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SMITH V. CITY OF SALEM, OHIO
378 F.3d 566 (6th Cir. 2004)

FACTS

Jimmie L. Smith is a seven year veteran lieutenant in the Salem Fire Department (SFD).¹ Smith, biologically and by birth a male, is a transitioning preoperative transsexual recently diagnosed with Gender Identity Disorder (GID).² After being diagnosed with GID, Smith followed international medical protocols for treating GID by expressing a more feminine appearance on a full time basis.³ As a result, Smith's co-workers commented and questioned him regarding his appearance and mannerisms, stating that he was not masculine enough.⁴

Smith brought his concerns to his immediate supervisor, Thomas Eastek, and informed him of his GID treatments and his eventual complete physical transformation from male to female.⁵ Smith also specifically asked Eastek not to reveal the substance of their conversation to any of his superiors, and in particular the Chief of the SFD, Walter Greenamyer.⁶ Eastek, however, did divulge his conversation with Smith to Greenamyer.⁷

Shortly thereafter, Greenamyer met with the Law Director for the City of Salem (City), C. Brooke Zellers, with the intention of terminating Smith's employment on the basis of Smith's transsexualism.⁸ On April 18, 2001, Greenamyer and Zellers arranged a meeting of the City's executive body to devise a plan to terminate Smith's employment.⁹ They agreed to require Smith to take three psychological evaluations with physicians of the City's choosing, hoping that Smith would either resign or refuse to comply, in which case they would terminate Smith on the ground of insubordination.¹⁰ The executive body did not follow state employment termination procedures.¹¹

A city official present at the meeting informed Smith of the plan after the meeting, calling the city's plan a "witch hunt."¹² Smith's counsel

¹ Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

² *Id.* GID has been characterized by the American Psychiatric Association as a disjunction between an individual's sexual organs and sexual identity. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576-82 (4th ed. 2000).

³ *Smith*, 378 F.3d at 568.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 569.

¹¹ *Id.* at 568-69. (citing OHIO REV. CODE ANN. § 121.22(G) (2004)) (detailing procedures that municipal officers need to abide by when taking employment action against a municipal employee).

¹² *Id.* at 569.

called the city two days later to advise and warn it of the potential legal consequences that could result if the City followed through with the plan discussed at the meeting.¹³ On April 22, 2001, Smith obtained a "right to sue" letter from the U.S. Equal Employment Opportunity Commission.¹⁴ Four days later Greenamyre suspended Smith for a 24 hour shift for an infraction of a "City and/or Fire Department policy."¹⁵ Smith contended the suspension was the result of selective enforcement in retaliation for his retention of counsel at a hearing before the Salem Civil Service Commission.¹⁶ During his seven year employment with the SFD, Smith has never had any negative incidents prior to the events in this case.¹⁷ Smith was not allowed to call witnesses and enter any testimony in regards to the April 18, 2001 meeting, contravening Ohio law.¹⁸ The Commission upheld Smith's suspension and Smith appealed to the County Court of Common Pleas, which reversed the suspension.¹⁹

Smith filed suit in federal district court, asserting Title VII claims of sex discrimination and retaliation, and claims pursuant to 42 U.S.C. § 1983.²⁰ The district court dismissed the federal claims and granted judgment on the pleadings for the Defendants.²¹ Smith appealed, claiming that the federal court erred in holding that 1) he failed to state a claim of sex stereotyping; 2) Title VII protection is not available for transsexuals; 3) he failed to demonstrate he had suffered from an adverse employment action; and 4) he failed to state a claim based on a deprivation of a constitutional or federal statutory right.²²

HOLDING

The Sixth Circuit Court of Appeals held that Smith was able to establish a *prima facie* case of employment discrimination under Title VII.²³ The Court found that Smith was able to show 1) sex stereotyping had occurred;²⁴ 2) Title VII protection did apply to transsexuals;²⁵ 3) 24 hour

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (citing OHIO ADMIN. CODE § 124-9-11 (2004)) (permitting the introduction of evidence of disparate treatment and selective enforcement).

¹⁹ *Id.*

²⁰ *Id.* 42 U.S.C. § 1983 (1996) creates a cause of action for a person whose rights are violated by anyone acting under color of state authority.

²¹ *Smith*, 378 F.3d at 569.

²² *Id.* at 569-70.

²³ *Id.* at 578.

²⁴ *Id.* at 572-73.

²⁵ *Id.* at 574-75

suspension was an adverse employment action;²⁶ and 4) although the Equal Protection Clause was never specifically mentioned in the complaint, the case for sex discrimination is so obviously grounded in the Equal Protection Clause that the defendants had fair notice of it.²⁷

ANALYSIS

The Court first analyzed Smith's Title VII claims.²⁸ To establish a *prima facie* case for employment discrimination, the plaintiff must show that: 1) he is a member of a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) he was treated differently from other similarly situated individuals outside his protected class.²⁹ Smith, as a male, was a member of a protected class, had suffered an adverse employment action when he was suspended without pay for a 24 hour period, was fully qualified to work at the SFD, and was treated differently merely because of a change in his behavior.³⁰ Thus, Smith made out a *prima facie* case of employment discrimination.³¹

In order to establish a *prima facie* case of retaliation under Title VII, the plaintiff must show that: 1) he engaged in an activity protected by Title VII; 2) the defendant knew the plaintiff was engaged in such activity; 3) the defendant took an adverse employment action against the plaintiff; and 4) there was a causal connection between the activity and the adverse action.³²

Smith suffered an adverse employment action in the form of his 24 hour suspension, which occurred after he pursued legal remedies by obtaining his "right to sue" letter.³³ The adverse employment action would not have happened but for his change in behavior, and the Court noted that the proximity in time between his obtainment of the "right to sue" letter and his suspension is "strongly suggestive of retaliation."³⁴

Turning its attention to the issues on appeal, the Court first addressed the issue of sex stereotyping, employing the standard articulated by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*.³⁵ The Court compared the

²⁶ *Id.* at 576.

²⁷ *Id.* at 577.

²⁸ *Id.* at 570.

²⁹ *Id.* (citing *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000)).

³⁰ *Id.* at 570.

³¹ *Id.*

³² *Id.* at 577 (citing *Dicarlo v. Potter*, 358 F.3d 408, 420 (6th Cir. 2004)).

³³ *Id.* at 570-71.

³⁴ *Id.* (citing *Miller v. Fairchild Indus. Inc.*, 797 F.2d 727, 731 (9th Cir. 1986)).

³⁵ *Id.* at 571. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that sex stereotyping is impermissible under Title VII). In *Price Waterhouse*, the Supreme Court considered a case that involved the denial of partnership to a female employee because she was perceived as too masculine. *Id.* at 231-32. The *Price Waterhouse* Court considered evidence that showed the excellent

facts in the case to the facts in *Price Waterhouse*, stating that the sex stereotyping of a female senior manager as too "macho" was directly analogous to the stereotyping of a firefighter as too "feminine."³⁶

The Court found that the district court erred by relying on pre-*Price Waterhouse* cases from other federal appellate courts which held that transsexuals were not a protected class, as discrimination was based on "gender" rather than "sex,"³⁷ using "gender" to refer to societal, behavioral norms as opposed to "sex," which refer to biological differences between men and women.³⁸ The reasoning in *Price Waterhouse* should have applied, as the Supreme Court had established that Title VII's reference to sex encompassed both biological and stereotypical differences.³⁹ The Court found that the type of sex stereotyping found in this case was impermissible under Title VII.⁴⁰

As to the adverse employment claim, the Court found that an adverse employment action had occurred when the SFD suspended Smith for a 24 hour shift.⁴¹ The Court reasoned that as Smith's 24 hour shift was the equivalent to three eight-hour days for an ordinary worker, his suspension cost him 60% of his work week in lost wages.⁴² The Court held irrelevant whether Smith's suspension was ultimately reversed by the Court of Common Appeals, as an adverse employment action (which does not require a negative effect or repercussion to the claimant) is not the same as a negative employment action.⁴³

Finally, the Court addressed the issue of whether or not Smith failed to state a claim based on the deprivation of a constitutional or federal statutory right.⁴⁴ The Court noted that Smith had stated a claim for relief under 42 U.S.C. § 1983 in connection with his sex-based claim of employment discrimination but never referenced the Equal Protection Clause

performance of the employee and that none of the other candidates for partnership that year had similar performance. *Id.* at 233-34. The employee was subject to comments that showed sex stereotyping, and she claimed that she was denied partnership because her behavior did not match up with some of the partnership's pre-conceived notions of gender. *Id.* at 234-36. The *Price Waterhouse* Court plurality opinion held that sex stereotyping is impermissible under Title VII, and the partnership had used sex stereotyping in considering her for partnership. *Id.* at 251.

³⁶ *Smith*, 378 F.3d at 571-2 (citing *Price Waterhouse*, 490 U.S. at 235).

³⁷ *Id.* at 572. See also *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) (holding that a transsexual pilot was not protected under Title VII because Congress never intended to include transsexuals under the definition of "sex").

³⁸ *Smith*, 378 F.3d at 573.

³⁹ *Id.* (citing *Price Waterhouse*, 490 U.S. at 251).

⁴⁰ *Id.* at 575.

⁴¹ *Id.*

⁴² *Id.* at 576.

⁴³ *Id.* (citing *White v. Burlington Northern & Sante Fe Ry. Co.*, 310 F.3d 443 (6th Cir. 2002)).

⁴⁴ *Id.*

specifically.⁴⁵ The Court noted the liberal standards of notice pleading and held that no specific reference to the Equal Protection Clause was required because Smith's claims were supported by facts that easily constituted a sex discrimination case.⁴⁶ The connection to the Equal Protection Clause was apparent to all.⁴⁷

Addressing a secondary issue brought by Smith in his appellate brief, the Court held that Smith failed to state a claim based on his right to due process.⁴⁸ The Court stated that State law cannot by itself be the basis for a federal constitutional violation, and Smith's complaint never specified what deprivation of property or liberty was implicated by the City's failure to comply with state procedural and administrative rules concerning his employment.⁴⁹

CONCLUSION

In a world of rapidly changing societal norms and the gradual breakdown of gender stereotypes, the Court of Appeals for the Sixth Circuit recognized the need to protect under Title VII all people who may be suffering from invidious sex discrimination.⁵⁰ If Title VII does not protect transsexuals, the reasoning in *Price Waterhouse* would be meaningless to protect those who wished to transcend sex stereotypes and classic gender identifications.⁵¹

There has been a gradual shift in recent years toward more legal protections of transsexuals and those who wish to transcend traditional sex stereotypes.⁵² Traditionally this has not been the case, as pointed out by the Court in its discussion of pre-*Price Waterhouse* case law which usually held that the term "sex" was never considered to include transsexuals by

⁴⁵ *Id.* at 576-67 (citing 42 U.S.C. § 1983 (1996)).

⁴⁶ *Id.* at 577. (citing U.S. CONST. amend. XIV § 1).

⁴⁷ *Id.*

⁴⁸ *Id.* at 578.

⁴⁹ *Id.* at 578. *See Purisch v. Tenn. Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996) (holding that a violation of a university's employment grievance procedure by the administration does not by itself implicate federal constitutional due process).

⁵⁰ *Smith*, 378 F.3d at 575.

⁵¹ *Id.* at 574-75.

⁵² *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (applying protections of the Gender Motivated Violence Act to transsexuals); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *1 (W.D.N.Y. Sept. 30, 2004) (denying summary judgment in a case where plaintiff alleged sexual harassment because he was gay).

Congress.⁵³ Even today, there are cases where courts will not recognize that sex stereotyping is occurring.⁵⁴

Gender Identity Disorder is a mental disorder recognized by the American Psychiatric Association.⁵⁵ As such, the Court may have viewed Smith as only following international medical protocols in his treatment of his disorder, and to be punished for that would have been unjust in its eyes. This may be an unfair assessment of transsexuals, as some do not believe transsexualism is a disorder at all. Still, the Court's unanimous holding seems to include not only transsexual and transgendered people, but also seems to strengthen *Price Waterhouse's* reasoning to strike against all types of sex stereotyping.⁵⁶ The Court seems to have expanded *Price Waterhouse* to such an extent that any type of sex stereotyping could lead to a right of action. This may have been done in the interests of justice because of the lack of a right of action under the Americans with Disabilities Act of 1990.⁵⁷ Only time will tell if such a broad treatment can survive.

Title VII was written to protect people from the debilitating effects of discrimination. The decision in this case follows the standard of *Price Waterhouse* and helps to eliminate out-of-date gender classifications and preserve liberty of self-identity in our 21st Century world.

Summary and Analysis By:
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⁵³ *Smith*, 378 F.3d at 572-73.

⁵⁴ *See* *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004) (stating that an employer policy requiring female bartenders to wear makeup is a legitimate grooming standard, not sex stereotyping).

⁵⁵ *Smith*, 378 F.3d at 568.

⁵⁶ *Id.* at 572-75.

⁵⁷ Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(b) (1990) ("Under this chapter, the term 'disability' shall not include – (1) transvestism, transsexualism . . .").