IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

ALEX PACHECO	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 7:10-CV-116-RAJ**
	)	
FREEDOM BUICK GMC TRUCK, INC.,	)	
	)	
Defendant.	)	
	)	

BRIEF OF UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN OPPOSITION TO SUMMARY JUDGMENT

P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DANIEL T. VAIL
Acting Assistant General Counsel

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M. Street NE
Washington, DC 20507

JUSTIN MULAIRE
Trial Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
33 Whitehall Street, 5th Floor
New York, NY 10004
212-336-3722
Fax: 212-336-3623
justin.mulaire@eeoc.gov

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The United States Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000e et seq. This case presents the question whether, under Title VII, disparate treatment of an employee because she is transgender is discrimination "because of ... sex." Given the Commission's enforcement interest in the resolution of this question, we offer our views to the Court.

It is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of ... sex" under Title VII. This is so for at least two reasons: (1) under the reasoning of the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of ... sex" under Title VII; and (2) following the reasoning in Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008), discrimination because an individual intends to change, is changing, or has changed his or her sex – including by changing aspects of his or her biological sex or gender expression – is likewise prohibited by Title VII. Further, in this case, the record evidence presents a genuine dispute of fact as to whether Defendant Freedom Buick GMC, Inc. ("Freedom") violated Title VII by firing Plaintiff Alex Pacheco ("Pacheco") "because of ... sex."[1]

Accordingly, the EEOC, as amicus curiae, respectfully submits that Freedom's motion for summary judgment should be denied.

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[1] The EEOC refers to and relies on evidence contained in the unsealed portions of the record. Citations herein to "Dominguez Dep.," "Hooker Dep.," and "Pacheco Dep." refer to the depositions attached to the Defendant's Appendix (Doc. No. 17), and "P.App." refers to the Plaintiff's Appendix (Doc. No. 22).

STATEMENT OF FACTS

When first hired by Freedom in January 2009 as a receptionist, Pacheco identified as and presented as male. Pacheco Dep. at 104, 237. Subsequently, Pacheco began taking hormones in order to undergo a physical transition from male to female. Id. at 94. These hormones caused changes in her physical appearance, including the development of breasts. Id. The plaintiff also grew her hair and nails out and began identifying, dressing, and otherwise "liv[ing] my life as a female" whenever she was not at work at Freedom. Id. at 98-99, 157.

In May 2010, Pacheco asked Sarah Dominguez ("Dominguez"), a cashier at Freedom, to ask Freedom's president, Josefina Hooker ("Hooker"), if Pacheco could begin presenting as female at work. Dominguez Dep. at 89. According to Dominguez, Hooker responded that this would be "inappropriate" and would not be permitted. Id. at 91.

Also at about that time, Hooker saw Pacheco presenting as a female one day when Pacheco was off-duty but had stopped by the workplace to give Dominguez a ride home. Pacheco Dep. at 210-11. According to Dominguez, Hooker later related that she was "shocked" to see Pacheco dressed as a woman. Dominguez Dep. at 83. Hooker's facial expression and manner of speaking while relating this made it clear to Dominguez that Hooker was shocked "in a bad way and found [Pacheco's] dressing as a woman to be very offensive." Id. at 95; see also id. at 83. Dominguez also testified that Hooker asked her repeatedly whether Pacheco planned to "get a sex change," id. at 103, in a manner that made it clear that Hooker found the idea objectionable, id. at 106. On another occasion at about this time, Dominguez heard Hooker and other employees express disapproval of Pacheco's appearance in pictures they saw on Pacheco's Myspace page in which Pacheco presented as a female. Id. at 98-101.

On June 15, 2010, Pacheco and Dominguez were summoned individually to Hooker's office and discharged. Dominguez Dep. at 77; Pacheco Dep. at 176, 189-90; Hooker Dep. at 38.

According to Pacheco and Dominguez, Hooker told each of them that she was discharging them because she was "simply reorganizing the office duties." Dominguez Dep. at 63; Pacheco Dep. at 176. Hooker recorded this in company records as the reason for Pacheco's discharge, and does not dispute that it is the reason she provided to Pacheco and Dominguez. Hooker Dep. at 34; see also Employee Disciplinary Report, P.App. Exh. D. Pacheco maintains that during this conversation Hooker also told her that "you just don't fit in the picture with the rest of the employees." Pacheco Dep. at 177. Hooker denies this. Hooker Dep. at 154. However, Hooker did not make any similar comment to Dominguez. Dominguez Dep. at 77.

Pacheco was replaced by a new receptionist the next day, on June 16, 2010, and Dominguez was replaced by a new cashier on June 15, 2010. Hooker Dep. at 38, 164. According to the defendant, the new receptionist's job description was the same as Pacheco's. Compare Answer to Interrogatory No. 3 with Answer to Interrogatory No. 13, P. App. Exh. F.

Later, during litigation, Hooker offered other, performance-related reasons for discharging Pacheco and Dominguez. Hooker Dep. 135-37. As set forth more fully in Pacheco's response to Freedom's motion, these explanations are contradicted by Hooker's deposition testimony, company records, or both. See Response to Motion for Summary Judgment at 4-10. Additionally, although Freedom maintains that Hooker decided to fire Dominguez and Pacheco because of an incident of misconduct on June 11, 2010, see Motion for Summary Judgment at 7-8, citing Hooker Dep. at 137, Hooker also testified that she had actually decided to discharge Dominguez at least two days earlier, on June 9, 2010, see id. at 39-40.

ARGUMENT

I. DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE HE OR SHE IS TRANSGENDER IS DISCRIMINATION "BECAUSE OF . . . SEX" UNDER TITLE VII.

A. Discharging a Transgender Employee Because He or She Fails to Identify, Look, or Live in Conformance with A Preferred or Expected Gender Norm Is Discrimination Because of Sex Under Title VII.

In Price Waterhouse, the Supreme Court recognized that Title VII's prohibition of discrimination "because of ... sex" means "that gender must be irrelevant to employment decisions." See 490 U.S. at 240. The Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" Id. at 251 (internal citations omitted). Thus "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004). As one court of appeals has explained, in Price Waterhouse:

> the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman" – that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one.

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

After Price Waterhouse, every federal circuit court of appeals that has addressed the question has recognized that disparate treatment of a transgender plaintiff can be discrimination

"because of ... sex" if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. See Smith, 378 F.3d at 572-73 (holding that adverse action taken because of transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful gender discrimination); Schwenk, 204 F.3d at 1201-02 (concluding that the transsexual prisoner had stated a viable sex-discrimination claim under the Gender Motivated Violence Act because "[t]he evidence offered ... show[s] that [the prison guard's assault was] motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor" and noting that its analysis was equally applicable to claims brought under Title VII); see also Kastl v. Maricopa County Cmty. Coll. Dist., 325 Fed.Appx. 492 at 494, 2009 WL 990760, at **1 (9th Cir. 2009) (concluding that after Price Waterhouse, "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222-24 (10th Cir. 2007) (assuming without deciding that a "transsexual" could bring a gender-stereotyping claim under Price Waterhouse, but also concluding that "transsexuals" are not a protected class under Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of "preoperative male-to-female transsexual" police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 213-15 (1st Cir. 2000) (applying Price Waterhouse to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender").[2]

[2] In addition, numerous federal district courts have come to the same conclusion. See, e.g., Glenn v.

Thus under Price Waterhouse, and in light of the clear weight of authority from lower courts applying its holding and rationale, it is unlawful sex discrimination under Title VII to discharge a transgender employee because he or she does not conform to the gender norms or stereotypes to which an employer expects or prefers the employee to conform.[3]

B. Discharging an Employee Because of a Change in Aspects of His or Her Sex, Including a Change in Gender Expression, Is Discrimination Because of Sex.

A plaintiff may also prove a claim of sex discrimination under Title VII by demonstrating that her employer discriminated against her because she planned to change, was in the process of changing, or had changed her sex. In Schroer, the court concluded that "no court would take seriously the notion" that religious converts are not protected by Title VII's prohibition against discrimination "because of ... religion." 577 F.Supp.2d at 306. Similarly, in Hobbie v. Unemployment Appeals Commission of Florida, the Supreme Court rejected the argument that unemployment benefits could be denied to a plaintiff who had been discharged for refusing to

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Brumby, 724 F.Supp.2d 1284, 1297-1301 (N.D. Ga. July 2, 2010) (on appeal); Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at *4 (D. Colo. June 24, 2010); Schroer, 577 F.Supp.2d 293; Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003); Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

[3] In its motion for summary judgment, Freedom draws a sharp distinction between cases alleging "sex stereotyping" (which it acknowledges may be actionable) and those involving discrimination on the basis of "sexual identity" or "gender identity disorders" (which it alleges are not). This is an artificial dichotomy, and Freedom construes Price Waterhouse too narrowly. Preferring or insisting that an employee's gender identity "match" the employee's actual or perceived biological sex (e.g., anatomy) is itself an impermissible sex stereotype. Thus, if an employer were to take an adverse employment action because an employee's gender identity is not consistent with the employee's biological sex, the employer would be discriminating "because of ... sex." See Smith, 378 F.3d at 574-75 ("discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman"); Schwenk, 204 F.3d at 1202 (discrimination because of gender in part because the perpetrator had targeted the transgender victim "only after he discovered that she considered herself female") (emphasis added); Myers v. Cuyahoga County, 182 Fed.Appx. 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender") (emphasis added).

work on her Sabbath if her need for a religious accommodation was the result of a religious conversion rather than preexisting religious beliefs. 480 U.S. 136, 144 (1987) ("In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so.").

Likewise, the Schroer court reasoned, "refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'" Id. at 308. The court's analogy to religious discrimination illustrates that discrimination on the basis of a protected characteristic encompasses discrimination because of a change in a protected characteristic. The fact that the protected characteristic at issue is "sex" rather than "religion" is immaterial. Accordingly, there is no basis for singling out transgender plaintiffs for less protection under Title VII's sex discrimination provision on the ground that aspects of their biological sex or gender-related expression changed at some point in time.

C. Contrary Caselaw Decided Before Price Waterhouse Is Not Controlling.

Several early appellate cases decided before Price Waterhouse rejected sex discrimination claims brought by transgender individuals. See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977), overruling recognized by Schwenk, 204 F.3d at 1201-02. Freedom, relying on these cases, likewise contends that transgender status is not a protected classification under Title VII. Motion for Summary Judgment at 3-5. These cases, however, have been abrogated by the Supreme Court's subsequent decisions in Price Waterhouse and Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75, 76 (1998).

The courts that held that Title VII did not protect transgender individuals did so primarily for two reasons. First, according to these courts, Congress intended the term "sex" to refer only to a person's biological status as male or female; therefore, only discrimination on the basis of that biological status is proscribed. See, e.g., Ulane, 742 F.2d at 1086 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); see also Sommers, 667 F.2d at 750 (concluding "the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation"); Holloway, 566 F.2d at 662 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."). And second, according to these courts, Congress did not specifically intend to protect transgender individuals. See Ulane, 742 F.2d at 1085 ("Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."); see also Sommers, 667 F.2d at 750 ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."); Holloway, 566 F.2d at 663 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

The rationales undergirding these decisions, however, have been eviscerated by the Supreme Court's decisions in Price Waterhouse and Oncale. As noted above, Price Waterhouse makes clear that Title VII does not simply prohibit discrimination based on biological aspects of sex, but also discrimination on the basis of gender-related stereotypes. See 290 U.S. at 251; see also Schwenk, 204 F.3d at 1201 ("sex" "encompasses both sex – that is, the biological differences between men and women – and gender"). And second, in Oncale, in ruling that same-sex harassment is actionable, the Supreme Court explicitly rejected the notion that Title VII only proscribes types of discrimination specifically contemplated by Congress. 523 U.S. at 79-80 (explaining that "statutory prohibitions often go beyond the principal evil [they were

passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

In short, as the Ninth Circuit noted when it repudiated its earlier decision in Holloway, "[t]he initial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse." Schwenk, 204 F.3d at 1201-02; see also Smith, 378 F.3d at 572-73 (reasoning that Price Waterhouse "eviscerated" Ulane, Sommers, and Holloway). It thus is now well-established that a plaintiff's transgender does not provide a basis for excluding him or her from Title VII's protections. See Smith, 378 F.3d at 574-75 (under Price Waterhouse, "a label, such as 'transsexual' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of ... gender non-conformity"); see also Schroer, 577 F.Supp.2d at 308 (discrimination on the basis of a change in sex is discrimination "because of ... sex").[4]

Freedom's argument – that Pacheco cannot prevail because transgender status is not a protected classification specifically listed in Title VII – therefore disregards Supreme Court precedent and rests on discredited reasoning. Discrimination against a transgender individual because the individual fails to conform (or stops conforming) with certain gender norms or stereotypes is discrimination "because of ... sex." Likewise, discrimination against a transgender individual because the individual intends to change, is changing, or has changed aspects of his or her sex/gender also is discrimination "because of ... sex." Thus, discrimination against a plaintiff because she is transgender is unlawful not because transgender status is a freestanding protected classification, but because such discrimination is a subcategory of sex discrimination.

[4] For the same reason, certain district court decisions declining to recognize that Title VII protects transgender individuals also are no longer persuasive. See, e.g., Sweet v. Mulberry Lutheran Home, 2003 WL 21525058, at *3 (S.D. Ind.) (relying on Ulane); Oiler v. Winn-Dixie Louisiana, Inc., No. Civ.A.00-3114, 2002 WL 31098541, at *5 (E.D. La) (relying on Ulane and other pre-Price Waterhouse appellate decisions); Dobre v. Natl. Railroad Passenger Corp., 850 F.Supp.2d 284, 286-87 (E.D. Penn. 1993) (relying on Holloway prior to its overruling).

II. THERE IS A GENUINE DISPUTE OF FACT AS TO WHETHER FREEDOM FIRED PACHECO BECAUSE OF HER SEX.

Given the record in this case, there is a genuine issue as to whether Freedom decided to discharge Pacheco because of her sex. A reasonable jury could find that shortly before Pacheco's discharge, Hooker was "shocked" by and reacted negatively to the plaintiff's appearance as a female, stated that it would be "inappropriate" for the plaintiff to present as a female at work, asked Dominguez repeatedly whether Pacheco planned to "get a sex change," and found the idea of such a sex reassignment surgery objectionable. Further, there is evidence that Hooker told Pacheco when discharging her that "you just don't fit in the picture with the other employees," but did not make such a comment to Dominguez, whom Hooker discharged on the same day, purportedly for the same incident of misconduct. It can also be inferred that Hooker knew that biological aspects of Pacheco's sex were changing and was concerned that Pacheco might have surgery that would result in further such changes. Finally, there is evidence that the reasons offered by Freedom for Pacheco's discharge are pretextual, since they have changed over time and are contradicted by Hooker's own testimony or the company's own records.

Given this evidence, a reasonable jury could conclude that Hooker expected or preferred that Pacheco look and act male, rather than dressing and otherwise presenting as female, and that the reason for Pacheco's discharge was Hooker's disapproval of Pacheco's transition from male to female and/or Pacheco's resulting failure to conform to male gender norms.[5] Accordingly, there is a genuine dispute of fact as to whether Pacheco was discharged because of sex, and Pacheco's claim cannot be resolved on summary judgment.

[5] For this reason, it is hardly dispositive that, as Freedom argues, Pacheco was already "effeminate" when first hired. Motion for Summary Judgment at 6. Hooker may not have been bothered by the fact that Pacheco was an effeminate man as long as he stayed male. Here, a reasonable jury could find that Hooker actually was motivated by Pacheco's full-fledged presentation as female (e.g., Pacheco's non-conformance with the stereotypical norm that males should look and act like males) and/or Pacheco's actual transition from male to female. That would be discrimination "because of ... sex" and thus a violation of Title VII.

CONCLUSION

For the reasons set forth above, the EEOC respectfully requests that the motion for summary judgment be denied.

October 13, 2011

Respectfully submitted,

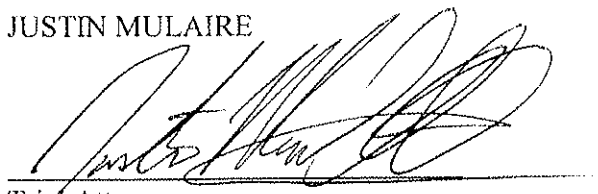
P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DANIEL T. VAIL
Acting Assistant General Counsel

Equal Employment Opportunity Commission
Office of General Counsel
131 M. Street, NE
Washington, DC 20507

JUSTIN MULAIRE



Trial Attorney
U.S. Equal Employment Opportunity Commission
33 Whitehall Street, 5th Floor
New York, NY 10004
212-336-3722
Fax: 212-336-3623
justin.mulaire@eeoc.gov
N.Y. Bar ID # 4311031