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## Epilogue

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*Gay & Lesbian Advocates & Defenders*

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## EPILOGUE

*Jennifer L. Levi*

The First Circuit reversed the district court's order dismissing Lucas Rosa's claim against Park West Bank.<sup>1</sup> The appeals court's reversal seems to be part of an emerging nationwide rejection of cases from the 1970s and 1980s<sup>2</sup> in which courts summarily dismissed sex discrimination claims brought by transgender plaintiffs, no matter how squarely the facts appeared to present a clear-cut case of discrimination based on sex.<sup>3</sup> Creating what appeared to be a "transgender" exception to sex discrimination law, those earlier courts ignored what the First Circuit recognized here—that a bank officer who tells an applicant to go home, change, and return presenting a more masculine appearance may very well have engaged in sex discrimination, even where the applicant may fairly be characterized as transgender or "cross-dressing."<sup>4</sup>

If anything useful can be gleaned from earlier cases excluding transgender people from any protection under sex discrimination laws, it is that as hard as it may be for judges to understand the harms caused by sex discrimination, it is even harder for them to do so when it is a transgender person who is being harmed. One of the most disturbing aspects of early exclusionary cases is the lengths to which courts went to explain away the discriminatory and adverse treatment experienced by transgender plaintiffs, many of whom were male-to-female transsexual women.

Fortunately, as Katherine Franke explained in her *Rosa* amicus brief, as sex discrimination jurisprudence has matured, more courts have moved beyond the simplistic, biologicistic model of sex discrimination on which

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1. *Lucas Rosa v. Park West Bank and Trust Co.*, 214 F.3d 213 (1st Cir. 2000).
  2. *See, e.g., Holloway v. Arthur Anderson & Company*, 566 F.2d 659, 662–63 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).
  3. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that *Price Waterhouse* overruled "cases like *Holloway*" and that under *Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); *Doe v. Yunits* (C.A. No. 00-1060-A (Superior Court of Commonwealth of Massachusetts), No. 2000-J-638 (Appeals Court of the Commonwealth of Massachusetts)); State of Connecticut Commission on Human Rights and Opportunities (CHRO) Declaratory Ruling on Behalf of John/Jane Doe (November 9, 2000).
  4. For a discussion of those "cases like *Holloway*," *Schwenk*, 204 F.2d at 1202, see article by Minter and Currah in forthcoming *William & Mary Journal of Gender*, volume 7.

early cases relied. As the amicus brief detailed, over time courts have recognized the harm of sex discrimination whether experienced by men or women. As part of this evolution in understanding, courts also came to recognize the harm of not just disfavoring females but also in disfavoring feminine roles. It is perhaps this broader understanding of the specific harms of sex discrimination as including the disfavoring of femininity (and masculinity by extension) that has enabled courts to see the harms of sex discrimination even when suffered by transgender people.

Rosa's case is important both because it continues to challenge our understanding of the harms caused by devaluing and disfavoring characteristics associated with femininity and because it recognizes that a person fairly characterized as transgender may have a claim of sex discrimination where it is her gender that is at the root of the different treatment. Rosa's case is challenging in a context in which many people still hold fast to unquestioned stereotypes—that is, in the context of gendered prescriptions about “appropriate” modes of dress and appearance. While society has shifted its understanding about the “appropriate” roles of women (and men) in employment,<sup>5</sup> post-secondary education,<sup>6</sup> and family life,<sup>7</sup> it has been slower to recognize the related and often equally damaging harms caused by enforcing gendered stereotypes about appearance—e.g. men should look like men and women should look like women.<sup>8</sup>

Fortunately for Rosa and other visibly gender nonconforming plaintiffs, the First Circuit was able to see past courts' previously limited views to recognize that sex discrimination on the basis of clothing and appearance is just as discriminatory and may be just as harmful as other, more widely recognized forms of discrimination. Sex discrimination is harmful to both women and men. Sending a female applicant home because she is perceived to be “too” feminine would be no less harmful to the loan applicant, also perceived to be “too” feminine, who turned out not to be biologically female or otherwise fit into the narrowly prescribed box of individuals who are deemed female. In other words, neither the facts (nor history) of one's biology can transform the experience or the effect of discrimination. What is surprising then is not the result in this case but that it has taken courts so long to understand something so simple. ✨

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5. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

6. *U.S. v. Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

7. *Orr v. Orr*, 440 U.S. 268, 279 (1982).

8. *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998).