

**STATE OF MINNESOTA
IN SUPREME COURT**

Julienne Goins,

Respondent,

vs.

West Group,

Appellant.

**BRIEF OF AMICI CURIAE HARRY BENJAMIN INTERNATIONAL GENDER
DYSPHORIA ASSOCIATION, PROFESSOR JULIE GREENBERG, AMERICAN CIVIL
LIBERTIES UNION, EMPLOYMENT LAW CENTER, GAY & LESBIAN ADVOCATE
AND DEFENDERS, HUMAN RIGHTS CAMPAIGN, NATIONAL CENTER FOR
LESBIAN RIGHTS, NATIONAL GAY AND LESBIAN TASK FORCE**

IN SUPPORT OF RESPONDENT S PETITION FOR REHEARING

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Pursuant to Minn. App. Rules Ann. R. 140, *amici* respectfully ask this Court to rehear this case. A critical factual error underlies the Court's conclusion that Defendant West Group (West) did not discriminate against Juli Goins on the basis of sexual orientation when it prohibited her from using the women's bathroom. In reaching this conclusion, the Court erroneously assumed that Ms. Goins is male, without considering the substantial and undisputed evidence in the record that she is female and should be treated as such for purposes of the Minnesota Human Rights Act (MHRA). As a result of this factual error, the Court has subverted the statutory purpose of protecting transgender employees.¹

Introduction

The Court's opinion strips transgender employees of meaningful protection by allowing *the employer* to decide what determines an employee's maleness or femaleness and to investigate individual employees whom the employer believes do not conform to the employer's definition of maleness or femaleness. Employers will likely continue to rely upon external cues, such as secondary sex characteristics, gender presentation, and legal identification to determine the gender of most employees. As a result of the Court's decision, however, employers are now free to single out employees whom they suspect of being transsexual, whether correctly or not, and subject them to any test the employer chooses to impose, no matter how arbitrary or invasive,

¹*Amici*Amici respectfully submit that the Court's understandingrespectfully submit that the Court's understanding who who does not have surgerywho does not have surgery is anachronistic in light of practicepractice with regard to practice with regard to transsexualism. practice with regard to transsexualism. SSI as a broader term that as a broader term that includes as a broader term that includes transsexual people. Neither undergone undergone or undergone or intends to undergo genital surgery. Whether undergone or intends to undergo a particular transsexual a particular transsexual person is a medical decision made by the individual a particular with with physicians. See Harry Benjamin International Gender Dysphoria Association Standards of Care for Gender Identity Disorders, Sixth Version, <http://www.hbgda.org/soc.html> (hereinafter Standards of Care).

and no matter how selectively applied. Delegating such unfettered power to employers is wholly inconsistent with the statutory purpose of protecting transgender employees from discrimination.

As this Court correctly noted, Ms. Goins does not challenge the practice of providing gender-segregated bathrooms in the workplace. Rather, she seeks only to be permitted to use the restroom corresponding to her female gender. *Amici* urge the Court to rehear this case to clarify that because the MHRA protects transgender employees and must be construed to effectuate that purpose, employers must treat a transsexual person who is undergoing or has undergone sex-reassignment as a member of his or her reassigned gender.

Amici also urge the Court to recognize that Ms. Goins has presented sufficient evidence that she is and should be treated as female for purposes of the MHRA, or, at a minimum, that sufficient factual questions are presented to warrant a remand for trial. The undisputed fact that Ms. Goins has taken female hormones since 1994 means that she has typical female secondary sex characteristics, including female breasts and an absence of facial hair. Slip op. at 2. *See also, e.g.,* Joshua F. Boverman, M.D. and Anna C. Loomis, M.D., *Cross-Sex Hormone Treatment in Transsexualism*, 68 Primary Psychiatry, June 2000: vol. 7, no. 6. (describing the profound physiological effects of female hormones).

In addition, it is undisputed that Ms. Goins' legal documentation reflects the fact that she is female. Indeed, she has a court order recognizing her change from genetic male to reassigned female. Slip op. at 2. It is also undisputed that her appearance and presentation are female and that she lives publicly as a woman in every way. *Id.* at 4. Finally, it is also undisputed that West permitted Ms. Goins to use the women's restroom in its Rochester, New York facility, and that Ms. Goins also consistently uses the women's restroom in her everyday life, outside of the workplace. *Goins v. West Group*, 619 N.W.2d 424, 426 (Minn. App. 2000).

Recognizing that transgender people also face tremendous discrimination in the workplace, Minnesota's law also specifically prohibits discrimination on the basis of having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. MINN. STAT. Section 363.01, subd. 45 (1998).

By enacting this broad language, Minnesota became the first state to establish express legal protections for transgender employees.⁴ Last year, Rhode Island became the second state to do so by amending its anti-discrimination law to include language almost identical to that in the MHRA.⁵ In addition, there are now thirty-seven local jurisdictions in the United States that have enacted legal protections for transgender people, based on language similar to that in the

111.321, 111.321, .32 ("Sexual orientation means 111.321, .32 ("Sexual orientation means 111.321 homosexuality or bisexuality, having a history of such a homosexuality or bisexuality, having a such a preference.).

⁴ Minnesota's groundbreaking role in this regard has been widely acknowledged in the media, legal scholarship, and judicial decisions from other states. *See, e.g.*, Stephanie Simon, *In Minnesota, a new battle of the sexes; state is only one to protect transgender residents from discrimination*, Los Angeles Times, April 8, 1991 at A5; Rosalind Bentley, *Transgenderism has become a workplace issue for employers; Employees have protection under state anti-bias law*, Star Tribune (Minneapolis, MN), May 11, 1998 at 1D; Rosalind Bentley, *The Supreme Court; Minnesotans react to ruling with joy, disappointment*, Star Tribune, May 21, 1996 at 8A (noting that Minnesota is the only state that includes transgender people in its definition of sexual orientation); *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501; 777 A.2d 365 (N.J. App. 2001) (noting that the Minnesota Human Rights act is unique in being one of the only state statutes to expressly include transgender people in its definition of sexual orientation).

⁵ R. I. GEN. LAW Section 34-37-3(17) (2001) (prohibiting discrimination on the basis of a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; whether or not . . . different from that traditionally associated with the person's sex at birth). *See also* David Rivello, *State House of Reps passes transgender civil rights bill*, Brown Daily Herald, May 2, 2001. California has also used language similar to that in the MHRA to amend its state hate crimes statute and its state education law to include transgender people. *See* CAL. PENAL CODE Section 422.76 and CAL. EDUC. CODE Section 220. Missouri and Vermont also include transgender people in their state hate crimes statutes. *See* MO. ANN. STAT. Section 557.035.4; VT. STAT. ANN. tit. 13, Section 1458.

MHRA.⁶ Even without an explicit statutory protection, many state courts have held that transgender people are protected under from discrimination under state sex and/or disability laws.⁷

One of the central purposes of the MHRA is to ensure that transgender people can participate equally in the workplace. The Court's decision subverts this basic purpose by allowing employers to require transgender employees to use either a separate bathroom or the bathroom corresponding to their birth sex. Requiring transgender people to use a separate bathroom stamps them with a mark of difference or even inferiority that compromises their ability to work, just as requiring a transgender person to sit at a separate desk or to eat at a separate cafeteria table would do.

In this case, the discriminatory effect of West requiring Ms. Goins to use a specially designated bathroom rather than the women's room is no different than if West had called her Justin rather than Juli and referred to her with the pronoun he. Each of these actions has the effect and intent of denying Ms. Goins the dignity of acknowledging her female identity and

⁶ For a list of these local jurisdictions, see Transgender Law and Policy Institute, *Map of Jurisdictions with Transgender-Specific Non-discrimination Laws*, available at www.transgenderlaw.org.

⁷ See *Enriquez v. West Jersey Health Sys* See *Enriquez v. West Jersey Health Systems*, 2, 2001 N.J. Super. 2001)2001) (concluding that state law prohibiting sex discrimination in employment encompasses discrimination against transsexual people); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transsexual people); *33162199*, 33162199, at * 3-4 (Mass. Super.), *aff'd sub nom, Doe v. Brockton Sch. Doe v. Brockton Sch.*, 638 (Mass. App. 2000) (affirming injunction requiring school to permit a transsexual student to attend school in female clothing); *Maffei v. Kolaet* *Maffei v. Kolaet on Industry, Inc.*, 626 N.Y.S. 2d (N.Y. Sup. Ct. 1995) (holding that a New York City gender discrimination claim by a transsexual person is covered by the New York State Human Rights Law); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS, 1996 U.S. Dist. LEXIS, 1996 (holding that a transsexual woman could state a sex discrimination claim under the New York State Human Rights Law).

is contrary to the accepted medical guidelines concerning the treatment of transsexual people. Refusing to recognize Ms. Goins as a woman for all purposes in the workplace undermines the basic purpose of the law.

Requiring transgender employees to use separate bathrooms also implicitly sends the message that the employer does not trust that transgender individuals will behave properly in the bathroom. Casting such an aura of suspicion and stigma over transgender employees is certainly a denial of equal treatment. This denial marginalizes individuals who have no visible difference from others and prevents them from being able to integrate, make relationships or live fulfilling lives and thus impairs quality of life. Dr. R. Reid et al, *Transsexualism: The Current Medical Viewpoint* 5.3 (1996), available at <http://www.pfc.org.uk/medical/mediview.htm> (hereinafter *The Current Medical Viewpoint*).

Similarly, requiring a transsexual woman to use the men's bathroom, which this Court's decision appears to permit, is tantamount to requiring that a transgender person renounce her identity as a condition of employment. In an analogous case, a Massachusetts court recently invalidated a school policy prohibiting a transsexual student from dressing in accordance with her female gender. The court correctly recognized that requiring a transgender person to forego living in accordance with her true gender as a condition of schooling or employment is a condition that no reasonable person would consider viable; it is like asking a short person to become taller. *Doe v. Yunits*, 2001 Mass. Super. LEXIS 327 (Mass. Super. Ct., Feb. 26, 2001) (holding that requiring Doe [a transsexual girl] to wear boy's clothing to school would be as injurious to her psychiatric health as requiring a psychologically masculine boy to wear a dress to school) (A copy of the decision is attached).

Sex-reassignment, or gender transition, is the standard treatment provided to transgender

people. Pursuant to established medical guidelines, this transition requires living full-time, 24 hours a day, 7 days a week, as a member of the other gender. *See* Standards of Care at IX (describing the real-life experience). The Court s ruling is in direct conflict with this essential requirement. It puts Ms. Goins in an untenable bind, forcing her to choose between being following her prescribed medical treatment or losing her job. While such a rule would be questionable even in the absence of an express statutory protection for transgender employees, it is unsupportable in the face of a statute specifically designed to enable transgender people to work.

II. Ms. Goins Is Female.

Ms. Goins physical appearance is that of a woman. She has female secondary sex characteristics, including breasts and an absence of facial hair. She dresses in female clothing and attire. She has a female name and uses female pronouns. Her drivers license and other identifying legal documents designate her as female. She lives as a woman in every aspect of her life. In light of these undisputed facts, there is no reasonable logical, medical, or legal basis for the Court to classify Ms. Goins as male for purposes of determining which bathroom she is qualified to use.

The Court should grant rehearing in this case to clarify that a transsexual woman who is undergoing or has undergone the medical process of gender-reassignment must be permitted to use the women s restroom. To do otherwise leaves Ms. Goins and other transsexual people in an untenable position, compromising their health and well-being and forcing them to choose between remaining employed and complying with the recognized medical guidelines for the treatment of transsexual people.

Transsexualism is also known as gender identity disorder or gender dysphoria. According

to the Diagnostic and Statistical Manual of Mental Disorders, there are two components of gender identity disorder, both of which must exist for an individual to be diagnosed as such. First, there must be a strong and persistent cross-gender identification, which means the desire to be, or the insistence that one is, of the other sex. Second, there must be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role assigned at birth based on one's birth sex. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994).

While the exact cause of transsexualism is not known, the weight of current scientific evidence suggests a biologically-based, multifactorial etiology. *See* The Current Medical Viewpoint, at 6.7. One recent study has determined that a section of the brain is larger in men than in women and that the brain structure of transsexual women is more similar to female brains than to male brains. Jiang-Ning Zhou, et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 *Nature* 68-70 (1995).⁸

Whatever its cause is ultimately determined to be, gender identity is an innate, deep-seated sense of maleness or femaleness that is highly resistant to change. Transsexuals do not alternate between gender roles; rather, they assume a fixed role of attitudes, feelings, fantasies, and choices consistent with those of the opposite sex, all of which clearly date back to early development. *Current Medical Diagnosis & Treatment* 928 (Lawrence Tierney, Jr. et al. eds., 35th ed. 1996) (cited in *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 370 (N.J. App. 2001)).

⁸ *See also* Dr. Louis Gooren, *Biological Aspects of Transsexualism and their Relevance to its Legal Aspects*, Proceedings of the XXIIIrd Colloquy on European Law: Transsexualism, Medicine and the Law, Strasbourg: Council of Europe (1993) (describing the scientific evidence that in transsexual people, the sexual differentiation of the brain differs from the sex corresponding to the person's chromosomes and anatomy).

The only effective treatment for transsexualism is sex-reassignment. Contrary to popular misconceptions, however, the medical process of sex-reassignment is complex and takes place over a period of years. Sex-reassignment does *not* consist of a single surgical procedure that abruptly transforms a biological male into a biological female. Rather, it consists of a variety of components, primarily including living as and being accepted as the other sex and hormonal reassignment. *See* Standards of Care, at VI - XIII (describing the treatments that comprise sex-reassignment).

Moreover, [i]n all cases, the length and kind of treatment provided will depend on the individual needs of the patient and will be subject to negotiation between the Consultants involved, the patient's general practitioner and the patient. The Current Medical Viewpoint, at 4.3. There is no single model of treatment: rather, variety in approach is both supported and sought as part of the continuing professional discussion of the syndrome. *Id.* at 4.1. In particular, [m]any MTF transsexuals forego surgical intervention and use hormone and cosmetic treatments alone to achieve their desired physical changes. Joshua F. Boverman, M.D. and Anna C. Loomis, M.D., *Cross-Sex Hormone Treatment in Transsexualism*, 68 *Primary Psychiatry*, June 2000: vol. 7, no. 6. In any given case, whether and when to undergo genital surgery or any other particular medical treatment will depend on a number of factors, including health, age, finances, individual medical needs, and other factors. *Id.* *See also* Standards of Care at II (noting that clinicians have become increasingly aware that genital surgeries are not appropriate for all transsexual persons).

In sum, the weight of current medical knowledge and practice defines a transsexual woman who is undergoing or has undergone sex-reassignment as female. To effectuate the statutory purpose of protecting transgender persons, this Court should apply the MHRA to be

consistent with this contemporary medical knowledge. The Court should grant rehearing to clarify that Ms. Goins and other transsexual women must be permitted to live and be treated as women in the workplace, including being permitted to use the women s restroom on an equal footing with other female employees.

III. Even in the absence of an express statutory protection, other national, state, and local jurisdictions and private employers have concluded that, in accordance with basic principles of non-discrimination and human dignity, transgender persons should be permitted to use the restroom corresponding to their reassigned gender.

By holding that an employer may require a transsexual woman to use the men s bathroom, this Court s decision is drastically at odds with other jurisdictions and employers who have addressed this question. *See Sheridan v. Sanctuary Investments Ltd. et al.*, Jan. 8, 1999 (British Columbia Human Rights Tribunal 1999) (holding that a transsexual woman must be permitted to use the women s restroom);⁹ *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980) (ruling, by implication, that it would be unconstitutional to arrest transgender persons, regardless of whether they have undergone genital surgery, for using the restroom designated for the sex consistent with their gender identity); *Workplace Guidelines for Transgendered Lucent Employees*¹⁰ (In Lucent, transgendered people generally have the right to use the appropriate restroom. Lucent recommends that transgendered people use the restroom matching their current gender presentation.); San Francisco Human Rights Commission, *Compliance Guidance to Prohibit Gender Identity Discrimination*¹¹ (providing that transgender persons have the right to use the restroom corresponding to their gender identity, as evidenced by at least one piece of legal identification); Ontario Human Rights Commission, *Policy on Discrimination and*

⁹ This decision is available at <http://www.bchrt.gov.bc.ca/sheridan2.htm>.

¹⁰ Available at <http://www.tgender.net/taw/tggl/rr.html>.

¹¹ Available at http://www.ci.sf.ca.us/sfhumanrights/tg_guide.htm.

*Harassment Because of Gender Identity*¹² (stating that a transsexual woman must be permitted to use the women's restroom regardless of whether she has undergone genital surgery); United Kingdom Department of Education and Employment, *A Guide to Sex Discrimination (Gender Reassignment) Regulations 1999*¹³ (stating that it is discriminatory to require a transsexual employee to use separate bathroom facilities).

All of these authorities have concluded that permitting a transsexual person to use the restroom corresponding to his or her reassigned gender, regardless of whether the person has undergone genital surgery, is essential to providing a non-discriminatory workplace. They have recognized that genital surgery should not be required before allowing a transsexual person to use the appropriate bathroom for a number of reasons: because using the bathroom at work does not require any public exposure of one's genitals; because medical guidelines require that a transsexual person live full time as a member of the other gender before becoming eligible for genital surgery; and because many transsexual people do not or unable ever to obtain genital surgery. In addition, whether a person has undergone genital surgery -- whether for sex-reassignment, as a result of testicular or ovarian cancer, to repair damage caused by an injury, or for any other medical reason -- is a highly private medical fact that a person should not be required to disclose unless there is a compelling reason to do so. In the case of bathrooms, whether one has had genital surgery has no rational bearing of any kind on one's ability to use the bathroom corresponding to one's reassigned gender.

This Court's departure from the conclusions uniformly reached by other authorities on this question is particularly troubling given that Minnesota has enacted a widely-emulated and

¹² Available at <http://www.ohrc.on.ca>.

¹³ Available at <http://www.pfc.org.uk/employ/dfeeguid.htm#part3-q10>.

very specific statewide law prohibiting discrimination against transgender employees.

Conclusion

Amici respectfully ask the Court to rehear this case to clarify that a transsexual person like Ms. Goins, who is undergoing or has undergone sex-reassignment, must be recognized in the workplace as a member of her reassigned gender. In the alternative, *amici* ask the Court to remand for a factual determination consistent with such a rule or, at a minimum, to issue a modified opinion clarifying that its determination in this case was based on an absence of sufficient evidence concerning Ms. Goins' identity and does not stand for the general proposition that an employer may prohibit a transsexual employee from using the restroom corresponding to her reassigned gender.

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