

# Tulsa Law Review

---

Volume 43  
Issue 3 *Supreme Court Review*

---

Spring 2008

## The Misconception of Sex in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims

Amanda S. Eno

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Amanda S. Eno, *The Misconception of Sex in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 *Tulsa L. Rev.* 765 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol43/iss3/10>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# THE MISCONCEPTION OF “SEX” IN TITLE VII: FEDERAL COURTS REEVALUATE TRANSSEXUAL EMPLOYMENT DISCRIMINATION CLAIMS

## I. INTRODUCTION

Imagine spending twenty-five years working for the Army only to be told that because of your sexual identity, you are no longer good enough to work for the federal government.<sup>1</sup> Imagine being told you are highly qualified for the position and have been selected,<sup>2</sup> but you would not be a “good fit”<sup>3</sup> because you are transgender. This is the story of Diane Schroer.<sup>4</sup>

In 2004, after Diane Schroer retired from the Army, she was offered a job as a terrorism research analyst with the Library of Congress.<sup>5</sup> However, when Diane (then Dave) told the Library of Congress she was transitioning from male to female, they withdrew the job offer.<sup>6</sup> “I couldn’t understand how the country that I had risked my life for could believe that it was ok to rescind its job offer to me solely because I’m transgender.”<sup>7</sup> In *Schroer v. Billington*,<sup>8</sup> Schroer filed suit against the Library of Congress asserting the refusal to hire her was sex discrimination protected by Title VII of the Civil Rights Act of 1964.<sup>9</sup>

Schroer, however, faces an uphill battle.<sup>10</sup> While the Supreme Court has held discrimination because of [biological] sex and discrimination on the basis of gender, called sex stereotyping, are prohibited by Title VII,<sup>11</sup> transgender people currently enjoy

---

1. See *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) [hereinafter *Schroer I*]. “Plaintiff Diane Schroer, a male-to-female transsexual, sues defendant Library of Congress for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).” *Id.* at 205. “Schroer is a twenty-five year veteran of the U.S. Armed Services.” *Id.*

2. “[Schroer] was highly qualified for the position.” *Id.* “[The Library of Congress] called Schroer to offer her the position.” *Id.* at 206.

3. *Schroer I*, 424 F. Supp. 2d at 206. “‘Given [Schroer’s] circumstances’ and ‘for the good of the service,’ Schroer would not be a ‘good fit’ at [the Congressional Research Service, an arm of the Library of Congress].” *Id.*

4. *Id.* at 205–06.

5. *Id.*

6. *Id.* at 206.

7. ACLU, *Federal Court Rules Transgender Discrimination Lawsuit against Library of Congress Can Proceed*, <http://www.aclu.org/lgbt/transgender/24851prs20060331.html> (Mar. 31, 2006) (The ACLU represents Diane Schroer.).

8. 424 F. Supp. 2d 203.

9. *Id.* at 205; 42 U.S.C. § 2000e-2(a)(1) (2000).

10. Kenneth Jost, *Transgender Issues: The Issues*, 16 CQ Researcher 385, 387 (May 5, 2006) (available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2006050500>).

11. See *Schroer I*, 424 F. Supp. 2d at 207 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (indicating “Title VII reaches claims of discrimination based on ‘sex stereotyping.’”)); see e.g. *Ulane v. E.*

no explicit protection under the Civil Rights Act of 1964.<sup>12</sup> Only thirteen states and the District of Columbia have explicit laws protecting transsexuals from discrimination.<sup>13</sup> What is unclear is whether the idea that sex is not always fixed and that sex can be a “human-made process” is protected by Title VII’s prohibition on sex discrimination.<sup>14</sup>

Nearly two decades have passed since the Supreme Court, in *Price Waterhouse v. Hopkins*,<sup>15</sup> held that the phrase “because of . . . sex” in Title VII protects an individual from sex stereotyping discrimination based on a person’s gender nonconformity.<sup>16</sup> The *Price Waterhouse* Court, while discussing the legislative history behind Title VII, said that Congress did not intend “sex” to be limited to discrimination based on biological sex.<sup>17</sup> Rather, in enacting Title VII, Congress also intended to forbid gender discrimination.<sup>18</sup> However, many courts continue to incorrectly reject transsexuals’ claims of employment discrimination under Title VII.<sup>19</sup> Based on the lack of uniformity in court decisions following *Price Waterhouse*, it is clear that applying Title VII’s “because of . . . sex” wording “in the context of transsexuals is decidedly complex.”<sup>20</sup>

Throughout history, society has constructed norms for gender-appropriate behavior; including rules for appropriate behavior, dress, and sexual expression.<sup>21</sup> Gender norms assume individuals are born either as a man or as a woman and should behave accordingly.<sup>22</sup> These rigid gender rules are often very harmful to everyone in

*Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (indicating that “Title VII prohibit[s] discrimination based on sex, in its plain meaning, implies that is unlawful to discriminate against women because they are women and against men because they are men.”).

12. Kristine W. Holt, Student Author, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temp. L. Rev. 283, 285 (1997).

13. Transgender L. & Policy Inst., *Non-Discrimination Laws that Include Gender Identity and Expression, Maps & Charts, Transgender Issues: A Fact Sheet*, <http://transgenderlaw.org/resources/transfactsheet.pdf> (last updated Sept. 2007) (the thirteen states are California, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington). See also ABA Res. 122B at 4 (Aug. 7–8, 2006) (available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwob.doc>) (citing Transgender L. & Policy Inst., *U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression*, stating that ninety-three cities and counties explicitly forbid discrimination on the basis of gender identity or expression in housing, employment, and/or accommodations).

14. *Schroer I*, 424 F. Supp. 2d at 207 (quoting, as one of three issues, “does Title VII prohibit discrimination against transsexuals?”). Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 Harv. J.L. & Gender 51, 53 (2006). “Less understood is the notion that sex itself is not fixed, clear, or ‘objective,’ and that sex is *also* a human-made process.” *Id.* See Holt, *supra* n. 12, at 285 (noting that the transgender community’s “legal status is . . . uncertain and precarious.”).

15. 490 U.S. 228 (1989).

16. *Id.* at 250–51.

17. *Id.* at 239–40.

18. *Id.*; *Ulane*, 742 F.2d at 1085. The Supreme Court held that when Congress enacted Title VII, Congress intended “because of . . . sex” to “forbid employers to take gender into account,” and not just forbid discrimination “against men because they are men and women because they are women.” *Id.*

19. See Holt, *supra* n. 12, at 286 (“[L]ower courts have applied the outdated statutory interpretation of narrowly defining ‘sex’ solely to derogate transgender persons’ civil rights and equal protection guarantees under Title VII.”). See e.g. *Eisitty v. Utah Transit Auth.*, 2005 WL 1505610 at \*3 (D. Utah June 24, 2005) [hereinafter *Eisitty I*], *aff’d*, 502 F.3d 1215 (10th Cir. 2007) [hereinafter *Eisitty II*].

20. *Schroer I*, 424 F. Supp. 2d at 207 (internal quotations omitted) (citing *Eisitty I*, 2005 WL 1505610 at \*3; *Doe v. United Consumer Fin. Serv.*, 2001 WL 34350174 at \*2 (N.D. Ohio Nov. 9, 2001)).

21. Dean Spade, *Resisting Medicine, Remodeling Gender*, 18 Berkeley Women’s L.J. 15, 24 (2003) (outlining how the Diagnostic and Statistical Manual discusses symptoms of Gender Identity Disorder, including gender inappropriate behavior).

society—regardless of sex, sexual orientation, or gender identity.<sup>23</sup> Most important to this paper is the harm gender norms cause to transgender people who do not fit into one of the two traditional gender categories.<sup>24</sup> Transgender people are often seen as “gender deviants”<sup>25</sup> and, as a result, experience extensive discrimination.<sup>26</sup> Transgender people “are regularly denied employment, fired from their jobs, denied housing and public accommodations at hotels and restaurants, even harassed, beaten or murdered because of hatred of their gender nonconformity.”<sup>27</sup> This mistreatment terrorizes transgender peoples’ “freedom to work and live safely in their own communities.”<sup>28</sup>

Transgender people frequently experience anxiety stemming from legal identity issues, and “[a]mbiguity in gender presentation can bring ridicule and ostracism.”<sup>29</sup> While every aspect of discrimination deserves attention, this paper focuses on employment discrimination. Employment discrimination includes the “failure to hire or promote, demotions, terminations, restrictions on a person’s gender expression, and hostile environments resulting from basic bias against people who transition from one gender to another on the job or are known, or discovered, to have done so in the past.”<sup>30</sup>

The discrimination of transgender people in the workplace is significant and “widespread.”<sup>31</sup> One study on transgender people in San Francisco found “[fifty percent of the study’s] respondents had experienced employment discrimination.”<sup>32</sup> Because of

category).

23. Sean Cahill, *Preface*, in Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* i, iii (Policy Inst. Natl. Gay & Lesbian Task Force 2000) (available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>). “Every person has a gender. When the expression of those genders is caught in rigid social scripts, people get hurt.” *Id.* The traditional gender binary has shown to be a large obstacle for transsexuals bringing Title VII sex discrimination claims. *See Etsitty II*, 502 F.3d at 1222 (stating that “[i]n light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual”).

24. *See Spade, supra* n. 21, at 25–26 (discussing the problem with “the scripted transsexual childhood narrative” in relation to medical treatment is that it often requires transsexuals to have corrective surgery to “reestablish [stereotypical gender] norm[s]”).

25. *Id.* at 25 (discussing medical views associated with gender identity disorder).

26. ABA Res. 122B at 4.

27. Cahill, *supra* n. 23, at iii.

28. GLAD, *Rights and Resources, Transgender Issues*, <http://www.glad.org/rights/transgender.shtml> (last updated Mar. 4, 2008).

29. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & Sexuality 123, 147 (2001) (citing Riki Ann Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (Firebrand Bks. 1997)). Society views a sense of “naturalness” to heterosexuality, and often society views “anyone falling outside of [the norm] falls short of human.” *Id.* at 132. “Because of this oppressive heteronormativity, transsexual people usually choose to live ‘under the radar,’ seeking to limit or erase their ‘transsexual’ status, for two reasons.” *Id.* First, transsexuals view themselves as males or females, not transsexuals, and their transsexualism is kept a private matter. *Id.* (citing Suzanne Kessler & Wendy McKenna, *Gender: An Ethnomethodological Approach* 121 (U. Chicago Press 1985)). Second, disclosure can result in “public shame, discrimination, harassment, and physical danger.” *Id.* (citing Intl. Conf. Transgender L. & Empl. Policy, *Discrimination against Transgender People in America*, 3 Natl. J. Sexual Orientation L. 1, 2 (1997)).

30. Natl. Ctr. Lesbian Rights & Transgender L. Ctr., *Advancements in State and Federal Law Regarding Transgender Employees: A Compliance Guide for Employers and Employment Law Attorneys*, <http://www.nclrights.org/site/DocServer/complianceguideemployers.pdf?docID=1201> (last updated Apr. 2006). *See also* GLAD, *supra* n. 28 (discussing how the most common harassment and discrimination transgender people experience is in employment, housing, and public accommodations).

31. ABA Res. 122B at 4.

32. *Id.* (citing Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities* Introduction, <http://www.transgenderlawcenter.org/tranny/pdfs/>

the significant discrimination to transgender people, organizations and employers have begun acknowledging the importance of protecting transsexuals from workplace discrimination.<sup>33</sup> For example, 125 of the Fortune 500 companies have policies prohibiting transgender discrimination.<sup>34</sup> On August 8, 2006, the American Bar Association House of Delegates passed resolution 122B, “which urges the protection of transgender people in employment.”<sup>35</sup> The ABA stated it “has an obligation to speak out on behalf of transgender people, who currently face widespread, invidious discrimination on the basis of their gender identity and expression.”<sup>36</sup>

While approximately thirty-seven percent of the United States population lives in a state that has laws prohibiting transgender discrimination, there is currently no federal protection for transgender people.<sup>37</sup> This article examines the possibility that transsexuals can bring a successful sex discrimination claim under Title VII of the Civil Rights Act of 1964.<sup>38</sup> Part II of this paper defines the term transsexual, as well as examines the terms which fall under the transgender umbrella. Part III examines the background of Title VII in relation to transsexual sex discrimination cases. Part IV shows how the courts that are currently rejecting transsexuals’ Title VII sex discrimination claims are misinterpreting the term “sex”<sup>39</sup> and are incorrectly viewing congressional history.<sup>40</sup> Part V analyzes “sex stereotyping” and shows that only in certain circumstances does sex stereotyping afford transsexuals protection under Title VII.<sup>41</sup> Part VI examines a new approach that moves away from the typical sex stereotyping analysis toward an analysis that says discrimination because of gender

Trans%20Realities%20Final%20Final.pdf (2003)).

33. See ABA Res. 122B.

34. Human Rights Campaign Found., *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2006–2007*, [http://www.hrc.org/documents/State\\_of\\_the\\_Workplace.pdf](http://www.hrc.org/documents/State_of_the_Workplace.pdf) (2007). See also Transgender L. Inst., *Employer and Union Policies: Employers Who have Policies Prohibiting Discriminating Against Transgender People*, <http://www.transgenderlaw.org/employer/index.htm> (last updated Mar. 21, 2006) (providing a list of employers that prohibit gender identity or expression discrimination with policies that the Transgender Law Policy has been able to confirm). Also, 115 colleges and one law school prohibit gender identity discrimination. ABA Res. 122B at 5 (citing Transgender L. Inst., *Colleges and Universities*, <http://www.transgenderlaw.org/college/index.htm#policies> (last updated Jan. 31, 2008)) (when the ABA passed the resolution there were forty-seven colleges and universities, now there are 115, plus one law school, that prohibit gender identity discrimination; the law school is Golden Gate University School of Law).

35. Jon Geier et al., *Recent Federal Rulings Shift Toward Title VII Protection of Transsexual Employees*, 21 *Andrews Empl. Litig. Rptr.* 13 (2006) (citing ABA Resolution 1[2]2B). ABA Resolution 122B also “urges the protection of transgender people in . . . housing and public accommodations.” *Id.*

36. *Id.*

37. Leslie A. Farber, *A Primer to Transgender Legal Issues and Practice*, 239 *N.J. Law.* 39, 40 (2006) (these laws are “explicit anti-discrimination” laws protecting transgender people).

38. 42 U.S.C. § 2000e-2(a)(1).

39. Courts rejecting transsexuals’ claims hold the phrase “because of . . . sex” refers to biological sex. See Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 *Me. L. Rev.* 117, 126–27 (2003) (describing how the most significant problem with transsexuals treatment in employment law “is the great inconsistency between the legal and medical determination of sex”).

40. Specifically, section III will show how these courts are ignoring case law that holds Title VII is not limited to those types of discrimination Congress intended the phrase “because of . . . sex” to mean, and that these cases are incorrectly viewing failed attempts to amend Title VII to include sexual orientation to mean they are failed attempts to include gender identity to Title VII.

41. “Sex stereotyping” protects transsexuals when they are being discriminated against because of their failure to act feminine or masculine enough for an employer, but does not protect against discrimination when a transsexual is not going against the gender grain, but with it. See *Proyer*, 424 F. Supp. 2d at 211.

identity disorder is discrimination "because of . . . sex." The courts rejecting transsexual sex discrimination claims are misinterpreting case law regarding gender identity because the proper application of "sex" to Title VII extends protection to transsexuals on the basis of "sex stereotyping" and "gender identity," as reflected in *Smith v. City of Salem*<sup>42</sup> and *Schroer*, which this comment claims represent more accurate interpretations.

## II. DEFINITIONS

In general, transgender<sup>43</sup> individuals are people whose birth sex does not match their internal perception of their gender identity.<sup>44</sup> When discussing the law, when practicing the law, and when using everyday language, understanding the appropriate terms to use in discussing transgender issues is important.<sup>45</sup> While some argue that using these terms may perpetuate sexist stereotypes,<sup>46</sup> defining them is necessary to analyze particular laws because jurisdictions treat the terms differently.<sup>47</sup> Therefore,

it is important to read the small print: not all of these laws protect everyone whose gender identity and expression is at odds with prevailing social norms. The scope of any particular law depends on the particular definition that is used, and may be limited by exclusions written into the law.<sup>48</sup>

Also, the diversity in the transgender community can be confusing to an outsider.<sup>49</sup> To clarify this confusion, here are some definitions.<sup>50</sup>

Often, the terms "gender" and "sex" are used synonymously.<sup>51</sup> However, "sex" usually refers "to a person's biological . . . identity as male or female."<sup>52</sup> The term

42. 378 F.3d 566 (6th Cir. 2004) (holding the plaintiff successfully states a claim for sex discrimination under Title VII).

43. There seem to be no accurate estimates of how many transgender people live in the United States. "The number of transsexuals in the United States is uncertain and subject to dispute." Jost, *supra* n. 10, at 387. Dean Spade, a transgender attorney and founder of the Sylvia Rivera Project, said "there are no current estimates [I] would trust on the number of trans people [sic] in the U.S. [N]o one counts us so the numbers we have are local and based on small studies." E-mail from Dean Spade to Amanda Eno (Sept. 9, 2006, 10:00 a.m. CDT).

44. Jamison Green, *Introduction to Transgender Issues*, in Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (Policy Inst. Natl. Gay & Lesbian Task Force 2000) (available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>).

45. "The best way to get a fuller understanding of gender terms is to look at many different sources. When dealing with an individual, it is important to ask what terms they prefer for themselves." Fair Workplace Project, *Gender Identity and Employment: Definitions of Terms 7* (Basic Rights Educ. Fund 2003) (available at [http://www.srlp.org/documents/FWP\\_Packet\\_2003\\_gi\\_supplemental.pdf](http://www.srlp.org/documents/FWP_Packet_2003_gi_supplemental.pdf)). "The diversity is really the key to the liberating aspect of transgender identity and politics." Shannon Minter, *The Transgender Umbrella: One View*, in Natl. Ctr. Lesbian Rights & Transgender L. Ctr., *Advancements in State and Federal Law Regarding Transgender Employees: A Compliance Guide for Employers and Employment Law Attorneys*, <http://www.nclrights.org/site/DocServer/complianceguideemployers.pdf?docID=1201> (last updated Apr. 2006).

46. Green, *supra* n. 44, at 2 ("these differences may sometimes . . . perpetuate invidious racist stereotypes and practices").

47. Paisley Currah & Shannon Minter, *A Growing Grassroots Movement for Trans Equality*, in *Transgender Equality: A Handbook for Activists and Policymakers* 18 (Policy Inst. Natl. Gay & Lesbian Task Force 2000) (available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>).

48. *Id.*

49. Weiss, *supra* n. 29, at 142.

50. *Id.* ("There are many shades of gender variance, as well as considerable disagreement about the terms used to describe them.")

51. Green, *supra* n. 44, at 2.

52. *Id.*

“gender” refers to the “collection of characteristics that are culturally associated with maleness or femaleness.”<sup>53</sup> Traditionally, “sex” is seen as a permanent,<sup>54</sup> immutable characteristic.<sup>55</sup> But, in the context of transsexuals, a disagreement exists on whether “sex” should be considered a mutable characteristic.<sup>56</sup>

“Gender identity” refers to a person’s internal, deeply felt sense of being either male or female, or something other or in between.”<sup>57</sup> Rather than being a characteristic that others can perceive, gender identity is the way a person defines oneself.<sup>58</sup> In contrast, a person’s “gender expression” is external and socially defined.<sup>59</sup> “Gender expression” refers to all characteristics that are seen as “either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.”<sup>60</sup>

“Transsexuals” are individuals whose gender identity (their internal perception) does not match their biological sex.<sup>61</sup> For example, a transsexual who was born a biological male internally perceives himself as having a female gender identity.<sup>62</sup> Despite the inclusion of “sex” in the word transsexual, sexual orientation is not the defining characteristic.<sup>63</sup> No connection exists between a person’s gender identity (an internal sense of being male or female), gender expression (external characteristics), and sexual orientation (what sex a person is attracted to).<sup>64</sup> Transsexualism “is not about [boys] liking boys or [girls liking] girls; it is about being boys or girls, a qualitatively different experience.”<sup>65</sup> Transsexuals internally perceive themselves as a member of the opposite sex, and thus are “not . . . homosexual[s] in the traditional sense of the word.”<sup>66</sup> Not all transgender people identify as gay, lesbian, or bisexual, and not all gay, lesbian, or bisexual people display gender non-conforming characteristics.<sup>67</sup>

53. *Id.*

54. Ben-Asher, *supra* n. 14, at 52 (citing Judith Butler, *Undoing Gender* 40–43 (Routledge 2004)) (“[W]hile ‘sex’ is often perceived as permanent, non-negotiable, and objective.”).

55. “[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.” D. Douglas Cotton, Student Author, *Ulane v. Eastern Airlines: Title VII and Transsexualism*, 80 Nw. U. L. Rev. 1037, 1059 n. 176 (1986) (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). However, Title VII is not limited to protecting immutable characteristics. “For example, title VII prohibits discrimination based on religion, a voluntary, not immutable, characteristic.” *Id.*

56. For additional information on “sex” being a mutual characteristic, like religion, review the text accompanying *infra* notes 170–75.

57. Green, *supra* n. 44, at 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. 1999) (discussing how “transsexuals believe and feel they are members of the opposite sex”).

62. This is an example of a male-to-female transsexual (MTF). There are also female-to-male transsexuals (FTM). See Green, *supra* n. 44, at 3.

63. Weiss, *supra* n. 29, at 130. “Sexual orientation refers to whether a person is attracted to men, women or to both.” Green, *supra* n. 44, at 8.

64. *Id.* at 8.

65. Weiss, *supra* n. 29, at 130.

66. *Littleton*, 9 S.W.3d at 230. Also, transsexuals are not transvestites. *Id.* “Transsexuals do not believe they are dressing in the opposite sex’s clothes. They believe they are dressing in their own sex’s clothes.” *Id.* See also *Maffei v. Kolaeton Indus., Inc.*, 164 N.Y. Misc. 2d 547, 551 (N.Y. Sup. Ct. 1995) (stating that transvestites are “not to be confused with transsexuals”).

67. Green, *supra* n. 44, at 8. “[A] person’s gender expression is often mistakenly assumed to reveal that person’s sexual orientation.” *Id.* These stereotypes are “not only unreliable and untrue, they are dangerous.” *Id.* at 9. Educating legislators and policymakers about the damage inflicted by sexism and gender

Some transsexual individuals seek medical treatment to correct their physical body.<sup>68</sup> Transition is the process by which individuals go through hormone therapy and sex reassignment to change themselves to align with their gender identity.<sup>69</sup> There are female-to-male transsexuals and male-to-female transsexuals.<sup>70</sup> Technically, transsexualism is a psychiatric disorder known as gender identity disorder (GID).<sup>71</sup> The diagnosis and treatment of transsexualism is listed in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).<sup>72</sup> Transgender advocates disagree on whether GID should be listed in the *DSM-IV* because "[it] gives a misleading picture of transgender people and their lives."<sup>73</sup> Not all transsexual people have mental health problems and, after transitioning, transsexuals live "normal, productive, healthy lives."<sup>74</sup> Also, the latest studies suggest that being transgender is not a mental condition, but it is a physical condition.<sup>75</sup> "These studies may support the conclusion that being transgender is just one variation in the broad range of human physical experiences."<sup>76</sup>

"Transgender" refers to people who identify with the sex that is opposite of their birth sex or who express their gender in ways atypical to their birth sex.<sup>77</sup> Originally, the term "transgender" had a limited meaning, only referring to a biological man who wished to live as a woman.<sup>78</sup> Today, the term "transgender" has become an umbrella term.<sup>79</sup> The term applies to a wide range of people who seem to display characteristics

stereotyping is a critical component of winning basic civil rights protections for GLBT people." *Id.*

68. *Id.* at 3. See also *Littleton*, 9 S.W.3d at 230 ("Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts.").

69. Fair Workplace Project, *supra* n. 45, at 7. "This may include a name change, pronoun change, and hormonal and/or surgical modifications." *Id.* "Transition may, but does not always, include necessary medical care like hormone therapy, counseling, and/or surgery." Minter, *supra* n. 45.

70. Green, *supra* n. 44, at 3. "Female-to-male transsexual (FTM) people are born with female bodies, but have a predominantly male gender identity. Male-to-female transsexual (MTF) people are born with male bodies, but have a female gender identity." *Id.*

71. Farber, *supra* n. 37, at 39 (quoting Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders IV* (Am. Psychiatric Assn. 1994)) (GID is also known as gender dysphoria). "However, there is some controversy within the mental health community regarding whether gender identity disorder should be listed in the DSM as a mental disorder." *Id.* at 42 n. 2. See also Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 Lab. L. 121, 123 (2005) (citing e.g. *Lie v. Sky Publ. Corp.*, 2002 WL 31492397 at \*\*1-2 (Mass. Super. Ct. Oct. 7, 2002)). "Strictly speaking, a 'transsexual' is a person who is (or could be) diagnosed with a recognized medical condition known as Gender Identity Disorder (sometimes called GID or 'gender dysphoria')." *Id.*

72. Fair Workplace Project, *supra* n. 45, at 7.

73. See Jost, *supra* n. 10, at 390-91, 401 (discussing whether Gender Identity Disorder should be listed in the *DSM-IV*).

74. *Id.* at 390. However, some transsexuals "do have mental health problems, such as depression or substance abuse . . . [b]ut . . . those are related to gender identity only because of how we're treated, not because of gender identity itself." *Id.*

75. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People through Disability Laws*, in *Transgender Rights* 74, 81 (Paisley Currah et al. eds., U. Minnesota Press 2006) (discussing studies that say being transgender is physiological, not psychological).

76. *Id.*

77. Farber, *supra* n. 37, at 39.

78. Green, *supra* n. 44, at 4. "Before the mid-1990's, the term 'transgender' had a narrower and more specific meaning." *Id.* "[T]he term originally referred to biological men who are satisfied with their male genitalia, but who wish to be seen and to live in the world as women." *Id.*

79. *Id.* at 3.

[A]n "umbrella" term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and



atypical to that of their birth sex.<sup>80</sup> In most cases, “[t]ransgender . . . people do not choose to be the way that they are; [instead,] they are acting on ‘deep-seated and irreversible feelings.’”<sup>81</sup> In addition, transgender people’s sexual orientation is “predominantly heterosexual (based on genitalia), but there are also bisexual, asexual, and homosexual individuals.”<sup>82</sup> While transgenderism is repeatedly amalgamated with homosexuality, sexual orientation is *not* the characteristic that defines transgenderism.<sup>83</sup>

Is it appropriate to use “transgender” as an umbrella term? Naming transgender people as a distinct group may have negative consequences because “it reinforces the mistaken view that transgender individuals are somehow fundamentally different than other people.”<sup>84</sup> Nevertheless, “[f]rom a political perspective, . . . it has been necessary to embrace the label ‘transgender’ to foster a sense of solidarity among those who bear the brunt of discrimination against gender atypical people.”<sup>85</sup> Remember, “[o]nly by naming that discrimination can we hope to end it, . . . [and only then] can we create a world in which the label ‘transgender’ will no longer be needed.”<sup>86</sup> In general, this paper uses “transgender” as an umbrella term. However, because the relevant case law involves plaintiffs that have either transitioned or are in the process of transitioning,<sup>87</sup> this paper will focus on transsexuals.

female cross-dressers (sometimes referred to as “transvestites,” “drag queens,” or “drag kings”); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.

*Id.* “As currently used, ‘transgender’ is an umbrella term that is analogous to other umbrella terms like people of color or people with disabilities.” Minter, *supra* n. 45.

80. Green, *supra* n. 44, at 3. Transgender is often used to include intersexed people. Intersexed people can be born with sexual anatomy that mixes male and female characteristics in ways that make it difficult to label them male or female. *Id.* at 5. Intersexed people can be “born with a sexual anatomy that mixes male and female characteristics in ways that make it difficult . . . to label them male or female.” *Id.* “Intersexed infants may have ambiguous genitalia, such as a penis that is judged ‘too small’ or a clitoris that is judged ‘too large.’” *Id.* Some intersexed people may have internal reproductive organs usually associated with the other sex than the sex they were born. *Id.* Intersexed people sometimes have to have the same medical treatments as transsexuals. Green, *supra* n. 44, at 6. In addition, “intersexed people are often discriminated against in employment and other areas if their intersexed identity becomes known.” *Id.* And, “[l]ike other transgendered people, intersexed people have mostly been excluded from any legal protection under existing anti-discrimination laws.” *Id.* Intersexed people often face many of the same obstacles of transgender people (they are stigmatized, face employment discrimination, and they are excluded from anti-discrimination laws). *Id.* This paper will not include intersexed people in its treatment of Title VII law.

81. Farber, *supra* n. 37, at 39 (citing Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders IV-TR* 581-82 (Am. Psychiatric Assn. 2000)).

82. Green, *supra* n. 44, at 4.

83. Littleton, 9 S.W.3d at 226 (citing Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA Women’s L.J. 219, 237 (1997)); see also Maffei, 164 N.Y. Misc. 2d at 551 (“A transsexual is not homosexual in the true sense as the latter seek sexual gratification from members of their own sex as members of that sex, whereas transsexuals’ erotic attractions are generally with persons of their own anatomic sex, but viewing themselves as members of the opposite desired sex.”).

84. Green, *supra* n. 44, at 2.

Many transsexual people have been willing to take on the label of transgender because it describes their experience before their change of sex, or in some way helps to describe their ongoing consciousness once they have changed their sex, implying the broader social awareness they may have as a result of experiencing life from within two kinds of (perceived) bodies, though their gender identity may always have remained the same.

*Id.* at 4–5.

85. *Id.* at 2-3.

86. *Id.* at 3.

## III. THE HISTORY OF TRANSEXUAL CASE LAW ON TITLE VII

Title VII prohibits an employer from discriminating against an employee "because of [an] individual's race, color, religion, sex, or national origin."<sup>88</sup> While Title VII seems to protect all people from sex discrimination,<sup>89</sup> the majority of federal courts deny transsexuals' Title VII sex discrimination claims.<sup>90</sup> Traditionally, federal courts deny transsexuals' discrimination claims based on a narrow interpretation of congressional intent behind the inclusion of "sex" in Title VII.<sup>91</sup> These courts systematically held Congress intended the word "sex" to mean biological sex,<sup>92</sup> not gender identity.<sup>93</sup> These holdings follow a 1984 Seventh Circuit ruling, *Ulane v. Eastern Airlines Inc.*,<sup>94</sup> that held "the total lack of legislative history . . . clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."<sup>95</sup>

In *Ulane*, Kenneth Ulane, who was born male, was hired as a pilot for Eastern Airlines.<sup>96</sup> Eleven years after being hired, Ulane was diagnosed as a transsexual and underwent hormone therapy and sex-reassignment surgery.<sup>97</sup> After the surgery, Ulane's birth certificate was revised to say female, and the Federal Aviation Administration revised Ulane's flight status to female.<sup>98</sup> When Eastern Airlines found out Ulane was a transsexual, they fired her.<sup>99</sup> Ulane then brought a Title VII sex discrimination claim against Eastern Airlines.<sup>100</sup> The *Ulane* court held, "[t]he words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder."<sup>101</sup>

The court noted its "responsibility" was to determine what Congress intended

88. 42 U.S.C. § 2000e-2(a)(1).

89. Leena D. Phadke, Student Author, *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination under Title IX*, 54 U. Kan. L. Rev. 837, 838 (2006) (citation omitted) ("Although Title VII . . . purport[s] to protect all individuals from discrimination on the basis of sex . . . transgender individuals do not necessarily enjoy such protection.").

90. See Dishman, *supra* n. 71, at 127 ("The first courts to consider the issue uniformly rejected transsexuals' Title VII claims."). See e.g. *Ulane*, 742 F.2d 1081; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Underwood v. Archer Mgt. Servs., Inc.*, 875 F. Supp. 96, 98 (D.D.C. 1994).

91. Dee McAree, Natl. L.J., *Courts Still at Odds over Transsexuals' Civil Rights*, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1123578311575> (Aug. 10, 2005).

92. Phadke, *supra* n. 89, at 839 (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)).

93. *Id.* at 838 (citing Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 Denv. U. L. Rev. 1321, 1353-54 (1998)).

94. 742 F.2d 1081.

95. *Id.* at 1085.

Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.

*Id.* at 1086 (citing *Gunnison v Commr.*, 461 F.2d 496, 499 (7th Cir. 1972)).

96. *Id.* at 1082-83.

97. *Id.* at 1083.

98. *Ulane*, 742 F.2d at 1083.

99. *Id.* at 1082.

100. *Id.*

101. *Id.* at 1085.

when adding “because of . . . sex” to Title VII.<sup>102</sup> The court then held that Congress “never considered nor intended” Title VII to mean more than its “plain language implies.”<sup>103</sup> Thus, the court held Title VII did not “apply to anything other than the traditional concept of sex.”<sup>104</sup> By giving this narrow interpretation, Title VII “would . . . exclude transsexuals.”<sup>105</sup>

Ulane also tried to assert a claim that she was discriminated against on the basis of being female.<sup>106</sup> However, the court held that a transsexual could not claim sex discrimination on the basis of being female, if the discrimination that occurred stemmed from her transsexual status.<sup>107</sup> Eastern Airlines discriminated against Ulane “not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”<sup>108</sup>

Around the same time of the *Ulane* decision, two other circuit courts also addressed what “sex” meant in Title VII, in relation to transsexuals.<sup>109</sup> Both *Holloway v. Arthur Andersen & Co.*<sup>110</sup> and *Sommers v. Budget Marketing, Inc.*<sup>111</sup> “held that discrimination against transsexuals does not fall within the ambit of Title VII.”<sup>112</sup> In *Holloway*, the Ninth Circuit refused to extend Title VII protection to transsexuals because discrimination against transsexuals is based on “gender” not “sex.”<sup>113</sup> The plaintiff in *Holloway*, after telling her employer that she was going through treatment to have a sex reassignment surgery, was told she “would be happier at a new job where her transsexualism would be unknown,” and was terminated.<sup>114</sup>

In *Sommers*,<sup>115</sup> the Eighth Circuit held transsexuals are not protected by Title VII because “the plain meaning must be ascribed to the term ‘sex.’”<sup>116</sup> The plaintiff in *Sommers* was “dismissed” from her job “because she misrepresented herself as an anatomical female when she applied for the job.”<sup>117</sup> The plaintiff’s misrepresentation interfered with the “company’s work routine” when some of the company’s female employees threatened to quit if the plaintiff would be allowed to use the women’s

102. *Id.* at 1084.

103. *Ulane*, 742 F.2d at 1085. “Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals.” *Id.*

104. *Id.*

105. *Id.* at 1086. See *Schroer I*, 424 F. Supp. 2d at 212 (discussing *Ulane*’s narrow interpretation of “sex” based on Congress’s “intent,” the *Schroer* court says, “[t]hose arguments, perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history”).

106. *Ulane*, 742 F.2d at 1087.

107. *Id.*

108. *Id.*

109. See *Holloway*, 566 F.2d 659; *Sommers*, 667 F.2d 748.

110. 566 F.2d 659.

111. 667 F.2d 748.

112. *Ulane*, 742 F.2d at 1086 (citing *Holloway*, 566 F.2d at 662–63; *Sommers*, 667 F.2d at 750).

113. *Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004) (citing *Holloway*, 566 F.2d at 661–63).

114. *Holloway*, 566 F.2d at 661.

115. 667 F.2d 748.

116. *Id.* at 750.

restroom.<sup>118</sup>

Until recently, all federal courts refused to extend Title VII's sex discrimination protection to transsexuals.<sup>119</sup> But, a 1989 Supreme Court ruling, *Price Waterhouse v. Hopkins*,<sup>120</sup> may have accidentally opened the door for transgender individuals by broadening the interpretation of "sex" to include gender stereotyping.<sup>121</sup> The plaintiff in *Price Waterhouse* was not a transsexual; she was an "aggressive" woman who was passed over for a promotion because she was too "macho."<sup>122</sup> Thus, the Supreme Court established that Title VII's "because of . . . sex" language included discrimination based on biological sex "and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."<sup>123</sup>

In the wake of *Price Waterhouse*, some courts have rightly abandoned the *Ulane* reasoning and have held that "Title VII protects transsexuals who do not conform to their employers' gender stereotypes."<sup>124</sup> In 2004, the Sixth Circuit in *Smith v. City of Salem* said "the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated by *Price Waterhouse*."<sup>125</sup> *Smith* reasoned that *Price Waterhouse* can apply to a transsexual firefighter who was discriminated against when he was diagnosed with gender identity disorder and started expressing more feminine characteristics.<sup>126</sup>

The Ninth Circuit in *Schwenk v. Hartford*,<sup>127</sup> by analogizing the Supreme Court's interpretation of Title VII in *Price Waterhouse*, held that transsexual individuals are protected under the Gender Motivated Violence Act.<sup>128</sup> The *Schwenk* court said that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender."<sup>129</sup> The court acknowledged "[t]he initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*."<sup>130</sup>

Despite the *Price Waterhouse* decision, some courts continue to rely on *Ulane*'s reasoning to deny transsexuals' discrimination claims.<sup>131</sup> These courts refuse to apply *Price Waterhouse*'s sex stereotyping doctrine to transsexuals.<sup>132</sup> Instead, courts

118. *Id.* at 748–49.

119. *Schroer I*, 424 F. Supp. 2d at 207; see *Ulane*, 742 F.2d at 1085; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662–63; *Doe v. U.S. Postal Serv.*, 1985 WL 9446 at \*2 (D.D.C. June 12, 1985).

120. 490 U.S. 228.

121. See *id.* at 250–51 (discussing that discrimination based on an employee's perceived failure to meet certain sex stereotypes violated Title VII).

122. *Id.* at 234–35.

123. *Smith*, 378 F.3d at 573 (emphasis added) (citing *Price Waterhouse*, 490 U.S. at 251).

124. *Schroer I*, 424 F. Supp. 2d at 207. See also *Smith*, 378 F.3d at 573; *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005).

125. *Smith*, 378 F.3d at 573 (citation omitted).

126. *Id.* at 572–73.

127. 204 F.3d 1187 (9th Cir. 2000).

128. *Id.* at 1201–02.

129. *Id.* at 1202.

130. *Id.* at 1201.

131. *Schroer I*, 424 F. Supp. 2d at 209; see e.g. *Cox v. Denny's Inc.*, 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999); *Oiler v. Winn-Dixie La., Inc.*, 2002 WL 31098541 at \*\*5–6 (E.D. La. 2001); *Dobre v. Natl. R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993); *Etsitty I*, 2005 WL 1505610 at \*6; *Underwood*, 857 F. Supp. at 98.

continue to use “pre-*Price Waterhouse* cases that perpetuate gender inequality.”<sup>133</sup> For example, two federal district courts, post-*Price Waterhouse*, held a transsexual employee could not bring a Title VII claim on the basis of sex discrimination.<sup>134</sup> In *Dobre v. National Railroad Passenger Corp.*,<sup>135</sup> the U.S. District Court for the Eastern District of Pennsylvania held that Title VII did not protect transsexuals from discrimination on the “basis of their transsexualism” and, accordingly, Title VII does not prohibit workplace discrimination “against a male because he wants to become a female.”<sup>136</sup> In *Dobre*, the plaintiff began transitioning from male-to-female several months after being hired by the defendant.<sup>137</sup> When she informed the supervisors about her hormone treatments she was told she would still be required to wear male clothes.<sup>138</sup> Also, her supervisor continued calling her by her male name, and her desk was moved from view of the public.<sup>139</sup> In ruling that transsexuals were not protected by Title VII, the *Dobre* court relied solely on *Ulane* and *Holloway* and made no reference to *Price Waterhouse*.<sup>140</sup> The court never even acknowledged the existence of sex stereotyping in its decision.<sup>141</sup>

Again, the U.S. District Court for the District of Utah in *Etsitty v. Utah Transit Authority*<sup>142</sup> rejected the employment discrimination claims of a transsexual bus driver.<sup>143</sup> In *Etsitty*, Senior Judge David Sam rejected the application of the *Price Waterhouse* rationale to transsexual claims.<sup>144</sup> Judge David Sam stated “[t]he Sixth Circuit, in two recent cases, has applied the *Price Waterhouse* rationale to transsexuals, and has concluded that *Ulane* and its progeny are no longer good law[;]”<sup>145</sup> however, “[t]his court disagrees.”<sup>146</sup>

The Tenth Circuit recently affirmed the district court’s decision in *Etsitty*.<sup>147</sup> In regards to *Etsitty*’s “because of . . . sex” claim, the Tenth Circuit, following the *Ulane* case, held discrimination against a transsexual is not discrimination “because of . . . sex” within Title VII.<sup>148</sup> As to *Etsitty*’s sex stereotyping claim, the court would not decide whether such a claim is available to transsexuals, because *Etsitty* failed to show a genuine issue of material fact as to her employer’s motivation for her termination.<sup>149</sup>

As the following section will show, *Etsitty* and other courts using *Ulane*’s rationale

Civ. Libs. L. Rev. 277, 277 (2005).

133. *Id.* at 283.

134. *Dobre*, 850 F. Supp. 284; *Etsitty I*, 2005 WL 1505610.

135. 850 F. Supp. 284.

136. *Id.* at 286–87.

137. *Id.* at 285.

138. *Id.* at 286.

139. *Id.*

140. *Dobre*, 850 F. Supp. at 286–87.

141. *Id.* at 284–90.

142. 2005 WL 1505610.

143. *Id.* at \*1, \*7.

144. *Id.* at \*4.

145. *Id.*

146. *Id.* at \*5.

147. *Etsitty II*, 502 F.3d 1215 (holding that a transsexual could not state a Title VII “because of . . . sex” claim).

148. *Id.* at 1221–22.

149. *Id.* at 1224 (the Tenth Circuit said “we assume, without deciding, that such a claim is available”).

are ignoring the fact that Title VII is *not* limited to those types of discrimination that Congress intended. Further, the courts rejecting transsexuals' Title VII claims are misinterpreting failed attempts to amend Title VII to prohibit discrimination based on sexual orientation, as failed attempts to amend Title VII to prohibit discrimination based on gender identity. Gender identity defines transsexuals, *not* sexual orientation.<sup>150</sup>

#### IV. TITLE VII IS NOT LIMITED TO BIOLOGICAL SEX

Courts reject transsexuals' sex discrimination claims based on a two prong rationale. First, they contend that legislative history suggests that Congress did not intend "because of . . . sex" to mean more than biological sex.<sup>151</sup> Thus, the "words [in Title VII] should be given their ordinary, common meaning."<sup>152</sup> Second, the courts note that the failure of proposed amendments to Title VII to prohibit discrimination based on sexual orientation "indicates that Congress intended the phrase ["because of . . . sex"] . . . to be narrowly interpreted."<sup>153</sup>

Under the first prong, courts deny transsexuals protection under Title VII on the basis that Congress intended the prohibition against sex discrimination to be narrowly interpreted to mean biological sex.<sup>154</sup> The *Ulane* court stated Title VII should be given its "plain meaning" and thus only "[prohibit] discrimination . . . against women because they are women and men because they are men."<sup>155</sup> However, this narrow interpretation is inconsistent with Supreme Court rulings on reading remedial statutes.<sup>156</sup> The Supreme Court, in discussing statutory construction has held that remedial statutes, like Title VII, "should be construed broadly to effectuate [their] purposes."<sup>157</sup> One district court held that because Title VII is a remedial statute, courts "must seek in every case 'an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination.'"<sup>158</sup> Many current cases, however, continue to apply *Ulane's* reasoning, which completely disregards that remedial statutes should be liberally construed.<sup>159</sup> For example, the *Etsitty* court explicitly agrees with the reasoning in *Ulane*, despite the fact that "Title VII is a remedial statute, which should be

---

150. Gender Identity Disorder "represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness." *Schroer I*, 424 F. Supp. 2d at 210 (citing Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders IV* 564 (Am. Psychiatric Assn. 1994)).

151. *Ulane*, 742 F.2d at 1085.

152. *Id.*

153. *Etsitty I*, 2005 WL 1505610 at \*3; see *Oiler*, 2002 WL 31098541 at \*4 n. 53 (listing proposed bills by members of Congress to amend Title VII to prohibit discrimination based on sexual orientation); *Ulane*, 742 F.2d at 1085 (noting that in statutory construction, "words should be given their ordinary, common meaning" and that the "plain meaning" of the statute "implies that it is unlawful to discriminate against women because they are women and against men because they are men").

154. See *Ulane*, 742 F.2d at 1085; *Sommers*, 667 F.2d at 750; *Underwood*, 875 F. Supp. at 98.

155. *Ulane*, 742 F.2d at 1085.

156. See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (discussing how remedial statutes "should be construed broadly to effectuate [their] purposes").

157. *Id.* at 336.

158. *Nordell v. Heckler*, 749 F.2d 47, 49 (D.C. Cir. 1984) (citing *Bethel v. Jefferson*, 589 F.2d 631, 642 (D.C. Cir. 1978) (footnotes omitted)).

159. See e.g. *Etsitty I*, 2005 WL 1505610 at \*3 (acknowledging Title VII as a remedial statute, but nevertheless refusing to construe it liberally).

liberally construed.”<sup>160</sup>

Rulings subsequent to the *Ulane* decision show the Supreme Court has “applied Title VII in ways Congress could not have contemplated.”<sup>161</sup> The Supreme Court “has repeatedly refused to limit Title VII to only those types of discrimination that Congress presumably had in mind when enacting the law.”<sup>162</sup> Justice Scalia, writing on whether same-sex discrimination was intended by Congress when it enacted Title VII, said

male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>163</sup>

The Supreme Court has rejected arguments that Congress intended Title VII to apply only to women and not to men.<sup>164</sup> It has also rejected arguments that Title VII sex discrimination applies only to “tangible, economic barriers” rather than “psychological aspects.”<sup>165</sup> And, as mentioned above, it has “rejected the argument that Title VII did not prohibit same-sex sexual harassment.”<sup>166</sup> The Supreme Court rejected these arguments despite the fact that these types of discrimination were not what “Title VII was enacted to combat”<sup>167</sup> and despite the fact that “Congress had not specifically indicated its intention to proscribe such conduct.”<sup>168</sup> In rejecting the argument that Title VII does not apply to psychological aspects but only economic barriers, the Supreme Court stated “[Title VII] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”<sup>169</sup>

The Supreme Court in *Price Waterhouse* notes that it is “difficult . . . to imagine” that Congress intended “because of” to require plaintiffs’ claims to be caused by discrimination because of biological sex.<sup>170</sup> Rather, “Congress meant to obligate [a plaintiff] to prove that the employer relied upon *sex-based considerations* in coming to its decision.”<sup>171</sup> This interpretation is further supported “by the fact that Title VII does

160. *Id.* at \*3. The court in *Etsitty I* said “our responsibility is to ‘interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex.’” *Id.* (citing *Ulane*, 742 F.2d at 1084).

161. *Schroer I*, 424 F. Supp. 2d at 212.

162. Pl.’s Memo. in Opposition to Def.’s Mot. to Dismiss at 9–10, *Schroer I*, 424 F. Supp. 203; see Cotton, *supra* n. 55, at 1049–51 (discussing examples of Supreme Court rulings that have extended the coverage of “because of . . . sex” in Title VII).

163. *Schroer I*, 424 F. Supp. 2d at 212 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)) (Justice Scalia wrote for a unanimous Court in *Oncale*).

164. Pl.’s Memo. in Opposition to Def.’s Mot. to Dismiss at 10, *Schroer I*, 424 F. Supp. 203; see e.g. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679–81 (1983).

165. Pl.’s Memo. in Opposition to Def.’s Mot. to Dismiss at 10, *Schroer I*, 424 F. Supp. 203 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

166. *Id.* (citing *Oncale*, 523 U.S. at 79).

167. *Id.*; see e.g. *Newport News*, 462 U.S. at 679–81.

168. Pl.’s Memo. in Opposition to Def.’s Mot. to Dismiss at 10, *Schroer I*, 424 F. Supp. 203 (citing *Oncale*, 523 U.S. at 79).

169. *Id.* (internal quotations omitted) (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)).

170. 490 U.S. at 241.

identify one circumstance in which an employer may take gender into account."<sup>172</sup> The Court states "[t]he only plausible inference to draw from this provision" is that gender cannot be a consideration in an employment decision.<sup>173</sup>

*Ulane* and its progeny suggest because the main purpose of the Civil Rights Act of 1964 was to end race discrimination,<sup>174</sup> sex, like race, should be treated as an immutable characteristic.<sup>175</sup> Also, Title VII is not limited to prohibit only immutable characteristics. For example, Title VII also prohibits discrimination based on religion, a voluntary characteristic.<sup>176</sup> In addition, Title VII prohibits discrimination on the basis of other voluntary conduct, like "bearing or adoption of children."<sup>177</sup> Assuming Title VII is limited to immutable characteristics is not only untrue, but is an "oversimplified approach."<sup>178</sup>

Second, courts denying transsexuals' claims also rely on the failed attempts to broaden Title VII to cover sexual orientation.<sup>179</sup> While it is true that the attempts to add *sexual orientation* into Title VII have failed, "it appears that no bill has ever been introduced in Congress to include or exclude discrimination based on sexual identity."<sup>180</sup> Thus, "the failure of numerous attempts to broaden Title VII to cover *sexual orientation* says nothing about Title VII's relationship to *sexual identity*."<sup>181</sup> One district court observed in *Oiler v. Winn-Dixie Louisiana*, that "it appears that *no* bill has ever been introduced in Congress to include or exclude" transsexuals.<sup>182</sup> As Judge Robertson notes in *Schroer v. Billington*,<sup>183</sup> "[t]he silence [on sexual identity over the last] forty years is simply that—silence."<sup>184</sup>

Furthermore, the Supreme Court in *Price Waterhouse* makes it clear that "because of . . . sex" in Title VII encompasses more than the narrow meaning of "sex."<sup>185</sup> The Court said, "because of . . . sex" means "that gender must be irrelevant to employment decisions,"<sup>186</sup> and "in forbidding employers to discriminate against individuals because

172. *Id.* at 242 (stating that an employer may take gender into account when "gender is a 'bona fide occupational qualification . . . reasonably necessary to the normal operation of the particular business or enterprise.'). *Id.* (citing 42 U.S.C. § 2000e-2(e)).

173. *Id.*

174. Cotton, *supra* n. 55, at 1046.

175. *Id.* at 1059 n. 176 ("[W]hen Congress used the word 'sex' in Title VII it was referring to a person's gender, an immutable characteristic with which a person is born.').

176. *Id.*

177. *Id.*

178. *Id.*

179. See *Ulane*, 742 F.2d at 1085–86 (noting that several attempts "to amend Title VII to prohibit discrimination based upon . . . 'sexual orientation'" have all failed); *Sommers*, 667 F.2d at 750 (attempts to add "sexual preference" to Title VII have failed); *Holloway*, 566 F.2d at 662 (Title VII should be given a narrow interpretation, as shown by the failed attempts to add "sexual preference" to Title VII).

180. *Schroer I*, 424 F. Supp. 2d at 212 (citing *Oiler*, 2002 WL 31098541 at \*4) (emphasis removed).

181. *Id.* (citing *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983)).

182. *Id.* (citing *Oiler*, 2002 WL 31098541 at \*4).

183. 424 F. Supp. 2d 203.

184. *Id.* at 212.

185. 490 U.S. at 239 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.'). "[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251.

186. *Id.* at 240.



of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from gender stereotypes.”<sup>187</sup> *Price Waterhouse* states that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”<sup>188</sup> Justice O’Connor, in a concurring opinion, said “the explicit consideration of . . . sex . . . in making employment decisions ‘was the most obvious evil Congress had in mind when it enacted Title VII.’”<sup>189</sup> Judge Robertson points out that while the arguments to reject transsexuals’ claims are “perhaps persuasive when written, [they] have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non*<sup>190</sup> of legislative history.”<sup>191</sup>

## V. SEX STEREOTYPING: BROADENING THE MEANING OF SEX

In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*<sup>192</sup> seemed to have unintentionally opened the door for transgender individuals claiming sex discrimination on the basis of sex stereotyping. In *Price Waterhouse*, the Court departed from the view that Title VII’s “because of . . . sex” only protects discrimination on the basis of biological sex.<sup>193</sup> Rather, *Price Waterhouse* explicitly extends “[because of . . . sex] to mean that gender must be irrelevant to employment decisions.”<sup>194</sup>

In *Price Waterhouse*, the plaintiff Ann Hopkins was a senior manager of a professional accounting firm, Price Waterhouse.<sup>195</sup> “Hopkins had worked at Price Waterhouse[ ] . . . for five years when the partners . . . proposed her as a candidate for partnership [in the firm].”<sup>196</sup> Although Hopkins was described by partners as an “outstanding professional” with a “strong character, independence and integrity,” she was denied partnership.<sup>197</sup> The Court cites evidence which shows that Price Waterhouse denied her partnership because Hopkins failed to conform to the partners’ idea of what the “proper behavior of women” should be.<sup>198</sup> The partners said that Hopkins was too “macho,” that she “overcompensated for being a woman,” and that she inappropriately used foul language.<sup>199</sup> Hopkins was told that in order to “improve her chances for partnership, . . . [she] should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”<sup>200</sup>

Because gender cannot be a factor in employment decisions, the Supreme Court

187. *Id.* at 251 (citations omitted).

188. *Id.* at 239.

189. *Price Waterhouse*, 490 U.S. at 239 (citing *Id.* at 275 (O’Connor, J., concurring) (citations omitted)).

190. *Vel non* means “[o]r the absence of it.” *Black’s Law Dictionary* 1589 (Bryan A. Garner ed., 8th ed., West 2004).

191. *Schroer I*, 424 F. Supp. 2d at 212 (emphasis in original).

192. 490 U.S. 228.

193. *Id.* at 239–40.

194. *Id.* at 240.

195. *Id.* at 232–33.

196. *Id.* at 233.

197. *Price Waterhouse*, 490 U.S. at 234.

198. *Id.* at 235–37.

199. *Id.* at 235 (noting that a partner advised Hopkins she should not swear because “it’s a lady using foul language”).

held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>201</sup> This type of discrimination is "sex stereotyping" which the Court states is protected by Title VII.

[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."<sup>202</sup>

The Supreme Court lays out a test for discrimination on the basis of sex stereotyping in *Price Waterhouse*.<sup>203</sup> Under the Court's test, a plaintiff must first show that "gender played a motivating part in an employment decision."<sup>204</sup> The Court notes that "stereotyped remarks can . . . be evidence that gender played a part."<sup>205</sup> In Hopkins's case, the stereotyping went beyond just "stray remarks."<sup>206</sup> *Price Waterhouse* had actually assessed "comments stemm[ing] from sex stereotypes" to make the decision about Hopkins's partnership.<sup>207</sup>

Once the plaintiff proves gender was a consideration in an employers' employment decision, the burden then shifts to the defendant to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."<sup>208</sup> The Supreme Court did not rule on whether *Price Waterhouse* would have made the same decision without taking Hopkins's gender into account, because the trial and appellate courts incorrectly held "the defendant must make this proof by clear and convincing evidence."<sup>209</sup>

According to *Price Waterhouse*, sex stereotyping a "feminine" acting man who is ridiculed, mocked, and assaulted because he is not "masculine" enough, is actionable sex discrimination.<sup>210</sup> However, courts still draw a line between cases involving "disparate treatment" based on stereotypical assumptions as to masculinity or femininity, which is protected, and claims involving discrimination based on sexual orientation, which is not.<sup>211</sup> This distinction is important since the *Price Waterhouse* logic does not extend to all cases of sex stereotyping, because "[s]ex stereotyping that does not produce disparate

201. *Id.* at 240, 250.

202. *Price Waterhouse*, 490 U.S. at 251.

203. *Id.* at 244–45.

204. *Id.* at 244.

205. *Id.* at 251 (emphasis in original).

206. *Id.*

207. 490 U.S. at 251.

208. *Id.* at 258 (A plaintiff must prove "gender played a motivating part in an employment decision.").

209. *Id.*

210. See e.g. *Doe v. City of Belleville*, 119 F.3d 563, 568, 576–77 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) (plaintiffs' sex was questioned, ridiculed for wearing an earring, and threatened with sexual assault); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (court applied the *Price Waterhouse* rationale to a case where a male plaintiff was criticized for carrying his tray "like a woman").

211. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 (7th Cir. 2003) (plaintiff failed to state a claim of sex discrimination under Title VII when the harassment stemmed from perceptions of his sexual orientation); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085–86 (7th Cir. 2000) (court rejected plaintiffs claim of sex stereotyping because the discrimination was based on his sexual orientation, and thus, was not because of sex).

treatment does not violate Title VII.”<sup>212</sup> In cases involving discrimination based on sexual orientation, the discrimination is “gender-neutral: it impacts homosexual men and women alike” and thus is not “because of . . . sex.”<sup>213</sup> Also, “gender-specific dress . . . codes” are not protected by sex stereotyping as long as they “do not disparately impact one sex or impose an unequal burden.”<sup>214</sup> The judge in *Schroer* suggests this type of logic, which bars claims based on sexual orientation, could also bar transsexual cases.<sup>215</sup>

Further, courts draw a line between cases where the discrimination was based on a person’s gender identity not matching their biological sex,<sup>216</sup> and cases where the discrimination was based on a person’s failure to conform to sex stereotypes.<sup>217</sup> This is a critical distinction, because the majority of courts hold that the first situation is not protected by Title VII, while the latter is.

Following the *Price Waterhouse* decision, Title VII prohibits “sex stereotyping” by “creat[ing] space for people of both sexes to express their sexual identity in nonconforming ways.”<sup>218</sup> In other words, employers cannot discriminate on the basis that a man is acting too “feminine” or on the basis that a woman is acting too “macho.”<sup>219</sup> Male and female employees can “express their individual . . . identities without reprisal for being perceived” as not conforming to stereotypical sex-role behavior.<sup>220</sup>

In *Smith v. City of Salem*,<sup>221</sup> the Sixth Circuit applied the *Price Waterhouse* rationale to a case involving a transsexual plaintiff.<sup>222</sup> Smith, the plaintiff, was a male-to-female transsexual who suffered from GID.<sup>223</sup> For seven years, Smith was a lieutenant with the fire department and never had any “negative incidents.”<sup>224</sup> However, when Smith revealed his GID to the department and began to express a feminine look, he was treated differently from other males in the department, because “his appearance and mannerisms were not masculine enough.”<sup>225</sup> City officials even conspired to have Smith fired, which prompted Smith to threaten suit.<sup>226</sup> Within the week, the fire chief suspended Smith for an “alleged infraction of . . . policy.”<sup>227</sup> Smith then filed a

212. *Schroer I*, 424 F. Supp. 2d at 208.

213. *Id.*; see *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); see also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996); *Schroeder v. Hamilton School Dist.*, 282 F.3d 946 (7th Cir. 2002); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989).

214. *Schroer I*, 424 F. Supp. 2d at 208–09; see e.g. *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076, 1080 (9th Cir. 2004).

215. *Schroer I*, 424 F. Supp. 2d at 208.

216. See generally *Schroer I*, 424 F. Supp. 2d 203.

217. See generally *Price Waterhouse*, 490 U.S. 228.

218. *Schroer I*, 424 F. Supp. 2d at 210.

219. See generally *Price Waterhouse*, 490 U.S. at 231–35.

220. *Schroer I*, 424 F. Supp. 2d at 210.

221. 378 F.3d 566.

222. *Id.* at 567, 571.

223. *Id.* at 568.

224. *Id.*

225. *Id.* (internal quotations omitted).

226. *Smith*, 378 F.3d at 568–69.

complaint against the city alleging sex stereotyping pursuant to *Price Waterhouse*.<sup>228</sup>

Smith argued, "he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man."<sup>229</sup> The district court dismissed the claim on grounds that Smith failed to state a claim for sex stereotyping.<sup>230</sup> The district court reasoned that Smith's sex stereotyping claim was an "end run around his *real* claim, which . . . was based upon his transsexuality."<sup>231</sup> The Sixth Circuit, however, disagreed and reversed the district court's decision, finding Smith had a valid sex stereotyping claim under Title VII.<sup>232</sup> The court first addressed the requirements to establish a *prima facie* case under Title VII, stating that

a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action.<sup>233</sup>

The court easily found that Smith engaged in a protected activity, that the defendant knew it was protected, and that there was a causal connection.<sup>234</sup> As to the third element, the court went into a careful examination on whether the fire department's actions were adverse to Smith.<sup>235</sup> The court found that when the fire department suspended Smith, the suspension constituted an adverse employment action.<sup>236</sup>

The *Smith* court then went on to see if Smith, as a transsexual, could properly allege a sex stereotyping claim under *Price Waterhouse*.<sup>237</sup> The court held that because Smith had "alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind [the fire department's] actions," Smith had successfully stated a sex stereotyping claim.<sup>238</sup> The court reasoned, "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."<sup>239</sup> Thus, "[an employer] who discriminate[s] against men because they *do* wear dresses . . . are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."<sup>240</sup>

The "sweeping language" of *Smith* suggests that "in the eyes of at least one federal circuit, discrimination against transsexuals and discrimination 'because of . . . sex' are indistinguishable."<sup>241</sup> The *Smith* court makes clear that *Price Waterhouse* "does not make Title VII protection against sex stereotyping conditional or . . . exclude Title VII

228. *Id.* at 569, 571.

229. *Id.* at 570.

230. *Id.* at 571.

231. *Smith*, 378 F.3d at 571 (internal quotations omitted) (emphasis added).

232. *Id.* at 575.

233. *Id.* at 570.

234. *Id.* at 570–71.

235. *Id.* at 571, 575–76.

236. *Smith*, 378 F.3d at 576.

237. *Id.* at 571–75.

238. *Id.* at 572.

239. *Id.* at 574.

240. *Id.* (emphasis in original).

coverage for non sex-stereotypical behavior simply because the person is a transsexual.”<sup>242</sup>

A year after the *Smith* decision, the Sixth Circuit echoed the *Smith* holding in another employment discrimination case involving a transsexual plaintiff.<sup>243</sup> In *Barnes v. City of Cincinnati*,<sup>244</sup> the plaintiff, a male-to-female transsexual, “established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.”<sup>245</sup> And again on May 31, 2006, in *Myers v. Cuyahoga County*,<sup>246</sup> the Sixth Circuit reaffirmed that Title VII protects transsexuals from sex stereotyping.<sup>247</sup> The *Myers* court plainly stated “Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.”<sup>248</sup>

While the Sixth Circuit is the only federal appellate court to specifically address whether transsexuals are protected under Title VII, district courts in the Second and Fourth Circuits have also addressed the issue.<sup>249</sup> Both district courts “held or implied that Title VII extends protections to transsexuals.”<sup>250</sup> In *Tronetti v. TLC HealthNet Lakeshore Hospital*,<sup>251</sup> a New York district court denied the defendant’s motion to dismiss for failure to state a claim in violation of Title VII, holding that a transsexual could successfully allege a claim under Title VII.<sup>252</sup>

The plaintiff, Tronetti, was a male-to-female transsexual that was discriminated against by TLC HealthNet Lakeshore Hospital (TLC), where she worked as a clinical psychiatrist and doctor of osteopathy.<sup>253</sup> One member of the board at TLC had spread rumors about Tronetti to outpatients and had openly questioned her sanity.<sup>254</sup> Another TLC employee, Luisa Kelsey, the nurse manager, spread rumors about Tronetti’s “sexuality and medical condition.”<sup>255</sup> TLC’s vice president for mental health even told Tronetti that she should “avoid wearing overtly feminine attire.”<sup>256</sup> Overall, TLC’s staff created a hostile work environment for Tronetti.<sup>257</sup> Tronetti brought an employment

242. *Smith*, 378 F.3d at 574–75.

243. *Barnes*, 401 F.3d at 737 (following the *Smith* holding, establishing that the plaintiff in *Barnes* stated a claim under sex stereotyping).

244. 401 F.3d 729.

245. *Id.* at 737.

246. 182 Fed. Appx. 510 (6th Cir. 2006).

247. *Id.* at 519.

248. *Id.* (citing *Barnes*, 401 F.3d 729; *Smith*, 378 F.3d 566).

249. See *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); see also *Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638 (D. Md. 2002).

250. Geier et al., *supra* n. 35 (citing *Tronetti*, 2003 WL 22757935 at \*4) (Title VII claim actionable when a transsexual alleges discrimination for failing to act like a man); *Lewis*, 217 F. Supp. 2d at 646 n. 3. (“those of ‘transgender’ would appear to belong to a protected group as well”).

251. *Tronetti*, 2003 WL 22757935.

252. *Id.* at \*1, \*5. Defendant’s motion to dismiss was denied in part and granted in part. The court denied the defendant’s motion to dismiss on the plaintiff’s Title VII claim; however, the court granted the defendant’s motion to dismiss because the plaintiff “fail[ed] to state a claim for violation of the FMLA.” *Id.* at \*5.

253. *Id.* at \*1.

254. *Id.* at \*\*2–3.

255. *Tronetti*, 2003 WL 22757935 at \*2.

256. *Id.* at \*1.

discrimination claim under Title VII against TLC "claiming to have been discriminated against for failing to act like a man."<sup>258</sup>

The *Tronetti* court looked at the *Ulane* case and flatly rejected its holding.<sup>259</sup> The court explicitly stated "[t]his Court is not bound by the *Ulane* decisions" and that "this Court will not follow *Ulane*."<sup>260</sup> The court went on to say that *Price Waterhouse* "undermined the reasoning of the *Ulane* decisions."<sup>261</sup> Accordingly, the court held "[t]ranssexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."<sup>262</sup>

Other circuit courts have also applied the *Price Waterhouse* logic to transsexual plaintiffs' claims under other federal laws.<sup>263</sup> These courts state that *Ulane* and *Holloway* seem to be "overruled by the logic and language of *Price Waterhouse*."<sup>264</sup> "[This] suggest[s] that the [First] and [Ninth] Circuits may be receptive to Title VII claims by transsexuals post-*Price Waterhouse*."<sup>265</sup>

Likewise, the *Price Waterhouse* rationale applies to a man who is being discriminated against for being too feminine. In *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>266</sup> a man brought a successful "*Price Waterhouse*-type claim"<sup>267</sup> when he was harassed based on the employer's stereotypical perceptions that the plaintiff was too feminine.<sup>268</sup> In *Nichols*, the plaintiff was harassed "for walking and carrying his serving tray like a woman."<sup>269</sup>

Under this *Price Waterhouse*-type approach, a male-to-female transsexual would be protected by Title VII if the employer perceived the employee as a man with feminine traits who does not conform to gender stereotypes.<sup>270</sup> However, this approach does *not* protect against discrimination when a male-to-female transsexual is being discriminated against for going "against the gender grain" but because her gender identity does not match her biological sex.<sup>271</sup> This critical distinction will be discussed in the next section.

258. *Id.* at \*4 (internal quotations omitted).

259. *Id.*

260. *Tronetti*, 2003 WL 22757935 at \*4.

261. *Id.* at \*4.

262. *Id.*

263. Geier, *supra* n. 35 (citing *Schwenk*, 204 F.3d 1187; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000)).

264. *Schwenk*, 204 F.3d at 1201.

265. Geier, *supra* n. 35.

266. 256 F.3d 864.

267. *Schroer I*, 424 F. Supp. 2d at 211.

268. *Nichols*, 256 F.3d at 874; see *Schroer I*, 424 F. Supp. at 208 (noting that "harassment 'based upon the perception that [the plaintiff] is effeminate' is discrimination because of sex").

269. 256 F.3d at 870. "The [plaintiff] testified that other Azteca employees habitually called him sexually derogatory names, referred to him with the female gender, and taunted him for behaving like a woman." *Id.* at 872.

270. See *Smith*, 378 F.3d 566; *United Consumer Fin. Servs.*, 2001 WL 34350174 at \*5 (acknowledging a distinction between a transsexual's claim of sex discrimination when her "appearance and behavior did not fit into her company's sex stereotypes" and a claim of discrimination because of her transgendered status).

## VI. GENDER IDENTITY: A NEW APPROACH TO SEX DISCRIMINATION

Based on the above analysis, transsexual plaintiffs who experience discrimination that stems from their failure to conform to “sex stereotypes,” are (or should be) protected by Title VII. But what is unclear is whether transsexuals, who are conforming to sex stereotypes but are still being discriminated against because they are transsexual, are protected. The District of Columbia District Court addressed this exact issue in *Schroer v. Billington*.<sup>272</sup>

In 2004, the Library of Congress seemed to have found the perfect candidate for a terrorism research analyst.<sup>273</sup> Diane Schroer, a recently retired Airborne Ranger and qualified Army Special Forces officer, had completed over 450 parachute jumps and had held a variety of command and staff positions in the Army, including those in Armored Cavalry, Special Forces, and Special Operations units, and in operations in Panama, Haiti, and Rwanda.<sup>274</sup> Schroer had received numerous awards and decorations, including the Defense Superior Service Medal.<sup>275</sup> Schroer also had earned master’s degrees in history and international relations, and had helped brief top officials in Washington, including Dick Cheney.<sup>276</sup> Schroer specialized in counter-insurgency and counter-terrorism.<sup>277</sup> “After 25 years of distinguished service” in the Army, Schroer retired as a Colonel.<sup>278</sup>

Thus, “[w]hen she interviewed for a job as a terrorism research analyst at the Library of Congress, [Schroer] thought she’d found the perfect fit.”<sup>279</sup> After Schroer interviewed with Charlotte Preece, a member of the Congressional Research Service, Preece told Schroer that she had been selected for the position and salary negotiations were made.<sup>280</sup> Preece told Schroer that the “selection committee believed that Schroer’s skills and experience made her application far superior to those of the other candidates.”<sup>281</sup>

Prior to starting work, Schroer explained to Preece that she was in the process of gender transitioning.<sup>282</sup> At the time of her birth, Schroer’s sex was classified as male and her parents had given her the name of David.<sup>283</sup> Schroer recognized that “[u]p to this point, [she] had been using her traditionally masculine legal name, and she had interacted with Preece while wearing traditionally masculine clothing.”<sup>284</sup> Schroer, as part of her medical treatment for GID, was about to change her name to Diane and to

---

272. *Id.*

273. *Id.* at 205–06.

274. *Id.* at 205; see ACLU, *ACLU Files Lawsuit on Behalf of Army Veteran against Library of Congress for Transgender Discrimination*, <http://www.aclu.org/lgbt/transgender/12256prs20050602.html> (June 2, 2005).

275. ACLU, *supra* n. 274.

276. *Schroer I*, 424 F. Supp. 2d at 205–06.

277. *Id.*

278. ACLU, *supra* n. 274.

279. ACLU, *Schroer v. Library of Congress: Case Profile*, <http://www.aclu.org/lgbt/transgender/24969res20050602.html> (June 2, 2005).

280. *Schroer I*, 424 F. Supp. 2d at 206.

281. *Id.*

282. *Id.*

283. *Id.* at 205.

begin presenting herself in traditionally feminine clothes.<sup>285</sup>

During the conversation with Preece, Schroer presented photographs of herself in feminine clothes "[t]o reassure Preece that she would dress in a workplace-appropriate manner."<sup>286</sup> Schroer, commenting on why she showed the pictures to Preece, stated that "[n]o one wants to go through life being the punch line of a joke. . . . I wanted her to see I looked good, professional."<sup>287</sup> At the end of the conversation, Preece told Schroer she had "'really given [her] something to think about."<sup>288</sup> The next day, Preece called and rescinded Schroer's job offer.<sup>289</sup> Preece explained that after a "long, restless night she had decided that given [Schroer's] circumstances and for the good of the service, Schroer would not be a good fit at [the Library of Congress]."<sup>290</sup>

Schroer's "first instinct was to just let it go."<sup>291</sup> However, after thinking about what happened, "she felt the sting of injustice."<sup>292</sup> "After risking my life for more than 25 years for my country, I've been told I'm not worthy of the freedoms I worked so hard to protect," said Schroer.<sup>293</sup> Schroer then filed suit against the Library of Congress for sex discrimination in violation of Title VII.<sup>294</sup>

In *Schroer v. Billington*, Schroer was "not seeking acceptance as a man with feminine traits," rather, Schroer wanted acceptance to express her identity as a female, not a feminine male.<sup>295</sup> Schroer did "not wish to go against the gender grain, but with it."<sup>296</sup> She did all the things normally associated with female stereotypes, including going by the name "Diane" and wearing feminine clothes.<sup>297</sup> The court in *Schroer* acknowledged a significant distinction between Schroer's discrimination claim and the plaintiff's claim in *Price Waterhouse*.<sup>298</sup>

In this case, the Library of Congress had a problem with Schroer's gender identity as a woman not matching her biological sex as a man, and not because she failed to conform to gender stereotypes.<sup>299</sup> Thus, Schroer could not successfully plead a claim

285. *Schroer I*, 424 F. Supp. 2d at 206.

286. *Id.*

287. Petula Dvorak, *The Right Person for the Job: Library of Congress Accused of Withdrawing Job Offer after Applicant Reveals Gender Change*, Washington Post B9 (June 2, 2005) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/01/AR2005060101777.html>).

288. *Schroer I*, 424 F. Supp. 2d at 206.

289. *Id.*

290. *Id.* (internal quotations omitted).

291. Mark Brown, *Should Gender Matter When You Want to Serve?* Chi. Sun Times (June 2, 2005).

292. *Id.*

293. ACLU, *supra* n. 274.

294. *Schroer I*, 424 F. Supp. 2d at 205.

295. *Id.* at 210–11. "She seeks to express her female identity, not as an effeminate male, but as a woman." *Id.* at 211. Later in 2007, Schroer amended her complaint to add a sex stereotyping claim. Judge Robertson again denied the Library of Congress' Motion to dismiss saying Schroer had successfully stated an "impermissible sex stereotyping [claim] pursuant to Title VII." *Schroer v. Billington*, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) [hereinafter *Schroer II*].

296. *Schroer I*, 424 F. Supp. 2d at 211.

297. *Id.* at 211.

298. *Id.* at 210.

299. *Id.* at 210–11; see e.g. *Smith*, 378 F.3d 566 (holding that a transsexual plaintiff, born a biological male, is protected under Title VII when employer discriminates against plaintiff because they are too feminine of a



for sex stereotyping.<sup>300</sup> The logic and reasoning in *Price Waterhouse* and *Smith* “does not extend to situations where the dress and makeup are intended to express, and are understood by the employer to be expressing, a female identity.”<sup>301</sup> Thus, that logic does not cover situations when an actual or potential employee is attempting to conform to a certain gender. The *Price Waterhouse* type rationale only applies to situations where a transsexual is experiencing discrimination based on the failure to conform to the employer’s expectations of how stereotypical men and woman act.<sup>302</sup>

However, *Schroer* says that even though there is no claim for sex stereotyping, it does not mean *Schroer* “has no protection under Title VII from discrimination based on her transsexuality.”<sup>303</sup> Judge Robertson says that transsexuals who are not hired “solely because of [their] sexual identity,” coupled with a scientific record on GID, could prove they were discriminated against “because of . . . sex.”<sup>304</sup> Accordingly, the *Schroer* court indicates that Title VII may prohibit discrimination against transgender people as a form of sex discrimination. Robertson notes this is “a straightforward way to deal with the factual complexities that underlie human sexual identity.”<sup>305</sup>

*Schroer* looked back to the district court’s decision in *Ulane* and acknowledged the possibility that sex may be more than just a “cut-and-dried matter of chromosomes.”<sup>306</sup> Judge Robertson suggested, “it may be time to revisit” the idea that “discrimination against transsexuals *because they are transsexuals* is ‘literally’ discrimination ‘because of . . . sex.’”<sup>307</sup> Further, if you apply Title VII “straightforwardly” to transsexuality you are “preserv[ing] the outcomes of the post-*Price Waterhouse* case law without colliding with the sexual orientation and grooming code lines of cases.”<sup>308</sup> The court found when “discrimination stems from intolerance towards a person whose gender identity and anatomical sex do not match (a bias distinct from sexual orientation discrimination), such discrimination against transsexuals is literally discrimination because of sex.”<sup>309</sup> In

300. *Schroer I*, 424 F. Supp. 2d at 211. *Schroer* later amended her complaint to add a sex stereotyping claim under Title VII. *Schroer II*, 525 F. Supp. 2d at 62.

301. *Schroer I*, 424 F. Supp. 2d at 211.

302. *Id.* (“A transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer.”).

303. *Id.*; but see *Schroer II*, 525 F. Supp. 2d at 63 (discussing whether “sex” in Title VII is “‘literally’ discrimination ‘because of . . . sex.’”). “[T]hat taxonomy . . . [in the *Schroer* decision] has the same inherent irony as the Sixth Circuit’s decision in *Smith* . . . and quite consciously implies that ‘sex’ for Title VII purposes be given an expansive and nontraditional judicial gloss, which is precisely what the settled case law had previously rejected.” Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?* 21 Lab. Law. 213, 238 n. 129 (2006).

304. *Schroer I*, 424 F. Supp. 2d at 213. “It should also be noted that the term ‘sexual identity’ is an older term not in favor among many transgender advocates because it alludes to an anatomical/biological view of identity. The preferred term . . . is ‘gender identity,’ which implies that psychological gender has no relation to anatomical sex.” Jillian Todd Weiss, Workplace Prof Blog, *Transsexual Can Sue for Sex Discrimination Under Title VII*, [http://lawprofessors.typepad.com/laborprof\\_blog/2006/04/transsexual\\_can\\_.html](http://lawprofessors.typepad.com/laborprof_blog/2006/04/transsexual_can_.html) (Apr. 2, 2006).

305. *Schroer I*, 424 F. Supp. 2d at 212.

306. *Id.* at 211 (citing *Ulane*, 581 F. Supp. at 825).

307. *Id.* at 212 (emphasis in original).

308. *Id.* at 213.

309. Debra L. Raskin & Christopher P. Reynolds, *Year in Review: Supreme Court Decisions; Sex Discrimination and Sexual Harassment Decisions; and Major Regulatory Initiatives*, 745 PLI/Lit. 129, 153–54 (2006).

denying the defendant's motion to dismiss, the court said while Schroer did not state a claim based on sex stereotyping, Schroer could prove she was discriminated against as a transsexual in violation of Title VII.<sup>310</sup> The court ordered further discovery to see if the term "sex" may scientifically apply to transsexuals.<sup>311</sup>

On April 14, 2006, the Library of Congress filed its answer, one of its defenses being that Schroer "failed to fulfill the national security requirements of the Specialist in Terrorism and International Crime . . . position."<sup>312</sup> The Library of Congress then amended its answer on October 23, 2006, dropping that defense.<sup>313</sup> The *Schroer* outcome will be a landmark decision. As Paul M. Secunda, an assistant professor of law at the University of Mississippi School of Law suggests, the *Schroer* case "has the potential to prove ground-breaking on the issue of transexuality [sic] under Title VII."<sup>314</sup> Another legal scholar, Jillian Todd Weiss, says the *Schroer* case "may lead to a split between courts that view transgender status as a matter of surgery, and those that view it as a matter of self-determination of gender."<sup>315</sup> Attorney Dana Stripling says, "[t]he [*Schroer*] case will surely land before the United States Supreme Court if the government appeals."<sup>316</sup>

Recent cases, like *Smith* and *Schroer*, suggest that a new trend is emerging amongst federal courts.<sup>317</sup> These positive court decisions are correctly holding that Title VII's "because of . . . sex" extends coverage to transsexuals who are being discriminated against based on sex stereotyping and/or gender identity.<sup>318</sup> The *Smith* decision shows *Price Waterhouse* can afford transsexuals protection under Title VII for sex stereotyping discrimination.<sup>319</sup> Under *Smith*, a transsexual could successfully state a *Price Waterhouse*-type claim for sex stereotyping, when the discrimination occurs on the basis of the employee failing to conform to the employer's notions of what a man or woman should act and look like.<sup>320</sup>

As Judge Robertson makes clear in *Schroer*, a transsexual experiencing discrimination based on their transsexuality, not the failure to conform to sex stereotypes, is not protected by *Price Waterhouse*.<sup>321</sup> However, this is not to say that Title VII does not still protect transsexuals.<sup>322</sup> As *Schroer* points out, sex may not be a "cut-and-dried matter of chromosomes."<sup>323</sup> Rather, sex may include a person's gender

310. *Schroer I*, 424 F. Supp. 2d at 213.

311. *Id.*

312. Def.'s Ans. at 1, *Schroer I*, 424 F. Supp. 2d 203.

313. See Def.'s First Amend. Ans., *Schroer I*, 424 F. Supp. 2d 203.

314. Paul M. Secunda, Workplace Prof Blog, *Transsexual Can Sue for Sex Discrimination under Title VII*, [http://lawprofessors.typepad.com/laborprof\\_blog/2006/04/transsexual\\_can\\_.html](http://lawprofessors.typepad.com/laborprof_blog/2006/04/transsexual_can_.html) (Apr. 2, 2006).

315. Weiss, *supra* n. 304.

316. Dana Stripling, Garlo Ward, P.C., *The Meaning of "Sex"*, <http://garloward.com/category/employment-issues/page/2/> (Apr. 10, 2006).

317. See *Schroer I*, 424 F. Supp. 2d 203; *Smith*, 378 F.3d 566; see also *Tronetti*, 2003 WL 22757935.

318. See generally *Schroer I*, 424 F. Supp. 2d 203; *Smith*, 378 F.3d 566.

319. See *Smith*, 378 F.3d 571-76.

320. See *id.* at 571-72 (male-to-female fire fighter successfully stated a *Price Waterhouse*-type claim when discrimination occurred based on his non-masculine behavior).

321. See *Schroer I*, 424 F. Supp. 2d at 211.

322. *Id.*

323. *Id.* (citing *Ulaw*, 561 F.Supp.2d at 825).

identity as well.<sup>324</sup> *Schroer* correctly suggests that a transsexual being discriminated against on the basis of their transsexuality is discrimination “because of . . . sex,” and thus transsexuals can be protected by Title VII.<sup>325</sup>

## VII. CONCLUSION

Courts are beginning to abandon the view that transsexuals are an oddity; instead, courts are acknowledging that transsexuals are a legitimate minority and are entitled to protection under the law. “It is a basic American value” that people should be judged on the work they perform, not on their “personal characteristics.”<sup>326</sup> Transsexuals should be judged no differently. Transsexuals are not seeking *special* protection; they are seeking *equal* protection under the law.

[T]ransgendered people want to lead normal lives and to be employed. They do not want to live in poverty, [or] on unemployment or general assistance . . . in an attempt to survive. They want to live their lives quietly, without fear of discrimination, harassment and violence, just like all other citizens of this country.<sup>327</sup>

Courts like *Smith* and *Schroer* are acknowledging that transsexuals are not genderless, and that sex may encompass more than the state of one’s physical body at birth. By acknowledging that “sex” is more than “a cut-and-dried matter of chromosomes,”<sup>328</sup> courts are correctly abandoning *Ulane*, which at one time was synonymous with the idea that being transsexual would automatically invalidate a Title VII claim of employment discrimination.

These courts are correctly interpreting “because of . . . sex” within Title VII. First, courts are recognizing that Title VII, as a remedial statute, should be read broadly to accomplish its purpose. Second, these courts are recognizing the lack of legislative history on Title VII’s “because of . . . sex” does not limit the statute to what Congress might have had in mind when enacting the law. This recognition is shown by the Supreme Court broadening Title VII to prohibit same-sex harassment, male discrimination, and gender discrimination. Third, courts are acknowledging that the failed attempts to add sexual orientation to Title VII does not amount to failed attempts to add transsexuals to Title VII. Transsexualism is about being a man or a woman, not about being attracted to a man or a woman—a significant distinction. Finally, courts are holding that discrimination on the basis of “sex stereotyping” and/or “gender identity” is protected by Title VII.

While the legal status of transsexual employment discrimination seems unsure and complicated, the cases discussed in this paper prove to be successful advances for transsexual protection from employment discrimination. It seems that both discrimination on the basis of sex stereotypes and discrimination on the basis of gender

324. *Id.* (*Schroer* uses “sexual identity” instead of “gender identity,” but both mean “a question of self-perception.”).

325. *Id.* at 212–13.

326. Jost, *supra* n. 10, at 391 (quoting Lisa Mottet, a transgender-rights lawyer with the Task Force).

327. Intl. Conf. Transgender L. & Empl. Policy, *Discrimination against Transgendered People in America*, 3 Natl. J. Sexual Orientation L. 1, 3 (1997).

identity should be protected by Title VII's "because of . . . sex." Ultimately, explicit protection of transsexuals is needed to make certain employers and the public understand that transsexual discrimination is prohibited. As the United States Supreme Court has pointed out: "Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."<sup>329</sup>

*Amanda S. Eno\**

---

329. *Romer v. Evans*, 517 U.S. 620, 628 (1996).

\* J.D. Candidate, The University of Tulsa College of Law (2008). I would like to thank Misty Cooper Watt for her invaluable comments, suggestions, and support in the writing of this paper. Particular thanks to an exceptional mentor, Tamara R. Piety, Associate Professor at The University of Tulsa College of Law. Also, thanks to Michael Scoggins and Jennifer Kovar for editing numerous drafts. Finally, thanks to my sister, Elizabeth Eno, for her suggestion to write on transgender discrimination and for opening my eyes to the issues facing the GLBT community, and thanks to my mother, Mary Anderson Eno, for her strength, support, insight, and patience.

