



Advancing the civil rights of transgender persons

Civil rights cases fought for the transgender community are a matter of freedom of self realization, and they're changing society's view of equality



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BY CHRISTOPHER DOLAN

As the legal battle concerning the rights of the lesbian and gay community has moved into the state legislature, through fiercely fought initiative battles and, finally, through the State and Federal Courts, the civil rights of transgender persons are belatedly being advanced and established. As a plaintiff's lawyer, my practice includes civil rights, including the fight for full, complete equality for transgender people.

Several of my recent cases, including one which I have the honor of co-counseling with the Transgender Law Center (TLC), have brought nationwide media attention to transgender rights. These cases are civil actions, brought under California law, for equality in healthcare, government services, and the ability to participate in international sporting organizations such as the Ladies Professional Golf Association (LPGA). This work has been extremely rewarding as it has caused real, widespread and lasting change; the kind of thing that we all idealized when we set out to become lawyers.

This is not an issue of gay or straight; psychology or social studies. It is a freedom issue: the freedom of self realization despite how society has defined you and/or the constrictions of your physical/birth body. Many of my clients have courageously struggled for years to conform to the expectations imposed by their physical bodies, only to break through that barrier and be immediately confronted again with ignorance and rejection spawned from prejudice.

This article will educate members of the Plaintiff's bar as to the struggles faced by the transgender community and show how courage, in combination with strong advocacy, is leading the fight for equality and dignity. This work is being done selflessly by advocacy groups throughout California such as the Transgender Law Center and Equality California. The work we are doing now employs the UNRUH Act, in precedent setting and

uniquely original ways, to shape our legal system and our society as more just, open, accepting and fair. The time has come for the plaintiff's bar to harness its collective wisdom, financial resources and talent, to fully embrace the urgent need for equality in employment, housing, health care, public services and economic opportunity within this under-represented minority community.

Definition of current terms of distinction

We will begin with the identification and clarification of the currently accepted (but evolving) terminology associated with the broad umbrella of the transgender community. The reader may not be entirely familiar with the terminology used in the transgender community, and a brief discussion of terminology related to gender and sexual identity is necessary to clarify the confusion and misconception in nomenclature which clouds the debate.

I will explore the origin and development of statutory civil rights in California (one of a few states in the nation to provide transgender people with statutory protection) and conclude with case studies that illustrate the need for effective private enforcement of these rights.

Transgender is a broad term applied to people whose gender identity and/or gender expression is unique from longstanding concepts of gender. Gender identity is one's internal, deeply felt sense of being male or female. Gender expression is one's characteristics and behaviors, such as, appearance, dress, and mannerisms that are perceived to be masculine or feminine. Gender identity and gender expression that are not conforming to one's assigned sex is at the core of transgender identity. The term is not synonymous with "sexual orientation." Transgender people may be heterosexual, homosexual, bisexual, etc. Transgender people exist, as do many, along the continuum between traditional roles of male and female. They may not adopt a single gender role and may, indeed, identify or express themselves outside of the male/female binary.

Transsexuals are people who are on the continuum of transition to a gender that is opposite of that which they were assigned at birth. Transsexuals identify with, and often live as members of



a gender opposite than that assigned at birth. Some, but not all, transsexuals access health care as part of their transition. This may include hormone replacement therapy, mental health therapy and a variety of sexual reassignment surgeries (SRS). Those who are in the transition process (a subject which itself could provide the basis for an article on the legal process for gender and identity change – a valuable, extensive, reference guide, California Transgender Law 101, may be found on the Transgender Law Center’s Web site www.transgenderlawcenter.org) often identify themselves as MTF (male to female) or FTM (female to male). A significant number of transsexuals who have undergone transition no longer identify with their former gender and may not consider themselves to be transsexual or transgender once their transition is complete.

Evolution of transgender civil rights

Members of the transgender community face systematic discrimination over the entire range of the social spectrum. As has been the tradition in the United States, civil rights laws protecting transgender people have been slow, if not glacial, to evolve. We live in a bubble of feigned parity in California where race and gender identity are concerned. As made evident by the recent passage of Proposition 8, that bubble is more of a fragile, but encased, bulwark along the coast; a foothold in the march towards true equality.

Transgender rights have largely evolved along with, but lagged behind, the rights of lesbian, gay and bisexual (“LGB”) communities. In California, two major civil rights vehicles have traditionally been used to advance the march towards equality for transgender people; the Fair Employment and Housing Act (“FEHA” Cal. Gov. Code, § 12926 et. seq., jobs and housing) and the UNRUH Civil Rights Act, (Cal. Civ. Code, § 51 et. seq., economic activity/businesses.) FEHA only recognized sexual orientation as a protected class starting in 1999. Before that time, sexual orientation was legally defined to mean one’s choice of partner, i.e., LGB communities). In 2003, the Gender Nondiscrimination Act, AB 196 (Leno) was passed, which prohibited discrimination based on gender identity or gender related appearance and behavior (gender expression). (Cal. Gov. Code, § 12926(p).) The current legal protections offered to transgender people are based on the definition of gender in California hate crime statutes. In 2004, AB 1234 (Khuel) altered the definition of gender as follows;

(c) “Gender” means sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth. (Cal. Pen Code, §§ 422.55 & 422.56.)

The UNRUH Civil Rights Act protects against discrimination based on sex and sexual orientation in economic activity. (Cal. Civ. Code, § 51.5.) This extends beyond the protection provided in FEHA governing employment and housing. For the definition of “sex” and “sexual orientation,” the UNRUH refers to

Section 12926 of FEHA, which in turn refers to the Penal Code. Neither the UNRUH Civil Rights Act nor FEHA contain an express definition within their provisions covering transgender people. There is currently legislation pending to incorporate the definition of gender into these statutes and to specifically enumerate gender identity and gender expression as protected characteristics.

Both the UNRUH Civil Rights Act and FEHA provide for recovery of actual and exemplary damages as well as attorneys fees. (See e.g., Cal. Civ. Code, §§ 51 & 52.1; Cal. Gov. Code, § 12970.) Under both statutes, injunction can be sought to end the unlawful activity. In some circumstances involving violence or intimidation, the UNRUH Civil Rights Act provides for a civil penalty of \$25,000. (Cal. Civ. Code, § 52.)

Case studies

The following two cases will illustrate how the UNRUH Civil Rights Act has been used to protect transgender rights. One case involves the denial of medical treatment and the other involves the prohibition of transgender women participating in women’s professional sports.

• *Hastings v. Seton Medical Center (Catholic Healthcare West)* Sf. Sup. Ct Case No. CGC-07-470336.

Charlene Hastings, a transgender woman, sought to undergo breast augmentation as part of her transition. Breast augmentation is a procedure undertaken by thousands of women in California each year. Ms. Hastings’ desired surgeon agreed to perform the surgery at Seton Medical Center in Daly City, where he had surgical privileges. When Ms. Hastings went to discuss her surgery, the consulting surgeon informed her that he could not operate on her at Seton as they, as a part of Catholic Healthcare West, prohibited any surgery which was part of the transition process. A memo from the President and Chief Executive Officer, to the Department of Plastic Surgery regarding Transgender Procedures dated Dec. 6, 2006, stated:

I would like to take this opportunity to notify all the members of the Section of Plastic Surgery that transgender procedures, or procedures that are part of the transgendering process, may not be preformed at Seton as Seton is a Catholic Hospital.

When Ms. Hastings called Seton to ask why she was prohibited from receiving the same services as other women (Seton provided breast augmentation for women designated female at birth), she was informed that it was “because God made you a man.”

Ms. Hastings, after being turned down by several civil rights groups known to typically advance transgender rights, contacted our firm for representation. We filed suit for violation of Ms. Hastings’ civil rights for precluding her from equal treatment in the provision of goods and services and for intentional infliction of emotional distress. The suit sought compensatory and punitive damages.



Attorney Chris Dolan and client Lana Lawless, a transgender woman who won the 2008 Women's Long Drivers Association championship.

would subsequently deny a woman who does not meet that requirement the ability to compete in the LPGA Qualifying Tournaments.

Likewise, the owner of the LDA, who had previously allowed Ms. Lawless to compete prior to her winning the Women's Division, stated;

According to the eligibility requirements for the 2010 Re/Max Women's Long Drivers Championship powered by Dick's Sporting Goods, competitors in the ladies' division must have been born female. As a result you are not eligible to participate in the competition.

Our firm agreed to represent Ms. Lawless and suit was filed in the Northern District based on diversity. Both the LPGA and LDA hold events in California. Before an answer was filed, the LPGA held a vote of its international membership and changed its bylaws to remove its "female at birth" policy. Likewise, the LDA has agreed that, should it continue with its Women's Division, it will follow the LPGA rules and permit females to participate pursuant to the rules established by the U.S. Olympic Committee, i.e., two years post SRS. The case is currently pending for an assessment of the right to, and amount of, further damages and/or the need for additional remedies to prevent further discrimination.

Conclusion

The work of freedom is always just beginning. The two major principles exemplified by the aforementioned cases are 1) unfortunately, discrimination continues to plague minorities while prohibiting their full participation in daily life and; 2) lawyers, through application of recently passed statutes, are the ones who bring about social change along with civil rights advocacy groups like the Transgender Law Center and Equality California.

Laws against discrimination, hard fought to get on the books, mean nothing without enforcement. This work is changing the face of society and rewarding lawyers who are making historical change by advancing equality locally, nationally and internationally. I invite you to support organizations like the Transgender Law Center and Equality California and join me in the struggle for full equality.

Chris Dolan is the owner of The Dolan Law Firm, San Francisco. He is the Immediate Past President of The Consumer Attorneys of California (CAOC) and an executive board member of the San Francisco Trial Lawyers Association (SFTLA). Dolan has been awarded the Consumer Attorney of the Year Award from CAOC, Trial Lawyer of the Year Award from SFTLA, California Lawyer Attorney of the Year award (CLAY) award from California Lawyer, the Transgender Law Center Advocate of the Year Award and was recently designated as one of the Top 100 lawyers in California by the Daily Journal. He is a frequent lecturer on subjects of civil rights, personal injury and trial practice and holds the largest recorded verdict in U.S. history for racial harassment.

Before an answer was filed, Seton requested that plaintiff enter into discussions to resolve the case. The matter was settled shortly thereafter including a change in Catholic Healthcare West's policies, statewide, permitting transgender surgery to the same extent surgery was provided to other women. In a letter dated February 11, 2008, the same corporate official wrote:

Transgendered people may now receive the same benefits as non transgendered persons throughout Catholic Healthcare West's 41 Hospitals throughout the Western United States.

•Lana Lawless v. Ladies Professional Golf Association (LPGA), Long Drivers Association (LDA), et. al. U.S. Dist Court, Northern District CV 10-4599 DMR.

Both the LPGA and LDA hold events in California. Lana Lawless, a transgender woman who had won the Long Drivers Association Women's Division in 2008, indicated her desire to qualify for the LPGA Tour. She was precluded based on a "female at birth" policy in LPGA's bylaws. Likewise, the LDA changed its rules from requiring that a participant be female and above the age of 18 to a policy that tracked the LPGA's rule requiring that a participant be "female at birth." Although Ms. Lawless' birth certificate had been changed to indicate she was female, she was precluded from participating in either association because of her transgender status.

The Senior Vice President of Tournament Operations and Player Services for the LPGA stated:

You are correct that our regulations only permit women who are "female at birth" to play on the LPGA Tour which