



Transgender Issues in the Law

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Individuals who are transgender or who otherwise do not conform to society's gender norms experience widespread discrimination in employment, housing, public accommodations, marriage and family litigation, medical care, prisons, schools, and hate crimes protection. An increasing number of states and municipalities have passed transgender rights legislation, and recent case law has generally favored transgender clients. However, transpeople often continue to be denied basic rights on the national, state, and local level.

Disability and Sex Discrimination Laws

Although transsexuality is recognized as a medical condition, transsexuals are not covered under federal laws that prohibit discrimination on the basis of disability. Both the Federal Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) of 1990 explicitly exclude transsexuals from protection.

Some state disability laws likewise exempt transsexual people, including the statutes of Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, and Virginia. However, state courts or administrative agencies in Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington have ruled that, as a significant physical or mental impairment, transsexuality is a protected disability under state laws. The California legislature has also removed transsexuality from the state's ADA restrictions.

Title VII of federal law prohibits sex discrimination in employment, but courts have historically rejected the application of the law to transgender people. For example, in *Ulane v. Eastern Airlines* (1984), the Seventh Circuit Court held that a transsexual woman who was fired from her job as an airline pilot because she underwent gender reassignment/confirmation surgery was not protected under Title VII, based on the dehumanizing argument that a transsexual is neither male nor female.

However, five years later, in *Price Waterhouse v. Hopkins*, the Supreme Court ruled that a woman who was denied a promotion because her employer considered her to be too masculine could bring a claim under the law, thus creating a more expansive interpretation of Title VII.

Since then, both federal district and circuit courts have applied sex discrimination laws to transgender people and other gender non-conforming individuals. In 2004, in one of the most far-reaching of these cases, *Smith v. City of Salem* (Ohio), the Sixth Circuit Court ruled that a transsexual woman firefighter who was harassed for not being "masculine enough" had legal recourse under the law. The decision was upheld on appeal and strengthened by a similar finding by the court in *Barnes v. Cincinnati* (2005), a case involving a transsexual woman police officer.

One notable exception to the more inclusive understanding of Title VII is *Oiler v. Winn-Dixie* (2002), in which a federal district judge dismissed the suit of Peter Oiler, a truck driver for the grocery chain, who was fired from his job when his employer learned that he occasionally cross-dressed outside of work.

As Title VII has been interpreted to include transgender people in recent years, so too have state sex discrimination laws. Courts or administrative agencies in Connecticut, Hawaii, Massachusetts, New Jersey, and New York have ruled that transgender people are protected under statutes prohibiting sex discrimination.

Transgender Civil Rights Laws

No federal law protects the rights of transgender people in employment, housing, and public accommodations. Until recently, the main lesbian and gay rights group behind the Employment Non-Discrimination Act had even opposed the inclusion of gender identity and expression in the proposed legislation for fear that it would lessen its chance of passage.

As of 2006, only seven states (California, Illinois, Maine, Minnesota, New Mexico, Rhode Island, and Washington) and the District of Columbia prohibit discrimination based on gender identity or expression in employment, housing, and public accommodations (an eighth state, Hawaii, covers just housing and public accommodations).

However, more than 80 cities and counties have enacted ordinances protecting the rights of transgender people. These laws have been passed not only in major urban areas such as Atlanta, Boston, Chicago, Dallas, Houston, New York City, Philadelphia, San Diego, and San Francisco, but also in smaller municipalities such as Covington, Kentucky; Huntington Woods, Michigan; Iowa City, Iowa; New Hope, Pennsylvania; and Peoria, Illinois.

Employment Policies

In 1997, Lucent Technologies became the first major corporation to add "gender identity/expression" to its nondiscrimination policy. A decade later, about one-fourth of the Fortune 500 companies have similarly amended their nondiscrimination policies.

In addition, a rapidly growing number of companies cover all or part of the health care costs of employees who transition from one gender to the other. These corporations include Apple, Avaya, Dupont, IBM, Lucent, and JP Morgan Chase.

Marriage and Family Law

Marriages in which a partner is transsexual rarely become a legal issue in most states as long as both spouses are living and want to stay married. "Legal problems may arise when one spouse dies and the other attempts to collect survivorship benefits or to claim inheritance or other tax benefits that are restricted to married couples," states Shannon Minter of the National Center for Lesbian Rights. "Alternatively, an employer or health insurance company may challenge the validity of the marriage in the context of trying to exclude the spouse from an employer-provided health plan."

While few state courts have ruled on the validity of marriages where one partner has undergone gender reassignment/confirmation surgery, transgender advocates had long believed that transsexuals effectively changed their legal sex by obtaining a new birth certificate and could then marry in their "true" gender. But two recent judicial decisions have called into question whether transsexuals can ever be legally recognized as a gender different from their biological sex at birth.

In *Littleton v. Prange* (1999), a Texas appeals court ruled that gender reassignment/ confirmation surgery and other medical procedures could not change a person's sex, thereby nullifying the six-year marriage of

Christie Lee Littleton, a transsexual woman, because she was born male-bodied.

In 2002, *In re Estate of Gardiner*, the Kansas Supreme Court reached a similar conclusion, invalidating what it considered a same-sex marriage between J'Noel Gardiner and her deceased husband, even though Gardiner had undergone gender reassignment/confirmation surgery years before the marriage.

While the Texas and Kansas courts refused to recognize the new birth certificates of transsexuals, three states--Idaho, Ohio, and Tennessee--deny transsexuals the right to change the sex designation on their birth certificates. As a result, transsexuals who want to get married in these states face a paradoxical legal situation. Same-sex couples can legally marry, if one spouse was born as a different sex, despite the fact that none of the states recognize same-sex marriages. At the same time, a male-female couple in which one partner has had gender reassignment cannot wed. For example, a heterosexual couple in Warren, Ohio, was denied a marriage license in 2003 because the judge knew that one spouse was transsexual.

Transgender people also regularly experience discrimination in family law cases. A number of courts have denied child custody or visitation rights to transsexual or cross-dressing parents or forced them to hide their gender identity in order to have access to their children.

A few judges, however, have recognized that a parent's transgender status, in itself, is not contrary to the best interests of a child. In a groundbreaking decision in 2003, a Florida circuit court judge granted Michael Kantaras, a transsexual man, primary custody of his two children, rejecting his former wife's argument that he was legally female and therefore had no recognizable relationship to the children because the couple was never legally married. An appeals court reversed the judgment, but the two parents subsequently reached a settlement in which Michael Kantaras shares legal custody with the children's mother.

Medical Care

Most private medical plans, many state Medicaid statutes, and federal Medicare explicitly exclude coverage for transsexual surgeries and related treatments, including the cost of hormones, based on the misguided belief that such procedures are cosmetic and therefore unnecessary. Increasingly, though, transgender advocates are successfully challenging the denial of basic health care services to transsexuals by using claim appeal processes and by filing suits against insurers and state Medicaid agencies.

Not only do medical plans often deny coverage for gender reassignment, but many transsexuals are unemployed or underemployed, so do not have insurance in the first place. As a result, a significant number of transsexuals lack access to health care, including proper counseling and medical supervision if they are in the process of transitioning.

Even when transsexuals are able to receive medical treatment, they frequently face discrimination and hostility from health care workers. Consequently, some transsexuals decide to inject silicone or underground hormones, which can contain dangerous and sometimes deadly chemicals, or allow unlicensed individuals to operate on them, often with devastating results.

Prisons

Despite the constitutional right against cruel and unusual punishment, transsexuals who are imprisoned have often been denied access to hormones, even if they are already taking them, and gender reassignment/confirmation surgery. However, in the last few years, several courts have recognized that hormone therapy can be a serious medical need for someone who is transsexual and required prison officials to allow for prescribed hormonal treatments.

Transsexual inmates also face a tremendous risk of physical and sexual violence from guards and other prisoners. In most instances, transsexuals who have not undergone genital surgery are housed with prisoners of their birth sex, which places male-to-female transsexuals, in particular, in grave danger of assault.

Nevertheless, the Supreme Court has largely absolved prison authorities of responsibility for the protection of transsexuals who are incarcerated. In *Farmer v. Brennan* (1994), the justices ruled that prison officials are not liable for violence against a transsexual prisoner unless they have "actual subjective knowledge" that the transsexual inmate is at risk and deliberately fail to intervene.

Schools

Junior high and high schools rarely provide a welcoming environment for students who identify as transgender or who are perceived as gender different. Yet, principals, school boards, and state officials have largely ignored the hostile atmosphere for trans youth. As of 2006, only California, Minnesota, New Jersey, and Washington have laws that ban harassment against students in public schools based on their gender identity or expression.

Many colleges and universities were likewise initially slow to respond to the needs of transgender students. A rapidly growing number of schools, though, are now seeking to protect the rights of transgender students through adding "gender identity or expression" to their campus nondiscrimination policies. In the decade since the University of Iowa became the first institution to amend its policy to include gender identity in 1996, more than 70 colleges and college systems have adopted trans-inclusive nondiscrimination statements, including the University of California, the University of Wisconsin, North Carolina State University, Ohio State University, and all but one Ivy League school.

Hate Crimes

For more than a decade, approximately one person a month has reportedly been murdered in the United States because of their perceived gender identity or expression. Yet transgender people are rarely covered by hate crimes legislation.

While 46 states have hate crimes laws, only ten states include enhanced penalties for crimes committed because of perceived gender identity or expression: California, Colorado, Connecticut, Hawaii, Maryland, Minnesota, Missouri, New Mexico, Pennsylvania, and Vermont, as well as the District of Columbia.

Conclusion

There is no denying that significant progress has been made in the struggle for transgender rights, especially in the last decade. Many courts and legislatures no longer dismiss transgender people and their claims of discrimination as ludicrous. But simply being taken seriously does not mean that transpeople regularly receive just and fair treatment. Even a modicum of equality still often remains elusive.

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About the Author

Brett Genny Beemyn has written or edited five books in glbtq studies, including *Queer Studies: A Lesbian, Gay, Bisexual Community Anthology* (1996) and *Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories* (1997). *The Lives of Transgender People* is in progress. A frequent speaker and writer on transgender campus issues, Beemyn is the director of the Stonewall Center at the University of Massachusetts-Amherst.