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Peter Oiler vs. Winn-Dixie Stores

Or

How I Failed at Impersonating Milton Berle.

In 1948, a relatively unattractive Jewish man with big ears and a smile that could charm the last nickel out of a hobo with two cents in his pocket put on a dress, some lipstick, and a wig, he then went in front of a live television audience, and made millions of people laugh. He became so popular and ultimately so powerful that he was even able to bring people of color into these homes as well. Milton Berle may have offended some highly conservative people with his slapstick humor and vaudeville shtick, but millions of America's viewers tuned in every week to the *Texaco Star Theater* to be entertained. They then ran out and purchased Texaco oil products as well. Berle was so revered and so valuable to television at the time that the National Broadcasting Corporation signed him to a 30-year contract; with the expectation that he would continue putting on a dress and keep viewers entertained. Berle was not homosexual, a transvestite, or transgendered; he was just an entertainer who liked to wear a dress. His employers and audience encouraged it. This is not the case for many others.

This paper discusses a federal civil rights wrongful termination and sex discrimination case filed by the American Civil Liberties Union (ACLU) on behalf of a married, transgender (cross-dresser) man who adhered to company work-clothes rules during working hours. However, on his own time and away from the company he would dress in women's clothing and assume the persona of a woman.

In 1979, Winn-Dixie Supermarket Inc. hired Peter Oiler as a loader. In 1981, he received a promotion to yard truck driver and later became a road truck driver. He worked from the Winn-Dixie's warehouse in Harahan, Louisiana, an industrial suburb of New Orleans, within Jefferson Parish. Oiler worked for the Winn-Dixie Supermarket chain for more than twenty years. His co-workers described him as a perfect employee. In and around 1998 Oiler claimed that a rumor spread around the local warehouse that he was gay. Oiler discussed this rumor with his supervisor and explained to him that he was not gay. Oiler was heterosexual, and had been married to his wife since 1976. On October 29, 1999 Oiler's supervisor, Gregg Miles inquired with Oiler about the rumors and if they had continued; at which time Oiler told Miles that there had not been any further comments; but then confided that he was in fact transgendered. He explained that he was not a transsexual and that he did not intend to become a woman. However, he told Miles that for a number of years he had been appearing in public at restaurants and clubs while cross-dressed. He went on and told Miles that while

he was cross-dressed, he also assumed the female role of “Donna”. He also asked if he was in jeopardy of losing his job if Michael Istre, the president of Winn Dixie Louisiana, Inc., ever saw plaintiff cross-dressed as a woman (Oiler 2002).

Miles immediately met with Istre and shared this highly private and confidential information, at which time Istre contacted Winn-Dixie’s counsel for legal advice (Oiler, 2002).

On November 1, 1999, Istre and Miles offered Oiler the opportunity to resign; but Oiler refused. He did not believe that what he was doing on his own time, away from company property, employees, and equipment was in any way wrong. During the next few weeks, they badgered Oiler repeatedly to resign. Finally, on January 5, 2000 when Oiler refused to resign, they terminated his employment with Winn-Dixie. The reason they gave him was that they believed that should Winn-Dixie customers recognize him, particularly those in Jefferson Parrish that those customers would shop elsewhere and as a result would damage Winn-Dixie’s reputation and business.

Oiler had been cross-dressing for years. During the first ten years he was married he would only cross dress in his own home. As Oiler became more comfortable in his role as “Donna” he ventured out into the public, but not in Harahan where he worked; he would go to the towns of Kenner, and Metairie. Sometimes he would go alone, other times he would go out with his wife, who was aware and supportive of his cross-dressing. He also attended support group

meetings, dined in restaurants, went to church, and shopping malls; all dressed as a woman.

Oiler v. Winn Dixie is based on two grounds. First, they argue that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual stereotyping and that his employer terminated him due to his cross-dressing and impersonating a woman while off-duty. The second argument is that he is a victim of disparate treatment in violation of Title VII for cross-dressing while other similarly situated female employees were not fired from their jobs.

Title VII of the Civil Rights Act of 1964 states:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, sex, or national origin (Velasquez 2012).

The 1977 amendment to Title VII expanded the definition and states: "The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes" (U.S. EEOC,1977).

Oiler's counsel relied on "related medical conditions" to build their case. Title VII never discussed sexual orientation, sexual preference, or any of the issues that Peter Oiler's attorneys claimed as arguments for this case. Courts have long held that discrimination on the basis of sexual orientation is not actionable under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq. Because the term "sex" in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation (Oiler, 2002).

The question comes down to; Was Peter Oiler unlawfully fired because he was transgendered? The summary judgment (September 16, 2002) on the case found for the defendant (Winn-Dixie) and indicated that Oiler was not a victim of discrimination based on either of the initial arguments. Oiler's attorneys brought in expert witnesses that asserted that Oiler was really a woman trapped in a mans body and was protected under a disability act, though the defendant had their own experts who refuted that claim. Upon reviewing the complaint, depositions, and the final summary judgment the argument that Oiler was fired because his employers were closed minded, uninformed, and insensitive to the needs of a loyal, trustworthy employee can be made. His employer violated two of his basic rights: The first is a property right to employment created by the employment discrimination laws. The second is a right to personal dignity; (McGinley 1996) however; they did not break the law in its current form.

The basis for Winn-Dixie's executive decision to fire Oiler was their belief that he did not conform to the morals of his community and as such, Oiler was wrong to dress as and impersonate a woman as he violated the ethical standards accepted in their culture (Velasquez, 2012). In some respects, the employer used a utilitarian approach in the termination. Oiler lost his job but the company retained its customers and their goodwill. While this may not be an approach of tolerance and acceptance of personal choices, it was within the legal rights of the company to terminate him in the state of Louisiana. Had Mr. Oiler undergone sex reassignment surgery and was then fired from his position he may have had a case sufficient to utilize Title VII as a valid argument. Peter Oiler's job was not that of a male truck driver, it was as a truck driver void of gender. What clothes he wore off-duty was of no consequence.

Was Oiler the victim of an unfavorable work environment? If the alleged rumor that Oiler was homosexual persisted and he was taunted and ridiculed he may have been the victim of harassment, however once Oiler brought the rumors to the attention of his supervisor those rumors seemed to have stopped.

Depositions from Winn-Dixie employees showed that there were never any rumors. All depositions stated that Oiler was the perfect employee. The follow-up inquiry by the supervisor (Miles) a year later to Oiler confirmed that these alleged rumors no longer existed. Further review of depositions show that for the entire time Winn-Dixie employed Oiler he had never been the victim of

any harassment prior to his termination of employment. However, when Istre and Miles badgered Oiler to resign they engaged in behavior that could border on harassment yet, Title VII does not address harassment.

Louisiana is an “employment-at-will” state. An employee can be terminated without reason unless they have an employment contract for a specific length of time or is a union member. An employee however is also free to leave their job for whatever reason and without notice to the employer. Oiler lost his job because he admitted that he was transgendered. Those are the facts and they are undisputed.

“Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this Court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent;” said Judge Africk in the summary judgment. “The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment” (Oiler, 2002).

Mr. Oiler was not a transvestite, nor was he a transsexual; he also had no intentions of sex reassignment. He did not frequent gay bars; and he was not part of the lesbian or gay communities. He did seek out transgendered support groups; however, he attended as “Donna,” not at Peter Oiler.

Mr. Oiler lost his job on January 5, 2000; he filed his lawsuit in Federal

District court on October 23, 2000. It is not clear if it was Oiler's intent to have his job terminated when he disclosed to Miles that he was transgender. One could speculate that Oiler's support groups influenced him to disclose his occasional transgender lifestyle in the hopes of losing his job and as a result file a wrongful termination lawsuit.

In order to file a private lawsuit against an employer for discrimination one first must first file a *Charge of Discrimination* with the Equal Employment Opportunity Commission (EEOC) and obtain a Notice of Right to Sue (NRS). The EEOC will only issue a NRS if they find that the employer did *not* violate the law. The average time it takes to process, an EEOC investigation is about 182 days ("The Charge Handling," 2013). How could Oiler be fired on January 5, 2000 then locate a competent civil rights attorney, file a Charge of Discrimination with the EEOC, have an investigation completed, have the NRS issued, then prepare a federal complaint, and have it all filed within 278 days unless he had a lot of help *and* a lot of money.

On the day, the initial court complaint was filed Oiler said in a press release: "I never expected Winn-Dixie to approve of my personal life or to punish me for it - I just never thought it had any bearing on how I do my job," he adds. "Losing the job I've had for practically my entire adult life has been a difficult ordeal, and I'm grateful for the loving support of my wife and the transgender community in Louisiana that has stood by us steadfastly" ("ACLU," 2000).

Earlier in this paper, it was established that Winn-Dixie violated Mr. Oiler's basic rights to employment and dignity. This type of unethical behavior towards people in the Lesbian, Gay, Bisexual and Transgender (LGBT) has been a major topic of controversy and legal conversation ever since the establishment of Title VII of the Civil Rights Act in 1964. The ACLU has been at the forefront of financing cases to combat the limited scope of the term "sex" in its definitions. Decisions, as in this case will continue to challenge the legal and social systems and people similar to Peter Oiler will do unethical things as well. Peter Oiler may have been the perfect candidate for just this task; he was the perfect employee, which made him the perfect test case.

Oiler had no reason to disclose his cross-dressing behavior to his employer. It would have served no purpose for him, his family, or his employer. There was no immediate upside. What Oiler did with his employer is situation testing, also known as litigation testing. These methods of research test for a variety of racial and sexual discrimination situations in employment. Some consider these methods unethical, as it is a form of entrapment (Rorive & Gornicioiu, 2009). Here, however, Oiler used this technique on his employer. If Oiler only disclosed that, he was transgendered and had not asked the question of possible termination this case may never have seen the light of day.

Oiler placed Miles and Istre in a position of using their personal moral judgments for the company; one that he instinctively knew the answer to. He

knowingly forced them to fire him in the hopes of breaking the law. Even though his goal may have been to help others within the LGBT community gain more justice within our legal system for their fundamental rights, he was also unethical in his approach to achieving his goal.

Thirteen years later, *Peter Oiler v. Winn– Dixie Louisiana, Inc.*, remains a formidable case for discussion. Some consider it a landmark case for what transgender people should not tell their employers. Others use it as a case with human resources personnel on what not to discuss with their employees. In addition, while the practices of Winn-Dixie and Oiler were each unethical it opened the conversation and perpetuated testing the validity of Title VII in relation to sexual orientation and gender identity. Since *Oiler v. Winn Dixie*, an additional ninety-three cities and counties have passed their own laws prohibiting gender identity discrimination bringing the total in the United States to sixteen states, the District of Columbia and 143 cities (The Transgender Law and Policy Institute, 2012). New Orleans is included in those cities, Harahan, where Winn Dixie operates is just over the line and still has the protection of the limited scope of Title VII. Oiler still lives in Louisiana but drives for a Texas based company.

Milton Berle died in March of 2002, at the age of 93, while this case was in court. One can only suspect that had the two of them put on their dresses, wigs, and lipstick they would have held conversations on important topics as this and enjoyed if only for a moment who they really were.

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