
APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 32894

**COMMISSION ON HUMAN RIGHTS AND
OPPORTUNITIES, ET AL.**

Plaintiffs-Appellees

vs.

CITY OF HARTFORD, ET AL.

Defendants-Appellants

BRIEF OF *AMICUS CURIAE* THE TRANSGENDER RIGHTS PROJECT
OF GAY & LESBIAN ADVOCATES & DEFENDERS

For the Amicus Curiae: The Transgender Rights Project of Gay & Lesbian Advocates & Defenders

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Gay & Lesbian Advocates & Defenders (GLAD) is a New England-wide legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV/AIDS status. The Transgender Rights Project of GLAD seeks to establish clear legal protections for the transgender community through public impact litigation and law reform. See, e.g. Rosa v. Park West Bank, 214 F.3d 213 (1st Cir. 2000); Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000). Thus, the Transgender Rights Project of GLAD shares the interests of a transgender woman in protecting herself from employment discrimination based on her sex and mental and physical disabilities. The Transgender Rights Project of GLAD has expertise in working to protect transgender individuals and can thereby assist the Court in its consideration of this matter. The Transgender Rights Project of GLAD appears as *amicus curiae* in order to provide the Court with analysis relevant to those questions based on its expertise and experience in representing transgender persons throughout New England.

Statement of the Issue Presented

1. Whether the Superior Court correctly held that Plaintiff properly alleged and demonstrated a claim of physical disability discrimination.¹

¹ In addition to the issue stated herein, this appeal presents two additional issues: 1. Whether the Superior Court correctly remanded for further proceedings because of the CHRO referee's inadequate pretext analysis; and 2. Whether the Superior Court correctly found that the CHRO referee improperly restricted Sergeant Peterson in developing her retaliation complaint. *Amicus curiae* agrees with the argument relating to these additional two issues as set forth by Sergeant Peterson and the CHRO in their brief in chief and focuses exclusively on the physical disability issue for conciseness and succinctness.

I. FACTS

*Amicus curiae*² incorporates herein by reference the Counterstatement of Facts of Plaintiff Sergeant Dana Peterson. *Amicus curiae* further states simply that Sergeant Peterson alleged and proved unlawful discrimination by the Defendant City of Hartford Police Department on the basis of sex and physical and mental disability as a result of the Defendant's improper refusal to promote Sergeant Peterson to the position of certified patrol canine officer. Facts relevant to this amicus brief include that Sergeant Peterson is a transgender woman who underwent surgery for gender reassignment in the fall of 1993. App. at A3.³ As such, she must remain on a life-long course of hormone therapy. App. at A28-A29.

II. ARGUMENT

The Superior Court Properly Held that Sergeant Peterson Has a Cognizable Claim of Physical Disability Discrimination.

Sergeant Peterson proved that she is physically disabled under the Connecticut Fair Employment Practices Act (CFEPA) because she underwent surgery and requires continued medical treatment for her transgender medical condition.⁴ Accordingly, the

² *Amicus curiae* has no financial interest in the outcome of this case, and no other party wrote this brief in whole or in part. In addition, *amicus curiae* has not received financial contribution from any other party for the cost of the preparation or submission of this brief.

³ Citations made to the appendix accompanying the brief of *amicus curiae* utilize the format of Appendix ("App.") in addition to the specific page number (A#). The appendix is paginated accordingly and includes portions of the record of the case as well as relevant legislative history.

⁴ It is well established under Connecticut law that transgender individuals are protected from discrimination based on mental disability. See Conway v. City of Hartford, No. CV 950553003, 1997 WL 78585 (Conn. Super. Feb. 4, 1997). The CHRO referee properly found Sergeant Peterson had stated a cognizable claim on this ground. The referee, however, improperly rejected the mental disability claim because of his finding that Plaintiff did not satisfy the qualification prong of the McDonnell-Douglas test and because of the referee's conclusion that Sergeant Peterson failed to prove that the Defendant's stated

Superior Court properly reversed the CHRO referee's rejection of Ms. Peterson's physical disability claim. In rejecting the analysis set forth in an earlier Superior Court decision, the lower court reviewing this case explained that, "[h]owever valid the Conway case was fifteen years ago, it is not applicable today." App. at A26. This Court should affirm that a transgender woman who established that she has an underlying chronic medical condition the treatment of which required gender transition along with the accompanying life-long management of the condition may pursue a physical disability claim.

CFEPA defines physical disability as, "any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." Conn. Gen. Stat. Ann. § 46a-51(15). The definition of physical disability under CFEPA is written broadly to provide the most protection to the most people suffering from a variety of medical conditions. See, e.g., Jackson v. Water Pollution Control Auth. of Bridgeport, 278 Conn. 692, 703 (2006). The text and legislative history of this definition demonstrate that it was intended to cover all people who suffer discrimination because they have a medical condition or disorder, regardless of the severity of the condition or whether it limits a person's life activities. The only limiting principle is that the condition must be "chronic." Transgender persons who medically transition from one gender to the other have a chronic health condition that easily meets the broad definition of the Act.

business reason for refusing to appoint her to the position of certified patrol canine handler was pretext for discrimination. The Superior Court properly remanded because the referee conflated the qualification prong with the pretext analysis. And, on the pretext analysis, the Court found that the referee, in failing to elaborate on his legal conclusions, had insufficiently analyzed the evidentiary record presented. App. at A22.

As the Superior Court explained, “The fact that the referee could not detect a physical disability by observing the plaintiff is irrelevant.” App. at A29. Nothing in the statutory language or legislative history of the Act requires that a condition be visible to others or exhibit symptoms. Epilepsy, an illustrative example in the statutory definition, is a medical condition that may manifest itself only periodically and remains invisible to others most or all of the time. Hypertension, “defined as ‘abnormally high arterial blood pressure’,” is not a readily visible or observable physical disability and yet is a physical disability within the meaning of the Act. Adriani v. CHRO, 220 Conn. 307, 314 n.7 (1991).

Connecticut superior courts have held that complainants suffered from a physical disability in cases of physical conditions as varied as those of diabetes, Poach v. Doctor’s Assoc., Inc., No. CV0740233906S, 2008 WL 4634559 (Conn. Super. Sept. 22, 2008); back injury, Pohorence v. Raymond’s Bldg. Supply, Inc., No. CV065003248S, 2008 WL 1822765 (Conn. Super. April 3, 2008); prostate cancer, Ferrucci v. S. New England Tel. Co., No. CV030476161S, 2005 WL 2207709 (Conn. Super. Aug. 17, 2005); heart attack, Tordonato v. Colt’s Mfg. Co., No. CV970481610S, 2000 WL 33124392 (Conn. Super. Dec. 26, 2000); carpal tunnel syndrome, Gilman Bros. Co. v. CHRO, No. CV950536075, 1997 WL 275578 (Conn. Super. May 13, 1997), Gen. Dynamics Corp., Elec. Boat Div. v. CHRO, No. 524412, 1993 WL 307663 (Conn. Super. Aug. 6, 1993); and hearing loss, CHRO v. Gen. Dynamics Corp., No. 524470, 1995 WL 264014 (Conn. Super. May 1, 1995).

When assessing a complainant’s condition in order to determine whether it met the definition of physical disability under CFEPA, the courts evaluated the level of continuing treatment, such as the persistent nature of diabetes treatment, to ensure that the condition was “chronic,” as well as the significance of the physically impairing event, such as a heart

attack. In no case did a court evaluate the visibility of a condition or its obviousness to the untrained eye.

This approach is consistent with the legislative history of the Act. In 1974, the Legislature defined “physical disability” by adding the word “chronic” as a modifier to “physical handicap.” The definition provided: “An individual is physically disabled if he has any chronic physical handicap . . . which is unrelated to the ability of such individual to perform a particular job . . .” 1974 Conn. Acts 74-346 (emphasis added). In the legislative debate, Representative Thornton explained that the Legislature did not define “physically disabled” when it passed the original non-discrimination bill “because we could see that there was just no way to do it and we wanted to cover as many people as possible under the definition and leave it open and broad.” App. at A34. She emphasized that the Legislature “intended to cover any medical condition,” so that “you could not discriminate against someone if they . . . had a medical problem.” Id.

Transgender individuals who medically transition as a result of experiencing gender dysphoria are covered by Connecticut’s definition of physical disability because of the ongoing, that is, chronic, nature of the medical condition they experience and, for Sergeant Peterson, the life-long medical management of that condition.

Gender dysphoria is the disabling experience of having a gender identity – one’s internalized sense of who that person is as either male or female – that is discordant with the person’s physical presentation of their gender. Gianna E. Israel & Donald E. Tarver, Transgender Care: Recommended Guidelines, Practical Information & Personal Accounts 7-8 (1997). Gender identity disorder is the medical diagnosis that describes the condition of a person who suffers from severe gender dysphoria. American Psychiatric Association,

Diagnostic and Statistical Manual of Mental Disorders (4th ed., text rev. 2000). While most people have a body that physically reflects their gender identity, transgender people do not. Sergeant Peterson was born with a female gender identity but a male body. As a result, she experienced severe psychological distress, the treatment for which was hormone therapy and surgery. Standards of Care for Gender Identity Disorders, 7th Ver., September 2011, <http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

The World Professional Association for Transgender Health established internationally accepted Standards of Care for Gender Identity Disorder that authorize surgery and hormone therapy when appropriate for transgender people with gender dysphoria. Id. “The medical procedures attendant to sex reassignment... are understood to be medically necessary for the treatment of the diagnosed condition.” WPATH, Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA, June 17, 2008 at 3, available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf> (citing Davidson v. Aetna Life & Casualty Ins. Co., 420 N.Y.S.2d 450, 453 (Sup. Ct. 1979) (finding that treatment and surgery for gender transition “is of a medical nature and is feasible and required for the health and well being of the patient.”)).

Although nearly fifteen years ago a Connecticut superior court held that a transgender complainant could not meet the standard for demonstrating a physical disability, that court relied solely on dissimilar federal anti-discrimination law (the Americans with Disabilities Act (“ADA”)) and two cases from other states with distinguishable anti-discrimination statutes. Conway v. City of Hartford, No. CV 950553003, 1997 WL 78585

(Conn. Super. Feb. 4, 1997). When interpreting the Connecticut Fair Employment Practices Act, the Connecticut Supreme Court does look to federal law for *guidance*. Levy v. CHRO, 236 Conn. 96 (1996). However, there are important distinctions between state and federal anti-discrimination law and Connecticut courts interpret state statutes differently particularly when they depart from the analogous federal model. State of Connecticut v. CHRO, 211 Conn. 464 (1989). As the Connecticut Supreme Court explained, courts “should not read into a remedial statute [, such as CFEPA,] an unstated exception that would undermine the legislature’s manifest intent.” CHRO v. Sullivan Assoc., 250 Conn. 763, 781-82 reargument denied, 251 Conn. 924 (1999). CFEPA is unlike the ADA in that it does not contain an exclusion for the transgender medical condition nor does it require that a medical condition limit a major life activity in order to be covered. Because the only limiting principle is that a condition be chronic, the Conway court erred in determining that being transgender was not a physical condition simply because it would not be covered under the federal disability law analogue.

In addition to federal law, Conway also improperly relied on Iowa and Pennsylvania laws, both of which are distinct from Connecticut law. 1997 WL 78585 at *3 (citing Sommers v. Iowa Civil Rights Comm’n, 337 N.W.2d 470 (Iowa 1983); Dobre v. Nat’l R.R. Passenger Corp., 850 F.Supp. 284 (E.D. Pa. 1993)). CFEPA, unlike anti-discrimination statutes in those states, see Iowa Code § 216.2(5), 43 Pa. Stat. Ann. § 954 (p.1)-(3), does not require that a disability affect a major life activity in order to fall within the statutory definition of physical disability. The court’s reliance on those state cases was consequently misplaced.

In 2001, the Massachusetts Commission Against Discrimination recognized this distinction between federal and state non-discrimination law in construing that state's statute, which, like CFEPa and unlike the ADA, has no express exclusion for transgender individuals. See Jette v. Honey Farms, 2001 WL 1602799 (MCAD Oct. 10, 2001); Accord Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. Oct. 7, 2002); Doe v. Yunits, 15 Mass. L. Rptr. 278, 2001 WL 664947 (Mass. Super. Feb. 26, 2001) (noting that two federal cases recognized employment discrimination claims based on a person's transgender condition because they were decided under the older version of the Federal Rehabilitation Act, which did not have the transgender exclusion).

As Yunits noted:

There is wisdom to such an approach. It recognizes that, as our knowledge of genetics, biology, psychiatry, and neurology develops, individuals who were not previously believed to be physically or mentally impaired may indeed turn out to be so, and may warrant protection from handicap discrimination.

2001 WL 664947 at *5.

In this case, the undisputed facts are that the complainant, Sergeant Peterson, underwent surgery for gender reassignment in the fall of 1993 and will continue hormone therapy for the duration of her life. App. at A3, A28-A29. Sergeant Peterson's condition is chronic; it will require contact throughout her life with a medical doctor. Despite the fact that her physical disability may not have been readily apparent to the referee during the proceeding, a complainant's appearance as physically disabled in the eyes of the referee is not required to prove physical disability under CFEPa. According to the plain language of CFEPa, Sergeant Peterson is physically disabled as a result of the medical treatment she has undergone and must continue to undergo to address her transgender condition.

II. CONCLUSION

For the foregoing reasons, The Transgender Rights Project of Gay & Lesbian Advocates & Defenders, *amicus curiae*, respectfully requests that the Court affirm the ruling of the Superior Court.

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