hormone treatment is required and it does not matter why you are transgender (i.e. no diagnosis required – the definition is non-medical). Intersex people are also explicitly included regardless of legal gender at birth. For example, in *Farmer v. Dorena Pty*³² Sara Farmer was a male to female transsexual was seeking employment by using the Dorena Employment agency. She had even changed her name. She changed her identification on official documents, for example, her drivers license, Medicare card and her bank-keycard. The Social Service Department, where she registered for unemployment benefits refused to change her sex on its records although it changed her name to her new female name. The Department advised the Applicant that legislation prevented the Department from making the change until she had had sex re-assignment surgery, which she had not undertaken. Nonetheless, for all intents and purposes, Farmer looked and was identified as being female.

She called Mr. Foley to ask his opinion as to whether or not her employment opportunities would be harmed because of her transgendered status and recounted some of her previous difficulties in seeing employment with United Distillers. Foley proffered his opinion that it would not and said that he knew folks at United and would talk to them. Farmer did not hear back from Foley and after one week phoned him to inquire the status of his inquiry. He said that he was too busy at the time but promised to do so. Once again he failed to respond to her and upon her seeing a position available in the paper called Foley to ask about the position. He basically told her that the prospective employer was interested in hiring a woman with small children since the schedule of the job was suitable for a woman with children. When Farmer stated that she was a woman and was interested in part-time work, Foley responded that they employer wanted a “woman – a vanilla woman”.

Farmer filed a complaint with the Anti-Discrimination Board of New South Wales (NSW). The first thing the Tribunal had to decide was whether Farmer was a protected individual under the law – a transgendered person—when the incident happened. It was concluded that Farmer met the definition of a transgendered employee under Section 38(a) which states:

A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a recognized transgender person:

- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

³² *Farmer v Dorena Pty Limited* [2002] NSWADT 81 (17 May 2002).

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person."³³

The Tribunal found that Farmer fell under the protection of the Act since “she was a person who identifies as a member of the opposite sex by living as a member of the opposite sex. Although she had not submitted to any surgical procedure to effect a change of sex, she had affected sufficient indicia of a female such that she herself identified as a female and she would have been identified as a female.”³⁴

In determining whether discrimination has occurred the Tribunal referred to Section 31B(1)(a) which states:

"38B What constitutes discrimination on transgender grounds:

(1) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on transgender grounds if, on the ground of the aggrieved person being transgender or a relative or associate of the aggrieved person being transgender, the perpetrator:

(a) treats the aggrieved person less favorably than in the same circumstances (or in circumstances which are not materially different) the perpetrator treats or would treat a person who he or she did not think was a transgender person or who does not have such a relative or associate who he or she did not think was a transgender person, or ..."

It was clear that Farmer’s transgender status was apparent to Foley since she specifically told him that she was having difficulty in obtaining employment because of her transgendered status and her transgendered status was listed on her resume which was sent to Foley. Furthermore, it was clear that Foley made no attempt to find Farmer work as he had promised and that his comment regarding a “vanilla woman” could clearly indicate he was referring to a non-transgendered female and was not, in Mr. Foley’s assertion, a reference to a woman without “complications”. Both facts persuaded the Tribunal that Ms. Farmer’s employment application was treated less favorably than other non-transgendered clients and ordered the defendant to pay \$6,000 (AUD).

Victoria law (Equal Opportunity Act 1995) bans gender identity discrimination, with a similar definition to New South Wales. Other states’ and territories’ law uses the term transsexuality, e.g. in South Australia, where the definitions are: "transsexual" means a person of the one sex who assumes characteristics of the other sex; "transsexuality" means the condition of being a transsexual. However, this was not always the case. The Equal Employment Act was amended to include protections for the transgendered and it was primarily due to one case which led to that amendment. The case was that of *Menzies v. Waycott*³⁵ where Menzies was

³³ Id. at paragraph 3.

³⁴ Id. at paragraph 16.

³⁵ Menzies v Waycott & Anor [2001] VCAT 415 (31 March 2001)

terminated from her employment because of her transsexualism was in breach of s. 14(b) of the Equal Opportunity Act 1995 ("the EO Act"). The Complainant contends that one or more of the following attributes set out in Section 6 of the EO Act encompass transsexualism: "sex", "physical features" and/or "impairment". Direct discrimination is defined in Section 8 of the EO Act, and indirect discrimination is defined in Section 9.

The Respondents (Waycott) claim that Ms Menzies' employment was terminated because she was performing poorly on a large contract and putting her employer at considerable financial risk. The Respondents deny that Ms Menzies' transsexualism had anything to do with the decision to terminate her employment.

The Tribunal task for Ms Menzies is to prove, on the balance of probabilities, that the Respondents subjected her to discrimination. While the Complainant contended that she was subjected to several instances of discrimination (under Section 14 of the EO Act) in relation to her employment with Astrovac, her most serious claim was that her employment was terminated as a result of unlawful discrimination. The court focused on the standard of proof that Ms Menzies would have to provide in order to prove her claim "on the balance of probabilities."

The Tribunal relied on *Miller v Minister of Pensions*³⁶[1947] 2 ER 372 at 374, Denning J. (as he then was) spoke in the following terms of the degree of cogency which evidence must reach in order that it may discharge the legal burden of proving a case on the balance of probabilities:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not".³⁷

When applying this standard, the Tribunal made note of the seriousness of the charge and that an allegation of discrimination on the grounds of sex, physical features and/or impairment in the area of employment, is a serious matter. If the claim is found proven, this may have an adverse effect on the reputation and standing in the community of the Respondents. This does not make the burden of proof heavier or different from that ordinarily applied in civil cases. It is, however, a factor to be taken into account.³⁸

The Tribunal noted three questions that were essential to determine the outcome in the case:

- (a) Was Ms Menzies' transsexualism a substantial reason for the decision to terminate her employment?
- (b) If yes to (a), does transsexualism properly form the basis for a claim of discrimination under the [EO Act](#)?
- (c) If yes to (a) and (b), what orders should the Tribunal make?³⁹

³⁶ *Miller v Minister of Pensions* [1947] 2 ER 372 at 374

³⁷ *Menzies supra* note 35 at paragraph 7.

³⁸ *Id.*, at paragraph 8. Relying on *Briginshaw v Briginshaw* [1938] HCA 34; [1938] 60 CLR 336 at 360 - 361 per Dixon J).

³⁹ *Menzies supra* note 35 at paragraph 9.

Regarding (b) above, Menzies claimed that because the Respondents accorded her less favorable treatment on the basis of her transsexualism, they were engaging in unlawful discrimination based on one or more of the following attributes set out in section 6 of the EO Act: sex, physical features and/or impairment.⁴⁰

For many years, Mr. Ronald Menzies (as the Complainant was known prior to his transition to a female) worked for small companies (Central Vac, Central Vac International Pty. Ltd. and Central Hivac International Pty. Ltd. ("Central Hivac")), which designed, manufactured and supplied central vacuum cleaning systems to the domestic, commercial and industrial markets. Mr. Menzies did a significant amount of work supplying central vacuuming systems to industry which were specifically designed to deal with the dust and occasional spills generated in manufacturing processes.

Another company Astrovac was interested in purchasing the business of Hivac which was the company that Menzies had worked for. One of the principle reasons that Astrovac wanted to acquire Central HiVac was due to the expertise of Menzies, who was presenting himself as a man at that time. Menzies had been friends with Mr. Waycott, who was the Managing Director of Astrovac, had known Menzies for over twenty-five years and was aware that Menzies was in the process of gender transition.⁴¹

Eventually, Astrovac acquired Central Hivac. Menzies was retained and given a fair salary. When he commenced his employment at Astrovac he was in well into his transition as a woman as required by the Gender Dysphoria Clinic of the Monash Medical Centre ("the Clinic"). As time went on Mr. Martin Hicks, who was a senior employee at Astrovac, and Mr. Waycott had discussed Menzies "situation" and the ways in which they could handle the unusual situation. Hicks went to visit Menzies at home and said that My Waycott agreed that she should work from home from now on. She refused and so other employees were apprised of Menzies 'situation and some accommodations were made for her transition (such as allowing her to use the women's restroom). Menzies had brought in a substantial amount of money during her employment with Astrovac (\$685,941).⁴²

Ms. Menzies took some time off to have her sex reassignment surgery. Upon her return, Mr. Hicks had her work with him on a big contract for a Phillip Morris facility. However, over time, Mr. Hicks asserted that she was not performing competently on the Phillip Morris contract and was subsequently dismissed. Ms. Menzies claimed that she was dismissed because she was a transsexual. Waycott and Hicks denied this saying that there were a number of occasions where Ms. Menzies dressed inappropriately (too flamboyant and dressed as a man on one occasion); explaining to new clients that she was transsexual; and a concern over her potential safety when working at one particular plant. Ms. Menzies stated that Mr. Waycott had counseled her that she would make more money if she lived and dressed as a man. Furthermore, she contended that the atmosphere at Astrovac was anything but welcoming. Ms. Menzies was referred by Waycott as "he" and "boy" or "Ronnie".⁴³ When Menzies had his implants, many workers asked him to "show us your tits". She reported being excluded from the meetings and received no visits or well wishes from employees when she was at the hospital.⁴⁴

⁴⁰ Id. at paragraph 10.

⁴¹ Id. at paragraph 16.

⁴² Id. at paragraphs 18-32.

⁴³ Id. at paragraphs 64-69

⁴⁴ Id.

She was dismissed from Astrovac because of her poor performance on the Phillip Morris contract and the letter was dispatched to Menzies' house right after she returned home from the hospital.⁴⁵ However, the letter did not contain specifics and asked Menzies to meet Waycott in his office. Waycott eventually met with her and terminated her employment saying that the handling of the Phillip Morris contract was a mess (although Waycott had never tried to investigate Menzies' side of the issue). However, evidence from those working on the contract presented evidence that Menzies' performance was satisfactory and that many of the statements made by Hick's regarding the unsatisfactory performance of Menzies' was incomplete and misleading and the Tribunal concluded that Menzies would have been able to successfully complete the Phillip Morris Contract.⁴⁶

When the Tribunal weighed the evidence regarding the less than welcoming atmosphere of the work environment, it was concluded that while most individuals were aware of Menzies transsexualism, the employees didn't believe that Menzies would follow through with the sex reassignment surgery.⁴⁷ The evidence pointed to Mr. Waycott exhibiting a significant amount of unease when he was around Ms. Menzies.⁴⁸ Therefore, it was the finding of the Tribunal that Ms. Menzies' had been less favorably treated due to her transgendered status.⁴⁹ However, unlawful discrimination will only occur if transsexualism falls within one or more of the "attributes" set out in section 6 of the EO Act. The Tribunal stated that Ms. Menzies was a victim of direct discrimination and it was left to determine whether transsexualism could be a proper cause of action under the EO Act. The Equal Opportunity Act currently does not prohibit discrimination on the basis of a person's gender identity. This undermines the objective of the Act to "eliminate, as far as possible, discrimination against people ...".⁵⁰

The present case must be decided on the law as it existed in March 1998 when Ms Menzies' employment was terminated, a substantial reason being her transsexualism. In considering whether one or more of the attributes of "sex", "physical features" and/or "impairment" is or are capable of including transsexualism, what guidance (if any) can be gained from the fact that a recent amending Act has inserted the attribute of "gender identity" into the EO Act? "Gender identity" in the amending Act is defined to include transsexualism⁵¹ (Section 4(a) of the *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000*).

185. The question for consideration is whether the meaning of original provisions (the attributes of "sex", "physical features" and "impairment" and whether one or more include transsexualism) should be interpreted in the light of an amendment (which adds "gender identity" as an attribute under the EO Act, being an attribute defined to include transsexualism).

186. The Tribunal relied on several cases to determine whether the later amendment to the Equal Opportunity Act should be considered in a case where the incident occurred prior to the amendment. In *Grain Elevators Board (Victoria) v Shire of Dunmunkle*⁵², Dixon J. considered

⁴⁵ *Id.* paragraphs 118-121.

⁴⁶ *Id.* at paragraph 110 and 154.

⁴⁷ *Id.* at paragraph 168.

⁴⁸ *Id.* at paragraph 169.

⁴⁹ *Id.* at paragraph 172.

⁵⁰ *Id.* at paragraph 189.

⁵¹ *Id.* at paragraph 184 citing (Section 4(a) of the Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000).

⁵² Grain Elevators Board (Victoria) v Shire of Dunmunkle [1946] **HCA** 13; (1946) 73 **CLR** 70,

that it was proper to take into account an amendment (passed too late to apply to the case at hand) when interpreting an earlier provision. Dixon J. observed:

"Although the provision was passed too late to apply to the present case, I think that it may be considered on the question of interpretation. It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile."⁵³

In Thompson v J.T. Fossey Pty. Ltd. (No. 1)⁵⁴ the Federal Court was called upon to interpret Section 53(a) of the Trade Practices Act 1974. Franki J. declined to look to the words of a 1997 amendment to assist in interpreting the original provision, saying:

"There is some considerable authority for the proposition that, if the words of a statute are ambiguous, it is permissible to examine a later statute to determine whether it throws any light upon the construction of the earlier statute. However, it seems that a condition which must exist before this is permissible, even where the later Act contains a provision that it is to be construed as one with the earlier Act, is that the meaning of the earlier statute must be ambiguous.

I cannot see why the prerequisite of an ambiguity should not apply when it is sought to use an amendment to an Act to assist in the interpretation of the original Act. I think a court should be careful not to assume that the legislature has not amended the Act for the purpose of clarifying it in the eyes of the layman."⁵⁵

When considering the question of whether transsexualism is covered by the attributes of "sex", "physical features" and/or "impairment", a question likely to arise - particularly in the context of "impairment" - is whether a word or words used in legislation should be given their current meaning or the meaning the word or words had at the time the legislation was enacted. The modern approach is summarized by the expression, "an Act is to be deemed to be always speaking".⁵⁶

The Tribunal then progressed to determining whether the condition of transsexualism is covered by one or more of the attributes relied upon Ms. Menzies by referring to the dictionary definitions of transsexual.

Given that "sex" is not defined in the EO Act, I propose to refer to dictionary definitions and to the relevant Second Reading Speech. The *Macquarie Dictionary* defines "sex" as:

"1. the character of being either male or female: *persons of different sexes*. 2. The sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences. 3. the

⁵³ Menzies supra note 35 at paragraph 86

⁵⁴ Thompson v J.T. Fossey Pty. Ltd. (No. 1) (1978) 20 ALR 496.

⁵⁵ Id at paragraph 501-502.

⁵⁶ Menzies supra note 35 at paragraph 190 citing Chappell and Co. Ltd. v Associated Radio Co of Australia Ltd. [1925] VLR 350.

instinct or attraction drawing one sex towards another, or its manifestation in life and conduct. 4. Men collectively or women collectively: *the fair sex ...*".⁵⁷

The *Shorter Oxford English Dictionary* defines "sex" as:

"1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (esp. of the human race) viewed collectively. 2. Quality in respect of being male or female ... 3. The distinction between male and female in general. In recent use: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned..."⁵⁸

In my view, "sex" in the EO Act has the straightforward meaning of the state of being male or the state of being female. The attribute of "sex" is included in the EO Act to prohibit discrimination on the basis of a person being a male or on the basis of the person being a female. 199. This means, in my view, that transsexualism is not covered by the attribute of "sex" in section 6(k) of the EO Act because transsexualism is "the condition of one who firmly believes that he (or she) belongs to the opposite sex to his (or her) biological gender."⁵⁹

The next question that was addressed by the Tribunal was whether **the** attribute of "physical features" in section 6(f) encompass transsexualism? Menzies relies on the bodily characteristics associated with her transition to gender reassignment surgery and thereafter including breast implants, alterations to her voice and the absence of male sex organs. She also relies on the fact that while she lives and functions as a female, she retains certain features of her physical gender.⁶⁰ 202. "Physical features" is defined in section s. 4 of the EO Act as meaning "a person's height, weight, size or other bodily characteristics."⁶¹

A 1995 amending Bill proposed the inclusion of the attribute of "physical features" in the Act. In the Second Reading Speech, the then Attorney-General said:

"Victoria is the first jurisdiction in Australia to prohibit discrimination on the basis of a person's physical features, which are defined in the bill to mean a person's height, weight, size or other bodily characteristics. Society places too much emphasis on a person's bodily characteristics, over which the person may not have much control. For instance, a person may not have any control over a birthmark across his or her face. A person's physical features should not be used to judge the suitability of the person for a job. Ultimately, such judgment should be based on performance criteria. If a person is the best qualified person and can perform the required duties, the fact that he or she is of a certain height or weight should be irrelevant. The attribute of physical features is not intended to

⁵⁷ *Id.* at paragraph 190 citing The Macquarie Dictionary (Second Revision, Reprinted 1990) at page 1553.

⁵⁸ *Id.* at paragraph 196 citing The Shorter Oxford English Dictionary (1973, Reset 1980) at page 1958.

⁵⁹ *Id.* at paragraph 199 citing Concise Medical Dictionary, Oxford University Press, 4th ed., 1994, p. 672).

⁶⁰ *Id.* at paragraph 200.

⁶¹ *Id.* at paragraph 202.

include such things as tattoos or body piercing which a person may choose to acquire."⁶²(Hansard, Assembly, 4 May 1995, p. 1251).

It is apparent that the attribute of "physical features" is meant to encompass people's physical features, as that term is normally understood. Ms Menzies firmly believed that she was female and, as a consequence, had decided to take steps to give effect to her belief. In my view, the concept of transsexualism is not encompassed by the attribute of "physical features" in section 6(f).⁶³

In view of the words used in (d)(i) of the definition of "impairment", and bearing in mind the dictionary definitions of the key terms, the Tribunal reached a preliminary view that transsexualism amounts to a failure by a part of the body to function properly and that the failure has a mental component. This is because a transsexual, in this case Ms Menzies, has the physical body of one sex but considers they are truly of the opposite sex, and so firmly is this conviction held that the person may take significant steps, including surgery, to try and mend the dissonance between mind and body. Therefore, the condition of transsexualism experienced by Ms Menzies amounts to a "malfunction of a part of the body" and that the condition has a mental component.⁶⁴

Menzies also included that she was discriminated on the basis of her impairment – her transsexualism. "Impairment" was proposed for inclusion in the EO Act as an attribute in 1982 which included: "The word "impairment" is broadly defined in the legislation and includes both a mental, as well as a physical, incapacity."⁶⁵

The only medical evidence in this case was given by Dr Herbert Bower, a psychiatrist called by the Complainant. Dr Bower is a consultant psychiatrist associated with the Gender Dysphoria Clinic of the Monash Medical Centre. He has had a long involvement with patients who are and was one of Menzies' treating physicians.⁶⁶

Dr Bower emphasized that in his view, transsexualism is a biological disorder.⁶⁷ He testified that a biological disorder is a disorder i.e. an abnormality of function, which is based on some subtle or major change in the anatomical or sub-anatomical aspects of the body.⁶⁸ To describe gender identity disorder as a biological disorder "does not mean that it is not properly characterized as a mental disorder. Any disorder involving an abnormality in behavior i.e. a divergence from normal, can be as characterized as there is a mental manifestation of the disorder."⁶⁹

The Tribunal interpreted Dr. Bower's evidence to be:

that Ms Menzies' transsexualism had a biological basis; that biological factors affected Ms Menzies' mental processes so that she had a deeply-held belief that despite being a

⁶² Id. at paragraph 203 citing Hansard, **Assembly**, 4 May 1995, p. 1251.

⁶³ Id. at paragraph 204.

⁶⁴ Id., at paragraph 205.

⁶⁵ Id. at paragraph 210 citing Hansard, **Assembly**, 1 December 1982, p. 2288.

⁶⁶ Id. at paragraph 212.

⁶⁷ Id. at paragraph 213.

⁶⁸ Id.

⁶⁹ Id.

male physically, she was more truly a person of the female sex; and that Ms Menzies had no mental or psychological disease or disorder of the kinds regularly seen by psychiatrists (such as schizophrenia or a depressive disorder). I understood Dr Bower to be saying that a person such as Ms Menzies functions normally, save for a deeply-held belief which defies logic - and which the transsexual knows defies logic - that the person's sex is really the opposite of that represented by the person's physical body.⁷⁰

Dr Bower said he would be reluctant to say that a transsexual had been "cured" following completion of a transition program because "cure is something total and absolute and I think in human affairs generally and [in] biological affairs, one can never aim or achieve 100 per cent but one has converted that person from an unhappy and maladjusted one into an adjusted and well-functioning [one]."⁷¹

The evidence of Dr Bower swayed that Tribunal to find that Ms Menzies' transsexualism amounts to a "malfunction of a part of the body." On Dr Bower's evidence, the condition has a biological basis resulting in a lack of synchronism between the psychological gender identity of the person and the person's physical gender. There is, in other words, a biological malfunction in a transsexual person and the malfunction has psychological manifestations.⁷²

Menzies charged that the Act had been violated based on actual and imputed impairment. The Tribunal concluded, "In relation to actual impairment, transsexualism is a recognized mental disorder. Further, it can be characterized as a malfunction of a part of the body and/or a malformation of a part of the body."⁷³

The Tribunal added:

Still further, s. 7[2][b] defines discrimination on the basis of an attribute to include discrimination `on the basis of a characteristic that a person with that attribute generally has'. A characteristic of gender identity disorder is that the person seeks a physical appearance in harmony with their psychological gender. This includes physical changes such as breast implants, alterations to the voice and ultimately gender reassignment surgery. But it also includes living and functioning in accordance with the psychological gender [including in appearance, dress and lifestyle] while inevitably retaining some features of the physical gender. In other words, there will however almost always invariably be some elements of the transsexual 's physical appearance which belie the psychological gender - and this is a characteristic of gender identity disorder even after surgery.⁷⁴

The Respondents charged that as far as imputed impairment, they regarded Menzies' determination to live and dress as a woman and to proceed to gender reassignment surgery as a psychological abnormality which they counseled her to reconsider. Further, they regarded her physical state, both before and after surgery, as an abnormality."⁷⁵

⁷⁰ Id. at paragraph 215.

⁷¹ Id. at paragraph 217.

⁷² Id. at paragraph 218.

⁷³ Id. at paragraph 219.

⁷⁴ Id.

⁷⁵ Id.

The Tribunal states:

“In my view, the Respondents' submission in (b) above over-simplifies Dr Bower's evidence. I consider the following statement by Dr Bower (quoted earlier) to accurately represent his view:

‘To describe gender identity disorder as a biological disorder does not mean that it is not properly characterized as a mental disorder. Any disorder involving an abnormality in behavior i.e. a divergence from normal, can be so characterized as there is a mental manifestation of the disorder.’ (Ex. G).

In my view, Ms Menzies' transition program concluded at the end of the period of recuperation following surgery, that is, on or about 4 May 1998. In these circumstances, I do not accept the Respondents' submission that at the time Ms Menzies' employment was terminated, she was no longer a person with the attribute of impairment. In any event, I note that s. 7(2)(a) of the EO Act is relevant in this context.⁷⁶

When one considers the definition of "impairment" in section 4 of the EO Act, the term is defined to mean:

"...
(d) malfunction of a part of the body, including -
(i) a mental or psychological disease or disorder;⁷⁷
..."

It was concluded that transsexualism constitutes a "malfunction of a part of the body".

“The word "malfunction" means to fail to function normally. In a transsexual person, there is a failure of a part of the body to function normally as the essence of the condition is dissonance or maladjustment between the person's sex as apparent from their physical body, and the person's sense of sexual identity.

If this analysis is incorrect, the latter words quoted ("... including a mental or psychological disease or disorder") are relevant. Dr Bower's evidence was that transsexualism has a biological basis that produces a psychological manifestation, that is, a firmly-held belief on the part of a transsexual that he/she is really of the opposite sex to that represented by his/her body. In my view, this amounts to a mental or psychological disorder within the meaning of those words in the definition of impairment. In saying this, I am relying on the current, ordinary meaning of the words in the context of an Act aimed at promoting equal opportunity and eliminating discrimination on the basis of certain attributes.”⁷⁸

Given that the EO Act may be described as remedial or beneficial legislation, such legislation should be interpreted "generously" consistent with the fair meaning of the language

⁷⁶ Id. at paragraph 221.

⁷⁷ Id.

⁷⁸ Id. at paragraph 227-8.

used. Bearing this in mind, and bearing in mind the objectives of the Act, particularly those articulated in section 3(a) and (b), the Tribunal considered:

...there are clear grounds for finding that the condition of transsexualism is an "impairment" within the meaning of that term in s. 4 of the EO Act. I find, therefore, that the condition of transsexualism amounts to a "malfunction of a part of the body" in the definition of "impairment" in s. 4. I also find that the condition of transsexualism is "a mental or psychological ... disorder", that phrase being a sub-category of the term "malfunction of a part of the body"⁷⁹

.Given that I consider that the condition of transsexualism fits within the ordinary meaning of the words used in para. (d) of the definition of impairment, it is not necessary to turn for guidance to the amending legislation (the *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000*) which adds "gender identity" as an attribute. I simply observe that from time to time, as was mentioned above in paras. 188 - 189, amending legislation clarifies certain matters or puts them beyond doubt.⁸⁰

It was found that Mr. Waycott contravened section 14(b) of the EO Act by terminating Ms Menzies' employment on the basis of the attribute of impairment (that being Ms Menzies' transsexualism). Menzies' transsexualism was the direct reason why Waycott did not seek out Menzies' explanations for when Mr. Hicks reported to Mr. Waycott that the Phillip Morris job was "in a parlous state". Mr. Waycott decided to terminate Ms Menzies' employment without according her basic fairness, and he took this course because of Ms Menzies' transsexualism.⁸¹

As for Mr. Hicks, it was determined that he subjected Ms Menzies to a detriment, when he presented Mr. Waycott with an inaccurate and damaging report regarding Ms Menzies' management of the Phillip Morris contract. The report, stating that the contract was "in a parlous state", led to Mr. Waycott terminating Ms Menzies' employment - with neither Mr. Waycott nor Mr. Hicks according Ms Menzies' basic fairness by asking her for an explanation about the alleged deficiencies in her management of the contract.⁸²

The Tribunal concluded that Menzies' transsexualism was the primary reason for her termination; that transsexualism properly forms the basis for a claim under the EO Act; and that the Tribunal will have to decide what orders should be made.⁸³ The case was groundbreaking in that transsexualism was specifically recognized as grounds for discrimination.

It would appear that many countries who share a common history of legal jurisprudence are much more progressive in their protection of transsexuals than the United States. However, there have been recent efforts at putting forward a bill which would afford the same types of protections known as the Employment Non-Discrimination Act (ENDA).

VIII. Employment Non-Discrimination Act (ENDA): Statutory Progress for the Transgendered in the United States.

⁷⁹ Id. at paragraph 230.

⁸⁰ Id.

⁸¹ Id. at 234.

⁸² Id. at paragraph 234-5.

⁸³ Id. at paragraph 236.

There was a glimmer of hope that the Employment Non-Discrimination Act (ENDA) might finally offer some federal protection for transgendered employees against discrimination in employment settings. Several forms of ENDA had been introduced as a way of protecting gay, lesbian and bisexual individuals and the earlier version was defeated by only one vote in the Senate in 1996.⁸⁴ Two other versions of the bill, H.R. 2015, was introduced by Representatives Frank, Shays, Baldwin and Pryce which included protections against individuals due to their sexual orientation and gender identity on April 24, 2007. In addition, Representative Frank introduced H.R. 3685 on September 27, 2007 without the inclusion of gender identity and this version of the bill passed the Education and Labor Committee on October 18, 2007.⁸⁵

On November 7, 2007, the House of Representatives passed the H.R. 3685, the Employment Nondiscrimination Act, by a vote of 235 to 194. However a group known as the Equality Federation⁸⁶ felt that this bill did not do enough to ensure that transgendered individuals would also be protected and so joined with 40 state organizations as well as 350 national, state and local gay, lesbian, bisexual and transgendered groups to form the ENDA Coalition which worked together to convince Congress that ENDA should include protections for transsexuals and transgendered persons.

To that end, Representative Tammy Baldwin (D-Wisconsin) was able to secure an agreement from the Democratic leadership to introduce House Amendment 884, an amendment to H.R. 3865 that would restore gender identity protection to ENDA which had been present in the original H.R. 2015.⁸⁷ Unfortunately, the bill was withdrawn by unanimous consent the same day it was introduced on November 7, 2007.⁸⁸ So, although the Bill passed the House without gender identity protection, various groups have vowed to reintroduce the amendment to ensure that the transgendered will not be excluded from ENDA.

The battle over whether the Federal government will ever extend specific protections against discrimination to transgendered persons will continue for sometime, however, both the political and the global climate are moving in the direction of providing such specific protections and it would behoove the employer to proactively make some changes in anticipation of the inevitable. Since the transgendered will eventually gain protection, employers should concentrate on rectifying several areas where discrimination against the transgendered is most common.

⁸⁴ Manley, Roslyn. (17 June 2003) New "Unified" Bill to Replace ENDA: A Left Coast Perspective TG Crossroads. Accessed 29 March 2008 at

<http://www.tgcrossroads.org/news/?aid=740>.

⁸⁵ Eleveld, Kerry. (29 September 2007) ENDA to Be Separated Into Two Bills: Sexual Orientation and Gender Identity. **The Advocate**. Found at http://www.advocate.com/news_detail_ektid49439.asp . Accessed on March 30, 2008.

⁸⁶ United ENDA <http://www.unitedenda.org/> last visited March 29, 2008.

⁸⁷ Id.

⁸⁸ Representative Tammy Baldwin, at <http://www.tammybaldwin.house.gov> <http://www.tgcrossroads.org/news/?aid=740> . referring to **House Report 110-422**. Last visited March 30, 2008.