

Gender Identity
and
Sexual Orientation
Discrimination
in the
Workplace

A Practical Guide

Glenn v. Brumby: Forty Years After Grossman

Vandy Beth Glenn

Editor-in-Chief

CHRISTINE MICHELLE DUFFY, ESQ.

*Pro Bono Partnership
Parsippany, New Jersey*

State Laws Executive Editor

DENISE M. VISCONTI, ESQ.

*Little Mendelson, P.C.
San Diego, California*

*With the assistance of The National LGBT Bar Association
and its Executive Director D'Arcy Kemnitz, Esq.*

**Bloomberg
BNA**

Arlington, VA

Copyright © 2014

The Bureau of National Affairs, Inc.

Reprinted by permission

Nothing contained herein is to be considered the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms or agreements herein are intended for educational and informational purposes only.

Library of Congress Cataloging-in-Publication Data

Gender identity and sexual orientation discrimination in the workplace : a practical guide / Editor-in-Chief Christine Michelle Duffy, Esq., Pro Bono Partnership, Parsippany, New Jersey ; State Laws Executive Editor Denise M. Visconti, Esq., Littler Mendelson, P.C., San Diego, California ; with the assistance of The National LGBT Bar Association and its Executive Director D'Arcy Kemnitz, Esq.

pages cm

Includes index.

ISBN 978-1-61746-300-6

1. Transgender people--Employment--Law and legislation--United States. 2. Gays--Employment--Law and legislation--United States. 3. Gender identity--Law and legislation--United States. 4. Transphobia--Law and legislation--United States. 5. Homophobia--Law and legislation--United States. I. Duffy, Christine Michelle, editor. II. Visconti, Denise M., editor. III. Kemnitz, D'Arcy. IV. National LGBT Bar Association

KF3467.5.G46 2014

344.7301'56--dc23

2014027148

All rights reserved. Photocopying any portion of this publication is strictly prohibited unless express written authorization is first obtained from BNA Books, 1801 S. Bell St., Arlington, VA 22202, bna.com/bnabooks. Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by BNA Books for libraries and other users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that \$1.00 per page is paid directly to CCC, 222 Rosewood Dr., Danvers, MA 01923, copyright.com, Telephone: 978-750-8400, Fax: 978-746-8600.

Published by Bloomberg BNA
1801 S. Bell Street, Arlington, VA 22202
bna.com/bnabooks

ISBN 978-1-61746-300-6

Printed in the United States of America

GLENN v. BRUMBY: FORTY YEARS AFTER GROSSMAN

*Vandy Beth Glenn
Atlanta, Georgia*

I. The Call I Took	6-2
II. The Call I Made	6-2
III. The Lawsuit	6-3
IV. The Appeal	6-4
V. The Struggle for Equal Rights Continues	6-8

Editor’s Note: Despite the valiant pro bono efforts 40 years ago of able lawyers such as Dick Schachter and willing plaintiffs such as Paula Grossman, achieving significant progress toward equality for LGBT workers has been a very long, tortuous journey. There are numerous milestones—positive and negative—along that journey that could be highlighted, but here we will focus on one of the most significant federal employment cases, litigated in one of the more conservative federal appeals courts.

In October 2007, Vandy Beth Glenn, a Georgia state employee, announced to her supervisor that she intended to live her life at work the way she lived it outside of work—as a woman. Soon thereafter, Vandy Beth was fired because the head of her office felt she was, as Vandy Beth summarizes it below, *icky*. In her essay, Vandy Beth discusses her misfortune at work, the work of her Lambda Legal lawyers, Cole Thaler and Greg Nevins, their four-year journey through the court system, and the road ahead for achieving equality.^a

^aOn September 23, 2009, Vandy Beth testified before the U.S. House of Representatives in support of the Employment Non-Discrimination Act (discussed in Chapter 19, The Employment Non-Discrimination Act: Its Scope, History, and Prospects). To read her testimony, see *The Employment Non-Discrimination Act of 2009, Hearing on H.R. 3017 Before the U.S. House of Representatives Committee on Education and Labor*, Serial No. 111-32, 111th Cong. 31-34 (Sept. 23, 2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr52242/pdf/CHRG-111hhr52242.pdf> and <http://democrats.edworkforce.house.gov/hearing/hr-3017-employment-non-discrimination-act-2009>. To see her live testimony, go to <http://edwork.edgeboss.net/wmedia/edwork/fc/fc092309.wvx>.

I. THE CALL I TOOK

It began at 11:30 on Tuesday, October 16, 2007. I was at my desk in the editors' room of the Georgia General Assembly's Office of Legislative Counsel (OLC). My desk phone rang.

"Would you come down to my office for a minute, please?" It was Sewell Brumby, Senior Legislative Counsel and head of the OLC, on the other end. I'd been expecting—and dreading—this call for weeks. I told him I'd be right down.

I gave my coworker, Eugie Foster, an apprehensive look as I rose from my chair. She responded with sympathetic raised eyebrows. We both knew what this was about.

I am a transsexual woman. In 2007, I had been working in the OLC for two years, and pursuing my gender transition for almost three. I was still presenting as a man in the workplace, but as my normal (female) self everywhere else. It's exhausting to live in two identities, especially if you're not a costumed superhero. A month earlier, I had told my immediate supervisor, the senior editor, that the time had come for me to begin coming to work looking as I did in all other areas of my life. She then duly informed Mr. Brumby, and for weeks I had been waiting for the inevitable fallout. This morning it finally came.

The meeting was brief and to the point. "Do I understand correctly," he said, "that you have formed a fixed intention of becoming a woman?" The way he phrased it made me think it bewildered him to think that anybody would want to be a woman. But I told him yes.

"Well," he said in the same matter-of-fact way, "I wish you well, but that just can't happen simultaneously with your employment here, and I have to dismiss you."

Minutes later I was out on the street walking to my car, the contents of my desk in a cardboard box in my arms, like a cliché out of a movie. And what had just happened to me *was* so common as to be a real-life cliché: I was a transsexual, and therefore I was fired.

II. THE CALL I MADE

But I was ready for this. Before I even reached my car, I was on the phone to Lambda Legal. "It just happened," I told the legal assistant, whom I'd told to be expecting this call. "They fired me for being transgender."

The decade just concluded, like all the ones before it, was mostly not a good time for the rights of transgender people. It's becoming easy to forget that in this new post-Chaz Bono, post-Kristin Beck era, but a very short while ago we were still considered tragic, disposable people, dismissed as freaks or mental cases. If we turned up in movies, invariably we were the villains or the victims. If we appeared on television, we were shocking the audiences of daytime talk shows. If we were discovered in the workplace, we were quickly sacked and forgotten.

If we then challenged our dismissals, courts didn't have much to say about it beyond that we were not entitled to legal protection. The Supreme Court did rule in 1989, in *Price Waterhouse v. Hopkins*,¹ that sex discrimination based on sex stereotyping is illegal under Title VII, which forbids discrimination on the basis of color, national origin, race, religion, or sex, but *Price Waterhouse* wasn't about transgender people, and for many years afterward other courts were unwilling to apply it to transgender people. Some did, and some didn't. Those that did typically were reversed on appeal. By the date I was fired, no case in the South had extended Title VII to reach transsexuals.

But Lambda Legal, which has litigated numerous landmark cases, such as *Lawrence v. Texas*,² agreed to take my case, and found a new, untried legal strategy. They decided to make a "Section 1983" sex discrimination claim under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The elements of an Equal Protection argument apply only to public employees such as myself, but are otherwise the same as a sex discrimination claim under Title VII.³ My attorneys, Cole Thaler and Greg Nevins, thought this would be a more palatable option. I'm not an attorney, so I'm not the one to explain why.

We also made a Section 1983 medical discrimination claim, because my gender identity disorder (now known as "gender dysphoria") was a medical diagnosis under the then-current edition of the *Diagnostic and Statistical Manual (DSM-IV)*,⁴ which called for transitioning in my workplace as a necessary part of my treatment.

III. THE LAWSUIT

In July 2008, our case was filed in the federal district court for the northern district of Georgia. Sewell Brumby immediately moved to dismiss the lawsuit, reminding the court that there is no federal law protecting transgender people. He was quoted by the Associated Press, in his only public statement over the entire course of the lawsuit, as saying "I think the lawsuit is without merit."⁵

In July 2009, Judge Richard Story denied the motion to dismiss, saying that Mr. Brumby "rightly indicate[s] this Court has held as a matter of law that transsexuals as a group are not a suspect class based on sex."⁶ The court went on to say, however, that "[t]his conclusion is not at odds with the

¹490 U.S. 228, 49 FEP 954 (1989).

²539 U.S. 558 (2003).

³[*Editor's Note*: See Chapter 15 (Federal Equal Protection) for a discussion of equal protection claims and their relationship to Title VII claims.]

⁴AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. text rev. 2000). The fifth edition of the *DSM* was released in May 2013.

⁵Associated Press, *Transgender Woman Sues Over Dismissal*, *AUGUSTA CHRONICLE* (July 23, 2008), available at http://chronicle.augusta.com/stories/2008/07/23/met_466760.shtml.

⁶*Glenn v. Brumby*, 632 F. Supp. 2d 1308, 1315, 106 FEP 1355 (N.D. Ga. 2009).

Supreme Court's interpretation of sex discrimination as defined in the *Price Waterhouse* case, where the Supreme Court explained that the prohibition of discrimination based on 'sex' bars gender discrimination as well, including discrimination based on sex stereotypes."⁷

Simply put, to win our case we had to prove to Judge Story that Mr. Brumby had committed "gender discrimination" against me. We took depositions that summer, and that's when Sewell Brumby won our case for us.

"I think it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," he admitted during his deposition, when asked to contemplate a transgender person (me) in the workplace.

He used the word "inappropriate" 13 times when describing the very idea of a transgender person working in his workplace. When asked to explain *why* it would be inappropriate, all he could say was that the "sheer fact" of it is inappropriate, and that it was only "common sense" to view it as such.

Sewell Brumby never identified a "legitimate governmental interest" that was served by denying me my job. In the three hours and change the deposition took, the best he could do was to establish that he thought transsexuals were, to summarize and paraphrase, *icky*.

This next era of our case, the year after the depositions and before Judge Story ruled on the merits of my claims, was the least nervous for me. In turning down the motion for dismissal, Judge Story had given us a legal road map for how to win in his court, and Mr. Brumby obligingly drove the van along that road, to torture a metaphor, during his deposition. I didn't know how long the judge would take to issue his ruling, but I was confident that the ruling would be in our favor.

In July 2010 that's just what happened. Although Judge Story turned down our medical discrimination claim, he held that we'd proved sex discrimination.⁸ A month later, he ordered that I be given back my job.⁹ Judge Story also enjoined Mr. Brumby from future discriminatory conduct toward me on the basis of sex.¹⁰

IV. THE APPEAL

Mr. Brumby didn't like this, and decided to double down on the original gamble with an appeal to the Eleventh Circuit Court of Appeals. In lieu of my return to work, the OLC resumed paying me my salary while the appeal was pending.

In late 2011, more than a year later, we headed into the Eleventh Circuit's courtroom for oral arguments. The Monday before Thanksgiving, Greg Nevins called to tell me the composition of the three-judge panel that

⁷*Id.*

⁸Glenn v. Brumby, 724 F. Supp. 2d 1284, 110 FEP 55, 23 AD 753 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011).

⁹Glenn v. Brumby, 2010 WL 3731107 (N.D. Ga. Sep. 15, 2010).

¹⁰*Id.*

would hear oral arguments on December 1 and rule on our case. I had been stressing over this for months. Because the Eleventh Circuit, which hears appeals from Georgia, Alabama, and Florida, was untested on LGBT issues and is considered a very conservative court, I had been obsessively researching the records of its 10 active judges and five senior judges.

It was a decidedly mixed bag, but overall not encouraging. The then-current batch of 15 judges had been appointed by every president from Gerald R. Ford to Barack Obama, and represented a range of judicial temperaments, but most of them tended away from the sort of social policy realignment argued for by my suit. And the composition of our panel would, theoretically at least, be completely random from among these 15.

So I took a deep breath and held it when Greg got me on the line and said, “I have some potentially bad news and good news.”

“First the bad news,” he said, followed by his own long inhalation. “We got Judge Pryor.” But then he added, “We have really good facts, good laws, so we have a fair chance he will agree with us.”

I keened in disappointment. Judge William H. Pryor Jr. was the one judge on the whole court I was 100 percent certain I did not want serving on our panel. Several things I knew about his biography informed my apprehension. I’ll mention two.

First, he was a George W. Bush appointee from 2004. Before his appointment to the federal bench, he was Alabama’s Attorney General, and in that role he filed an amicus brief in *Lawrence v. Texas* in which the Supreme Court declared that states cannot ban gay sex. Attorney General Pryor’s brief had urged the Court not to declare “homosexual sodomy as a fundamental constitutional right,” arguing that acceptance of “a constitutional right that protects ‘the choice of one’s partner’ and ‘whether and how to connect sexually’ must logically extend to activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia.”¹¹

Second, during a contentious U.S. Senate confirmation hearing on his nomination to the Eleventh Circuit, he admitted that as a result of “a value judgment,” he and his wife rescheduled a family vacation to avoid the annual “Gay Day” at Disney World.¹²

Of course, to be *homophobic* is not necessarily also to be *transphobic*, so I was perhaps unfairly presuming on Judge Pryor’s biases and inability to apply the law fairly. However, it’s pretty rare to find a homophobic person who isn’t also transphobic.

¹¹Brief of the States of Alabama, South Carolina, and Utah as *Amici Curiae* in Support of Respondent, 2003 WL 470172 (Feb. 18, 2003) (in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹²Confirmation Hearing on the Nominations of William H. Pryor, Jr. to be Circuit Judge for the Eleventh Circuit And Diane M. Stuart To Be Director, Violence Against Women Office, Department Of Justice, Hearing Before the Committee on the Judiciary of the United States Senate, Serial No. J-108-15 (June 11, 2003), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg91200/html/CHRG-108shrg91200.htm>.

“Quickly, Greg! The good news!” I replied, paraphrasing Peter O’Toole from the film *King Ralph*.

The good news was much better. Our other two panelists were Rosemary Barkett and nonagenarian senior judge Phyllis A. Kravitch, both well-known for their progressive attitudes on social issues. Judge Barkett is a former Catholic nun and the first Mexican American and the first woman to serve as chief justice of the Florida Supreme Court. Judge Kravitch was one of the first female graduates of University of Pennsylvania Law School and one of the first female litigation attorneys in Georgia in the 1940s, and she helped to end segregation in Savannah, Georgia.

So it looked like we had exactly two tolerant pairs of ears waiting for us on the first of December. And two is a majority of three. I began to let myself breathe easier.

Oral arguments were at 9 a.m. Greg had been honing his remarks for a month, and I’d attended both of his moot court practice sessions, so I believed I knew what he was going to say. The defendant’s outside counsel, Richard Sheinis, addressed the court first.

The courtroom was nearly full when I arrived. I recognized several people in the pews as reporters from the Atlanta gay press, who’ve been good and diligent at covering my story over the years. Some have even become friends, to the extent that maybe they shouldn’t have been covering the case anymore.

Greg was there in the pews; he hadn’t been cloistered out of sight to be anointed in oils and clothed in a white robe to prepare him for the ritual. I sat with him.

Sewell Brumby also arrived shortly before court began. His successor was there, too.

Two other cases preceded ours. One was a criminal case and one was about banks. In fairness and humility, I should note that probably some of the spectators filling the seats were there not because of my case but because one of these other cases interested them. I have no way of knowing, of course. The only thing that impressed me about these other cases was that one of the attorneys voluntarily forfeited some of the time he had reserved to speak. That seemed like a wasted opportunity, and I whispered to Greg that I hoped he didn’t do the same. He grinned and shrugged. “We’ll see how things go,” he whispered back. “Sometimes you can lose your own case by saying more than you have to.”

The cases were both over and done with by 9:30, which both shocked me and, more importantly, left me relieved. I’d been ready to spend the whole morning waiting in the queue, my anxiety building by the minute. My experiences over the previous four years had not led me to believe that anything happens quickly in the federal court system.

Sheinis went to the lectern and began to reiterate his contortionist’s argument about how my gender was not the problem, but my gender transition itself was what required that I be fired, because of the disruption it would cause in the office and in the capitol. He couldn’t make the arguments

Mr. Brumby had offered when he fired me—that my coworkers would be uncomfortable with my changed gender or that the legislators would find my continued employment immoral; those opinions were so clearly illegal that Sheinis had spent the past four years assiduously pretending Mr. Brumby had never said them.

Sheinis had hardly gotten a sentence out before Judge Pryor interrupted him. “You have a big problem under *Price Waterhouse*,” he said flatly.

This statement, from this judge, was pretty startling to everyone in the room. You could have heard a pin drop. Sheinis went on with his argument, trying unsuccessfully to draw a distinction between firing me for my transition and firing me because of unlawful sex stereotyping, but he never built up any momentum, as Judges Pryor and Barkett continued to pepper him with skeptical questions. Judge Barkett was even moved to laugh openly at one of Sheinis’ arguments.

Eventually Sheinis tried to shift to scare tactics, and told the panel that if it ruled in my favor, “transgender people would become a protected class.”

“That’s right,” Judges Pryor and Barkett responded, nodding vigorously and clearly unperturbed by this possibility. “Take it up with Congress,” Judge Pryor added with a shrug.

The exchange continued like this until Sheinis’ time had nearly run out. His arguments weren’t getting any traction. The time had so obviously gone badly for him that Judge Barkett prefaced her final question (the substance of which I don’t remember) with “just answer this and then we’ll put you out of your misery.”

Greg took the lectern next, and now I understood his statement that it can sometimes be best to say nothing. At this point, anything he said would only tend to diminish the high we were clearly riding. He scrapped his entire prepared argument, which he’d sweated over and moot-courted six ways from Sunday, and instead said, “I’ll just answer any questions y’all may have.”

Judge Pryor had a few technical questions that didn’t go to the substance of our case, and then we were done. We left the courtroom, talked to a few reporters, and barely an hour after we’d arrived, it was over.¹³

I went on with my December at that point, began to prepare for the holidays and tried to put the case out of my head. Everybody I know who knows about such things told me I shouldn’t expect a decision until late spring or early summer, and the pace of the lawsuit through briefs, arguments, appeals, and court decisions up to now—more than four years—reinforced that expectation. I had a long winter of uncertainty in front of me.

Or so I thought.

Five days after oral argument, at about noon, I got a text message from Greg: “We won!”

¹³Newspaper accounts of how oral argument went confirm my recollections. See Bill Rankin, *Court Appears Ready to Hand Legal Victory to Transgender Woman*, ATLANTA JOURNAL-CONSTITUTION (Dec. 1, 2011), available at <http://www.ajc.com/news/news/local-govt-politics/court-appears-ready-to-hand-legal-victory-to-trans/nQN9n>.

I stared at my phone in amazement. Five days? A five-day decision? That wasn't possible! I texted Greg back to ask if he was sure, and if this was unprecedented. He said he was sure, and that yes, outside the realm of a case involving a presidential election, it's almost unheard of to see an appeal decided and an opinion issued in only five days.

The decision was written by Judge Barkett, and it was unanimous. Judge Pryor joined in the decision, which was much broader in its scope than we had dared to reach for. The court accepted our equal protection argument, stating, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."¹⁴

That was the setup. Here was the knockout punch: "An individual cannot be punished because of his or her perceived gender non-conformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual."¹⁵

That tied it up neatly in a holiday bow as far as my specific case was concerned, because Sewell Brumby undeniably fired me because I'm a transgender person. As the Eleventh Circuit confirmed, "Brumby's testimony provides ample direct evidence to support the district court's conclusion that Brumby acted on the basis of Glenn's gender non-conformity."¹⁶

This would all be great for me; it's a binding precedent protecting not only me but also all other transgender public employees in Alabama, Florida, and Georgia. Such employees now cannot be legally fired in any of those three states because of gender variance. But even private-sector employees will benefit from the decision because the court expressed its agreement with a Sixth Circuit ruling that "discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause."¹⁷

V. THE STRUGGLE FOR EQUAL RIGHTS CONTINUES

I went back to my job almost immediately, on December 9, 2011. Some awkwardness was inevitable as I reintroduced myself to my former coworkers, but it soon passed and I became just another employee again. None of Mr. Brumby's horror scenarios came to pass. The legislators I pass in the hallways of the capitol don't give me a second look. If they've even heard of my case, they likely still have no idea who I am.

I am living the radical idea that transgender people are ordinary people.

¹⁴Glenn v. Brumby, 663 F.3d 1312, 1316, 113 FEP 1543 (11th Cir. 2011). [*Editor's Note:* The Eleventh Circuit's decision is discussed further in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 39 (Law and Culture in the Making of *Macy v. Holder*).]

¹⁵663 F.3d at 1319.

¹⁶*Id.* at 1321.

¹⁷*Id.* at 1317 (citing *Smith v. City of Salem*, 378 F.3d 566, 94 FEP 273 (6th Cir. 2004)).

In April 2012, the U.S. Equal Employment Opportunity Commission (EEOC), in *Macy v. Holder*,¹⁸ ruled that no private or public employer in the United States covered by Title VII can discriminate against employees on the basis of their gender identity, change of sex, and/or transgender status. Judge Barkett's opinion was cited as a major precedent for this ruling. As a result, the legal machinery of the EEOC can be brought to bear against future Sewell Brumbys when they fire future Vandy Beth Glensns.

I'm proud to have been a part of the long journey of so many litigants and their advocates throughout the United States over the 40 years since Paula Grossman first went to court to protect the rights of transgender people. We have made the world a better place. However, it's a sad reflection on our society that it's taken 40 years to get to this point with respect to federal law, and that more than 30 states' antidiscrimination laws still do not expressly protect people like me.

We need to continue the battle until every person, LGBT or not, is able to go to work and not have to worry about discrimination on the basis of characteristics that have no relevance to their ability to be productive employees. Thankfully, until that day there are many talented lawyers, such as Cole and Greg, who are willing to stand side by side with (and at no cost to) victims of discrimination to affirm the rights of all workers. A workplace free of discrimination—whether based on gender, sexual orientation, race, age, disability, or any other irrelevant characteristic—is a better workplace for everyone.

¹⁸2012 WL 1435995 (EEOC Apr. 20, 2012). [*Editor's Note*: The *Macy* decision is discussed further in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 39 (Law and Culture in the Making of *Macy v. Holder*).]

