



# *DPS Legal Review*

*December 2011 Legal Services (404) 624-7423 Volume 10 No. 12*

## **GENDER NON-CONFORMITY DISCRIMINATION**

The Plaintiff, who was born a biological male, was diagnosed with Gender Identity Disorder (“GID”) as an adult. The Plaintiff took steps to transition from male to female under the supervision of health care providers. This process included living as a woman outside of the workplace, a prerequisite to sex reassignment surgery. In 2005, while presenting as a man, the Plaintiff was hired as an editor by the Georgia General Assembly’s Office of Legislative Counsel (“OLC”).

The following year, the Plaintiff told her direct supervisor that she was a transsexual and was in the process of becoming a woman. On Halloween, when OLC employees were permitted to come to work wearing costumes, the Plaintiff came to work dressed as a woman. When the head of OLC saw her, he told her that her appearance was not appropriate and asked her to leave the office. The head of OLC said that a male in women’s clothing is “unnatural.” The head of OLC met with the Plaintiff’s supervisor and learned that the Plaintiff intended to undergo a gender transition.

In the fall of 2007, the Plaintiff told her supervisor that she was ready to proceed with gender transition and would begin coming to work as a woman and planned to change her legal name. When the head of OLC was told about these impending changes, he terminated the Plaintiff. He said he believed the “intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue,” and that it would make “coworkers uncomfortable.”

The plaintiff sued alleging: 1) discrimination based on her female gender identity and her failure to conform to the sex stereotypes associated with the sex the Defendant perceived her to be and 2) discrimination based on her medical condition, GID. The Court dismissed the

medical discrimination claim but granted the declaratory and injunctive relief associated with the sex discrimination claim. Both sides appealed.

**HOLDING:** The Eleventh Circuit Court of Appeals held that the Defendant supervisor lacked any sufficiently important governmental interest to justify terminating the Plaintiff. The Court also held that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of gender non-conformity. The Defendant’s concern that other women might object to a transgender employee’s restroom use was not a sufficiently important governmental interest under the Fourteenth Amendment to justify terminating the Plaintiff because of gender non-conformity, where the concern was based on speculation.

The Court held that the Equal Protection Clause requires the state to treat all persons similarly situated alike or, conversely, to avoid all classifications that are arbitrary or irrational and those that reflect a bare desire to harm a politically unpopular group. The Court also held that governmental acts, based upon gender stereotypes (which presume that men and women’s appearance and behavior will be determined by their sex), are subject to heightened scrutiny since they embody the very stereotype the law condemns. Glenn v. Brumby, \_\_\_ F.3d \_\_\_, 2011 WL 6029978 (11th Cir. (Ga.)).

## **K-9 ALERT**

While on patrol after 1:00 a.m., a Florida Officer saw the Defendant’s car swerve out of his lane, almost hitting the curb twice, then make a wide turn into an oncoming traffic lane. The Officer initiated a stop with his K-9 partner, Dusty. He checked the Defendant’s driver’s license and registration for outstanding warrants. The Officer gave the Defendant a citation for failing to maintain a single lane and failing to wear a seatbelt. He asked the Defendant and

his two passengers to exit the car so the Defendant could sign the citations and Dusty could do a free-air sniff of the outside of the car. The Defendant and his passengers complied.

Twelve minutes after the Officer stopped the car and before the Defendant signed the citations, Dusty alerted. The Officer searched the car and found crack cocaine and a handgun. The Defendant moved to suppress arguing: 1) the Officer lacked probable cause to stop his car, 2) the Officer unreasonably prolonged the stop by asking the Defendant and his passengers to exit the car, and 3) no probable cause existed to search because the dog was unreliable. (Dusty's "false alert" rate was nearly 30% in the field.)

**HOLDING:** The Court held that the Officer's observation of the Defendant swerving out of his lane three times created a suspicion that the Defendant was intoxicated. The Court also held that the stop's 12-minute duration was justified by the ordinary inquiries incident to such a stop. The Defendant had not signed the citations when Dusty alerted. The Court held that it was undisputed that the dog alerted to the presence of drugs.

The Court held that a dog sniff must be sufficiently reliable to establish probable cause, and "training of a dog alone is sufficient proof of reliability." Further, the Court held that "even considering Dusty's alleged 70% accuracy rate in the field, a positive alert would be sufficient to establish a 'fair probability' that drugs would be found in the car." U.S. v. Smith, Slip Copy, 2011 WL 6115544 (C.A. 11 (Fla.)).

### **ROADBLOCK**

At 5:00 a.m. the Defendant stopped at a roadblock. She was arrested. At trial, a Sheriff's Chief Deputy testified that he was authorized to approve roadblocks. This roadblock was a large scale coordinated effort with the Sheriff's Offices of Douglas and Carroll County and the Governor's Office of Highway Safety. The purpose was highway safety and driver sobriety. The Officer who initially spoke to the Defendant and the Officer who completed the DUI investigation testified that they were participating in the roadblock under the direction and supervision of the commander of the Highway Enforcement of Aggressive Traffic (H.E.A.T.) Unit. The Defendant was convicted of driving under the influence of marijuana and cocaine to the extent it was less safe for her to drive and possession of marijuana. She appealed arguing that the State failed to prove the roadblock had a legitimate purpose.

**HOLDING:** The Court held the roadblock was lawful. The Court noted that the State did not offer the testimony of the H.E.A.T. commander regarding his authority to implement roadblocks or his purpose in implementing the roadblock. However, the Court **declined to hold** that the testimony of the supervisory officer who orders a roadblock is required to prove these facts. The Court held that the evidence taken as a whole authorized a finding that the commander had the authority to implement roadblocks and had a legitimate primary purpose. Martin v. State, \_\_\_ S.E.2d \_\_\_, 2011 WL 6061359 (Ga.App.).

### **INQUIRING MINDS**

**QUERY:** May interstate commercial bus and truck drivers use hand-held mobile telephones while driving?

**ANSWER:** No. The final hand-held cell phone ban rule can be accessed [here](#). Drivers who violate the restriction will face federal civil penalties of up to \$2,750 for each offense and disqualification from operating a commercial motor vehicle for multiple offenses. Additionally, states will suspend a driver's commercial driver's license (CDL) after two or more serious traffic violations. Commercial truck and bus companies that allow their drivers to use hand-held cell phones while driving will face a maximum penalty of \$11,000.

**QUERY:** When will the new regulations related to "personal transportation devices" take effect?

**ANSWER:** As of January 1, 2012, based on O.C.G.A. § 40-6-363, all personal transportation vehicles must have a braking system, a functioning reverse warning device, a main power switch that is not operable without a key or switch, head lamps, reflex reflectors, tail lamps, a horn, a rearview mirror, safety warning labels, hip restraints, and hand-holds. This is a new class of vehicles defined at O.C.G.A. § 40-1-1(43.1).

### **ALS REMINDER**

⊗ If you need an additional witness for an ALS Hearing, please remember to contact Dee or Beverly to subpoena the witness. Always put the necessary contact information for the additional witness in the incident report. This information should include: **full name, badge number, precinct/zone, and phone number.**

### **QUOTABLE WISDOM WORKS**

*"Ring out the false, ring in the true."*

*~ Alfred Lord Tennyson*

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and

