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David M. Neff

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**DENIAL OF TITLE VII PROTECTION TO
TRANSSEXUALS:
*ULANE V. EASTERN AIRLINES, INC.***

Title VII of the Civil Rights Act of 1964 provides that an employer may not discriminate against an individual on the basis of that individual's race, color, religion, sex, or national origin.¹ Although the statute was passed primarily to outlaw racial discrimination,² the word "sex" was proposed as an addition to the statute by a southern congressman who wished to defeat passage of the entire statute.³ Congress, however, approved Title VII without significant debate over the meaning of the word sex.⁴

Despite the absence of legislative guidance as to the precise meaning of the word sex,⁵ courts have held that Congress intended the word's inclusion to guarantee women freedom from discriminatory employment practices.⁶ Nevertheless, plaintiffs have repeatedly tried to persuade courts to extend Title VII's prohibition of sex discrimination to situations perhaps not envisioned by Congress in 1964. Courts have responded to the challenge of determining the parameters of discrimination based on sex by interpreting

1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982). The statute specifically prohibits discrimination that concerns hiring, firing, compensation, terms, conditions, or privileges of employment. *Id.* § 2000e-2(a)(1). The statute applies to employers engaged in an industry affecting commerce that employs fifteen or more persons for twenty or more weeks of the calendar year. *Id.* § 2000e(b). For a detailed description of Title VII and other federal statutes prohibiting employment discrimination, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* (1980).

2. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (Title VII was passed primarily "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

3. The amendment was offered by Congressman Howard Smith of Virginia. 110 CONG. REC. 2577 (1964). Congresswoman Green questioned Congressman Smith's motives during debate on the proposed amendment, which she said would "clutter up [Title VII] and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it." *Id.* at 2581; see also Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971).

4. See *Wentzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975); *Diaz v. Pan Am. Airways*, 442 F.2d 385, 386 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). For the complete debate regarding the proposed amendment to Title VII of the word "sex," see 110 CONG. REC. 2577-84 (1964).

5. Specifically, the amendment was intended to protect *white* women. See 110 CONG. REC. 2580 (1964), where Congresswoman Griffiths stated that "a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister. If we are trying to establish equality in jobs, I am for it, but I am for making white women equal, also." Moreover, Congressman Andrews argued that "[u]nless this amendment is adopted, the white women of this country would be drastically discriminated against in favor of a Negro woman." *Id.* at 2583.

6. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983).

Title VII to protect men;⁷ individuals subjected to sexual harassment;⁸ married women;⁹ women with pre-school age children;¹⁰ and unwed mothers.¹¹ Courts have refused, however, to interpret the word sex in Title VII as covering homosexuals¹² or "effeminate" men.¹³

In *Ulane v. Eastern Airlines, Inc.*,¹⁴ the Court of Appeals for the Seventh Circuit addressed the issue of whether employment discrimination against transsexuals constituted discrimination based on sex, as proscribed by Title VII.¹⁵ The *Ulane* court refused to interpret the word sex in Title VII to protect transsexuals for three reasons: (1) the plain meaning of the word sex in Title VII;¹⁶ (2) the legislative history of Title VII;¹⁷ and (3) congressional rejection of bills to amend Title VII to prohibit discrimination based on sexual orientation.¹⁸

By denying Title VII protection to transsexuals, the *Ulane* court has forced transsexuals to seek protection against employment discrimination from Congress. It is extremely unlikely, however, that a group as politically powerless, socially unpopular, and numerically small as transsexuals can persuade Congress to amend Title VII to protect them.¹⁹ Therefore, after *Ulane*, transsexuals are realistically precluded from seeking protection from employment discrimination.

This Note examines the assumptions made by the *Ulane* court and suggests that the court failed to accord a proper liberal interpretation to a remedial statute such as Title VII. Additionally, this Note criticizes the *Ulane* court

7. See *Diaz v. Pan Am. Airways*, 442 F.2d 385 (5th Cir. 1971) (an airline could not exclude men from jobs as flight attendants).

8. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (plaintiff claimed her supervisor abolished her job after she rebuked his sexual advances). Courts have also extended Title VII to cover instances of sexual harassment by a homosexual. See *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981); *Barlow v. Northwestern Memorial Hosp.*, 30 Fair Empl. Prac. Cas. (BNA) 233 (N.D. Ill. 1980). For an excellent review of sexual harassment claims arising under Title VII, see Hill & Behrens, *Love in the Office: A Guide for Dealing with Sexual Harassment under Title VII of the Civil Rights Act of 1964*, 30 DE PAUL L. REV. 581 (1981).

9. See *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (the court invalidated defendant's rule that prohibited stewardesses from marrying), *cert. denied*, 404 U.S. 991 (1971); *Jurinko v. Edward L. Wiegand Co.*, 331 F. Supp. 1184 (W.D. Pa. 1971) (refusal to hire married women violates Title VII). The legislative debate reveals that a congressman did briefly mention the issue of married women employed as stewardesses. 110 CONG. REC. 2578 (1964) (remarks of Congressman Bass).

10. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

11. See *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

12. See *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

13. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

14. 742 F.2d 1081 (7th Cir. 1984).

15. *Id.* at 1084.

16. *Id.* at 1085; see *infra* notes 170-71 and accompanying text.

17. 742 F.2d at 1085; see *infra* notes 172-73 and accompanying text.

18. 742 F.2d at 1085-86; see *infra* notes 174-75 and accompanying text.

19. See *infra* notes 283-88 and accompanying text.

for disregarding the trial court's findings, particularly the trial court's reliance on medical testimony and medical evidence to define both transsexualism and sex. Finally, this Note argues that the *Ulane* court erred by failing to distinguish between transsexuals before and after their sexes are surgically changed.

BACKGROUND

Simply stated, "[a] transsexual is an individual anatomically of one sex who firmly believes he [or she] belongs to the other sex."²⁰ Transsexuals are not homosexuals or transvestites, although transsexuals superficially appear to practice both homosexuality and transvestism.²¹ Rather, transsexuals who have not yet undergone sex reassignment surgery and are referred to as preoperative transsexuals²² suffer because their gender identities—their own feelings of masculinity or femininity—do not conform to their anatomies.²³ These individuals hope to align their gender identities and their anatomies through sex reassignment surgery. After surgery, these individuals are known as postoperative transsexuals.²⁴ Although these individuals after surgery no longer feel that their genders conflict with their bodies, it is not certain whether the underlying gender identity disorders cease.²⁵ Despite the ease with which transsexualism is defined, courts and medical authorities cannot agree as to which sex a postoperative transsexual belongs.²⁶ Thus, it is crucial

20. *Richards v. United States Tennis Ass'n*, 93 Misc. 2d 713, 718, 400 N.Y.S.2d 267, 270 (N.Y. Sup. Ct. 1977); see *M.T. v. J.T.*, 140 N.J. Super. 77, 79-80, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976) (testimony of Dr. Charles L. Ihlenfeld); *TRANSSEXUALISM AND SEX REASSIGNMENT* 487 (R. Green & J. Money ed. 1969) [hereinafter cited as *TRANSSEXUALISM AND SEX REASSIGNMENT*]; Money & Gaskins, *Sex Reassignment*, 9 INT'L J. PSYCHIATRY 249, 251 (1970-71); Comment, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971) [hereinafter cited as Comment, *Transsexuals in Limbo*].

21. See *infra* notes 47-57 and accompanying text.

22. See, e.g., *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

23. See Comment, *A Legal Conundrum—Transsexuals in Athletics*, 1 COMM/ENT 369, 374-76 (1977-78) [hereinafter cited as Comment, *A Legal Conundrum*]. The distinction between sex and gender still confuses courts and legal commentators. See Gould, *Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism*, 13 VAL. U.L. REV. 423, 449 (1979) (the author criticizes the courts and legal commentators for seeking to enunciate a legal standard for sex without first distinguishing between sex and gender). Dr. Robert J. Stoller of the University of California at Los Angeles School of Medicine described gender identity as one's sense of masculinity or femininity and sex as the biological attributes that cause someone to be male or female. Stoller, *A Contribution to the Study of Gender Identity*, 45 INT'L J. PSYCHOANALYSIS 220, 226 (1964). At least one commentator expects most courts to follow Dr. Stoller's distinction. Twardy, *Medicolegal Aspects of Transsexualism*, 1980 MED. TRIAL TECH. Q. 249, 257.

24. See, e.g., *M. T. v. J. T.*, 140 N.J. Super. 77, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

25. See Graham, *Transsexualism and the Capacity to Enter Marriage*, 41 JURIST 117, 122-23 (1981).

26. See *Frances B. v. Mark B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974). The court quoted Dr. George Burou, who claimed to have performed more than seven hundred sex reassignment operations: "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind." *Id.* at 117-18, 355

to a Title VII sex discrimination analysis to examine the factors that constitute an individual's sex.²⁷ Only then can one determine whether sex reassignment surgery changes an individual's sex.

A. *Transsexuals—What Are They?*

An individual's sex is normally determined at birth by an attending physician who makes a visual observation of the infant's external genitalia.²⁸ The medical community and legal commentators, however, recognize at least eight factors that cause society to label an individual as either male or female:²⁹ (1) chromosome pattern;³⁰ (2) presence of ovaries or testes;³¹ (3) sex hormone pattern;³² (4) reproductive organs;³³ (5) external genitalia;³⁴ (6)

N.Y.S.2d at 717. *But see* Richards v. United States Tennis Ass'n, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977). The court quoted Dr. Leo Wollman, who claimed to have treated more than 1,700 transsexuals: "[The plaintiff] has the external genital appearance, the internal organ appearance, gonadal identity, endocrinological make-up and psychological and social development of a female [and should therefore] be considered a female . . ." *Id.* at 720, 400 N.Y.S.2d at 271.

27. H. BENJAMIN, *THE TRANSEXUAL PHENOMENON* 5-9 (1969) (nine factors); Money, *The Sex Chromatin and Psychosexual Differentiation*, in *THE SEX CHROMATIN* (K. Moore ed. 1966) (seven factors); Moore, *Recent Developments Concerning the Criteria of Sex and Possible Legal Implications*, 31 *MANITOBA B. NEWS* 104, 104-10 (1959) (eight factors).

28. *In re Anonymous*, 57 Misc. 2d 813, 815, 293 N.Y.S.2d 834, 836-37 (N.Y. Civ. Ct. 1968).

29. These eight factors are patterned after the list compiled by Dr. John Money of the Johns Hopkins Gender Identity Clinic. The legal community has relied on these eight factors more than any other set of variables. *See* Comment, *M.T. v. J.T.: An Enlightened Perspective on Transsexualism*, 6 *CAP. U.L. REV.* 403, 404 (1977) [hereinafter cited as Comment, *M.T. v. J.T.*]; Comment, *A Legal Conundrum*, *supra* note 23, at 374; Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 *CORNELL L. REV.* 963, 965 (1971) [hereinafter cited as Comment, *Transsexualism*].

30. A female will develop when sperm containing an X chromosome joins with the X chromosome in the ovum. A male will develop when sperm containing a Y chromosome joins with the X chromosome in the ovum. *See* J. MONEY, *SEX ERRORS OF THE BODY* 15-21 (1968). Determining an individual's sex based on his or her chromosome composition has been criticized as being unfair to transsexuals and hermaphrodites. *See* Comment, *A Legal Conundrum*, *supra* note 23, at 382; Comment, *Transsexualism*, *supra* note 29, at 966. For a definition of a hermaphrodite, see *infra* note 38.

31. The gonadal standard as a determinant of sex has been criticized by legal commentators because the hermaphrodite possesses gonads of both sexes and the transsexual's gonadal tissue is removed during sex reassignment surgery. *See* Comment, *A Legal Conundrum*, *supra* note 23 at 376; Comment, *Transsexualism*, *supra* note 29, at 967.

32. Legal commentators have rejected the sex hormone standard because the sex reassignment process involves the administration of drugs and castration, both of which drastically alter an individual's hormonal balance. *See* Comment, *A Legal Conundrum*, *supra* note 23, at 377; Comment, *Transsexualism*, *supra* note 29, at 967.

33. Considering an individual's reproductive organs, such as a male's sperm ducts or a female's uterus, when determining sex has been criticized because hermaphrodites possess both male and female internal genitalia and the transsexual's internal genitalia is removed during sex reassignment surgery. *See* Comment, *A Legal Conundrum*, *supra* note 23, at 377; Comment, *Transsexualism*, *supra* note 29, at 967.

34. External genitalia has been criticized as a factor because these organs are often removed during sex reassignment procedure. *See* Comment, *A Legal Conundrum*, *supra* note 23, at 378.

sex assigned at birth;³⁵ (7) secondary sex characteristics;³⁶ and (8) psychological sex or gender identity.³⁷ In most individuals these factors are consistent with each other and the individual accordingly is designated as either male or female.³⁸ Preoperative transsexuals, however, are individuals whose gender identities do not conform to their other sex factors. Thus, a preoperative transsexual may have a female gender identity but have male chromosomes, hormones, internal and external genitalia, and secondary sex characteristics, and have been classified at birth as a male.³⁹ Nevertheless, such an individual will believe himself to be a female who possesses a male's body. Sex reassignment surgery and hormone treatment cause the transsexual's other

35. Doctors cannot always determine the sex of an infant immediately after birth, however, if the infant is born with abnormalities or lacks genitalia altogether. Bartholomew, "*Hermaphrodites*" and the Law, 2 MALAYA L. REV. 83, 88 (1960). Moreover, doctors have been sued because they misidentified an infant's sex. See *Kaufman v. Israel Zion Hosp.*, 183 Misc. 714, 51 N.Y.S.2d 412 (N.Y. Sup. Ct. 1944). In *Kaufman*, the parents sued for mental anguish because they were informed that their newborn child was a female and several days later were told that their child actually was a male. *Id.* at 714, 51 N.Y.S.2d at 412. The court held that the plaintiffs did not prove any physical injury caused by the doctor's negligence. *Id.* at 715, 51 N.Y.S.2d at 413.

36. Because secondary sex characteristics such as body hair, muscle mass, and breasts are amenable to change by hormonal drugs routinely taken by transsexuals, commentators have claimed this factor is unreliable. See Comment, *A Legal Conundrum*, *supra* note 23, at 378.

37. Many legal commentators have favored psychological sex or gender identity as the most important determinant of an individual's legal sex. See Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282, 295 (1968) (transsexuals' legal sex for purposes of birth records should be based on their gender identity); Comment, *A Legal Conundrum*, *supra* note 23, at 379 (the author called this factor "appealing because it humanely recognizes the sex that the individual has felt himself to be all along"); Comment, *Transsexualism*, *supra* note 29, at 968-69 (the author correctly predicted that courts would not favor the gender identity factor because it is subjective); Comment, *Transsexuals in Limbo*, *supra* note 20, at 254 (the most important factors are psychological identity and anatomical appearance); Comment, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 SAN DIEGO L. REV. 331, 355 (1978) (courts should determine sex based on an individual's gender identity and anatomical appearance) [hereinafter cited as Comment, *Transsexuals in Search of Legal Acceptance*].

Nevertheless, legal commentators realize that all eight factors should be considered by courts. See Comment, *A Legal Conundrum*, *supra* note 23, at 379-80. However, one commentator warns that courts should not base determinations of sex on a test that looks only to a simple majority of agreeing factors. Such a test would be inaccurate because it incorrectly assumes that each factor is of equal significance. See Comment, *Transsexualism*, *supra* note 29, at 966.

38. J. MONEY, *supra* note 30, at 85. Nevertheless, a court requirement that all factors agree is unrealistic because all the factors will not be in agreement for transsexuals. Comment, *Transsexualism*, *supra* note 29, at 968. Moreover, there are a number of different types of individuals whose chromosomes or hormones produce an ambiguous sexual status. Androgen insensitive persons exhibit the male XY chromosome pattern yet have a vagina and physically appear as females because their bodies respond to the female hormone estrogen, rather than the male hormone androgen. D. FEDERMAN, *ABNORMAL SEXUAL DEVELOPMENT* 105-11 (1967). Hermaphrodites possess both male and female reproductive organs. Individuals with Klinefelter's Syndrome are sterile males with an XXY chromosome pattern instead of the normal male XY pattern. Individuals with Turner's Syndrome are sterile females with an XO chromosome pattern instead of the normal female XY pattern. Metafemales are females with an XXX chromosome pattern. J. MONEY & A. EHRHARDT, *MAN AND WOMAN, BOY AND GIRL* 29-35 (1972).

39. See *supra* note 23 and accompanying text.

sex factors to coincide with his or her gender identity. Thus, a postoperative transsexual may have a female gender identity, hormones, internal and external genitalia, and secondary sex characteristics.⁴⁰ Nonetheless, because an individual's chromosomes and sex assigned at birth cannot be altered, these factors would still designate the individual as a male.⁴¹

The transsexual develops his or her gender identity disorder early in childhood.⁴² The transsexual often is said to feel like a female trapped in a male's body or vice versa.⁴³ The cause of this gender identity disorder is disputed.⁴⁴ The disorder can become extremely severe, often leading to anxiety and depression⁴⁵ that can culminate in suicide or self-mutilation of the external genitalia.⁴⁶

Although transsexuals are often confused with homosexuals and transvestites, the three types of individuals are considered to be distinct by most legal and medical authorities.⁴⁷ Transsexuals are individuals who suffer from

40. For a discussion of how transsexuals' bodies are altered, see *infra* text accompanying notes 58-59.

41. See Comment, *A Legal Conundrum*, *supra* note 23, at 373.

42. Benjamin & Ihlenfeld, *Transsexualism*, 73 AM. J. NURSING 457 (1973). Estimates vary on the number of transsexuals that exist. See Lothstein, *Sex Reassignment Surgery: Historical, Bioethical, and Theoretical Issues*, 139 AM. J. PSYCHIATRY 417 (1982) (30,000 transsexuals, 10,000 in the United States); Twardy, *supra* note 23, at 253 (5,000 operated transsexuals and 40,000 to 50,000 unoperated transsexuals in the United States); Wein & Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075, 1086 n.73 (1979) (3,000 postoperative transsexuals); Comment, *Transsexualism*, *supra* note 29, at 964 n.5 (estimates of transsexuals living in the United States range from 10,000 to 100,000, including transvestites). It is estimated that male-to-female transsexuals outnumber female-to-male transsexuals by a ratio as high as eight to one and as low as two to one. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 263 (3d ed. 1980) [hereinafter cited as DSM-III].

DSM-III consists of findings of observable symptoms that are classified under mental disorders with defined properties. *Id.* at 6. Follow-up studies are used to test the categories of disorders. *Id.* at 5. The objective of DSM-III is to provide criteria for greater uniformity of expert opinion. *Id.* at 5.

43. See Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria*, 1983 MED. TRIAL TECH. Q. 167; Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975) [hereinafter cited as Comment, *The Law and Transsexualism*]. There have been a number of books written about the transsexual's plight. See C. CONN, CANARY, *THE STORY OF A TRANSSEXUAL* (1977); F. FALLOWELL & A. ASHLEY, *APRIL ASHLEY'S ODYSSEY* (1982); N. HOYER, *MAN INTO WOMAN* (1933); C. JORGENSON, *C. JORGENSON: A PERSONAL AUTOBIOGRAPHY* (1967).

44. Graham, *supra* note 25, at 118; Comment, *Transsexuals in Limbo*, *supra* note 20, at 238.

45. DSM-III, *supra* note 42, at 263; see also Wise, *supra* note 43, at 183-97 (case studies on various types of individuals who seek sex reassignment surgery).

46. DSM-III, *supra* note 42, at 263. Self-mutilation often occurs because transsexuals are disgusted by their own genitals. See LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES 103 (Frankel ed. Supp. 1980) [hereinafter cited as LAWYERS' MEDICAL CYCLOPEDIA].

47. See *Doe v. McConn*, 489 F. Supp. 76, 77-78 (S.D. Tex. 1980); Bullough, Bullough & Smith, *A Comparative Study of Male Transvestites, Male to Female Transsexuals, and Male Homosexuals*, 19 J. SEX RESEARCH 238, 238-57 (1983); Matto, *The Transsexual in Society*, 1972 CRIMINOLOGY 85, 86-89; Rollin, *Transsexualism Observed*, 285 BRIT. MED. J. 461 (1982).

gender identity disorders.⁴⁸ Homosexuals are individuals who are attracted sexually to members of their own sex.⁴⁹ Transvestites are men who experience psychological relief and sexual arousal by dressing in women's clothes.⁵⁰ Frequently, the preoperative male transsexual acts and dresses like both an effeminate homosexual and a transvestite.⁵¹ The preoperative transsexual, however, is neither a homosexual nor a transvestite. For example, a male preoperative transsexual is attracted to men in a heterosexual sense.⁵² Because the male preoperative transsexual considers himself to be a female, he does not consider his sexual attraction to men to be homosexual.⁵³ The same is true of female preoperative transsexuals who are attracted sexually to females.⁵⁴

Likewise, the male preoperative transsexual should not be confused with the transvestite. Unlike the transvestite, the male preoperative transsexual does not derive sexual arousal from cross-dressing.⁵⁵ The male preoperative transsexual dresses like a female either because he psychologically considers himself to be a female or because he is fulfilling the requirement of his doctors that prior to sex reassignment surgery he act and dress like a female.⁵⁶

Furthermore, homosexuals and transvestites are content with their sexual status and do not seek sex reassignment surgery.⁵⁷ Preoperative transsexuals, on the other hand, often seek sex reassignment surgery to alleviate the discomfort caused by their gender identity disorder. The sex reassignment process in an individual born as a biological male consists primarily of some or all of the following procedures: the administration of the female hormone estrogen to initiate the development of breasts; the construction of a vagina from the penile shaft; the amputation of the testicles; the removal of facial hair with electrolysis; and the surgical alteration of voice pitch.⁵⁸ The alteration for an individual born as a biological female consists primarily of some or all of the following procedures: the administration of the male hormone testosterone to alter voice pitch and promote growth of body hair;

48. See *supra* notes 20-25 and accompanying text.

49. Benjamin & Ihlenfeld, *supra* note 42, at 460.

50. TRANSSEXUALISM AND SEX REASSIGNMENT, *supra* note 20, at 487. The term transvestism has only been applied to males. See DSM-III, *supra* note 42, at 269.

51. Comment, *Transsexuals in Limbo*, *supra* note 20, at 238.

52. *Id.*

53. *Id.*; see also DSM-III *supra* note 42, at 269 (unlike homosexuals and transvestites, transsexuals do not derive sexual pleasure from their genitals, but rather wish to be rid of them).

54. Comment, *Transsexuals in Limbo*, *supra* note 20, at 238-39.

55. The primary characteristic of transvestism is cross-dressing. See *supra* note 50 and accompanying text.

56. Money & Gaskins, *supra* note 20, at 259-60. The current treatment requires, in part, that the preoperative transsexual act and dress as a member of the opposite sex for six months to two years before surgery will be performed. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 46, at 103.

57. See *supra* note 53.

58. See LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 46, at 103; Twardy, *supra* note 23, at 260-63.

the removal of the breasts, uterus, and ovaries; and the construction of a penis and scrotum.⁵⁹ None of the postoperative transsexuals can reproduce, although they can engage in sexual intercourse.⁶⁰

Sex reassignment surgery for individuals suffering from gender identity disorders dates back to 1931.⁶¹ Since that time, a number of clinics that specialize in sex reassignment surgery have been established at major medical schools.⁶² It was not until 1980, however, that the American Psychiatric Association formally categorized transsexualism as a mental disorder.⁶³ Despite this categorization, transsexualism and sex reassignment surgery are still the subjects of controversy and debate in the medical community. Many medical authorities argue that psychotherapy is useless with transsexuals and that only sex reassignment surgery alleviates the transsexual's gender identity disorder by altering the individual's body to conform to his or her self-conception.⁶⁴ In fact, studies have found that most patients reported being satisfied with the sex reassignment surgery and their new identities.⁶⁵ Other medical authorities, however, argue that the proper treatment for transsexualism is psychotherapy, not sex reassignment surgery.⁶⁶ These authorities argue that although sex reassignment surgery may be subjectively satisfying to the individual, it does not cure the transsexual's gender identity disorder.⁶⁷ Furthermore, they argue that doctors lack acceptable diagnostic criteria for selecting proper candidates for sex reassignment surgery and, as a result, some individuals who were not true transsexuals have undergone such operations.⁶⁸

59. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 46, at 104.

60. *Id.*

61. See Meyer & Reter, *Sex Reassignment*, 36 ARCHIVES GEN. PSYCHIATRY 1010, 1010 (1979) (citing Abraham, *Genitalumwandlung an zuei maennlichen transvestiten*, 18 Z Sexualwissenschaft 223 (1931)). The term "transsexualism" was first used in 1949. See Cauldwell, *Psychopathia Transsexualis*, 16 SEXOLOGY 274 (1949). The term was popularized in 1953 by Dr. Henry Benjamin, a pioneer in sex reassignment surgery. See Bullough, Bullough & Smith, *supra* note 47, at 240.

62. The Johns Hopkins Gender Identity Clinic, which opened in 1965, has been the most well-known clinic specializing in treating individuals suffering from gender identity conflicts. The clinic ceased performing sex reassignment surgery because of political pressure caused in part by the Meyer and Reter study, Meyer & Reter, *supra* note 61. Lothstein, *supra* note 42, at 422. The Meyer and Reter study concluded that "[s]ex reassignment surgery confers no objective advantage in terms of social rehabilitation, although it remains subjectively satisfying to those who have rigorously pursued a trial period and who have undergone it." Meyer & Reter, *supra* note 61, at 1015.

63. DSM-III, *supra* note 42, at 261-64.

64. See Graham, *supra* note 25, at 123; Lothstein, *supra* note 42, at 417.

65. For an analysis of studies conducted on transsexuals through the 1970's, most of which reported widespread patient satisfaction, see Lothstein, *supra* note 42, at 417-24.

66. See Lothstein, *supra* note 42, at 417.

67. See *id.*

68. See *id.* Although Lothstein reviewed studies that reported patient satisfaction with surgery, he found that many individuals continue to be misdiagnosed as transsexuals and should be treated with psychotherapy rather than surgery. Thus, he predicted that "[a]s clinicians learn new ways to diagnose and treat transsexualism, either sex reassignment surgery will be abandoned

Even after sex reassignment surgery, transsexuals often face a lack of sympathy or acceptance from family, friends, and the public.⁶⁹ Although postoperative transsexuals physically appear to be members of their new sex, society has been hesitant to accept the transsexuals' new identities. Thus, when this lack of acceptance has resulted in the denial of legal rights, transsexuals have sought recourse from the judiciary.

B. Transsexuals and the Law

Transsexuals pose difficult questions for courts before,⁷⁰ during,⁷¹ and after⁷² sex reassignment surgery. Significantly, there is a trend among courts to recognize the transsexual's peculiar legal status and to interpret laws in a liberal fashion to benefit them. For example, preoperative transsexuals are faced with a dilemma caused by the requirement that they cross-dress for a number of months prior to sex reassignment surgery.⁷³ A number of jurisdictions have laws that impose criminal liability for cross-dressing in public places.⁷⁴ Recently, however, courts have failed to find a legitimate state interest sufficient to allow such an infringement on the preoperative transsexual's constitutional right to cross-dress.⁷⁵ The state's alleged interests,

as a routine treatment modality (reserved for only a few select patients) or new predictive variables for choosing suitable patients for sex reassignment surgery will be established." *Id.* at 424.

69. See Matto, *supra* note 47, at 97-99, 102-103; Wein & Remmers, *supra* note 42, at 1086, 1094.

70. The preoperative transsexual's gender identity crisis can lead to a number of adverse legal consequences. For example, it is reported that thirty-two states prohibit homosexual behavior. Twardy, *supra* note 23, at 300. Thus, a preoperative transsexual who engages in sexual relations with an individual of the same sex could face criminal liability even though he or she considers such sexual conduct heterosexual. See *supra* text accompanying note 53.

71. For a discussion of the surgeon's potential criminal liability for statutory mayhem, battery, diagnostic malpractice and failure to gain informed consent, see Note, *Is He or Isn't She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology*, 21 WASHBURN L.J. 342, 365-71 (1982) [hereinafter cited as Note, *Is He or Isn't She*].

72. One court has found a postoperative transsexual qualified to retain child custody. *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973). However, courts have declined to strike down army regulations that disqualify transsexuals from military service. *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981). One interesting question not yet presented to courts is the effect of transsexual surgery on an individual's rights under testamentary wills. For example, one legal commentator argues that a male-to-female transsexual might have to initiate litigation if the individual's parent bequeathed property to "my son." Comment, *Transsexuals in Limbo*, *supra* note 20, at 247-51.

73. See *supra* note 56 and accompanying text.

74. See Comment, *M.T. v. J.T.*, *supra* note 29, at 411 (listing ten states that have laws that could be used to prosecute the transsexual for cross-dressing).

75. See *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980) (the ordinance violated transsexuals' fourteenth amendment rights against deprivation of liberty); *City of Chicago v. Wilson*, 75 Ill. 2d 525, 531, 389 N.E.2d 522, 524 (1978) ("[t]he notion that the state can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with 'values of privacy, self-identity, autonomy, and personal integrity that the . . . Constitution was designed to protect.'").

which courts have found unsubstantiated by the evidence, include (1) preventing citizens from being misled or defrauded; (2) aiding in the description and detection of criminals; (3) preventing crimes in washrooms; and (4) preventing inherently antisocial conduct.⁷⁶ Thus, courts have found ordinances prohibiting cross-dressing unconstitutional as applied to preoperative transsexuals who cross-dress in preparation for sex reassignment surgery.⁷⁷

In addition to being relieved from potential criminal liability for cross-dressing, preoperative transsexuals have recently been given the right to receive medicaid payments⁷⁸ for sex reassignment surgery. Medicaid payments are only given for "necessary medical services."⁷⁹ Courts had previously concluded that sex reassignment surgery was not a necessary medical service.⁸⁰ Recently, however, courts have ordered payments to transsexuals for their surgery. In *Doe v. State Department of Public Welfare*,⁸¹ the court held that medical necessity must be determined on a case-by-case basis.⁸² Thus, the court ruled that the state welfare department erred by routinely denying medicaid payments based on a physician's handbook that excluded sex reassignment surgery from medical coverage.⁸³ The court also found that the state welfare department mistakenly required the plaintiff to prove that the surgery would eliminate his disability and render him self-supporting.⁸⁴ The court held that under this approach needy patients such as cancer victims would also have to be denied medicaid funds because they could not prove that their treatment would be successful.⁸⁵ Likewise, other courts have ordered medicaid payments for sex reassignment surgery after finding that

76. *City of Chicago v. Wilson*, 75 Ill. 2d 525, 532, 389 N.E.2d 522, 524 (1978).

77. *See Doe v. McConn*, 489 F. Supp. 76, 81 (S.D.Tex. 1980); *City of Chicago v. Wilson*, 75 Ill. 2d 525, 534, 389 N.E.2d 522, 525 (1978).

78. Title XIX of the Social Security Act, 42 U.S.C. § 1396 (1982); *see Note, Medicaid Funding for Transsexual Surgery*, 63 MINN. L. REV. 1037 (1979).

79. Medicaid was enacted in 1965 to enable "each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance . . . [to those] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 (1982).

In Lothstein, *supra* note 42, at 418, the author cautioned that "[i]f sex reassignment surgery becomes a Medicaid-subsidized procedure, it could be performed on many nontranssexual patients with gender dysphoria, who may later regret their decisions." Thus, Lothstein argued that "[i]t is imperative that legislators who wish to provide Medicaid payments for transsexual surgery understand that, in most cases, alternatives to sex reassignment surgery are available to patients." *Id.* at 424.

80. *See, e.g., Denise R. v. Lavine*, 39 N.Y.2d 279, 347 N.E.2d 893, 383 N.Y.S.2d 568 (1976) (the director of social services acted within his discretion in weighing conflicting testimony as to the plaintiff's need for a sex-change operation).

81. 257 N.W.2d 816 (Minn. 1977).

82. *Id.* at 820.

83. *Id.* at 819-21.

84. *Id.* at 820-21; *accord* 42 C.F.R. § 440.230(c), (d) (1984) ("The Medicaid agency may not arbitrarily deny . . . the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition" although the agency may require medical necessity).

85. 257 N.W.2d at 821.

such surgery was not merely cosmetic⁸⁶ or that such surgery was the only treatment available to the transsexual.⁸⁷

After transsexuals undergo sex reassignment surgery, they often seek to change their legal names to conform to their postoperative appearances. Additionally, postoperative transsexuals often seek to change the sex designation on their birth certificates. Name changes are routinely granted to individuals, including postoperative transsexuals, provided that the individuals do not request the name change to perpetrate a fraud or interfere with the rights of third parties.⁸⁸

In contrast, postoperative transsexuals have not routinely been granted sex designation changes on their birth certificates. Initially, only three states allowed such action.⁸⁹ Presently, statutes in at least seventeen states specifically permit postoperative transsexuals to have new birth certificates issued or to have their birth certificates amended to reflect their new appearances.⁹⁰ Prior to the past decade, postoperative transsexuals infrequently received judicial relief because courts initially were reluctant to change the sex listed on birth certificates absent clear statutory authority.⁹¹ Courts in the past ten

86. See *G.B. v. Lackner*, 80 Cal. App. 3d 64, 145 Cal. Rptr. 555 (1978); *J.D. v. Lackner*, 80 Cal. App. 3d 90, 145 Cal. Rptr. 570 (1978). In both *G.B.* and *J.D.*, the courts held that the Director of the California Department of Health arbitrarily denied benefits after erroneously concluding that surgery to change the external appearance of the genitalia is cosmetic and, thus, not covered under California's medical assistance program. *But see* *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (upholding a Georgia Medicaid plan, which expressly excluded payments for cosmetic and "experimental surgery, e.g. transsexual operations").

87. See *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (sex reassignment surgery was medically necessary because it was the only treatment available for plaintiff); *Davidson v. Aetna Life & Casualty Ins. Co.*, 101 Misc. 2d 1, 420 N.Y.S.2d 450 (N.Y. Sup. Ct. 1979) (ordering an employee medical plan insurer to pay for sex reassignment surgery because the surgery was imperative and necessary for the employee to lead a normal life).

88. See *In re Anonymous*, 57 Misc. 2d 813, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968) (desire of transsexual to have her name match her postoperative appearance is a reasonable ground for granting a name change); *accord In re Anonymous*, 64 Misc. 2d 309, 314 N.Y.S.2d 668 (N.Y. Civ. Ct. 1970).

89. See Note, *Is He or Isn't She*, *supra* note 71, at 344 n.12 (citing ARIZ. REV. STAT. ANN. § 36-326 (1974); ILL. REV. STAT. ch. 111 1/2, § 73-17 (1977); LA. REV. STAT. ANN. § 40:336 (West 1976)).

90. See ARIZ. REV. STAT. ANN. § 36-326 (Supp. 1984); ARK. STAT. ANN. § 82-512(d) (1983); CAL. HEALTH & SAFETY CODE § 10475 (West Supp. 1984); D.C. CODE ANN. § 6-217(d) (Supp. 1984); GA. CODE ANN. § 31-10-23(e) (Supp. 1984); HAWAII REV. STAT. § 338-17.7(e) (Supp. 1983); ILL. REV. STAT. ch. 111 1/2, § 73-17 (1984); IOWA CODE ANN. §§ 144.23-.24 (West Supp. 1984); LA. REV. STAT. ANN. § 40.62 (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 46, § 13 (West Supp. 1984); MICH. COMP. LAWS ANN. §§ 333.2831-.2832 (1980); MISS. CODE ANN. § 41-57-21 (Supp. 1983); N.M. STAT. ANN. § 24-14-25(D) (1978); N.C. GEN. STAT. § 130A-118(b)(4) (Supp. 1983); OR. REV. STAT. § 432.290(5) (1983); UTAH CODE ANN. § 26-2-11 (Supp. 1983); VA. CODE § 32.1-269(E) (Supp. 1983).

New York has issued new birth certificates for about 20 transsexuals to reflect their changed sex in accordance with N.Y. PUB. HEALTH LAW §4176 (McKinney 1977). That statute permits correction of "errors" or "defects." *Id.*; see *Wein & Remmers*, *supra* note 42, at 1080 n.25.

91. See *Hartin v. Director of Bureau of Records*, 79 Misc. 2d 229, 232, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973) (using the same reasons as the *Weiner* court to hold that "surgery

years, however, have ordered such changes, recognizing that postoperative transsexuals have a substantial interest in changing the sex designations on their birth certificates.⁹²

Perhaps the most far-reaching case to determine the rights of transsexuals concerned the legality of transsexual marriages. In *M.T. v. J.T.*,⁹³ the court upheld the validity of a marriage between a male-to-female transsexual and a male.⁹⁴ The *M.T.* court, which was the first to uphold a transsexual's marriage,⁹⁵ ruled that an individual's sex should not be determined solely by his or her chromosomes.⁹⁶ In so holding, the court rejected the rationale of *Corbett v. Corbett*,⁹⁷ an English case that was the leading decision in this area.⁹⁸ In *Corbett*, the court held that an individual's sex is determined by his or her chromosomes and genitalia at birth.⁹⁹ In essence, according to *Corbett*, an individual born with male chromosomes and genitalia could never be transformed surgically into a woman.¹⁰⁰ The *M.T.* court, however,

for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality); *Anonymous v. Weiner*, 50 Misc. 2d 380, 382-83, 270 N.Y.S.2d 319, 321-22 (N.Y. Sup. Ct. 1966) (denying mandamus to compel the department of health to change the sex designation on a transsexual's birth certificate for three reasons: (1) male-to-female transsexuals, such as plaintiff, remain chromosomally male; (2) it is questionable whether the law and birth certificate records should be used to aid the social adaptation of psychologically ill persons; and (3) the public interest to prevent fraud outweighs the transsexual's interest in the change of sex on the birth record).

92. See *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975) (holding that the Connecticut Commissioner of Health must show a substantial state interest to justify a policy of refusing any changes in the sex designation on birth certificates of postoperative transsexuals); *K. v. Health Div.*, 26 Or. App. 311, 552 P.2d 840 (1976) (finding that the court had the power to order a change of sex designation in a birth certificate of a postoperative transsexual). In Comment, *The Law and Transsexualism*, *supra* note 43, at 310, the author argued that a birth certificate that failed to reflect the new appearance of the postoperative transsexual ignored "the socially most important sex identifying characteristics—genitalia and secondary sex characteristics. The claim is that the postoperative transsexual is no longer 'ill,' if ever he was, that the sex reassignment surgery is the adjustment which rectifies his condition, and that society ought to recognize the change."

93. 140 N.J. Super. 77, 355 A.2d 204 (N.Y. Super. Ct. App. Div. 1976).

94. *Id.* at 90, 355 A.2d at 211.

95. Marriage has been defined as the "[l]egal union of one man and one woman as husband and wife." See *Singer v. Hara*, 11 Wash. App. 247, 254, 522 P.2d 1187, 1193 (1974). Statutes also have mandated that marriages occur only between individuals of the opposite sex. KAN. STAT. ANN. § 23-101 (Supp. 1980). Thus, homosexuals consistently have been denied the right to marry under the law. See Comment, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

96. 140 N.J. Super. at 86, 355 A.2d at 208-09.

97. [1970] 2 W.L.R. 1306, 2 All E.R. 33.

98. See Comment, *M.T. v. J.T.*, *supra* note 29, at 417-18.

99. [1970] 2 W.L.R. at 1325, 2 All E.R. at 47.

100. Thus, the court concluded that the plaintiff was a male and could not perform the "essential role of a woman in marriage." *Id.* at 1324-25, 2 All E.R. at 48.

Transsexuals also were denied the right to marry in *Frances B. v. Mark B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974). The court granted an annulment in part based on fraud and in part because the husband, a female-to-male transsexual, was unable to impregnate

determined an individual's sex based on his or her anatomy and gender identity.¹⁰¹ The court held that the plaintiff, a male-to-female transsexual, had "become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes."¹⁰²

C. Transsexuals and Title VII

Title VII was intended to remove "artificial, arbitrary, and unnecessary barriers to employment" that served to discriminate based on impermissible classifications such as sex.¹⁰³ Thus, Title VII is a remedial statute that must be liberally construed.¹⁰⁴ In fact, the Supreme Court has cautioned lower federal courts to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate*."¹⁰⁵ The lower federal courts have responded by extending Title VII coverage to situations perhaps not envisioned by Congress in 1964.¹⁰⁶ The reasoning asserted by these courts in extending Title VII was best expressed by Judge Goldberg of the Fifth Circuit in *Rogers v. EEOC*:

Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.¹⁰⁷

his wife. The court held that "the marriage relationship exists with the result and for the purpose of begetting offspring." *Id.* at 117, 355 N.Y.S.2d at 717. Legal commentators have criticized the court for implying that sterility rather than capacity for intercourse governs the validity of a marriage. Comment, *The Law and Transsexualism*, *supra* note 43, at 321; Twardy, *supra* note 23, at 277.

101. 140 N.J. Super. at 89, 355 A.2d at 210-11.

102. *Id.* at 89-90, 355 A.2d at 211.

103. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

104. *See Jefferies v. Harris Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980). In *Jefferies* the Fifth Circuit held that Title VII protected black women from employment discrimination. *Id.* at 1032. The court noted that Title VII did not specifically prohibit discrimination against black women as a class, although the Act did proscribe discrimination based on race or sex. *Id.* The court found that Title VII proscribed discrimination directed at black women as a class because they reasonably fell within the Act's ambit and there was no clear legislative intent not to protect black women as a class separate and distinct from a class consisting of all women or a class consisting of all blacks. *Id.* For additional examples of how courts liberally construe Title VII, see *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1040 (7th Cir. 1982); *Coles v. Penny*, 531 F.2d 609, 615 (D.C. Cir. 1976).

105. *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981) (emphasis added). The court also held that Title VII was "intended to be broadly inclusive." *Id.* at 170.

106. *See supra* notes 7-11 and accompanying text.

107. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). In *Rogers*, the plaintiff was a Hispanic who claimed that her employer created a discriminatory and offensive work environment by discriminating against Hispanic clients. *Id.* at 237. The Fifth Circuit held that Title

Thus, sex discrimination occurs whenever an individual's sex, for no legitimate reason, is a substantial factor in the discrimination.¹⁰⁸ Moreover, the discrimination does not need to occur solely because of the individual's sex.¹⁰⁹ Rather, a prima facie violation of Title VII occurs whenever the discrimination is based at least partly, yet firmly, on the individual's sex.¹¹⁰ The Supreme Court has held that a discriminatory employment practice can violate Title VII regardless of an employer's intent or motivation.¹¹¹ Thus, it is not necessary for the employee to show a discriminatory intent of the employer. Finally, Title VII only allows a sex-based distinction in employment if that distinction is a "bona fide occupational qualification" for the particular job.¹¹²

Despite the advances made in other areas of the law, neither preoperative nor postoperative transsexuals have gained Title VII protection from employment discrimination. With the exception of the trial court in *Ulane*,¹¹³ no court has held that the Title VII ban on sex discrimination protects transsexuals.¹¹⁴ Five courts have considered preoperative transsexuals' claims that Title VII protects them.¹¹⁵ In each case the court rejected the preoperative transsexual's arguments for three reasons. The leading case, *Holloway v. Arthur Andersen & Co.*,¹¹⁶ is representative of how these courts have resolved the Title VII claims of preoperative transsexuals.

In *Holloway*, the plaintiff was terminated after informing his supervisor that he was undergoing treatment in preparation for sex reassignment sur-

VII was intended not only to proscribe discriminatory hirings and firings, but also discriminatory work environments. *Id.* at 238.

Another example of judicial expansion of Title VII occurred in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). In that case the plaintiff claimed that she was subjected to sexual harassment. *Id.* at 239. The court held that Title VII should not be limited to discrimination based solely on sex, but rather should be interpreted to proscribe discrimination when a victim's sex was a substantial factor. *Id.* at 942. After finding that the plaintiff's sex was a substantial factor in her discriminatory treatment, the courts held that sexual harassment was discrimination based on sex in violation of Title VII. *Id.* at 948.

108. *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

109. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1981).

110. *Id.* at 991.

111. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); see also *Rogers v. EEOC*, 454 F.2d 234, 239 (1972) (the employer's failure to discriminate intentionally against plaintiff held not material to a finding of a Title VII violation).

112. 42 U.S.C. § 2000e-2(e) (1982). Title VII does not permit a bona fide occupational qualification with respect to an employee's race. *Id.*

113. 581 F. Supp. 821 (N.D. Ill. 1983), rev'd, 742 F.2d 1081 (7th Cir. 1984). For a discussion of the district court's opinion in *Ulane*, see *infra* notes 157-63 and accompanying text.

114. See *Sommers v. Budget Mktg.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen and Co.*, 566 F.2d 659 (9th Cir. 1977); *Terry v. EEOC*, 25 Empl. Prac. Dec. (CCH) 31,638 (E.D. Wis. 1980); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. 1975); *Voyles v. Ralph K. Davies Med. Center*, 403 F. Supp. 456 (N.D. Cal. 1975).

115. See cases cited *supra* note 114.

116. 566 F.2d 659 (9th Cir. 1977).

gery.¹¹⁷ First, the court held that the legislative history regarding the inclusion of the word sex in Title VII did not reveal a congressional intent to protect transsexuals.¹¹⁸ Consequently, the *Holloway* court refused to interpret Title VII to cover transsexuals in the absence of clear legislative intent.¹¹⁹

Second, the *Holloway* court examined the plain meaning of the word sex.¹²⁰ The court noted that the dictionary defined sex differently than it defined gender.¹²¹ Thus, because sex was not synonymous with gender,¹²² the court concluded that Congress did not intend discrimination based on sex, which Title VII prohibits, to include the type of discrimination from which transsexuals suffer—discrimination based on gender.¹²³

Third, the *Holloway* court considered the fact that Congress had repeatedly rejected bills to amend Title VII to prohibit discrimination based on sexual preference.¹²⁴ Although these bills were intended to protect homosexuals,¹²⁵ the *Holloway* court ruled that their rejection proved that Congress intended a traditional meaning of the word sex in Title VII.¹²⁶ The court, however, did note that transsexuals would be protected by Title VII if they claimed discrimination because they were males or females.¹²⁷ Because the plaintiff in *Holloway* claimed discrimination solely because she was a transsexual, the court denied Title VII protection.¹²⁸

Judge Goodwin, dissenting in *Holloway*, argued that employers who dis-

117. *Id.* at 661.

118. *Id.* at 662; *accord* *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982); *Voyles v. Ralph K. Davies Med. Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975).

119. 566 F.2d at 663.

120. *Id.* at 662; *accord* *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977).

121. 566 F.2d at 662 n.4.

122. For a discussion of the meaning of gender, see *supra* note 23.

123. 566 F.2d at 662; *Voyles v. Ralph K. Davies Med. Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975)(Title VII "speaks of discrimination on the basis of one's 'sex.' No mention is made of change of sex or sexual preference.")

124. 566 F.2d at 662 & n.6 ("Three such bills were presented to the 94th Congress: HR 5452, 94th Cong., 1st Sess. (1975); HR 166, 94th Cong., 1st Sess. (1975) and HR 2667, 94th Cong., 1st Sess. (1975). Seven have been presented to the 95th Congress: HR 451, 95th Cong., 1st Sess. (1977); HR 2998, 95th Cong., 1st Sess. (1977); HR 4794, 95th Cong., 1st Sess. (1977); HR 5239, 95th Cong., 1st Sess. (1977); HR 7775, 95th Cong., 1st Sess. (1977); HR 8268, 95th Cong., 1st Sess. (1977) and HR 8269, 95th Cong., 1st Sess. (1977)"). In *Ulane*, 742 F.2d 1081, 1085 n.11 (7th Cir. 1984), the court of appeals noted additional failed congressional attempts to amend Title VII to prohibit discrimination based on "affectational or sexual orientation": H.R. 1454, 97th Cong., 2d Sess. (1982); H.R. 2074, 96th Cong., 2d Sess. (1980).

125. *See, e.g.*, H.R. 1454, 97th Cong., 2d Sess. (1982) ("the term 'affectational or sexual orientation' means male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults."); *see also* 121 CONG. REC. 1441 (1975) (Rep. Abzug prefaced the introduction of H.R. 5452, 94th Cong., 1st Sess. (1975), by stating that the bill was intended to prohibit discrimination against homosexuals), *cited in* *Voyles*, 403 F. Supp. at 457 n.2.

126. 566 F.2d at 662; *accord* *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982).

127. 566 F.2d at 664.

128. *Id.*

charge postoperative transsexuals because they have changed their sex would violate Title VII because the terminations would necessarily be based on sex.¹²⁹ Thus, Judge Goodwin found no rational reason to deny Title VII protection to an employee discharged a few days prior to sex reassignment surgery, yet grant Title VII protection to an employee terminated immediately after such surgery.¹³⁰ Judge Goodwin reasoned that both actions by an employer result in the employee's discharge based on sex.¹³¹ Therefore, Judge Goodwin concluded that the case should have been remanded for a trial on the merits.¹³²

A New Jersey district court, in *Grossman v. Board of Education*,¹³³ was the only court prior to *Ulane* to consider the Title VII claims of a postoperative transsexual. In *Grossman*, the plaintiff was a schoolteacher who was terminated because her presence in the classroom allegedly would psychologically harm her students.¹³⁴ The district court denied Title VII protection to the plaintiff because it found that she had been discriminated against not because she was a female, but rather because she surgically changed her sex from male to female.¹³⁵ The *Grossman* court, unlike the dissent in *Holloway*, did not conclude that discrimination based on the change of one's sexual status is necessarily based on sex.¹³⁶ To the contrary, the court stated that discrimination based on sex would have occurred if plaintiff had been terminated because of her employer's stereotypical view of the abilities of women or because of any condition common only to women, such as pregnancy.¹³⁷ After holding that the plaintiff was not discriminated against as a female, the court analyzed whether Title VII protected any discrimination against her as a transsexual.¹³⁸ The court concluded that discrimination based on an individual's status as a transsexual was not covered by Title VII because the legislative history did not reflect such an intent nor did the plain meaning of sex encompass transsexualism.¹³⁹

Hence, the district court and the court of appeals in *Ulane* were confronted with the approaches of the six courts that denied Title VII protection to transsexuals and the *Holloway* dissent, which argued that such protection be given. The six courts basically asserted the same three reasons to reject

129. *Id.* at 664. (Goodwin, J., dissenting); see also Wein & Remmers, *supra* note 42, at 1100 (arguing that discharging postoperative transsexuals because they changed sex would violate Title VII).

130. 566 F.2d at 664 (Goodwin, J., dissenting).

131. *Id.* (Goodwin, J., dissenting).

132. *Id.* at 664-65 (Goodwin, J., dissenting).

133. 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. 1975).

134. *Id.* at 1197.

135. *Id.* at 1198.

136. *Id.* at 1198-99.

137. *Id.* For a discussion of the particular issues raised by the termination of a tenured transsexual teacher, see Note, *Dismissal of a Transsexual From a Tenured Teaching Position in a Public School*, 1976 Wis. L. REV. 670.

138. 11 Fair Empl. Prac. Cas. (BNA) at 1198-99.

139. *Id.*

the argument that Title VII prohibited discrimination based on an individual's transsexualism.¹⁴⁰ In addition, the *Grossman* court found that discrimination based on a transsexual's *change of sex* could not be equated with discrimination based on sex for Title VII purposes.¹⁴¹ On the other hand, the *Holloway* dissent argued that such discrimination was based on sex. Thus, the *Holloway* dissent stated that Title VII should protect both postoperative transsexuals and preoperative transsexuals who were discriminated against because they wanted to change their sex.¹⁴²

STATEMENT OF THE CASE

Until 1980, Karen Frances Ulane was a biological male known by the name of Kenneth Ulane.¹⁴³ As Kenneth Ulane, the plaintiff earned a pilot's license and served, with distinction, as an Army pilot in the Vietnam War.¹⁴⁴ In 1968 Eastern Airlines hired Ulane as a pilot.¹⁴⁵ Shortly before leaving the military to join Eastern, Ulane underwent psychiatric and medical care because he¹⁴⁶ considered himself to be a female who possessed a male's body.¹⁴⁷ Ulane claimed to have had this self-perception since early childhood.¹⁴⁸ Ulane eventually had female hormones, which caused breast development, prescribed for him.¹⁴⁹

In September 1979, Eastern granted Ulane a leave of absence.¹⁵⁰ Ulane spent seven months preparing for sex reassignment surgery by living as a female twenty-four hours a day.¹⁵¹ In April 1980, Ulane underwent sex reassignment surgery.¹⁵² After surgery, Ulane requested and received changes in her sex designation on various records. For example, the State of Illinois

140. See *supra* notes 117-26 and accompanying text.

141. See *supra* note 136 and accompanying text.

142. See *supra* notes 129-31 and accompanying text.

143. *Ulane*, 742 F.2d at 1082. In other words, Ulane was born with male chromosomes, hormones, reproductive organs, external genitalia, secondary sex characteristics, and testes.

144. *Id.* at 1082.

145. *Id.* At the time of discharge, Ulane was a First Officer and flight instructor who had logged more than 8,000 flight hours. *Id.* at 1082-83.

146. When referring to Ulane before sex reassignment surgery, the pronoun he will be used; she will be used to refer to Ulane after surgery.

147. 742 F.2d at 1083.

148. *Id.*

149. *Id.*

150. Brief for Appellee at 7, *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) [hereinafter cited as Brief for Appellee].

151. *Id.* For a discussion of this requirement and its legal implications, see *supra* notes 56, 73-75 and accompanying text.

152. Brief for Appellant at 5, *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) [hereinafter cited as Brief for Appellant]. Ulane underwent surgery after successfully living as a female for seven months and receiving the unanimous assent of the Gender Identity Board of the University of Chicago Medical School. *Id.* at 7. The Gender Identity Board includes a psychiatrist, a gynecologist, a urologist, a plastic surgeon, an endocrinologist, a general surgeon, and the University's legal counsel. *Id.*

issued a revised birth certificate noting that Ulane was a female.¹⁵³ In addition, the Federal Aviation Administration certified Ulane for flight status as a female.¹⁵⁴ When Ulane sought to return to her pilot's position at Eastern, however, she was informed that she would not be reactivated.¹⁵⁵ Instead, Eastern terminated Ulane in April 1981.¹⁵⁶

Judge John F. Grady of the District Court for the Northern District of Illinois found that Ulane was fired because she was a transsexual¹⁵⁷ and held that Title VII prohibited discrimination against transsexuals.¹⁵⁸ The district court reached this conclusion by noting that Title VII was a remedial statute and therefore must be liberally construed.¹⁵⁹ The court then found that although the exact meaning of the word sex was disputed in the medical community,¹⁶⁰ the evidence at trial proved that the term as used in any medical sense and as used in Title VII should reasonably be interpreted to encompass "sexual identity."¹⁶¹ The court found that transsexuals suffer from sexual identity disorders.¹⁶² Thus, because the evidence showed that Eastern discriminated against Ulane because of her sexual identity, and because nontranssexuality was not a bona fide occupational qualification for the job, the court held that Eastern violated Title VII.¹⁶³

153. 742 F.2d at 1083. For a discussion of the law's response to the transsexual's request to change the sex designation on his or her birth certificate, see *supra* notes 89-92 and accompanying text.

154. 742 F.2d at 1083.

155. Brief for Appellee, *supra* note 150, at 1.

156. *Id.*

157. 581 F. Supp. at 837. The district court described Ulane as follows: "She conducts herself as a woman. She dresses as a woman. There is nothing flamboyant, nothing freakish, about the plaintiff. It would take an extremely practiced eye, it seems to me, to detect any difference between the plaintiff and the biological woman." *Id.* at 821. The district court also placed great weight on the fact that Ulane was determined to be a transsexual by the Gender Identity Board of the University of Chicago Medical School, *id.* at 825; see *supra* note 152, the fact that Ulane's witnesses were credible when describing her as a transsexual, 581 F. Supp. at 825, 831-32, and the fact that Ulane was an intelligent individual who carefully weighed the decision to undergo sex reassignment surgery, *id.* at 825-27.

158. 581 F. Supp. at 825. The district judge later amended his findings to hold that Ulane also had been discriminated against because she was a female in violation of Title VII. *Id.* at 839-40. The district court has not yet tried seven additional counts [as of the date of this publication], "which allege violations of 42 U.S.C. §§ 1985(3), 1986, 18 U.S.C. § 371 (conspiracy), and 45 U.S.C. § 184 (Railway Labor Act), defamation, and intentional or reckless causing of emotional and mental distress." 742 F.2d at 1082 n.1.

159. 581 F. Supp. at 824.

160. *Id.* at 823.

161. *Id.* at 825.

162. *Id.* at 823.

163. *Id.* at 825. It appears that the district court's reasoning also would afford Title VII protection to preoperative transsexuals because they, too, can be subjected to discrimination based on their sexual identity. In fact, in a prior motion to dismiss, the district judge relied on Judge Goodwin's reasoning in *Holloway* to deny the defendant's motion. *Ulane*, 28 Fair Empl. Prac. Cas. (BNA) 1438, 1439 (N.D. Ill. 1982). The district judge stated that "the plaintiff made a telling argument in her brief when she suggested that the firing was, in effect, a statement that a condition of plaintiff's continued employment was that she remain a male. And if that suggestion is valid, then clearly the allegations of the complaint show that the discharge was because of sex." *Id.*

On appeal, however, the United States Court of Appeals for the Seventh Circuit reversed the district court.¹⁶⁴ The court of appeals prefaced its discussion by noting that other courts had not equated the word sex in Title VII with sexual preference.¹⁶⁵ The court then stated that even the district court recognized that Title VII does not protect homosexuals and transvestites.¹⁶⁶ The court of appeals, however, disagreed with the district court that Title VII could be interpreted to protect transsexuals but not homosexuals or transvestites.¹⁶⁷ In fact, although the court of appeals found that the three groups were distinct, it held that the reasons for denying Title VII protection to homosexuals and transvestites were equally persuasive in denying protection to transsexuals.¹⁶⁸

The court of appeals relied on three reasons to support its holding that Title VII did not protect transsexuals.¹⁶⁹ First, the court of appeals asserted the rule of statutory construction that absent a specific definition, words should be given their ordinary and common meaning.¹⁷⁰ The court held that the word sex in Title VII meant a man or a woman, not an individual suffering from a sexual identity disorder.¹⁷¹ Second, the court of appeals found that the legislative history of Title VII failed to reveal any congressional intent to protect transsexuals.¹⁷² Thus, the court concluded that the legislature must have intended to apply the traditional meaning of the word sex.¹⁷³ Third, the court of appeals stated that Congress repeatedly had rejected attempts to amend Title VII to prohibit discrimination based on an individual's "affectational or sexual orientation."¹⁷⁴ The court recognized that these bills were intended to protect homosexuals, but held that their rejection "strongly indicate[d]" that Congress intended a narrow and traditional interpretation of the word sex in Title VII.¹⁷⁵

164. 742 F.2d at 1087.

165. *Id.* at 1084.

166. *Id.*

167. *Id.*

168. *Id.* at 1085. This reasoning proved circular. See *infra* note 294.

169. Although *Ulane* presented the claims of a postoperative transsexual, the court's rationale appears to apply with equal force to deny Title VII protection to preoperative transsexuals, homosexuals, and transvestites. In fact, the court's rationale parallels the reasons offered by the other courts that denied Title VII protection to preoperative transsexuals. See *supra* notes 116-28 and accompanying text.

170. 742 F.2d at 1085 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

171. 742 F.2d at 1085. The court of appeals wrote that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.*

172. *Id.*

173. *Id.* The court of appeals stated that "[h]ad Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate." *Id.*

174. *Id.* at 1085. For a discussion of these legislative bills, see *supra* notes 124-26 and accompanying text.

175. 742 F.2d at 1085-86. The court of appeals also noted that Congress had continued to reject these legislative bills even after courts had denied Title VII protection to transsexuals. *Id.* at 1086.

Based on these reasons, the court of appeals held that Congress did not intend Title VII to protect transsexuals.¹⁷⁶ Therefore, the court stated that it could not act in a legislative role by expanding the statute's scope to protect individuals such as Ulane.¹⁷⁷ Furthermore, the court held that Congress was the proper forum for the determination of whether Title VII should protect transsexuals because it was the only appropriate body to consider all the ramifications of such an extension.¹⁷⁸ Thus, the court held that Ulane and other transsexuals should not be protected by Title VII until Congress specifically provided for such coverage.¹⁷⁹

The court of appeals also rejected the amended finding of the district court that Eastern discriminated against Ulane because she was a female.¹⁸⁰ In fact, the court did not find it necessary to decide whether Ulane actually was a female.¹⁸¹ Rather, the court held that the district court failed to make sufficient factual findings to reach such a conclusion.¹⁸² In addition, the court found that "[i]t is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is a female, but because Ulane is a transsexual" who underwent sex reassignment surgery.¹⁸³

ANALYSIS AND CRITIQUE

Generally, transsexuals suffer from employment discrimination for two reasons. First, employers discriminate against them because of their gender identity disorders. In effect, employers terminate transsexuals because the employers believe that the transsexuals' gender identity disorders render them unstable or incapable of performing their jobs.¹⁸⁴ The three reasons asserted by the courts that denied Title VII protection to preoperative transsexuals addressed this situation.¹⁸⁵ Second, this Note contends that employers discriminate against postoperative transsexuals because of their new sex. In this

176. *Id.* at 1086.

177. *Id.* (citing *Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972)).

178. 742 F.2d at 1086.

179. *Id.* Therefore, the court did not reach the issues of whether Ulane was discriminated against because of her transsexuality or whether nontranssexuality was a bona fide occupational qualification for the position of commercial airlines pilot. *Id.* at 1087.

180. *Id.* at 1087.

181. *Id.* The court stated:

After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.

Id.

182. *Id.*

183. *Id.* The court of appeals carefully avoided ruling whether sex reassignment surgery caused Ulane to change from a male to a female. *See id.*

184. The range of arguments was reflected in Eastern's appellate briefs, where the company argued that Ulane's transsexualism would reflect poorly on business, cause distress among coworkers, and render Ulane unsafe and unreliable as an employee. *See* Brief for Appellant, *supra* note 152, at 35-47.

185. *See supra* notes 116-28 and accompanying text.

situation, the employer discriminates against the postoperative transsexual because the employer treats all members of the transsexual's new sex less favorably or because the transsexual was a member of one sex when hired but now is a member of the opposite sex. The court of appeals in *Ulane* considered the first manner of discrimination, but not the second.

The court of appeals in *Ulane* denied Title VII protection to a postoperative transsexual by adopting the reasoning of the courts that have refused such protection to preoperative transsexuals based on their gender identity disorders.¹⁸⁶ In essence, the court held that both preoperative and postoperative transsexuals faced discrimination based on their transsexualism, that is, on their gender identity disorder.¹⁸⁷ Therefore, the court assumed that it did not have to determine whether postoperative transsexuals such as *Ulane* actually changed their sex after sex reassignment surgery.¹⁸⁸ *Ulane's* postoperative sex, whether it was female or male, was irrelevant to the court's analysis of whether the word sex in Title VII encompassed transsexuals.¹⁸⁹ As a result, the *Ulane* court adopted the reasoning of the courts that considered the claims of preoperative transsexuals.¹⁹⁰

The court merely determined that (1) the plain meaning of the word sex in Title VII did not encompass discrimination against transsexuals;¹⁹¹ (2) the legislative history of Title VII did not indicate a congressional intent to protect transsexuals;¹⁹² and (3) the congressional rejection of attempts to amend Title VII to prohibit discrimination based on sexual orientation indicated that Congress intended the word sex in Title VII to have a traditional meaning.¹⁹³ In addition, the court of appeals found that the district court did not make sufficient findings to hold that *Eastern* discriminated against *Ulane* because she was a female.¹⁹⁴

The court's rationale, however, is seriously flawed in three respects. First, the court failed to determine whether transsexuals assume a new sexual status

186. *See supra* note 169.

187. For example, the court of appeals referred to an individual like *Ulane* as:

a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

742 F.2d at 1085. Such a statement does not take into account the fact that sex reassignment surgery conforms the transsexual's anatomy with his or her gender identity. *See supra* note 40 and accompanying text.

188. *See supra* note 181 and accompanying text.

189. The court did discuss the debate over whether sex is unalterably determined at birth by the individual's chromosome composition. 742 F.2d at 1083 n.6. The court, however, did not resolve the issue or relate the question of the postoperative transsexual's sex to its analysis.

190. *See supra* notes 169-75 and accompanying text.

191. *See supra* notes 170-71 and accompanying text.

192. *See supra* notes 172-73 and accompanying text.

193. *See supra* notes 174-75 and accompanying text.

194. *See supra* notes 180-83 and accompanying text.

after sex reassignment surgery. The medical testimony presented at trial suggested that transsexuals do assume a new sexual status after sex reassignment surgery.¹⁹⁵ Consequently, employers may discriminate against postoperative transsexuals at least in part based on their new sex, an action that Title VII should prohibit.¹⁹⁶ Second, the court ignored the weaknesses inherent in each of the three reasons asserted by the courts that denied Title VII coverage to a plaintiff who claimed discrimination based on his or her status as a transsexual. Third, the court should have recognized that Title VII prohibits discrimination against postoperative transsexuals based on their new sex, rather than on their sex change.

A. Sexual Status After Sex Reassignment Surgery

The court of appeals did not reach the issue of whether Ulane's sexual status after sex reassignment surgery was female or male.¹⁹⁷ Thus, the court failed to recognize certain significant differences between preoperative and postoperative transsexuals. Ulane's physical and psychological condition strongly suggested that she was a female.¹⁹⁸ In fact, the district court stated that Ulane appeared and acted as a female.¹⁹⁹ The district court remarked that "[i]t would take an extremely practiced eye . . . to detect any difference between the plaintiff and the biological woman."²⁰⁰ The only factors of sex that could not be changed in Ulane or any other individual are chromosome composition and sex assigned at birth.²⁰¹ Many commentators have criticized the determination of sex based only on one's chromosomes.²⁰² Indeed, it is incorrect to classify postoperative transsexuals by their preoperative sex because they now appear, act, and are regarded by society as members of their postoperative sex. It is equally inappropriate to classify an individual's sexual status by the sex that he or she was assigned at birth. Not only are such designations sometimes impossible to make and subject to mistake,²⁰³ but also many states, including Illinois, permit postoperative transsexuals to alter the sex designations on their birth certificates.²⁰⁴ These state laws, as the district court noted, are strong evidence of a social policy to recognize the changed sex of the postoperative transsexual.²⁰⁵

There is also compelling precedent for courts to hold that sex reassignment

195. See *supra* note 157; see also *Richards v. United States Tennis Ass'n*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977) (testimony of Drs. Money, Granato, Rubbell, and Wollman).

196. See *supra* notes 103-12 and accompanying text.

197. See *supra* note 181 and accompanying text.

198. 581 F. Supp. at 817.

199. *Id.*

200. *Id.*

201. See *Wise*, *supra* note 43, at 170.

202. See *supra* notes 30, 38.

203. See *supra* note 35.

204. See *supra* note 90.

205. 581 F. Supp. at 824.

surgery changes the transsexual's sex for purposes of the law. In *M.T.*²⁰⁶ the court held that the crucial determinants of sex were the individual's anatomy and gender identity, not his or her chromosomes.²⁰⁷ Thus, the *M.T.* court found that sex reassignment surgery changed the transsexual's sex because it conformed the individual's postoperative anatomy to his or her gender identity.²⁰⁸ As a result, the *M.T.* court upheld the validity of a marriage between a male-to-female transsexual and a male.²⁰⁹ Likewise, although there may be some dispute in the medical community,²¹⁰ sex reassignment surgery should be deemed to change the transsexual's sex for Title VII purposes.

An employment decision to terminate a transsexual after he or she has undergone sex reassignment surgery conceivably can occur solely because the employee ceased being a member of one sex and became a member of the opposite sex.²¹¹ In fact, when Eastern terminated Ulane, it told her:

To the extent the operation and the counseling you have undergone have been successful in changing your essential nature from male to female, it has changed you from the person Eastern has hired into a different person. Eastern would not have hired you had it known you contemplated or might in the future contemplate such an action.²¹²

The district court found this statement to be a "virtual admission" of discrimination based on sex.²¹³ By terminating Ulane, Eastern arguably set forth a policy that employees such as Ulane must remain male. Eastern wanted Kenneth Ulane, a male. Eastern did not want Karen Ulane, a female.²¹⁴ Thus, the district court was correct in finding that Eastern's requirement was based on Ulane's sex.²¹⁵ The court of appeals, by not directly addressing this issue, erroneously precluded Ulane from using a viable argument to extend Title VII protection to postoperative transsexuals.

There is an additional reason to extend Title VII protection to postoperative transsexuals. Transsexuals usually derive a great deal of satisfaction from sex reassignment surgery because it diminishes the conflict between their anatomy and their gender identity.²¹⁶ As a result, postoperative transsexuals can function better in society.²¹⁷ Their gender identity disorders, nevertheless,

206. See *supra* notes 93-102 and accompanying text.

207. 140 N.J. Super. at 89, 355 A.2d at 208-09.

208. *Id.* at 89-90, 355 A.2d at 210-11.

209. *Id.* at 90, 355 A.2d at 211.

210. See *supra* note 26 and accompanying text.

211. See Wein & Remmers, *supra* note 42, at 1106.

212. 581 F. Supp. at 832.

213. *Id.* The district court commented that such a statement "should probably be included as part of the hand-out material for any seminar on discrimination cases." *Id.*

214. See Brief for Appellee, *supra* note 150, at 35.

215. See *supra* note 213 and accompanying text.

216. See *supra* notes 25, 65 and accompanying text.

217. See *supra* note 65.

will continue to exist.²¹⁸ In other words, postoperative transsexuals will always be cognizant of the fact that they were not born and raised as members of their postoperative sex.²¹⁹ Their gender identity disorders, however, are usually not manifested by the anxieties and depressions that afflicted the transsexuals before surgery, which often impaired their functioning²²⁰ and caused them to consider suicide and self-mutilation.²²¹

Therefore, employer discrimination against postoperative transsexuals might well be unrelated to their gender identity disorders, which, unlike before surgery, are not manifested in an unconstructive fashion. In fact, because *Ulane* was not terminated before surgery, when his gender identity disorder was most severe, it reasonably can be inferred that discrimination after surgery occurred at least in part because she changed her sex. Such discrimination is based on sex and thus violates Title VII.²²²

The court of appeals should have distinguished preoperative transsexuals from postoperative transsexuals. Discrimination against postoperative transsexuals often might occur at least partly because of their postoperative sexual status.²²³ On the other hand, preoperative transsexuals usually suffer discrimination based solely on their gender identity disorders.²²⁴ Some may attempt to argue that Title VII should protect preoperative transsexuals who are discriminated against because they are about to undergo surgery to change their sex.²²⁵ Courts, however, should consider the additional reasons to afford Title VII protection to postoperative transsexuals.²²⁶

B. The *Ulane* Rationale

Title VII prohibits discrimination based at least in part on an individual's sex.²²⁷ Eastern admitted that one of its bases for terminating *Ulane* was that she ceased being a male and became a female.²²⁸ This Note suggests that Eastern's statement can be interpreted to mean that it discriminated against

218. See *supra* note 25 and accompanying text.

219. See *id.*

220. See *Ulane*, 581 F. Supp. at 831. The district court in *Ulane* referred to "the substantial body of medical literature which supports the proposition that sex reassignment surgery has on the whole been successful in alleviating the anxieties and the depressions that transsexuals without the surgery frequently have." 581 F. Supp. at 831.

221. See *supra* note 46.

222. See *supra* notes 108-10 and accompanying text.

223. See *supra* notes 211-15 and accompanying text.

224. See cases cited *supra* note 114.

225. Judge Goodwin appeared to make such an argument in his dissent in *Holloway*. See *supra* notes 129-31 and accompanying text. Judge Goodwin seemed to assume that the *Holloway* majority would hold that a postoperative transsexual discriminated against because he or she changed sex would be protected by Title VII. See *id.* The majority, however, probably meant to state that Title VII would protect a postoperative female, for example, where the employer treated all females less favorably, not where the employer objected to the actual change of sex. See *supra* notes 127-28 and accompanying text. Thus, Judge Goodwin's argument and his criticism of the majority are misplaced.

226. See *supra* notes 206-22 and accompanying text.

227. See *supra* notes 108-10 and accompanying text.

228. See *supra* note 212 and accompanying text.

Ulane because it required employees to remain members of the sex into which they were born. It is further asserted that Title VII protects individuals who are discriminated against because they ceased being members of one sex and became members of the opposite sex. Such action literally appears to be based on sex. Therefore, the court of appeals should have found that Ulane was protected by Title VII and was discriminated against based on her sex. The court then should have proceeded to determine whether non-transsexuality was a bona fide occupational qualification for employment as a commercial airline pilot.²²⁹

The court, however, did not reach such a result. Instead, the court focused on the three reasons offered by other courts to deny Title VII protection to preoperative transsexuals who were discriminated against based on their gender identity disorders.²³⁰ This Note suggests that courts should not rely on those reasons in cases involving postoperative transsexuals. Nevertheless, courts may agree with *Ulane* that there is no reason to distinguish between preoperative and postoperative transsexuals because discrimination against both groups is based solely on their status as transsexuals, that is, as individuals with gender identity disorders. This Note, therefore, will analyze those three reasons and suggest their inherent weaknesses when applied to individuals who are discriminated against based on their gender identity disorders.²³¹

1. Plain Meaning of the Word Sex

The court of appeals in *Ulane* held that the plain meaning of the word sex in Title VII prohibited discrimination against women as women and against men as men.²³² The court's basis for this plain meaning definition

229. See *supra* note 112 and accompanying text.

230. See *supra* notes 169-75 and accompanying text.

231. This Note will be limited to the court of appeals' three reasons for denying Title VII protection to transsexuals and to the court's finding that Ulane was not discriminated against as a female. However, transsexuals can assert a wide range of arguments when seeking protection from employment discrimination. See generally Wein & Remmers, *supra* note 42, at 1098-1128 (transsexuals can make the following arguments: transsexualism is immutable; the transsexual's sex "plus" the neutral factor of sex reassignment surgery falls within Title VII protection under the sex-plus cases; sex reassignment surgery is a fundamental right and deserves the same protection as the right to marry or bear children; transsexuals are a suspect class; and transsexuals are handicapped individuals under state and federal laws and are subject to discrimination based on their handicaps).

Additionally, transsexuals may be able to persuade a court that sex reassignment surgery causes one's sex no longer to be immutable. *But see* *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (sex is immutable); *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (sex is immutable). Sex could be analogized to religion, which a person can easily change. Thus, discriminating against an individual because he or she changed sex is like discriminating against an individual for converting from one religion to another. Such discrimination should be covered by Title VII when an employer takes action because of the employee's new religion. An employer who discriminates not because of the employee's new religion but because the employer feels anyone who would convert to a new religion is unstable presents the same situation as an employer who discriminates against a transsexual because of the transsexual's sex change. Arguably, the employer's conduct in both situations should violate Title VII.

232. 742 F.2d at 1085.

was its own perception of the popular meaning of the word sex.²³³ The court of appeals specifically rejected the district court's reliance on medical testimony and medical evidence to determine the plain meaning of the word sex.²³⁴ There are compelling reasons, however, for courts considering transsexuals' claims to consider medical testimony and medical evidence when determining the meaning of the word sex.

The district court in *Ulane* was the first court to compile a factual record before determining whether Title VII protected transsexuals. The other courts, after determining that Title VII did not protect transsexuals, granted the defendants' motions to dismiss or motions for summary judgment.²³⁵ Thus, the district court in *Ulane* benefited from an abundance of medical evidence and the ability to assess the credibility of medical witnesses.²³⁶ The district court found that the word sex, as defined by the medical witnesses, includes gender identity.²³⁷ Because Title VII is a remedial statute that must be liberally interpreted,²³⁸ the district court found that it could broadly interpret the medical definition of sex to protect transsexuals who were discriminated against because of their gender identity disorders.²³⁹ The court of appeals rejected such an analysis in favor of its own narrow view of the meaning of the word sex.²⁴⁰

The district court's analysis seems to be the more reasonable approach to determine the plain meaning of the word sex. An individual's gender identity, that is, the individual's psychological feelings of being a male or a female,²⁴¹ is a key element of his or her sex.²⁴² Indeed, many legal commentators argue that gender identity is the most important element to be considered when determining one's sex.²⁴³ Gender identity, however, is not synonymous with sex,²⁴⁴ as some have argued,²⁴⁵ because there are at least seven other factors

233. *Id.*

234. *Id.* at 1086. The court of appeals held that "[w]e do not believe that the interpretation of the word 'sex' as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court." *Id.*

235. See cases cited *supra* note 114.

236. The district court's assessment of the witnesses' credibility was particularly instructive. The district court stated that "[m]y reaction to each and every plaintiff's medical witness was positive. My reaction to each and every defense medical witness was negative." 581 F. Supp. at 832. The district court, referring to one medical witness for the defense, stated, "I can tell you quite candidly that I attach no weight whatever to his testimony and, other things being equal, would be inclined to believe that the opposite of anything he testified to would be more probably true than not true." *Id.* at 824.

237. *Id.* at 825.

238. See *supra* notes 104-05 and accompanying text.

239. 581 F. Supp. at 824-25.

240. See *supra* note 171 and accompanying text.

241. See *supra* note 23 and accompanying text.

242. See *supra* note 37 and accompanying text.

243. See *id.*

244. See *supra* note 23.

245. Cf. Brief for Appellee, *supra* note 150, at 35 ("Ulane . . . changed her gender from male to female Nothing changed but her gender." It was Ulane's sex, not her gender that changed. Her gender remained feminine after surgery.)

that constitute an individual's sex.²⁴⁶ Nevertheless, transsexuals can argue that because gender identity is a component of sex, any discrimination based on gender identity necessarily is based on sex. Indeed, it appears that the district court in *Ulane* based its holding on such an argument. Although Title VII prohibits discrimination based *partly* on sex, no court other than the district court in *Ulane* has accepted the argument that Title VII prohibits discrimination based on a *part* of sex, that is, on gender identity.²⁴⁷ The courts that rejected this argument, unlike the district court in *Ulane*, did not benefit from a factual record and medical testimony to aid in defining the word sex and to aid in revealing the crucial role an individual's gender identity plays in determining his or her sex.²⁴⁸

Courts often have relied on medical testimony and medical evidence for guidance when determining the definition of words or terms with inherently medical meanings. For example, medical testimony and evidence have assisted courts in determining the definition of such words as "life,"²⁴⁹ "death,"²⁵⁰ and "mentally ill."²⁵¹ In these instances, courts did not apply their own perceptions of the words' plain meanings. Similarly, the court of appeals should have relied on medical authorities for guidance when defining such an inherently medical term as sex.

2. Legislative History

The court of appeals assumed that because Title VII's legislative history was silent regarding the protection of transsexuals, Congress did not intend to protect such individuals.²⁵² Such an assumption, however, ignores the fact that Title VII is a remedial statute that must be liberally construed.²⁵³ Granted, courts cannot extend a remedial statute to protect individuals who clearly do not fall within the statute's ambit.²⁵⁴ Nevertheless, Congress did

246. See *supra* notes 29-37 and accompanying text.

247. See cases cited *supra* note 114.

248. The district court, in finding that the word sex applies to transsexuals, stated: "That there is room for argument on the question does not release me from making a decision one way or the other, and I have made the decision which seems to me to be the one most consistent with the factual record that was developed in this case." 581 F. Supp. at 825.

249. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (Supreme Court essentially recognizing the medical definition of the viability of the fetus as the onset of life for constitutional purposes).

250. The traditional definition of death was the cessation of the heartbeat. Medical evidence and testimony, however, have convinced courts and legislators to accept "brain death" as the test for death. See *Commonwealth v. Golston*, 373 Mass. 249, 251-54, 366 N.E.2d 744, 747-48, *cert. denied*, 434 U.S. 1039 (1978); *In re Welfare of Bowman*, 94 Wash. 2d 407, 412-16, 617 P.2d 731, 734-36 (1980); see also Recent Case, *The Acceptance of Brain Death As a Legal Definition of Death in Illinois*: In *Re Haymer*, 33 DE PAUL L. REV. 207 (1983) (reviews the adoption of brain death as the standard for determining cessation of life).

251. See generally *Hermann, Morrison, Sor, Norman & Neff, People of the State of Illinois vs. John Gacy: The Functioning of the Insanity Defense at the Limits of the Criminal Law*, 86 W. VA. L. REV. 1169 (1984) (review of the case, which includes discussion of the use of medical testimony to define the term mentally ill).

252. See *supra* notes 172-73 and accompanying text.

253. See *supra* notes 104-05 and accompanying text.

254. *Ulane*, 742 F.2d at 1086.

not discuss whether transsexuals specifically would be protected by Title VII.²⁵⁵ The district court in *Ulane*, however, reasonably found that the word sex in Title VII protected transsexuals.²⁵⁶ Thus, the court of appeals' erroneous holding that the plain meaning of sex does not encompass transsexuals, led to its erroneous conclusion that Title VII could not be construed to protect transsexuals. Instead, the court of appeals should have found not only that the word sex encompassed transsexuals, but also that congressional silence regarding transsexuals meant that Congress did not specifically intend to exclude such individuals from Title VII protection. Such a result would have been consistent with the liberal interpretation that remedial statutes should be given.

Additionally, Congress cannot be expected to consider all possible interpretations of statutory language. Thus, its failure specifically to outlaw discrimination against transsexuals is inconclusive.²⁵⁷ Courts have not hesitated to extend the Title VII prohibition of sex-based discrimination to situations not discussed in the legislative debates.²⁵⁸ Similarly, by extending Title VII protection to transsexuals, courts would not be usurping a legislative function, as the court of appeals in *Ulane* argued.²⁵⁹ Rather, courts would be acting within their authority by interpreting a remedial statute in a liberal fashion.

3. Sexual Orientation Bills

The court of appeals concluded that congressional rejection of bills to amend Title VII to prohibit discrimination based on sexual orientation indicated that Congress intended a traditional meaning of the word sex.²⁶⁰ Once again, the court interpreted Title VII in a narrow manner. Instead, the court should have acknowledged the statute's remedial purpose and thus interpreted the statute and any failed attempts to amend it in a liberal fashion.

These sexual orientation bills were intended to and clearly would have only served to protect homosexuals, who are individuals subject to discrimination based on their sexual orientations.²⁶¹ Courts have asserted that transsexuals, in contrast, are individuals subject to discrimination based on their gender identity disorders, rather than their sexual orientations.²⁶² Therefore,

255. See *supra* notes 3-4 and accompanying text; see also *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (Title VII "speaks of discrimination on the basis of 'sex.' No mention is made of change of sex or sexual preference.")

256. 581 F. Supp. at 825.

257. It is not surprising that Congress did not specifically protect transsexuals in Title VII because such individuals are numerically small, see *supra* note 42, socially unpopular, and politically powerless. See *supra* note 69 and accompanying text; *infra* notes 284-87 and accompanying text.

258. See *supra* notes 7-11 and accompanying text.

259. 742 F.2d at 1086.

260. See *supra* notes 174-75 and accompanying text.

261. See *supra* note 125 and accompanying text.

262. See cases cited *supra* note 114.

the court of appeals should have declined to infer any conclusions from the rejection of these bills because they would not have afforded protection to transsexuals.

Furthermore, medical evidence shows that an individual's gender identity is a crucial component of his or her sex.²⁶³ This fact led the district court in *Ulane* to conclude that discrimination based on an individual's gender identity necessarily is based on sex.²⁶⁴ Thus, the district court ruled that Title VII was violated.²⁶⁵ An individual's sexual orientation, however, is not an element of his or her sex. Sexual orientation, as used in the bills, refers to an individual's preference in sex or affectional partners.²⁶⁶ Thus, homosexuals could not assert discrimination based on any component of sex. Moreover, they would not be covered by the *Ulane* district court's reasoning. Instead, homosexuals have argued that discrimination against them should be prohibited because it has a discriminatory impact on males²⁶⁷ or because it constitutes sexual stereotyping.²⁶⁸ In summary, courts consider transsexuals to be discriminated against based on a sex component known as their gender identity while homosexuals are discriminated against not based on a sex component, but rather, based on their choice of sex or affectional partners. Thus, any legislation that specifically relates to homosexuals will be inapplicable to transsexuals. Hence, the court of appeals should have disregarded the congressional rejection of the sexual orientation bills.

C. *Ulane as a Female*

The court of appeals rejected the amended finding of the district court that Eastern discriminated against Ulane because she was a female.²⁶⁹ The court of appeals did not specifically state that a postoperative transsexual could claim discrimination based on his or her new sex. Instead, the court stated that "the argument might be made that Title VII applied" when an employer discriminated against a postoperative female because in general the employer treated females less favorably than males.²⁷⁰ Indeed, in such a situation Title VII protection is inescapable.

263. See *supra* note 37 and accompanying text.

264. 581 F. Supp. at 825.

265. *Id.*

266. See *supra* notes 124-25.

267. See Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976). The author suggests that homosexuals argue, based on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that discrimination has a disparate impact on males because males constitute a much greater proportion of homosexuals than females. Siniscalco, *supra*, at 508-10. This argument was rejected in *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330-31 (9th Cir. 1979). Undoubtedly, courts would follow *DeSantis* to reject such a disparate impact argument by individuals suffering from transsexualism, which also afflicts males much more frequently than females. See *supra* note 42.

268. See Comment, *Challenging Sexual Preference Discrimination in Private Employment*, 41 OHIO ST. L.J. 501, 507-09 (1980) (arguing that discrimination because of sexual orientation violates a congressional intent to ban discrimination based on irrelevant stereotypes).

269. 742 F.2d at 1087.

270. *Id.*

The Ninth Circuit in *Halloway*,²⁷¹ stated, in dicta, that Title VII protected a postoperative transsexual discriminated against because of his or her new sex.²⁷² A contrary finding would permit an employer to tell a postoperative transsexual that he or she was being discriminated against because the employer did not want employees who were members of the transsexual's new sex.²⁷³ Clearly, Title VII was intended to proscribe such employer conduct. Thus, Title VII should cover a situation when an employer, without knowledge that an employee is a postoperative transsexual, discriminates against that employee based on his or her postoperative sex.

A conclusion that postoperative transsexuals could not claim discrimination based on their postoperative sex would mean that they could only claim discrimination based on their sex before surgery or could not claim sex-based discrimination at all. It is highly unlikely that an employer would discriminate against a postoperative transsexual based on his or her preoperative sex. If a postoperative transsexual dresses and acts like a female, considers herself a female, physically appears to be a female, and is considered by others to be a female, it is inconceivable that an employer would discriminate against her based on her preoperative male sex. To conclude otherwise is to assume that an employer would ignore the transsexual's new appearance. Moreover, such a conclusion implies that an individual's sex is unalterably determined at birth by chromosome composition.²⁷⁴ This conclusion is misguided and would effectively deny Title VII protection to postoperative transsexuals.

Likewise, it is impractical to conclude that an employer could never discriminate against a postoperative transsexual because that individual is a male or a female. This conclusion implies that such individuals do not have a male or female sex for Title VII purposes. Following from this conclusion, three sexes would have to be recognized under the law: male, female, and postoperative transsexual. Such a conclusion would lead to drastic consequences in many areas of the law.²⁷⁵ Furthermore, such a conclusion is unsupported by medical science, which does not recognize the status of postoperative transsexual as a separate sex.²⁷⁶

The court of appeals in *Ulane* held that the district court did not make the necessary factual findings to support its holding that Eastern discriminated against *Ulane* because she was a female.²⁷⁷ In fact, the court of appeals ruled that the evidence clearly proved that Eastern terminated *Ulane* because

271. See *supra* notes 116-32 and accompanying text.

272. 566 F.2d at 664.

273. See Brief for Appellee, *supra* note 150, at 38.

274. For a criticism of the argument that chromosomes alone should determine an individual's sex, see *supra* notes 30, 38. Furthermore, such a position was rejected by the court in *M.T.*, 140 N.J. Super. at 88, 355 A.2d at 208. See *supra* notes 93-102 and accompanying text.

275. See Comment, *The Law and Transsexualism*, *supra* note 43, at 294 (dispensing with the male/female sex classification system is impractical and unnecessary).

276. Medical authorities classify postoperative transsexuals by either their preoperative or postoperative sex, not by a "transsexual" sex classification. See *supra* note 26.

277. 742 F.2d at 1087.

she was a transsexual, not because she was a female.²⁷⁸ There was substantial evidence presented, however, that Eastern treated Ulane differently than similarly situated male pilots.²⁷⁹ Therefore, the court of appeals should have at least remanded the case to the district court to make specific findings on whether Eastern discriminated against Ulane as a female.

IMPACT

The court of appeals in *Ulane* extended the rationale for excluding pre-operative transsexuals from Title VII protection to postoperative transsexuals.²⁸⁰ The court found that Congress did not intend to prohibit employment discrimination based on an individual's status as a transsexual, that is, as an individual suffering from a gender identity disorder.²⁸¹ Therefore, based on *Ulane*, courts would lack jurisdiction to hear such claims. As a result, courts would be compelled to grant defendants' motions to dismiss when transsexuals claim discrimination based on their gender identity disorders.²⁸² Thus, a court following the holding in *Ulane* would not entertain medical testimony and medical evidence to determine whether the word sex could encompass transsexuals. Because such testimony may be crucial to a finding of Title VII coverage, transsexuals would be precluded from offering important evidence to a court that adopts the court of appeals' view in *Ulane*.

Thus, the procedural impact of *Ulane* is twofold. First, transsexuals are precluded from seeking judicial relief for employment discrimination based on their gender identity disorders. Unless a court chooses to follow the district court's rationale in *Ulane*, defendants' motions to dismiss will routinely be granted. Second, the court of appeals in *Ulane* held that Title VII would only protect transsexuals if Congress manifested a specific intent to afford such protection. Transsexuals, therefore, are forced to seek a legislative amendment to Title VII that would specifically prohibit discrimination against them.

It is extremely unlikely, however, that Congress will enact such an amendment. Transsexuals are few in number²⁸³ and do not have the political power or organization needed to effect congressional action.²⁸⁴ In addition, Congress may perceive that the hearings and debates needed to amend Title VII to protect transsexuals would not be warranted in light of the exceedingly small number of individuals whom the amendment would affect.²⁸⁵ Furthermore,

278. *Id.*

279. See 581 F. Supp. at 833-37.

280. See *supra* note 169.

281. See *supra* notes 172-73 and accompanying text.

282. See cases cited *supra* note 114.

283. See *supra* note 42.

284. See Wein & Remmers, *supra* note 42, at 1106 n.191 ("Congressional unfamiliarity with transsexualism and the group's negligible political power has been recently demonstrated by legislative attempts to amend Title VII to include 'sexual preference or orientation,' but not transsexualism.").

285. See *supra* note 42. Any amendment to Title VII to protect transsexuals would not cover homosexuals for the same reasons that the amendments proposed to protect homosexuals would

transsexuals are not the subject of widespread public support.²⁸⁶ To the contrary, they are misunderstood and scorned by society.²⁸⁷ Thus, not only would Congress encounter little popular support to extend Title VII protection to transsexuals, but also any such amendment probably would be subjected to widespread denunciation and, thus, would not be politically expedient for members of Congress to support. As a result, congressional action is highly improbable.²⁸⁸

Substantively, the court of appeals in *Ulane* added little new analysis to the issue of whether Title VII prohibits discrimination against individuals because of their gender identity disorders. The court, however, made a somewhat encouraging statement that postoperative transsexuals might be able to argue that Title VII protects them from discrimination where other members of their new sex also suffer from discrimination.²⁸⁹ Of course, to make such a claim the postoperative transsexual first would have to convince the court that sex reassignment surgery actually changed his or her sex for Title VII purposes.²⁹⁰ The court of appeals in *Ulane* did not decide this issue.²⁹¹ Nevertheless, it would be necessary for a court to hold a trial on the merits to determine whether the postoperative transsexual changed sexes. Moreover, a court would then have to determine whether a postoperative transsexual was discriminated against because members of his or her new sex were treated less favorably. Thus, in this situation, postoperative transsexuals' Title VII claims should not be dismissed. Practically, postoperative transsexuals should always argue that their employers discriminated against them based on their new sex; otherwise, a claim of discrimination solely because of a gender identity disorder would be dismissed.²⁹² Similarly, pre-operative transsexuals after *Ulane* can only claim discrimination based on their current sex, which would be the sex into which they were born.

In addition to its impact on future courts considering Title VII claims of transsexuals, the *Ulane* decision will affect Title VII claims of homosexuals

not have covered transsexuals. See *supra* notes 260-68 and accompanying text. Thus, transsexuals could not count on the support of homosexuals.

286. See Brent, *Some Legal Problems of the Postoperative Transsexual*, 12 J. FAM. L. 405, 420-21 (1972-73) ("[q]uestions of sexual deviation and sexual abnormalities probably provoke more emotional responses in society generally than almost any other subject.").

287. *Id.*

288. Moreover, courts have an obligation to interpret remedial laws in a fashion so that they overcome prejudices. In *Diaz v. Pan Am. Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), the court stated that Title VII in particular was intended to overcome customer prejudices. *Id.* at 389. Therefore, the court found that the defendant airline violated Title VII by prohibiting men from becoming flight attendants on the theory that customers prefer women flight attendants. *Id.* Likewise, courts should not be influenced by public sentiment against transsexuals.

289. See *supra* note 270 and accompanying text.

290. For an analysis of whether sex reassignment surgery actually changes the transsexual's sex, see *supra* notes 198-210 and accompanying text.

291. See *supra* note 183.

292. See *supra* notes 105-12 and accompanying text.

and transvestites. The court stated, in dicta, that Title VII does not protect homosexuals and transvestites.²⁹³ Thus, although Title VII claims by homosexuals and transvestites have not yet been addressed by a court in the Seventh Circuit, such arguments probably would be rejected.²⁹⁴ As a result, the *Ulane* decision may affect a much greater number of individuals than just transsexuals.

The *Ulane* decision also may affect the rights of transsexuals in areas of the law other than Title VII. For example, courts may be persuaded to follow the *Ulane* court's narrow approach to interpreting laws that affect transsexuals rather than adopt the liberal approach of the court in *M.T.*²⁹⁵ Thus, the *Ulane* court's narrow plain meaning approach to defining the word sex may prompt future courts to discard *M. T.* and conclude that the traditional notion that sex is based on one's chromosomes and sex designation at birth should be utilized to preclude transsexual marriages.²⁹⁶

Likewise, courts may rely upon the *Ulane* court's finding that Title VII should not protect transsexuals absent specific legislative intent. For example, numerous states lack statutes that specifically allow postoperative transsexuals to change the sex designations on their birth certificates.²⁹⁷ Therefore, based on *Ulane*, courts in those states could conclude that such changes cannot be made absent clear legislative intent.²⁹⁸ Thus, *Ulane* could spark a new trend among courts to narrowly interpret laws that effect transsexuals.²⁹⁹

293. See *supra* note 166 and accompanying text.

294. The *Ulane* court stated that it was denying Title VII protection to transsexuals for the same reasons that it would deny Title VII protection to homosexuals and transvestites. See *supra* note 168 and accompanying text. To the contrary, courts have denied Title VII protection to homosexuals based on the reasons asserted by courts that denied Title VII protection to transsexuals. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (citing *Holloway v. Arthur Andersen and Co.*, 566 F.2d 659 (9th Cir. 1977)).

295. See *supra* notes 93-102 and accompanying text.

296. Although the court of appeals in *Ulane* did not specifically determine that sex is based solely on one's chromosomes, the court's holding may encourage other courts to determine sex based on their perceptions of its plain meaning. Thus, courts may rely on cases prior to *M.T.* that ruled that the plain meaning of sex is to be determined by one's chromosomes and sex at birth. See *supra* notes 97-100 and accompanying text. In any event, the court of appeals' decision in *Ulane* signals a departure from *M.T.*'s liberal holding.

297. For a list of states that specifically allow postoperative transsexuals to change the sex designations on their birth certificates, see *supra* note 90.

298. But see *supra* note 90 (the State of New York has allowed such changes absent specific legislative intent).

299. Nevertheless, it appears that the holding by the court of appeals in *Ulane* will have no effect on postoperative transsexuals seeking name changes, because such changes are routinely granted. See *supra* note 88 and accompanying text. Likewise, the *Ulane* decision should not effect the payment of medicaid for sex reassignment surgery, because such payment is conditioned on the medical necessity of such surgery, which was not considered by the court of appeals in *Ulane*. See *supra* notes 78-87 and accompanying text. In addition, the *Ulane* holding should not affect the criminal liability of preoperative transsexuals who violate cross-dressing statutes because the *Ulane* case did not deal with the propriety of cross-dressing by preoperative transsexuals. See *supra* notes 74-77 and accompanying text.

CONCLUSION

In *Ulane*, the Court of Appeals for the Seventh Circuit rejected the argument that Title VII protects postoperative transsexuals. The court's reasoning applies with equal weight to deny Title VII protection to preoperative transsexuals, homosexuals, and transvestites. The court's analysis, however, ignores the remedial purposes of Title VII and rejects medical testimony and medical evidence to determine the meaning of transsexualism and the word sex. Therefore, transsexuals are precluded from seeking judicial relief from employment discrimination.³⁰⁰ In addition, transsexuals are extremely unlikely to receive such relief from Congress. As a result, *Ulane* permits employers to discriminate against transsexuals without fear of violating federal statutory law.

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300. Cf. Comment, *Transsexualism*, *supra* note 27, at 1008-09 ("Future judicial response [to transsexualism] hopefully will be liberal and understanding. The guidepost of legal decision-making in this area should always be what is in the best interests of the transsexual, for those interests and the interests of society are not in conflict."); Wein & Remmers, *supra* note 42, at 1106 ("Because of the stigma attached to this small, powerless minority, the judiciary should be more sympathetic to the transsexual's employment discrimination claim.")