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Lucas Rosa V. Park West Bank and Trust Company

Katherine M. Franke
Columbia University

LUCAS ROSA V. PARK WEST BANK AND TRUST COMPANY

BRIEF FOR THE PLAINTIFF-APPELLANT LUCAS ROSA

AMICUS CURIAE BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AND EQUAL RIGHTS ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

ROSA V. PARK WEST BANK: DO CLOTHES REALLY MAKE THE MAN?

INTRODUCTION

*Katherine M. Franke**

In July of 1998 something rather mundane happened: Lucas Rosa walked into Park West Bank in Holyoke, Massachusetts and asked for a loan application. Since it was a warm summer day, and because she[1] wanted to look credit-worthy, Rosa wore a blousey top over stockings. Suddenly, the mundane transformed into the exceptional: When asked for some identification, Rosa was told that no application would be forthcoming until and unless she went home, changed her clothes and returned attired in more traditionally masculine/male clothing. Rosa, a biological male who identifies herself as female was, it seems, denied a loan application on that ground.

Outraged at such treatment, and convinced that her attire had no relevance to her credit-worthiness, Rosa filed an action in federal court under the Equal Credit Opportunity Act,[2] claiming that she had been discriminated against on the basis of her sex.[3] Was Rosa discriminated against on the basis of his male sex, on the basis of her female gender, or on some other basis that may or may not fall comfortably under the sex discrimination provisions of the ECOA? After all, the ECOA was enacted by Congress in 1974, in large part to curtail the practice among creditors of refusing to grant a wife's credit application without a guaranty from her husband.[4] Did Rosa's case present some radical

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* Professor of Law, Co-Director, Center for the Study of Law and Culture, Columbia University.

1. In this introduction, I will refer to Lucas Rosa with a feminine pronoun, as that is what she prefers, and it is a common practice for referring to a transgender person who self-identifies as female, the advice and guidance of mental health and other professionals who work with TG clients, and the practice followed by most courts. *See, e.g.*, Schwenk v. Harford, 204 F.3d 1187, 1192 (9th Cir. 2000); Murray v. United States Bureau of Prisons, 106 F.3d 401, 401 n.1 (6th Cir. 1997) (unpublished disposition); Meriwether v. Faulkner, 821 F.2d 408, 408 n.1 (7th Cir. 1987).
2. 15 U.S.C. §§ 1691-1691f (hereinafter ECOA).
3. In fact, the complaint was framed using male pronouns for Rosa. The complaint contained other allegations not germane to this discussion.
4. Mayes v. Chrysler Credit Corp., 37 F.3d 9 (1st Cir. 1994).

interpretation of sex discrimination principles, or threaten to stretch the bounds of the ECOA well beyond the scope intended by its authors in 1974? I thought not, and to my delight the First Circuit has agreed.

To those of us who work in this area, Rosa's case was far from odd, marginal or hybrid in some exotic way. Instead, her treatment at the hands of the Park West Bank loan officer reflected an everyday occurrence for countless people who fail to conform to rather traditional gender norms, notably, something experienced more often by people who get caught displaying inappropriate femininity.[5] Rather than understand Rosa's experience as lying well beyond the bounds of laws relating to sex-stereotyping, she is better understood as a sort of canary in the sartorial coal mine: She was simply the most visible victim of systemic gender norms that regulate all of us in the ways in which we coherently present ourselves to the world as "men" or "women." The refusal that Rosa experienced from Park West Bank was merely the sharp edge of the gender-based discipline according to which we all routinely operate in virtually all aspects of our lives.

Rosa and her counsel drew a senior judge in the District Court in Massachusetts to hear the case. In October, 1999, Judge Frank Freedman dismissed Rosa's ECOA claim on the ground that "the issue in this case is not his sex, but rather how he chose to dress when applying for a loan. Because the Act does not prohibit discrimination based on the manner in which someone dresses, Park West's requirement that Rosa change his clothes does not give rise to claims of illegal discrimination."[6]

So what, after all, do clothes have to do with sex discrimination? They are supposed to "make the man," after all. Any connection was totally lost on Judge Freedman. Yet many queer and feminist scholars and activists do not find this a difficult question, indeed many law review articles have been devoted to this topic.[7] And, of course, it seems obvious that the question is easily resolved by the Supreme Court's deci-

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5. This was Mary Anne Case's point in *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

6. Bench Order, Lucas Rosa v. Park West Bank and Trust Company, Civ. Action No. 99-30085-FHF, October 18, 1999 at 1-2. The Bench Order is part of the record appendix, which is on file with the *Michigan Journal of Gender & Law*.

7. *See, e.g.*, Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Lynne D. Mapes-Riordan, *Sex Discrimination and Employer Weight and Appearance Standards*, 16 EMPLOYEE REL. L.J. 493 (1991); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982). For the connection between clothing/hair and race discrimination, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

sion in *Price Waterhouse v. Hopkins*[8] wherein the Court held that sex discrimination principles applied to a woman who was denied a promotion because she was believed to act insufficiently feminine.[9] In *Price Waterhouse*, the Supreme Court clearly held that clothing-based sex stereotyping fell squarely within the sex discrimination protections of federal law. Yet a number of years after the case was decided by the Supreme Court, it has had less effect upon cases, such as Rosa's, than I might have hoped. Indeed, Judge Freedman's opinion in Rosa's case dismissed the relevance of *Price Waterhouse* altogether, holding that: "neither a man nor a woman can change their status from unprotected to protected simply by changing his or her clothing."[10]

When Rosa and her counsel, Jennifer Levi, decided to appeal the dismissal of the complaint to the First Circuit, they called me to see if I would be interested in writing an amicus brief on Rosa's behalf. My job, as Levi and I saw it, was to reassure the First Circuit that this case fit comfortably within the scope of well-established sex discrimination jurisprudence that dealt with gender-based stereotypes. Levi, correctly I believe, calculated that an access to credit case presented a better factual situation in which to get a circuit court to affirm *Price Waterhouse* than did employment cases where the employer's desire to fire a man in a dress might intuitively, yet mistakenly, resonate with the court's notion of legitimate business necessity. What, in contrast, could a person's attire have to do with credit-worthiness?

What follows are the principal and amicus briefs to the First Circuit.[11] Thereafter, Jennifer Levi provides some reflections on the First Circuit's opinion. Both Levi and I share some reservations about what is otherwise a rather wonderful victory in this case. Not wanting to tip our hand to the detriment of future litigation in this area, you will understand that we will remain rather cryptic about these reservations.

Nevertheless, the collaboration that these two briefs represent was an exceptional opportunity for me, as it offered the chance to translate

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8. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
9. "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched 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.'" Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (CA7 1971)." *Price Waterhouse*, 490 U.S. at 251.
10. Bench Order, *supra* note 6, at 2.
11. The First Circuit opinion is available at 214 F.3d 213 (1st Cir. 2000).

my more theoretical writing on sex, gender, performance, identity and equality into an argument that courts would understand and accept. Levi and I spent hours discussing theories of the case, notions of gender identity, and ways to win this issue with minimal collateral damage. I truly appreciated the opportunity to work with a sharp and thoughtful litigator who, as a public interest lawyer, has the challenging task of maintaining a dual focus on the interests of her client and the larger issues advanced by her client's claims. We both offer these briefs as an example of the dynamic collaboration that can take place in litigation when theory and practice are brought to bear on difficult questions of equality.

In the end, this and other similar cases raise an interesting set of questions: What is a question of gender discrimination a question of? How is gender-based discrimination to be differentiated from sex-based discrimination? Or is Justice Ruth Bader Ginsburg correct in using these two terms interchangeably?[12] Why are some courts so obstinate in confusing gender bias with sexual orientation bias? What, in the end, do sex, gender and sexual orientation based discrimination have to do with one another? ⚘

12. *See, e.g.*, "Parties who seek to defend *gender-based* government action must demonstrate an 'exceedingly persuasive justification' for that action. Today's skeptical scrutiny of official action denying rights or opportunities based on *sex* responds to volumes of history." U.S. v. Virginia, 518 U.S. 515, 531 (1996)(emphasis supplied).