

School District Violated Title VII by Prohibiting Transgendered Employee from Using Both Men's and Women's Restrooms.

Brandilyn Roberts began working for the Clark County School District as a police officer in 1994 and held the position without incident for 17 years. In 2011, Roberts began dressing for work like a man, grooming like a man, identifying himself as a man, and using the men's restroom at work. When others complained that a woman was using the men's restroom, Roberts' commanding officers scheduled a meeting with him. At this meeting, Roberts explained that he is transgender and in the process of becoming a man. Robert said he wanted to be called Bradley and to use the men's restroom. Roberts' commanding officers told him to use the gender-neutral restrooms. Roberts sent a letter to his superiors explaining that he was changing his name to Bradley, he wanted his coworkers to use male pronouns to reference him, and that he would follow the men's grooming code. The district responded by holding a second meeting with Roberts, during which Roberts repeated his requests. Captain Anthony York told Roberts that he would not be referred to as a man or allowed to use the men's restroom until he could provide official documentation of a name and sex change.

Captain York and the district's general counsel had a third meeting with Roberts two days later. At this meeting, they told Roberts that he could informally use the name Bradley, but that all official documents would use the name Brandilyn Roberts until he obtained a court order and a name change packet from Human Resources. They also explained that Roberts was banned from using the men's restrooms until he provided documentation of a sex change, but that he also was not allowed to use the women's restrooms. He was required to use the gender-neutral or single occupancy restroom.

Captain York sent Roberts proposed language for a memo regarding his name change. Roberts agreed to the language. A few days later, Captain York, the Police Chief, and the general counsel emailed the entire department to alert them that Roberts was changing his name, that everyone should recognize his new name and use male pronouns when referring to him, and that discrimination on the basis of gender identity violates Nevada law. Roberts claimed to be "blindsided" by the email. He thought that only supervisors and management would be notified about his name change.

After Roberts' name change petition was granted in December 2011, he updated his driver's license to identify his gender as male and submitted a completed name change packet to Human Resources. However, Roberts' records were apparently not updated because in January 2012, he received a new insurance card that listed his gender as "female."

That same month, Roberts filed a charge with the Nevada Equal Rights Commission (NERC) alleging gender-identity discrimination. The NERC determined that the district likely discriminated against Roberts and set the case for a public hearing. One month before the hearing was scheduled to take place, the district issued a new bathroom policy so that Roberts was no longer required to use the gender-neutral bathroom.

The NERC closed Roberts' case, finding that the district had taken measures that rendered Roberts' complaint moot. Roberts filed a claim with the EEOC, and then filed suit against the district alleging various causes of action, including gender discrimination, harassment, and retaliation under Title VII. Both parties filed motions for summary judgment on the issue of whether Roberts was subjected to discrimination, harassment, or retaliation for the period of time that he was banned from using the men's bathroom. The district court granted Roberts' summary judgment motion as to his discrimination claim.

Education Matters

Title VII prohibits discrimination because of a person's sex, but does not reference gender. The district argued that Title VII does not prohibit gender discrimination, and that it did not discriminate against Roberts because of his sex since it treated Roberts like any other person of his biological sex. The district court rejected this argument. In *Price Waterhouse v. Hopkins*, the Supreme Court held that Title VII prohibited Price Waterhouse from making employment decisions based on gender stereotypes. In *Schenk v. Hartford*, the Ninth Circuit Court of Appeals discussed how "sex" under Title VII encompasses both sex, i.e., the biological differences between men and women, and gender. Therefore, the district court concluded that Title VII protects against gender discrimination.

In order to state a *prima facie* case of discrimination, Roberts had to show that he was a member of a protected class, he was performing his job satisfactorily, he suffered an adverse employment action, and he was treated differently than similarly situated employees who did not belong to the same protected class.

The court found that the bathroom ban was an adverse action. Equal access to restrooms is a basic condition of employment. The court also found that Roberts presented direct evidence of the district's discriminatory intent. It banned Roberts from the women's restroom because he no longer behaved like a woman, and banned him from the men's restroom because he is biologically female. Therefore, Roberts was treated differently than persons of both his biological sex and the gender he identifies as. While the district claimed that it instituted the bathroom ban in order to protect the privacy rights of other employees and students, it failed to support this contention with evidence. Therefore, the court granted partial summary judgment in Roberts' favor on his discrimination claim.

The court denied both parties' motions for summary judgment as to the harassment and retaliation claims because there was too much conflicting evidence.

Note:

While we generally do not report on trial court decisions, very few courts have addressed the issue of transgender access to restrooms in the workplace. California recently passed AB1732 which provides that, commencing March 1, 2017, all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be identified as all-gender toilet facilities. In addition, under the California Fair Employment and Housing Act, discrimination on the basis of gender identity, gender expression, and transgender persons is prohibited. Accordingly, an agency should allow an employee who is protected by the Fair Employment and Housing Act to use the restroom of the gender with which he or she identifies.