

## Transgender plaintiff gets new trial on discrimination claim

by Guy Loranger, Staff Writer

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Saying he made "evidentiary errors," a federal judge has ordered a new trial for a transgender woman who claimed the City of Charlotte fired her from her job as a supervisory mechanic because she did not conform to her boss's "gender stereotype."

The city fired the plaintiff in December 2006 after finding she had falsified inventory records. The plaintiff sought to present evidence that would have shown that other employees had done the same but had not been punished as severely.

U.S. District Judge Frank Whitney ruled that the evidence could not come in until a proper foundation had been laid. He said he thought that would likely occur when the city to put on its case in chief.

However, the city ended up not putting on a case in chief, which meant the plaintiff did not enter any of the evidence in rebuttal.

At the end of the three-day trial, a jury in the U.S. District Court for the Western District of North Carolina returned a verdict for the city, finding the plaintiff's failure to conform to gender stereotypes was not a motivating factor in her termination.

"After reviewing the trial transcript, the court cannot conclude that its evidentiary errors did not permeate the trial, negatively affecting the presentation of the plaintiff's discrimination claim," Whitney wrote in a May 6 order. "Accordingly, the court will order a new trial."

The case is *Clukey v. City of Charlotte* (North Carolina Lawyers Weekly No. 10-04-0443, 7 pages).

Julie Fosbinder, a Charlotte attorney representing the plaintiff, said the new trial will take place in September.

"We're very appreciative of the court's order and of getting the chance to put our evidence in front of a jury," Fosbinder said.

### Background

In a complaint filed in January 2009 in Mecklenburg County Superior Court, the plaintiff claimed to have more than 40 years of experience in automotive maintenance, including eight years in management.

The city's fleet operations manager hired her in March 2005 as a motor pool assistant and gave her a positive review after her first six months on the job.

The situation changed when the manager learned the plaintiff had undergone gender-reassignment surgery in 2001 and become a woman, the complaint asserts.

"[The manager] became irate over the fact that the plaintiff was transgendered and the fact that it was now public knowledge," the complaint states.

The plaintiff contended the manager was "very hostile" during the plaintiff's future attempts at landing promotions, and the plaintiff complained to the assistant director of business support services about her treatment.

Eventually, the plaintiff accepted a position as a parts supervisor in April 2006.

However, in the ensuing months, the manager issued two written reprimands containing "unsupported allegations," according to the plaintiff.

Then, the plaintiff received a suspension in November 2006 for "making unauthorized inventory adjustments," the complaint stated. She was fired a month later.

### Gender stereotype

In her lawsuit, the plaintiff asserted claims for violation of Title VII of the Civil Rights Act of 1964, sex discrimination in violation of N.C. public policy and negligent supervision and retention.

The gist of her allegations: She had been fired "because she did not conform to [her manager's] gender stereotype" and because she was "retaliated against for making management aware of [the manager's] discriminatory actions."

The case was removed to federal court, and after a sealed summary-judgment ruling, only the Title VII claim went to trial.

Fosbinder said she believed it was the first sex-discrimination case to be brought in a Fourth

Circuit court by a transgendered person based on gender stereotyping.

The theory is a rare but recognized one.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the U.S. Supreme Court held that a Title VII claim could be based on "sex stereotyping." That case involved a "macho" female associate who had been allegedly passed over for a promotion because she did not behave in a more "feminine" manner.

In September 2008, a decision in U.S. District Court for the District of Columbia, *Schroer v. Billington*, held that Title VII could protect transgender persons who are discriminated against because they do not conform to gender stereotypes.

However, an attorney for the City of Charlotte said the claim is distinguishable from one asserting a Title VII violation based on the plaintiff's transgender identity alone. The Fourth Circuit has yet to recognize such a claim.

"That's not the claim that went to trial," said the assistant city attorney, Hope A. Root.

### **Mixed motives**

In a "mixed-motive" discrimination case, such as this one, the plaintiff must show intentional discrimination in an employment decision.

The defendant is then allowed to put on an affirmative defense, showing that the same decision would have been made regardless of the impermissible motivating factor.

Here, the plaintiff argued that, during her case in chief, she should have been allowed to show that falsifying records, alone, was not a legitimate reason for her termination in light of the city's practice of not firing other employees who had done the same thing.

In the May 6 order, Judge Whitney said his decision to exclude that evidence was error.

According to the order, the court had premised its ruling on the basis that the evidence was admissible only as to the defendant's affirmative defense and not permissible to question the legitimacy of the defendant's stated motive for firing the plaintiff because the plaintiff had already admitted to falsifying the inventory records.

In retrospect, the court held that "the jury should have been permitted to consider circumstantial evidence as to the validity of the defendant's articulated reason for the plaintiff's termination, not in the sense of proving pretext which is not the standard in a mixed-motive case but in the context of casting doubt on the defendant's stated reason for termination to show that other motivating factors like gender played a role in the employment decision," Whitney wrote.

More significantly, Whitney wrote that the court had made its rulings under the presumption that the city would put on an affirmative defense.

Root told North Carolina Lawyers Weekly that, after the plaintiff presented her evidence, she did not believe it was necessary to put on the affirmative defense.

"I did not believe she had proven discrimination," Root said.

As a result, the jury did not hear rebuttal evidence from the plaintiff, and the court did not submit an instruction to the jury on the affirmative defense.

"The court's rulings, in effect, excluded all circumstantial evidence that could have cast doubt on the defendant's stated reason for termination and thus, could have shown, in the eyes of a reasonable juror, that the plaintiff's gender was a motivating factor in her termination," Whitney wrote.

### OPINION BRIEF

Case name: Clukey v. City of Charlotte

Court: **U.S. District Court for the Western District of North Carolina (Charlotte)**

Judge: **Hon. Frank D. Whitney**

Date: **May 6, 2010**

Plaintiff's attorneys: **Julie H. Fosbinder and Mark N. Kerkhoff of Fosbinder & Van Kampen (Charlotte)**

Defendant's attorneys: **Hope A. Root of Office of City Attorney (Charlotte) and Matthew F. Tilley of Robinson, Bradshaw & Hinson (Charlotte)**

Issue: **Was the plaintiff entitled to a new trial in her mixed-motive Title VII employment-discrimination case based on the trial court's exclusion of evidence that would have called into question the defendant's stated reasons for terminating the plaintiff?**

Holding: **Yes. The jury should have been permitted to consider circumstantial evidence as to the validity of the defendant's articulated reason for the plaintiff's termination, not in the sense of proving pretext but in the context of casting doubt on the defendant's stated termination reasons and showing that other motivating factors like gender played a role in the termination decision.**

Noteworthy: **According to an attorney for the plaintiff, this is one of the first Title VII cases to go to trial involving a transgendered person claiming discrimination on the basis of a gender stereotype.**  
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