

*Attachment*  
*CHRO Declaratory Ruling*  
*on behalf of John/Jane Doe*

**Commission on Human  
Rights and Opportunities**

# Memo

*Public*  
*Hearing* 3/19/09  
*Reid* 3/25/09

To: Judiciary Committee  
From: Robert J. Brothers, Jr., Acting Executive Director  
Date: March 24, 2009  
Re: **HB 6452, AN ACT CONCERNING DISCRIMINATION**

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At your public hearing on March 19, 2009 I was asked several questions relating to **HB 6452, AN ACT CONCERNING DISCRIMINATION**. I believe the following information addresses each of the areas the Committee expressed interest in. If you would like additional information on any of this material or have other questions do not hesitate to contact me.

The issue of transsexual/transgender discrimination has a limited yet significant history in Connecticut civil rights wherein the Commission on Human Rights and Opportunities determined through its **CHRO Declaratory Ruling on behalf of John/Jane Doe** adopted by the Commission on November 9, 2000 that transsexuals are, in CHRO matters, a protected class

Since the 2000 ruling we have had approximately 24 cases of transsexual/transgender discrimination filed with the Commission. Of those 2 have been certified to public (administrative) hearing and have resulted in decisions.

The finding of who is covered is explained in part of the Ruling's Section V.

## **V. WHO IS A TRANSSEXUAL UNDER CONNECTICUT LAW?**

For purposes of this analysis, consistent with Doe's petition, we define "transsexual" to include transgendered persons. Transgendered people include, among others, people who are intersexed; that is, people who are born with ambiguous genitalia or chromosomal ambiguity found in persons with, e.g. Androgen Insensitivity Syndrome, Klinefelter's Syndrome and Turner's Syndrome. Intersexed people are often more commonly referred to in lay terms as hermaphrodites, people born with both female and male reproductive organs. Dreger,

Hermaphrodite and the Medical Invention of Sex, Harvard University Press (Cambridge, MA 2000), pp. 37-39.

We use the terms "gender dysphoria" and "gender identity disorder" synonymously with "transsexualism". We adopt the definition of "gender identity" as "having or being perceived as having a self-image, expression or identity not traditionally associated with one's sex at birth". We further note that, "This definition is intended to include pre-operative and post operative transsexuals, [transgendered] people, and cross-dressers [transvestites<sup>15</sup>]." See, Leonard, "The New York Law School Journal of Human Rights, CHRONICLING A MOVEMENT: A Symposium to Recognize the Twentieth Anniversary of the *Lesbian/Gay Law Notes*" (2000).<sup>16</sup>

Additionally we specifically refer you to two adjudicated cases (Dwyer and Peterson), links to which are provided below, which deal with the application of the John/Jane Doe Declaratory Ruling.

1) **CHRO Nos. 0130315, 0230323**, Erin Dwyer v. Yale University, November 29, 2005, **MEMORANDUM OF DECISION**, Donna Maria Wilkerson, Referee.

**SUMMARY:** Final decision. Judgment, in part, for the Complainant. The Complainant alleged that the Respondent discriminated against the Complainant by 1) failing to respond to her continued reports of workplace harassment by both co-workers and management; 2) by treating her dissimilarly to other employees in trial periods; and 3) by suspending and ultimately terminating her because she is a transgendered woman with a mental disability who was, or was perceived to be homosexual, and in retaliation for participating in the University's grievance process and filing a CHRO complaint. *Held:* The Respondent violated General Statutes § 46a-81c(1) by creating a hostile work environment based on the Complainant's sexual orientation or perceived sexual orientation during her employment at one of its facilities when it failed to take reasonable steps to remedy the hostile work environment. The Respondent is liable to the Complainant for her injuries. The Complainant is entitled to an award of back pay along with 10% pre and post-judgment interest. The Commission and the Complainant failed to prove that the Respondent discriminated, retaliated or aided and abetted discrimination against the Complainant for the lost promotions, demotions, poor evaluations, being placed on probation, failure to accommodate, and the suspension and termination and those claims are dismissed.

2) **CHRO No. 0410049**, Dana Peterson v. Hartford Police Department, November 14, 2008, **FINAL DECISION**, Thomas C. Austin, Jr., Referee.  
**NOTE: This case is currently on appeal in the Superior court.**

**SUMMARY:** Final decision. Judgment for the respondent. The complainant alleged she was discriminated against as a consequence of her gender and disabilities (transsexual/physical and mental/gender dysphoria disorder). She further alleged that as a consequence of her having previously opposed an alleged discriminatory employment practice she was retaliated against by the respondent. Held: The complainant and commission failed to establish a prima facie case under the pretext model of analysis on most of the complainant's claims. As to the claims where the complainant successfully presented a prima facie case the legitimate business reason produced by the respondent for its decision was not proven to be a pretext for discrimination.



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## CHRO Declaratory Ruling on behalf of John/Jane Doe

### STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

#### DECLARATORY RULING ON BEHALF OF JOHN/JANE DOE

#### I. INTRODUCTION.

On January 31, 2000, the Commission on Human Rights and Opportunities (CHRO) received a petition from Attorney Bruce A. Goldberg on behalf of John/Jane Doe (Doe) requesting a declaratory ruling. See Attachment 1 (without exhibits). Under the authority of CONN. GEN. STAT. ' 4-176 and Section 46a-54-122 of the REGULATIONS OF CONNECTICUT STATE AGENCIES, Doe seeks a ruling from the CHRO that the statutory prohibitions against discrimination on the basis of sex encompass discrimination based upon a person's apparent gender, specifically discrimination against transsexual individuals. Doe requests that the CHRO find such prohibitions in CONN. GEN. STAT. ' ' 46a-60(a)(1), 46a-64(a)(1), 46a-64c(a)(1) and 46a-66(a).

At its regular meeting held on March 9, 2000, the CHRO voted to issue a declaratory ruling on Doe's petition, but amended it to include the question of whether discrimination against transsexual persons constituted discrimination based on physical and/or mental disability. Despite that amendment, however, the CHRO declines to decide whether discrimination against transsexual persons falls within statutory prohibitions against physical and/or mental disability discrimination, and limits this ruling to the narrower question of sex discrimination, as requested in Doe's Petition.

On March 9, 2000, the CHRO received a petition for Inter-venor status on behalf of: Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights; Connecticut Women's Education and Legal Fund; Gay & Lesbian Advocates & Defenders; Human Rights Campaign; National Center for Lesbian Rights; Female-to-Male International and Gender Public Advocacy Coalition, Inc., in the matter of Doe's request for Declaratory Ruling. At its regular meeting on April 13, 2000, the CHRO granted the Petition to Intervene, pursuant to CONN. GEN. STAT. ' 4-176(d).

On May 2, 2000, the CHRO received a petition for Intervenor Status on behalf of Connecticut Civil Liberties Union Foundation in this matter. At its regular meeting on May 11, 2000, the CHRO granted the Petition to Intervene. On May 2, 2000, the CHRO received a Motion to Allow Appearance of Attorney Jennifer Levi for the Gay & Lesbian Advocates & Defenders. At its regular meeting on May 11, 2000, the CHRO granted the motion.

The CHRO caused a Notice to be published in the April 9, 2000 edition of the *Hartford Courant* inviting interested persons or organizations to seek party or intervenor status. See Attachment 2. No other persons sought to be made a party or intervenor in this declaratory ruling process.

With the consent of the party and Intervenor pursuant to CONN. GEN.

STAT. § 4-176(i), the CHRO voted on July 13, 2000 to extend the time to issue the declaratory ruling to September 30, 2000. At its regular meeting on September 12, 2000, the CHRO again extended the time to issue the declaratory ruling to October 12, 2000. At its regular meeting on October 12, 2000 the CHRO ratified, by voice vote, *nunc pro tunc*, its action taken at the September meeting extending the deadline. At its regular meeting on October 12, 2000, with the consent of the party and Intervenor, the CHRO again extended the time to issue the declaratory ruling to December 31, 2000. The CHRO now issues this declaratory ruling on Doe's Petition.

## II. FACTS PRESENTED.

In the Petition, Doe provides the following background for CHRO to examine:

There is within the State of Connecticut (and else-where in the United States) a class of people who are the constant victims of violent hate crimes and discrimination on the basis of sex. These...victims... of a well documented gender identity conflict, are commonly referred to as "transsexuals". Transsexuals are often treated as loathsome and categorized with pedophiles, exhibitionists and voyeurs. This gender identity conflict is referred to in medical literature variously as transsexualism, gender dysphoria and gender identity disorder. It is a "persistent discomfort and sense of inappropriateness about one's assigned sex."...Transsexuals are not depraved sexual deviants....

The governments of both the State of Connecticut and the United States of America recognize the need to amend such official documents as driver's licenses, birth certificates and passports to reflect the apparent gender identity of a transsexual during and after transition.

See Petition and supporting documents, dated January 27, 2000.

Further, the Intervenor provide the following background, very similar to that identified in Doe's petition, for the CHRO to examine:

Transgendered people are individuals who do not conform to commonly held stereotypes of how "real" men or "real" women should look or act. This category also includes transsexual people, but it also includes effeminate men, masculine women, and people who are intersexed. Like those who fall in the narrower category of transsexual individuals, transgendered people also face discrimination in employment, credit, housing, and places of public accommodation because of their failure to meet commonly held beliefs about how men and women should look and act....

Intersexed people include those who are born either with ambiguous genitalia or certain characteristics that do not match the characteristics typically associated with the sex ascribed to them at birth. For example, a person with Turner's syndrome typically has female primary and secondary sex characteristics but no XX chromosomes.

Transsexualism and transgenderism are stigmatizing conditions, and when a person is treated adversely because of another person's negative reactions to her gender expression, she's protected from discrimination because of that negative perception.

See Intervenor's Public Policy Analysis and Position Statement (Position Statement) dated March 8, 2000; and Supplemental Position Statement

(Supplemental Statement) dated June 16, 2000.

**III. PARTIES.**

The party to this declaratory proceeding is:

John/Jane Doe

By:  
Attorney Bruce A. Goldberg  
733 Summer Street, Suite 202  
Stamford, CT 06901.

The Intervenor to this declaratory proceeding are:

Connecticut Coalition for Lesbian, Gay, Bisexual and  
Transgender Civil Rights;  
Connecticut Women's Education and Legal Fund;  
Gay & Lesbian Advocates & Defenders;  
Human Rights Campaign;  
National Center for Lesbian Rights;  
Female-to-Male International;  
Gender Public Advocacy Coalition, Inc.

By:  
Attorney Maureen M. Murphy  
Murphy, Murphy, Ferrara & Nugent, LLC  
234 Church Street  
New Haven, Connecticut 06510

and

Attorney Jennifer Levi  
Gay & Lesbian Advocates Defenders  
294 Washington Street, Suite 740  
Boston, MA 02108;

and

Connecticut Civil Liberties Union

By:  
Attorney Philip Tegeler  
32 Grand Street  
Hartford, Connecticut 06106.

**IV. DOES DISCRIMINATION AGAINST TRANSSEXUAL PERSONS VIOLATE CONNECTICUT'S STATUTORY PROHIBITIONS AGAINST SEX DISCRIMINATION?**

**A. Introduction.**

Doe has asked the CHRO to rule that the statutory prohibitions against discrimination on the basis of sex in CONN. GEN. STAT. §§ 46a-60(a)(1), 46a-64(a)(1), 46a-64c(a)(1) and 46a-66(a) include discrimination based on apparent gender, specifically discrimination against transsexual persons.<sup>1</sup>

In arguing that transsexual persons should find protection from sex discrimination under Connecticut law, Doe has asked the CHRO to reject a

traditional, narrow definition of sex in favor of a broader, more inclusive one. Historically, federal courts have held that transsexuals are not protected from sex discrimination. Holloway v. Arthur Andersen & Company, 566 F.2d 659, 662-3 (9th Cir. 1977)(court found that Congress did not intend to expand the definition of sex beyond its traditional meaning, rejecting the argument that the term "sex" was synonymous with the term "gender" in Title VII<sup>2</sup>); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)(relying on Holloway, court rejected extending Title VII's coverage to transsexuals stating that the plain language of Title VII does "not outlaw discrimination against a person who has a sexual identity dis-order").<sup>3</sup> Over the years, other courts followed suit.

The experience of federal courts under federal employment discrimination law is sometimes a useful guide in considering the meaning of our state laws prohibiting discrimination. The legislative history of CONN. GEN. STAT. ' 46a-60 indicates that its prohibition against sex discrimination were patterned after Title VII. See CONNECTICUT GENERAL ASSEMBLY SENATE PROCEEDINGS, 1967, Vol. 12, Part 3 at 1091 (remarks of Sen. Pope). Moreover, at times, Connecticut courts have acknowledged their indebtedness to and have been guided by interpretations of federal law. Pik-Kwik Stores, Inc. v. CHRO, 170 Conn. 327, 331 (1976)<sup>4</sup>. Were the CHRO to adopt these federal interpretations of federal law, of course, Doe would not derive protection under state sex discrimination laws.

Adopting a more inclusive definition of sex discrimination would have been difficult when Holloway and Ulane went unchallenged. But the legal climate has warmed considerably in the intervening years since Holloway and Ulane were decided, and the CHRO agrees that legal decisions more sympathetic to Doe now warrant a different approach to Connecticut's laws against sex discrimination. Connecticut laws have often been interpreted more progressively than their federal counterparts. As the Connecticut our Supreme Court has written, "the [Connecticut Fair Employment Practice Act] is in many respects stronger than" federal law. Evening Sentinel v. National Organization for Women, 168 Conn. 34, 35 n.5 (1975). Cases confirm this fact. Compare State v. CHRO, 211 Conn. 464 (1991) (retroactive adjustment of retirement allowance paid under plan that reduced benefits to male early retirees was proper under state law) with Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(no remedy for violation under federal law); and Luenenburg v. Mystic Dental Group, 1996 WL 456967, No. CV-95-0535839, J.D. of New London at New London (August 1, 1996)(Hurley, J.)(individuals may be personally liable for sexual harassment under state law) with Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995)(no individual liability under federal law); and Staten v. East Hartford Bd. of Education, No. FEP-6-34-1 (Psarakis, Tribunal) (March 28, 1972)(requiring pregnant employee to take maternity leave without pay violated state law), appeal dismissed, East Hartford Bd. of Education v. CHRO, No. 113226 (Ct.Com.Pleas) (April 11, 1975)(Hamill, J.), CHRO order enforced, sub nom. CHRO v. East Hartford Bd. of Education, Hartford County (Super.Ct.) (February 11, 1976)(Bracken, J.) and Lagana v. Middletown Bd. of Education, No. FEP-SEX-257-3 (September 10, 1976) (Dranginis, Tribunal)(limiting disability leave benefits due to pregnancy violated state law), judgment stipulated sub nom. Middletown Bd. of Education v. CHRO, No. 7290, Middlesex County (Ct.Com.Pleas) (April 5, 1977) with General Electric Co. v. Gilbert, 429 U.S. 125 (1976)(pregnancy not covered by federal sex discrimination law). The CHRO is persuaded that Doe's proposed expansion of the definition to sex discrimination to include transsexual persons is congenial with Connecticut's history of advancing civil rights.

Two legal developments lead the CHRO to the conclusion that transsexuals may be victims of sex discrimination. First, the emerging trend among courts that have considered the issue is to read ever more expansively the general protections against discrimination based on sex. Second, following the lead of the U.S. Supreme Court in Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989),

more and more courts have ruled that having specific expectations that a person will manifest certain behavior based upon his or her gender is not only conceptually outmoded sexual stereotyping, but also an unlawful form of sex discrimination.<sup>5</sup>

**B. Since the Enactment of Title VII, Courts are Adopting a More Inclusive Definition of Sex Discrimination.**

It may surprise many that what became the Civil Rights Act of 1964 did not originally outlaw discrimination against women. Opponents of Title VII added prohibition of sex discrimination as a strategy to defeat the act. Judge Howard Smith of Virginia, Chairman of the Rules Committee, proposed the language on the House floor. The majority of representatives who voted for the amendment later voted against the act. Thus, Rep. Smith's original intent was not to benefit women, but to defeat Title VII. To complete the irony, "the prohibition of discrimination based on sex has probably had a greater impact" than the other portions of the act. Lindemann and Grossman, *EMPLOYMENT DISCRIMINATION LAW* (3d ed.), Vol. I at xvii.

Since then, prohibitions against sex discrimination have made significant strides. One area in which protection against sex discrimination has gone beyond settled expectation involves discrimination against males. Although sex discrimination laws on both the state and federal level were originally designed to protect women from discrimination they have historically suffered at the hands of men, courts have since held that men are also protected under these laws, much as white persons now benefit from laws designed to protect against discrimination on account of race.<sup>6</sup>

The highest court in this state affirmed a ruling by this agency that a man bringing an equal pay claim had standing to sue based on sex discrimination. *State v. CHRO*, 211 Conn. 464 (1989). Federal law is similar. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669, 682 (1983)(Title VII's prohibition of discrimination "because of... sex" protects men as well as women.).

More recently, the U.S. Supreme Court unanimously held that a male victim of same-sex sexual harassment was entitled to the protection of Title VII despite the original intent of Congress to provide protection to women from such discrimination. The Court wrote:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we are governed.

*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

The reasoning behind the Court's ruling in this landmark case seriously undermines the holdings of those federal cases which had previously held that Title VII's protection does not extend to transsexuals. See also *Zalewski v. Overlook Hospital*, 300 N.J. Super. 202, 692 A.2d 131 (1996)(male heterosexual's complaint of sexual harassment by other heterosexual males based on gender stereotyping was actionable as a violation of the New Jersey Law Against Discrimination).

This very body--the Commissioners of the CHRO--issued a declaratory ruling that preceded *Oncale* by several months which posed an identical question under state law: whether our laws against sexual harassment prohibited male-

to-male harassment. We answered in the affirmative, declaring that "Connecticut antidiscrimination law recognizes a cause of action for same-sex sexual harassment, regardless of the sexual orientation of the victim and harasser." Declaratory Ruling of the Petition for a Declaratory Ruling Filed by Hunter's Ambulance, Inc., CHRO No. 9730074 (December 8, 1997) at 23. We noted that the outcome would be the same, regardless of how the U.S. Supreme Court would eventually rule in Oncale. *Id.* at 11.

These decisions chart a decided shift away from traditional notions of sex discrimination, and the CHRO recognizes that they should now command a majority view.<sup>7</sup>

### **C. Sexual Stereotyping is a Form of Sex Discrimination.**

Years after the Holloway and Ulane decisions, the U.S. Supreme Court had occasion to address not only the traditional meaning of sex discrimination, but what the Court ultimately found to be an equally discriminatory practice: sex stereotyping. Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989).

In Price-Waterhouse, a woman's candidacy for partnership was rejected because her employers determined that she failed to conform to socially constructed gender expectations. In its decision favorable to the woman candidate, the Supreme Court determined that, under Title VII, the term "sex" encompasses both sex and gender. For example, the Court wrote, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute." *Id.* at 239. "Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities." *Id.* at 242.

The Court went on to discuss sex stereotyping as another form of sex discrimination. "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. Hopkins was accused of being "macho", that she "overcompensated for being a woman", was advised to take "a course at charm school", was criticized for swearing "because it's a lady using foul language" and was "somewhat masculine". *Id.* at 235. "Her only hope for achieving partnership", her employer recommended, "was to be more feminine, wear makeup, have her hair styled, and wear jewelry." *Id.* The Court found this sufficient evidence of sex stereotyping:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match 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, quoting Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 707, n.13 (1978), quoting Strogis v. United Airlines, Inc. 444 F.2d 1194, 1198 (7th Cir. 1971).

In J.E.B. v. Alabama, 511 U.S. 127 (1994), the U.S. Supreme Court found that selecting jurors solely on the basis of sex was as impermissible as excluding jurors solely on the basis of race. In its discussion, the Court discredited the myth of sex stereotypes, as it had done earlier in Price-Waterhouse:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender

in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. The generalization advanced by Alabama in support of its asserted right to discriminate on the basis of gender is, at the least, overbroad, and serves only to perpetuate the same "outmoded notions of the relative capabilities of men and women," that we have invalidated in other contexts. The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

Id. at 140 n.11 (internal citations omitted).

Strong support for rejecting sexual stereotyping notions likewise appears in Connecticut law. Evening Sentinel v. NOW, 168 Conn. 26 (1975) involved the segregation of the help-wanted advertisements by a newspaper into "three categories: Help Wanted Male, Help Wanted Female, and Help Wanted Male/Female." Id. at 28. There was some suggestion that the practice merely assisted persons in locating suitable job opportunities. Our Supreme Court, however, called it what it was: a flagrant example of sex discrimination based on stereotypical notions of suitable employment for men and women.

In West Hartford v. CHRO, 176 Conn. 291 (1978), the Town of West Hartford employed women in a traditionally male job--fire dispatcher--but under the title of communications center operator at a reduced rate of pay. Justice Ellen Peters, writing for the Court, scoffed at the implication that women were fortunate just to be employed, however reduced their wages: the "employment of a cadre of women at a pay scale considerably below that of [men]...cannot be considered to be a benefit, as the trial court held." Id. at 298-99.

**D. Modern Legal Developments Treat Transsexuals as a Class of Persons Protected by Antidiscrimination Laws.**

Taken together, the authority discussed in the previous sections provides strong support for the proposition that our laws do protect transsexuals from discrimination based on sex stereotyping. Most recently, that view was adopted by the Ninth Circuit in Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

Schwenk was an inmate in a Washington state prison. Biologically male, Schwenk preferred feminine attire, attributes and other manifestations of femaleness, and it ultimately became known throughout the prison that Schwenk was a male-to-female transsexual. Shortly after learning this, Hartford, a prison guard, began to sexually harass Schwenk. The harassment, while initially verbal, escalated into a physical sexual assault, which prompted Schwenk to file a court action against Hartford.

In Schwenk, the court was confronted with the question of whether the Gender Motivated Violence Act (GMVA), enacted in 1994 as part of the Violence Against Women Act, protected transsexuals. The court concluded that the GMVA parallels Title VII, and that both prohibit discrimination based on gender as well as sex. Id. at 1202. Recognizing that the language and logic of Price-Waterhouse overruled Holloway, the Schwenk court relied on the Price-Waterhouse analysis that Title VII barred discrimination, because the plaintiff failed to act like a woman and 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. Thus, under Price-Waterhouse, "sex" under Title VII encompasses both sex--that is, the biological differences between men and women--and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

Id. at 1202.

Recently, the First Circuit has had occasion to interpret the Equal Credit Opportunity Act (ECOA) in Rosa v. Park West Bank and Trust Company, 214 F. 3d 213 (1st Cir. 2000).<sup>8</sup> Rosa, a biological male, went to the Bank to apply for a loan dressed in "traditionally female attire". Upon Rosa's request for a loan application, the Bank employee asked Rosa for identification, which Rosa produced. After looking at the identification cards, the employee sent Rosa home with instructions to change clothes so that Rosa would be dressed as he had been dressed in the identification cards ("more traditionally male attire") before she would give Rosa a loan application or process a loan request. Rosa alleged that this treatment violated the ECOA and Massachusetts's antidiscrimination laws. The First Circuit agreed. Looking to Title VII case law to interpret the ECOA, the court found that, based on the Price-Waterhouse analysis,

It is reasonable to infer that [the Bank employee] told Rosa to go home and change because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application. That is, the Bank may treat, for credit purposes, a woman who dresses like a man differently than a man who dresses like a woman. If so, the Bank concedes, Rosa may have a claim. Indeed, under Price Waterhouse, "stereotyped remarks [including statements about dressing more 'femininely'] can certainly be evidence that gender played a part."

Id. at 215-16 (internal citation omitted).

See also Maffei v. Kolaepon Industry, Inc., 164 Misc.2d 547, 626 N.Y.S.2d 391 (Sup.1995)(holding that a New York City ordinance prohibiting gender discrimination provides protection to transsexuals); Rentos v. Oce-Office Systems, 1996 W.L. 737125 (S.D.N.Y. 1996)(following Maffei, the District Court held that transsexuals were protected from discrimination under both state and city human rights laws proscribing sex discrimination); Miles v. New York University, 979 F.Supp. 248 (S.D.N.Y. 1997) (court refused to dismiss Miles' Title IX complaint of sexual harassment despite the fact that the victim was a male-to-female transsexual, noting that the employer perceived her to be a female).

We accept the analysis contained in Price-Waterhouse, Schwenk and Rosa as more in keeping with the letter and spirit of Connecticut antidiscrimination law than the more restrictive interpretations found in earlier cases.<sup>9</sup> A Massachusetts Superior Court, in reliance on Price-Waterhouse and Rosa, recently held that the discipline of a male-to-female transsexual student who dressed in traditional female attire constitutes sex (gender) discrimination. Doe v. Yunits, No. 00-1060-A, Plymouth Superior Court (October 11, 2000)(Giles, J.) at 10-11.<sup>10</sup>

#### **E. Conclusion.**

"[P]rejudice and bigotry unfortunately are still prevalent in our society and they are facts to which we cannot close our eyes and pretend that they do not exist." State v. Smith, 222 Conn. 1, 30 (Berdon, J., dissenting). Connecticut's antidiscrimination laws, as a critical component of social legislation designed to rid this state of the scourge of discrimination, must be construed fairly and wisely to eradicate all traces of unlawful discrimination, wherever they are found to exist. Remedial statutes are liberally construed. Dysart Corp. v. Seaboard Sur. Co., 240 Conn. 10, 18 (1997) ("remedial statutes should be construed liberally in favor of those whom the law is intended to protect"); Knight v. F.L. Roberts and Co., Inc., 241 Conn. 466, 475 (1997); Keeney v. Fairfield Resources, Inc., 41 Conn.App. 120, 132-133, 674 A.2d 1349 (1996). This is a well-recognized principle of statutory construction.<sup>11</sup> Statutes under the CHRO's jurisdiction are remedial in nature. Civil Service Commission v. Trainor, 39 Conn.Sup. 528, 531 (App.Sess.Super.Ct. 1983), rev'd on other grounds, 195 Conn. 226 (1985). By far it is better to extend the benefit of statutory protections than to withhold them, and thereby subject persons to discrimination.

Unlike several federal enactments,<sup>12</sup> Connecticut law does not contain any exclusion, express or implied, of transsexuals from the general prohibitions against sex discrimination. That being the case, "we should not read into a remedial statute an unstated exception that would undermine the legislature's manifest intent....The principles of statutory construction direct us to construe remedial statutes liberally to effectuate the legislature's intent." CHRO v. Sullivan Associates, 250 Conn. 763, 781, reargument denied, 251 Conn. 924 (1999). As one legal scholar has noted,

{T}he treatment of transsexuals under antidiscrimination law affects the rights of all groups marginalized on the basis of sex. An effective challenge to the exclusion of transsexuals from the meaning of "sex" under sex discrimination statutes will undermine the contention that the protections effected by sex discrimination statutes are limited to certain defined groups.

Nevins, 24 N.Y.U. REV. L. & SOC. CHANGE 383, 384 (1998).

As a result, this CHRO declares that transsexuals, as defined in Part V of this ruling, may pursue claims of sex discrimination under CONN. GEN. STAT. ' 46a-60(a)(1), 46a-64(a)(1), 46a-64c(a)(1) and 46a-66(a).<sup>13</sup>

## V. WHO IS A TRANSEXUAL UNDER CONNECTICUT LAW?

Having determined that discrimination against transsexuals is a form of sex discrimination, it remains important to state, as much as possible under the circumstances, the parameters of this ruling. As said, Connecticut's laws prohibit discrimination on the basis of sex. The phrase "[d]iscrimination on the basis of sex" means "but is not limited to discrimination related to pregnancy, childbearing capacity, sterilization, fertility or related medical conditions" under CONN. GEN. STAT. ' 46a-51(17). Where the legislature has supplied a special definition, we must pay particular attention to it. Link v. Shelton, 186 Conn. 623, 627 (1982).

Beyond this special definition, numerous statutes under the CHRO's jurisdiction prohibit discrimination because of "sex". In arriving at an appropriate meaning, words and phrases in statutes are interpreted according to their plain and ordinary meaning. Johnson v. Manson, 196 Conn. 309, 316 (1985). The AMERICAN HERITAGE DICTIONARY (2d coll. ed. 1982) defines "sex" as:

1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions,

designated male and female, of this classification...3. The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female.

The same source defines transsexual as "1. A person with an overwhelming desire to become a member of the other sex. 2. A person whose sex has been changed externally through surgery." *Id.*

As another source noted:

Transsexualism is defined as "[t]he desire to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex." *STEDMAN'S MEDICAL DICTIONARY* 1841 (26th ed. 1995). The condition experienced is properly termed "gender dysphoria," its manifestation (i.e., adoption of the desired sex role) "transsexualism." William A. W. Walters, *Human Sexual Differentiation and Its Disturbances*, in *SEX CHANGE: THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT* 21 (H.A. Finlay ed., 1988).

"Transgendered" has emerged as an alternative to "transsexual" and refers to "women and men whose self-described gender identity is other than their sexual identity at birth (regardless of whether those people have had hormonal treatment or surgery to reassign their sexual identity)." Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 679 n.\* (1996). Transgenderism also refers to "all those subjects who cross gender boundaries (as in 'the transgender community') [and] (more specifically) those subjects who undergo partial sex change, usually hormonal." BERNICE L. HAUSMAN, *CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER* 228 n.85 (1995). See also KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 67-68 (1994) (explaining the hierarchy among transsexuals, transgenders, and transvestites); GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 55-56 (1994) (explaining the relationship between "transgenderism" and "transsexualism").

Storrow, 4 MICH. J. GENDER & L. at 334.

Transsexual individuals are classified by the medical profession as those individuals who have gender identity conflict, gender dysphoria, and/or gender identity disorder. See generally *The Standards of Care for Identity Disorders* (Fifth version, June 15, 1998), Harry Benjamin International Gender Dysphoria Association (Doe Petition, Exhibit C). See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition, 1994) ("DSM-IV"). Further, the U.S. Supreme Court has defined

a transsexual [as], one who has "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex," and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.

*Farmer v. Brennan*, 511 U.S. 825, 829 (1994)(quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).<sup>14</sup>

For purposes of this analysis, consistent with Doe's petition, we define

"transsexual" to include transgendered persons. Transgendered people include, among others, people who are intersexed; that is, people who are born with ambiguous genitalia or chromosomal ambiguity found in persons with, e.g. Androgen Insensitivity Syndrome, Klinefelter's Syndrome and Turner's Syndrome. Intersexed people are often more commonly referred to in lay terms as hermaphrodites, people born with both female and male reproductive organs. Dreger, Hermaphrodite and the Medical Invention of Sex, Harvard University Press (Cambridge, MA 2000), pp. 37-39.

We use the terms "gender dysphoria" and "gender identity disorder" synonymously with "transsexualism". We adopt the definition of "gender identity" as "having or being perceived as having a self-image, expression or identity not traditionally associated with one's sex at birth". We further note that, "This definition is intended to include pre-operative and post operative transsexuals, [transgendered] people, and cross-dressers [transvestites<sup>15</sup>]." See, Leonard, "The New York Law School Journal of Human Rights, CHRONICLING A MOVEMENT: A Symposium to Recognize the Twentieth Anniversary of the *Lesbian/Gay Law Notes*" (2000).<sup>16</sup>

With the limited record before us, the CHRO can do little more than provide a general outline of those persons we envision as falling within the protection our law affords against sex discrimination. We do not attempt to capture every personal situation that may be presented. This does not mean that we treat the issue as unimportant. Rather, our considered judgment is that factual disputes can be better resolved through the investigative and public hearing processes than decided by us in a near vacuum. Previously, we have taken this approach to allow individual cases of discrimination to be resolved in this manner. Declaratory Ruling on the Petition of Phoenix Home Life Mutual Insurance Company and Griffith and Co., Inc., CHRO No. 9910499 (June 7, 2000). Any attempt by us to arrive at an all-encompassing definition would inevitably overlook, through our inadvertence or inexperience, persons to whom, upon deeper reflection, we would have now extended statutory protection. In reaching this conclusion, our intent is to see that justice is done for each individual--transsexual or nontranssexual, male or female, straight or gay, black or white, rich or poor--so as to recognize each person as a unique and valued member of our great human family.

## VI. CONCLUSION.

In the course of discharging their responsibilities to the public, administrative agencies must necessarily interpret and apply statutes. The "legislature intended that administrators issue declaratory rulings based on their interpretations of statutes." Connecticut Life & Health Ins. Guaranty Assn. v. Jackson, 173 Conn. 352, 356 (1977). As Connecticut's antidiscrimination law enforcement agency, the CHRO has an obligation to interpret and apply state antidiscrimination law. According to Sullivan v. Bd. of Police Commissioners, 196 Conn. 208, 215 (1985):

Read in its entirety, the CFEPFA [Connecticut Fair Employment Practices Act] not only defines important rights designed to rid the workplace of discrimination, but also vests first-order administrative oversight and enforcement of these rights in the CHRO. It is the CHRO that is charged by the act with initial responsibility for the investigation and adjudication of claims of employment discrimination.

"It is the CHRO that is charged with the primary responsibility of determining whether discriminatory practices have occurred and what the appropriate remedy for such discrimination must be." Dept. of Health Services v. CHRO, 198 Conn. 479, 488 (1986).

Acknowledging these public responsibilities, we are persuaded that there is ample and sound legal authority for the result we reach. "The people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination. Connecticut has approved the pending equal rights amendment to the United States constitution...and its own Connecticut equal rights amendment, in addition to the [statutes enforced by the CHRO that are under review here]. The history of this mass of legislation evidences a firm commitment not only to end discrimination against women, but also to do away with sex discrimination altogether." *Evening Sentinel v. NOW*, 168 Conn. at 34.

In response to Doe's question, the CHRO finds that transsexuals, as defined in this ruling, are covered by Connecticut's statutes prohibiting discrimination based on sex, specifically CONN. GEN. STAT. ' ' 46a-60(a)(1), 46a-64(a)(1), 46a-64c(a)(1) and 46a-66(a).

### **COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES**

Adopted by a majority vote of the Commissioners of the Commission on Human Rights and Opportunities present and voting at the regular monthly meeting of the Commission held on November 9, 2000, at Hartford, Connecticut.

Attest:

Amalia Vazquez Bzydra, Chairperson Dated: 11/9/00

#### ***Endnotes:***

1. CONN. GEN. STAT. ' 46a-60(a)(1) makes it a discriminatory practice "for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need to refuse to hire or to employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's...sex". CONN. GEN. STAT. § 46a-64(a)(1) reads in pertinent part, "it shall be a discriminatory practice in violation of this section: (1) to deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of...sex". CONN. GEN. STAT. § 46a-64c(a)(1) proscribes discrimination in housing, providing that it shall be a discriminatory practice "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of... sex". CONN. GEN. STAT. § 46a-66(a) sets out prohibitions against discrimination in the provision of credit: "it shall be a discriminatory practice in violation of this section for any creditor to discriminate on the basis of sex". Thus, this declaratory ruling asks that we protect the basic human rights of transsexual persons to live and work freely in this state, rights already enjoyed by the overwhelming majority of us.

2. "Title VII" refers to Title VII of the Civil Rights Act of 1964, as amended. Codified as 42 U.S.C. ' 2000e *et seq.*; it is a historic enactment that extends the protection of federal law to the American workplace.

3. One commentator has criticized these decisions, observing that courts which have restricted the application of Title VII to transsexuals incorrectly distinguish between "sex" and "gender". "Given that Title VII's remedial aspirations are aimed at a societal, not a biological level, Title VII is not aimed at sex at all, in either its traditional or nontraditional sense, but is in fact aimed at preventing irrelevant distinctions based on gender from being the basis of employment decisions. Current Title VII jurisprudence supports this point, with the differential treatment of masculine women and effeminate men being only one

example of the judiciary's focus, not on chromosomes or genitalia, but on acceptable gender roles." *Storrow*, 4 Mich. J. Gender & L. 275, 318-19 (1997).

4. At other times, our courts have repudiated federal law, and moved independently. *State v. CHRO*, 211 Conn. 464, 469-70 (1989) ("Although we are not bound by federal interpretation of Title VII provisions, we have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute. Nevertheless, we have also recognized that, under certain circumstances, federal law defines the beginning and not the end of our approach to the subject.").

5. In *Miko v. CHRO*, 220 Conn. 192 (1991) and *Levy v. CHRO*, 236 Conn. 96 (1996), the Connecticut Supreme Court has cited *Price-Waterhouse* with authority and adopted its analytical framework for direct discrimination cases.

6. The U.S. Supreme Court has clearly and unequivocally ruled that Title VII's proscription against race discrimination protects whites equally. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).

7. For example, transitioning or transitioned male-to-female transsexuals have encountered the same type of sex discrimination women faced when moving into traditionally male occupations. *Ulane v. Eastern Air Lines, Inc.*, 742 F.2d at 1085 (male-to-female transsexual lost her job as an airline pilot, a male-dominated job, which she had held as a man; it is unclear whether her employer's motivation to terminate her employment was based as much on her sex as it was on her being a transsexual); *James v. Ranch Mart Hardware, Inc.*, 881 F.Supp. 478, 480-81 (D.Kan. 1995) (male-to-female transsexual lost job as a sales clerk in the electrical department of a hardware store after she transitioned on the job); *Doe v. Boeing Company*, 846 F.2d 531, 533-34 (Wash. 1993) (male-to-female transsexual lost job as Boeing engineer after transitioning on the job). These types of career obstacles parallel those long suffered by biological women. "If Title VII was intended to make it possible for females with feminine sensibilities to work comfortably in the public sphere, then the statutory protections must be interpreted to cover expressions of feminine gender by transsexuals, whether or not the expression of such femininity by transsexuals was the principal concern of Congress.... [L]egal protection of [male to female transsexuals] who transition on the job, and who want to continue holding jobs that have been identified as male jobs, is necessary to assure legal protection for persons born female who wish to hold those jobs. A primary purpose of Title VII is carried out if "sex" is read to include "[male-to-female] transsexuals". *Cain*, 75 D.E.V.U. REV. 1321, 1357-1358 (1998).

8. Entitled "Activities constituting discrimination", the relevant provision, 15 U.S.C.A. § 1691(a)(1), states: "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction...on the basis of...sex".

9. The only case to interpret whether Connecticut's prohibition against sex discrimination extends to transsexuals was decided in the negative. *Conway v. City of Hartford*, 1997 WL 78585 \*7, No. CV-95-0553003, J.D. of Hartford-New Britain at Hartford (February 4, 1997) (Hale, J.R.). Due to the absence of Connecticut law on the subject, Judge Hale considered the "weight of outside authority holding that Title VII and similar state statutes do not prohibit discrimination against transsexuals"; *id.*; including *Holloway* and *Ulane*. Since *Schwenk* specifically repudiates *Holloway*, *Conway's* analysis is now suspect, and its use in interpreting state law significantly diminished. Although the CHRO normally looks to decisions of the Superior Court for guidance in interpreting our law, especially in the absence of any other state precedent, we are not required to do so. "[Superior] court cases do not establish binding precedent. *J.M. Lynne Co. v. Geraghty*, 204 Conn. 361, 369 (1987)." *McDonald v. Rowe*,

43 Conn.App. 39, 43 (1996)(parallel citation omitted). Conway does, however, recognize that transsexuals may properly pursue claims of discrimination based on mental disorder under CONN. GEN. STAT. ' 46a-60(a)(1). As stated at the outset, we do not address whether transsexualism is a mental disorder in this ruling. We also note that the Appellate Court recently affirmed a judgment denying Conway's motion to open a judgment of nonsuit due to his failure to comply with discovery orders. Conway v. City of Hartford, 2000 WL 1635690, Conn.App. (2000). The Appellate Court did not have before it Judge Hale's ruling on whether transsexuals were able to complain of discrimination under Connecticut law.

10. Although only a superior court decision interpreting the law of another state, we find its arguments and conclusions persuasive. Its treatment of sex stereotyping as a form of sex discrimination is consistent with the emerging view found in more modern federal decisions.

11. Since 1848 Connecticut courts have recognized this principle. Rawson v. State, 19 Conn. 292 (1848).

12. Transsexuals are expressly excluded from protection under the Vocational Rehabilitation Act and the Americans With Disabilities Act. See 29 U.S.C. ' 706 (8)(F)(i)(under Rehabilitation Act, "the term 'individual with a disability' does not include an individual on the basis of...transsexualism") and 42 U.S.C. ' 12211(b)(1)(under the ADA, "the term 'disability' shall not include...transsexualism").

13. Although the party and intervenors mention only four statutes for us to consider, other laws under the CHRO's jurisdiction prohibit discrimination on the basis of sex. The CHRO remains convinced that sex stereotyping generally is a form of sex discrimination, as modern authority finds. Thus, absent special circumstances, this ruling should be understood to apply uniformly to all statutes outlawing sex discrimination under the CHRO's jurisdiction.

14. Thus, there appears to be no basis in science, medicine or law to conclude that a transsexual is a third sex, neither male nor female. Instead, a transsexual is an individual who was born a member of one sex but has "an overwhelming" desire to become, or has become, a member of the other sex.

15. The dictionary defines a transvestite as "A person, esp. a male, who dresses in the clothing of the opposite sex for psychological reasons." The American Heritage Dictionary, Second College Edition, (1982).

16. Neither transsexual nor transgendered people are protected by prohibitions against discrimination based on sexual orientation. Protection from discrimination based on sexual orientation is guaranteed by Connecticut's Gay Rights Law, CONN. GEN. STAT. § 46a-81a *et seq.* Sexual orientation concerns whom an individual loves or desires; gender identity concerns which gender an individual feels s/he is. See Doe Petition, p. 5, Exhibit A, p. 17; and Intervenors' Position Statement, p. 2.

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