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DOE V. BELL

Harley Abrevaya
New York Law School Class of 2006

DOE V. BELL
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HARLEY ABREVAYA*

Dorothy Parker observed that "heterosexuality is not normal, it is just common."[1] If so, then what is "normal?" At some point, the line between normal and abnormal might become so blurred that it becomes "normal" to be "abnormal."[2] Were that to happen, those considered "abnormal," such as people with physical or mental disabilities might lose their protected status within society.

In *Doe v. Bell*, the Supreme Court of New York addressed the issue of whether gender identity disorder (GID) constitutes a disability and, if so, whether Atlantic Transitional Foster Care Facility's dress code unlawfully discriminated against Jean Doe, a biological male who identified as a woman, in violation of article 15 of the New York State Human Rights Law (NYHRL).[3] The court concluded that Atlantic's dress code discriminated against Doe in violation of the NYHRL because Atlantic refused to reasonably accommodate Doe's GID needs.[4] With this holding, the court ex-

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* J.D. candidate, 2006, New York Law School.

1. Thinkexist.com, Dorothy Parker Quotes, http://en.thinkexist.com/quotation/heterosexuality_is_not_normal-it-s_just/182842.html (last visited Mar. 29, 2006).

2. *See generally* Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights* Philosophy, 80 N.C.L. REV. 371 (2002) (discussing the distinction between normal and abnormal sexual desires).

3. 754 N.Y.S.2d 846 (Sup. Ct. N.Y. County 2003). Note the court's use of the name "Jean Doe" to refer to the plaintiff. According to the opinion, although biologically a male, Doe prefers to be referred to as "she" because she identifies as a woman. *Id.* at 846 n.1. The court noted that gender identity disorder is recognized by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders. *Id.* According to the court, the manual recognizes three components of GID:

> (i) 'a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the opposite sex'; (ii) 'there must also be evidence of that persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex'; and (iii) 'clinically significant distress or impairment in social, occupational, or other important areas of functioning.'

Id. at 848 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-33 (4th ed. 1994)).

4. *Id.* at 851.

panded the already broad definition of "disability" under the NYHRL to include a person with GID.[5]

This case comment contends that although the holding of *Doe* is correct based on the legal test applied, the twenty-year-old case from which it derives, *State Division of Human Rights ex rel. McDermott v. Xerox,*[6] is outdated in today's society. In light of *Doe*, this comment suggests that it is time to revisit the *Xerox* test. By defining conditions such as GID as "disabilities," the test undermines the severity of serious mental and physical disabilities. In addition, the test might cause the word "disability" to lose its significance and protected status within society. This comment concludes that New York should adopt the standard articulated in the Americans with Disabilities Act (ADA) to determine what constitutes a disability while statutorily excluding other conditions from being deemed "disabilities."[7]

Jean Doe was a seventeen-year-old biological male who had been in the foster care system since age nine.[8] Doe's psychiatrist, Dr. Spritz, diagnosed Doe as having GID.[9] The diagnosis was based on: (1) Doe's identification as a woman; (2) her preference for wearing women's clothing; (3) her aversion to wearing men's clothing; and (4) the awkward and uncomfortable feelings she experienced when she wore men's clothing.[10] Dr. Spritz's treatment plan for Doe recommended that she dress as a woman in order to facilitate acceptance of her "internal identity."[11] Dr. Spritz explained that forcing youths with GID to dress contrary to their internal identity "causes significant anxiety, psychological harm, and antisocial behavior."[12]

Doe lived in Atlantic, an all-male short-term foster care placement center.[13] From the time of her admission in January 2002, Doe was denied the right to wear female clothing within the facil-

5. *Doe*, 754 N.Y.S.2d at 850.
6. 65 N.Y.2d 213 (1985).
7. *See infra* text accompanying notes 53-54.
8. *Doe*, 754 N.Y.S.2d at 848.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

ity.[14] In March 2002, Wayne Antoine, the director of Atlantic, issued a memo to his employees declaring that Doe was "not permitted to wear female attire in the facility."[15] Antoine did, however, allow Doe to wear women's accessories such as scarves, bras, and fake nails.[16] Doe's attorney complained to the Administration for Children's Services (ACS) that Atlantic was denying Doe the right to dress as a woman.[17] ACS responded that it denied Doe permission to wear female clothing because of its need to "protect the safety and welfare of the resident children."[18]

On July 18, 2002, Doe petitioned the Supreme Court of New York for injunctive relief and demanded that ACS allow her to wear women's clothing at Atlantic.[19] Doe alleged that Atlantic's dress code constituted unlawful disability discrimination in violation of the NYHRL[20] and violated Doe's federal constitutional right to freedom of expression.[21] Doe argued that under the broad definition of "disability" in the NYHRL, GID rendered her "disabled"[22] and, in failing to reasonably accommodate her disability, Atlantic unlawfully discriminated against her.[23] Shortly after Doe filed her petition, Antoine announced a new dress code at Atlantic, requiring all residents to wear pants and shirts while living at the facility.[24]

Defendant ACS argued that Atlantic did not fail to reasonably accommodate Doe for three reasons.[25] First, Atlantic did not know she was disabled and, therefore, was not aware it had to accommo-

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14. *Id.* at 849. Wayne Antoine, Atlantic's director, agreed that Doe could wear women's clothes *only* as she was exiting Atlantic. *Id.* Upon returning to the facility, Antoine required that Doe be immediately escorted to her room to change into more acceptable clothing. *Id.*

15. *Id.* (quotation omitted). It should be noted that throughout this memo, Antoine repeatedly referred to Doe as "he." *Id.* In doing so, Antoine appeared to ignore Doe's wishes to be known as a woman, a product of her GID. *Id.* at 848.

16. *Id.* at 849. In allowing this exception, Antoine failed to consider that such female accessories already allowed Doe to appear more like a woman.

17. *Id.*

18. *Id.* (quotation omitted).

19. *Id.*

20. N.Y. EXEC. § 291 (Consol. 1951).

21. *Doe*, 754 N.Y.S.2d at 848.

22. *Id.* at 850.

23. *Id.* at 848.

24. *Id.* at 850.

25. *Id.* at 854.

date her.[26] Second, Atlantic had provided Doe with a limited accommodation by allowing her to wear women's accessories.[27] ACS contended that to allow a "broader accommodation" would jeopardize the "safety and security" of Atlantic's other residents.[28] In particular, ACS asserted that if Doe were to wear women's clothing it would cause other Atlantic residents to feel "confused or threatened" and to "act out."[29] Finally, ACS argued that Doe was evicted from a previous foster care facility for misconduct; thus, she should not complain about Atlantic's dress code.[30]

The court rejected defendant's arguments.[31] Relying on *State Division of Human Rights ex rel. McDermott v. Xerox*, it reasoned that the term "disability" was broadly defined under the NYHRL because it encompassed physical, mental, and medical impairments.[32] In *Xerox*, the Court of Appeals held that to qualify as a disability under the statute, the condition at issue must prevent the exercise of a normal bodily function, or be demonstrable by medically accepted clinical or diagnostic techniques.[33] The *Doe* court held that because GID was clinically diagnosed by Dr. Spritz using medically accepted standards, the second prong of the *Xerox* test was satisfied; therefore, Doe's condition qualified as a disability under the statute.[34]

The *Doe* court next addressed whether Atlantic's failure to exempt Doe from its dress code discriminated against her.[35] Relying on *Ocean Gate Associates Starrett Systems, Inc. v. Dopico,* the court held that Atlantic discriminated against Doe because it failed to make

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26. *Id.*

27. *Id.* This argument seems to be in direct contradiction to the defendant's contention that it did not know Doe was disabled and, therefore, did not know they needed to accommodate her. The court did not explore this contradiction.

28. *Doe*, 754 N.Y.S.2d at 854.

29. *Id.* at 855.

30. *Id.* at 856. To read more about New York State foster care facilities, see Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM. J.L. & SOC. PROBS. 1 (2002).

31. *Doe*, 754 N.Y.S.2d at 856.

32. *Id.* at 850 (citing *Xerox*, 65 N.Y.2d at 220).

33. *Xerox,* 65 N.Y.2d at 218-19. *See* N.Y. EXEC. § 292[21] (Consol. 2005).

34. *Doe*, 754 N.Y.S.2d at 851. The court noted that Doe was also examined by a second psychiatrist, Dr. Levin of the Family Court Mental Health Services, who concurred with Dr. Spitz's diagnosis that Doe suffered from GID. *Id.*

35. *Id.* at 853.

reasonable accommodations for her disability.[36] In *Dopico*, the court denied a motion for summary judgment, reasoning that a landlord should make reasonable accommodations for a tenant with a disability by allowing the tenant to keep a pet despite a no pets clause in the lease.[37] In that case, the tenant was wheelchair-bound and a dog was necessary to allow the tenant the freedom to use the dwelling.[38] Among other things, the dog helped detect smoke and fire to ensure the tenant would not be victimized.[39] Similarly, the *Doe* court reasoned that if Doe were not allowed to wear women's clothing, she would suffer severe emotional and psychological distress.[40] Therefore, the exemption was reasonable, and would allow Doe full and equal freedom to use and enjoy Atlantic's facilities.[41]

The court found ACS's argument that Atlantic was not aware Doe was disabled unpersuasive because the evidence demonstrated several instances in which Atlantic had been alerted to Doe's condition.[42] As to its second argument that Atlantic had already made limited accommodations to Doe by allowing her to wear women's accessories such as scarves, bras, and fake nails, the court held that allowing Doe to dress in woman's clothing was not substantially different from wearing women's accessories.[43] Finally, ACS argued that Doe was evicted from a previous foster care facility for misconduct and, therefore, should not complain about Atlantic's dress code.[44] In response, the *Doe* court held that Doe's alleged miscon-

36. *Id.* at 853 (citing Ocean Gate Assoc. Starrett Systems, Inc. v. Dopico, 441 N.Y.S.2d 34 (N.Y. Civ. Ct. 1981)). Note that the NYHRL requires "covered entities to provide persons with disabilities reasonable accommodations . . . to ensure that persons with disabilities enjoy equality of opportunity." *Id.* at 851 (citing N.Y. EXEC. LAW § 296 (18)(2) (McKinney 2000).

37. *Dopico*, 441 N.Y.S.2d at 35.

38. *Doe,* 754 N.Y.S.2d at 852.

39. *Id.* at 35.

40. *Id.*

41. *Id.* The *Doe* court looked to the text of the NYHRL to determine what constitutes a "reasonable accommodation." *Id.* at 852-53. It concluded that the *Dopico* decision was a good model, but that all accommodations sought need not be granted, especially if the accommodation proposed would cause "undue hardship on the entity or is . . . otherwise unreasonable." *Id.* at 853.

42. *Id.* at 854.

43. *Id.* at 855.

44. *Id.* at 855-56.

duct at a previous foster care facility gave Atlantic "no license to discriminate against her by denying her a reasonable accommodation."[45] In finding that Doe's condition qualified as a disability under the *Xerox* test, the court accepted the testimony that GID was medically diagnosable.[46] Although correct under existing law, the *Xerox* test is outdated and should be re-examined.

The broad language of the *Xerox* test, with its emphasis on the "medical" aspects of disability, risks turning every condition into a type of disability.[47] Examples of conditions that would fit within the plain meaning of the second prong of the *Xerox* test include compulsive gambling, kleptomania, and pyromania, all of which the ADA wisely excludes from the definition of "disability" because they are better characterized as impulse control disorders.[48] At some point, most psychological illnesses will be characterized using the language of medical diagnosis, even ones as common as internet addiction,[49] video game addiction,[50] or being a shopaholic.[51] If

45. *Id.* at 856. The court also reminded defendants that each and every foster care facility must comply with the NYHRL to provide reasonable accommodations. *Id.*

46. *Id.* at 850-51.

47. *See* Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 298 n.224 (1999).

48. The rationale behind their exclusion from the ADA is explored later in this comment. *See infra* text accompanying notes 58-60; *see also* Cynthia Haines, *Types of Mental Disorders*, WEBMD, Feb. 21, 2006, http://webmd.com/content/article/60/67134.htm (outlining characterization of compulsive gambling, kleptomania and pyromania as "impulse control disorders"). People afflicted with these types of disorders are "unable to resist urges, or impulses, to perform acts that could be harmful to themselves or others. Pyromania (starting fires), kleptomania (stealing) and compulsive gambling are examples of impulse control disorders. . ..Often, people with these disorders become so involved with the objects of their addiction that they begin to ignore responsibilities and relationships." *Id.*; *see also* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 4, at 312.34-39 (explaining the diagnostic characteristics of impulse-control disorders including kleptomania and compulsive gambling); Norman H. Kirshman, *ADA: The 10 Most Common Disabilities and How to Accommodate Them*, FINDLAW, Mar. 1, 1997, http://library.findlaw.com/1997/Mar/1/126914.html (explaining the ADA and the mechanics of ADA claims and statutory definitions).

49. *See* Sarah Kershaw, *Hooked on the Web: Help Is on the Way*, N.Y. TIMES, Dec. 1, 2005, at G1; Verlyn Klinkenborg, Editorial, *'No Messages on This Server,' and Other Lessons of Our Time,* N.Y. TIMES, Jan. 29, 2006, at 15.

50. *See* Drake Lucas, *Games Ruining Players' Lives*?, SENTINEL & ENTERPRISE, Jan. 30, 2006; Amie Thompson, *Fun and Games or Addiction*?, GREAT FALLS TRIBUNE, Nov. 22, 2005, at 12K.

51. *See* Carey Goldberg, *Shopping Addicts: When the Urge to Shop Overtakes the Rational Processes of Mind and Budget*, N.Y. TIMES, Oct. 8, 1995, § 13, at 1.

these conditions were held to be disabilities under the NYHRL, it would undermine the gravity of severe mental illnesses such as schizophrenia or bipolar disorder.

The test to determine what qualifies as a disability under the ADA is narrower than the *Xerox* text applied in *Doe*.[52] A person with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.[53] Under this standard, GID probably would not qualify as a disability. In the scientific community, there has been much debate as to exactly what causes GID and how to diagnose it.[54] Given this debate, attempting to demonstrate that GID substantially limits a major life activity might prove problematic. In fact, several

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52. *See supra* text accompanying notes 33-34.

53. Americans with Disabilities Act, 42 U.S.C. §12102(2) (2000). *See also* Kirshman, *supra* note 49 (explaining that the ADA's definition of disability "is based upon the definition of 'handicap' found in the Rehabilitation Act. A judgment under either is precedent for the other") (citation omitted).

54. Determining the cause of GID itself is not very clear cut and the biological vs. social derivation of GID has been long-debated by psychologists, with no clear consensus. *See* Dr. Kenneth M. Maguire, Biological Involvement in Transsexualism (Dec. 1, 2003) (unpublished Ph.D. dissertation, Widener Univ.) (on file with author). Many psychologists rely on The Harry Benjamin Association as the accepted international authority on the standards of care for GID. *See* E-mail Interview with Dr. Kenneth M. Maguire, Coordinator of the Joint Degree Doctor of Psychology and Master of Human Sexuality Program, Widener Univ. (Jan. 5, 2006) (on file with author). A recent study in the Netherlands concluded "there is little consensus, at least among Dutch psychiatrists, about diagnostic features of gender identity disorder." Joost à Campo et al., *Psychiatric Comorbidity of Gender Identity Disorders: A Survey among Dutch Psychiatrists*, 160 AM. J. PSYCHIATRY 1332-36 (July 2003), *available at* http://ajp.psychiatryonline.org/cgi/content/full/160/7/1332. Other doctors recognize that GID is "a personal conception of oneself . . . a self-label" and its diagnosis is complicated "because the results of psychological testing are not conclusive." Shuvo Ghosh et al., *Sexuality: Gender Identity*, EMEDICINE, May 26, 2005, *available at* http://www.emedicine.com/ped/topic2789.htm; *see also* Robert Levey et al., *Sexual and Gender Identity Disorders*, EMEDICINE, Apr. 16, 2004, *available at* http://www.emedicine.com/med/topic3439.htm. Another professional warns that "[m]any psychiatrists go through their entire clinical career seeing only a few cases of gender identity disorder . . . When a disorder is this unusual, appropriate practice should be to seek the opinion and experience of physicians and psychologists who have evaluated and cared for many of these patients." Walter J. Meyer, III, Letter to the Editor, 161 AM. J. PSYCHIATRY 934-35 (May 2004). Thus, there is debate as to whether GID is medically diagnosable.

jurisdictions have determined that GID (or transsexualism) is not a disability.[55]

Regardless of how it might be characterized under the ADA, GID is explicitly excluded from being a disability under that statute.[56] Other excluded conditions include: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania and psychoactive substance use disorders resulting from current illegal use of drugs.[57] Many of these conditions were excluded because of concerns that they were more similar in nature to socially constructed conditions rather than medical disorders, and/or that they did not substantially limit major life activities.

There are both positive and negative aspects to labeling a sexually diverse condition as a "disability." One positive effect is protection from workplace discrimination. For example, the Employment Non-Discrimination Act (ENDA), proposed by Senator Edward Kennedy in July 2001, acknowledged that there was a qualified need to prohibit employment discrimination in the workplace based on sexual orientation.[58] The Senate report on this bill recog-

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55. *See* Holt v. N.W. Pa. Training P'ship Consortium, Inc., 694 A.2d 1134 (Pa. Commw. Ct. 1997) (holding that transsexualism is not a protected disability under the Pennsylvania Human Rights Act because it does not limit any bodily functions or major life activities); Conway v. City of Hartford, 1997 Conn. Super. LEXIS 282, at *10 (Feb. 4, 1997) (holding that transsexualism is not a disability because it was explicitly excluded from the ADA's definition of disability and because other jurisdictions have perpetuated that exclusion); Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 476 (Iowa 1983) (holding that transsexualism is not a protected disability under the Iowa Civil Rights Act because it does not limit a major life activity); *see also* Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 289 (E.D. Pa. 1993) (holding that gender dysphoria is not a mental disorder because transsexualism does not limit a major life activity).

56. 42 U.S.C. § 12211. An example of a gender identity disorder that results from a physical impairment is a child born with congenital adrenal hyperplasia, commonly known as "intersex." An intersex girl has genitals so enlarged that they look male. A recent article in the *New York Times* explored whether parents of children with genital abnormalities should elect to get corrective surgery for the children in an effort to avoid the "secrecy, shame, and medical complications" associated with this condition. Mireya Navarro, *When Gender Isn't A Given*, N.Y. TIMES, Sept. 19, 2004, § 9, at 6. S*ee also* JOHN COLAPINTO, AS NATURE MADE HIM (2001).

57. 42 U.S.C. §§ 12208, 12211. *See also* Kirshman, *supra* note 49 (citing HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK § 3.2 (2d ed. 1991)).

58. S. REP. NO. 107-341 (2002). It is not clear what became of this proposed bill. It was placed on the Senate Legislative Calendar under General Orders Calendar No.

nized that sexual orientation discrimination in the workplace is abundant and stems from "severe anti-gay bias."[59] It further acknowledged that sufficient evidence exists to show that discrimination harms sexually diverse employees by "threatening job security and by fostering an oppressive work environment in which gay, lesbian, and bisexual employees fear that their sexual orientation may be revealed to the detriment of their careers."[60] Thus, being labeled as "GID" might act as a protective measure against employment discrimination.

On the other hand, being labeled as "disabled" in the workplace has many negative consequences. By labeling GID as a "disability," not only do sexually diverse people have to deal with anti-gay prejudice in society, but they also have to contend with the stigmas attached to being labeled "disabled."[61] The public bias toward persons with disabilities is best summarized in the concept of "sanism."[62] Sanism is an irrational prejudice toward or stereotype about persons with disabilities synonymous with the "prevailing social attitudes [toward] racism and . . . homophobia."[63] In general, when people encounter a person known to be disabled, they have already formed an opinion about such a person. That opinion (or generalization) will often be a sanist one — i.e., a prejudiced one.[64]

Doe's "condition" could, perhaps, have been more properly analyzed on freedom of expression grounds. By analyzing her desire to wear women's clothing as a matter of expression rather than as a disability, the court could have avoided labeling Doe in a man-

763 on November 15, 2002, but there does not seem to be any further record of the bill. Although this bill was cosponsored by forty-four senators, it appears to have stalled on the Senate floor. *See Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01284:@@@L&summ2=m& (last visited Feb. 26, 2006).

59. *Id.*

60. S. REP. NO. 107-341 (2002). Although the bill does not include biases toward persons with GID, it seems logical to extend the broad language of "sexual orientation" to include such persons.

61. *See generally* Dean Spade, *Resisting Medicine Re-Modeling Gender*, 18 BERKLEY WOMEN'S L.J. 15 (2003).

62. *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000) (explaining that the term "sanism" was first coined in the 1960s by Morton Birnbaum, who is further credited with "finding the constitutional basis for right to treatment in the Due Process Clause").

63. *Id.* at xvii.

64. *See id.*

ner that ultimately renders her "disabled." It should be noted that Doe alternatively alleged that Atlantic's dress code violated her right to free speech.[65] The court, however, did not address this argument because it granted her relief on the disability discrimination claim.[66]

In light of *Doe*, New York courts should reconsider the language of the outdated *Xerox* test. Characterizing GID as a disability under the NYHRL threatens to open the floodgates of litigation to people claiming that all kinds of conditions should be considered disabilities. The ADA, which articulates a narrower test to determine what constitutes a disability and statutorily excludes some conditions from being deemed "disabilities," serves as an effective model to ensure that only serious mental and physical impairments are labeled "disabilities," while the "differently abled" are given the freedom to express themselves as they choose.

65. *Doe*, 754 N.Y.S.2d at 856.
66. *Id.*