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### Transsexual Discrimination: Discrimination "Because of...Sex"

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# **TRANSSEXUAL DISCRIMINATION: DISCRIMINATION “BECAUSE OF . . . SEX”**

## **INTRODUCTION**

In 1964, Congress enacted important civil rights legislation protecting individuals from discrimination in the workplace for reasons unrelated to employee skill and ability. At that time, it adopted the Civil Rights Act of 1964.<sup>1</sup> Although the Civil Rights Act of 1964 covered those bases of discrimination that were of most concern to Congress at that time, it fell far short of covering all types of discrimination in the workplace. Thus, Congress adopted the Age Discrimination in Employment Act (ADEA) and in 1991, the Americans with Disabilities Act (ADA).<sup>2</sup> However, none of these statutes protect employees from discrimination on the basis of sexual orientation or gender identity.<sup>3</sup> This paper will focus on the limited legal protections available to transsexuals,<sup>4</sup> including those suffering from a diagnosable disorder known as gender identity disorder (GID),<sup>5</sup> discriminated against in employment.

As more and more transsexual individuals are diagnosed with GID and as those individuals disclose their condition in the workplace, reported cases of discrimination against this population has increased. It is estimated that there are somewhere from 700,000 to 3 million

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<sup>1</sup> 42 U.S.C. §§2000e-2000e-17 (2000).

<sup>2</sup> Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (2000); Americans with Disabilities Act, 42 U.S.C. §§12101-12213 (2000).

<sup>3</sup> Although this author believes strongly that individuals must be protected from discrimination on the basis of sexual orientation, this paper will not address this topic. It is of some importance that the United States House of Representatives recently made great gains in prohibiting discrimination on the basis of sexual orientation when it adopted H.R. 3685, the Employment Non-Discrimination Act. The legislation is currently awaiting action by the United States Senate.

<sup>4</sup> “Transsexual” is a term used to refer to a person who has changed, or is in the process of changing, his or her physical sex to conform to his or her internal sense of gender identity. The term can also be used to describe people who, without undergoing medical treatment, identify and live their lives full-time as a member of the gender different from their designated sex at birth. Samir Luther, *Transgender Inclusion in the Workplace*, 2 (2d Ed., Human Rights Campaign Found. 2008).

<sup>5</sup> “Gender Identity Disorder” is a mental disorder listed in the “Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition” published by the American Psychiatric Association, and refers to transsexuals who experience discomfort from the strong internal sense that their true gender identity does not match their physical sex. Samir Luther, *Transgender Inclusion in the Workplace*, 2 (2d Ed., Human Rights Campaign Found. 2008).

transgender individuals in the United States.<sup>6</sup> Numerous studies have demonstrated that throughout the nation, transgender individuals are subjected to repeated and reprehensible harassment and discrimination in the workplace. Specifically, anywhere from 20% to 57% of transgender individuals report experiencing some form of employment discrimination, revealing discrimination aimed at this population is a “serious problem” in the United States.<sup>7</sup> Because transgender individuals are not protected from discrimination, they frequently suffer from poverty, unemployment, unaffordable health care and often suicide.<sup>8</sup>

As victims of discrimination, transgender employees are seeking protection from their employers and state and federal courts. Unfortunately, what these plaintiffs are discovering is difficult to comprehend in a country which prides itself on being the land of opportunity; where citizens are promised “economic success . . . [to] anybody . . . willing to play by the rules and work hard.”<sup>9</sup> Transsexuals quickly learn that the door to opportunity is not only not open to them, but if they somehow get through the door; they will most likely not be protected by either state or federal law, if their employers find their mere presence in the workplace disturbing.

However, the legal landscape is not completely devoid of protections for transsexuals. An increasing number of corporations have determined that protecting their transgender employees from discrimination is not only in the employee’s interest but in the employer’s

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<sup>6</sup> *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. 1 (2008) (statement of Rep. Rob Andrews, Chairman).

<sup>7</sup> *The Employment Non-Discrimination Act of 2007: Hearings on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. 44-49 (2007) (statement of Lee Badgett, Assoc. Professor of Economics, Univ. of Mass. and Research Director, Institute for Gay and Lesbian Strategic Studies). See also *Employment Non-Discrimination Act of 2007: Hearing on H.R. 3685 Before the H. Comm. of the Whole*, 110th Cong. H13231 (2007) (statement of Rep. Woolsey, declaring that 50% of transgender individuals “have reported employment discrimination at some point in their lives.”).

<sup>8</sup> *The Employment Non-Discrimination Act of 2007: Hearings on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. 44-49 (2007) (statement of Lee Badgett, Assoc. Professor of Economics, Univ. of Mass. and Research Director, Institute for Gay and Lesbian Strategic Studies).

<sup>9</sup> *Employment Non-Discrimination Act of 2007: Hearing on H.R. 3685 Before the H. Comm. of the Whole*, 110th Cong. H13231 (2007) (statement of Rep. Deborah Pryce).

economic interest. Currently, 300 major businesses ban discrimination based on gender identity and expression including The Dow Company which has concluded that protecting these employees is of “critical and economic business importance.”<sup>10</sup> Companies such as Dow recognize that adoption of anti-discrimination policies allow it to be competitive in the global economy by allowing it to hire “the best employees, with the greatest range of perspectives.”<sup>11</sup>

Although employers increasingly recognize the importance of protecting transsexual employees from discrimination, only twelve states and the District of Columbia have enacted statutes protecting transsexual individuals from discrimination in employment.<sup>12</sup> Additionally, ninety-eight cities and counties throughout the nation prohibit employment discrimination based on gender identity.<sup>13</sup> Despite the increasing number of employers, states, cities, and counties prohibiting discrimination based on gender identity in the workplace, only 17% of the American work force is covered by employer discrimination policies<sup>14</sup> and only 39% live in jurisdictions banning discrimination based on gender identity.<sup>15</sup>

However, adopting legislation in the states or amending Title VII to provide protection for transgender individuals is not necessary to protect this class of individuals from discrimination. Despite judicial decisions in the 1970’s and 1980’s refusing to extend Title VII

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<sup>10</sup> *An Examination of Discrimination Against Transgender Americans in the Workplac: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. 1 (2008) (statement of Bill Hendrix, Global Leader, The Dow Chemical Company).

<sup>11</sup> *Id.*

<sup>12</sup> Samir Luther, *Human Rights Campaign: Transgender Inclusion in the Workplace*, 11 (2d Ed., 2008) (the following states prohibit discrimination against transgender employees: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington).

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *The Employment Non-Discrimination Act of 2007: Hearings on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. 44-49 (2007) (statement of Lee Badgett, Assoc. Professor of Economics, Univ. of Mass. and Research Director, Institute for Gay and Lesbian Strategic Studies).

<sup>15</sup> *An Examination of Discrimination Against Transgender Americans in the Workplac: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. of Education and Labor*, 110th Cong. (2008) (statement of Rep. Tammy Baldwin).

protections to transsexuals,<sup>16</sup> later Supreme Court decisions<sup>17</sup> broadened the scope of Title VII, allowing federal courts increasingly to protect transsexuals from discrimination under Title VII where the plaintiff establishes facts demonstrating she was discriminated against for failing to conform to gender stereotypes. Thus, this paper will argue that Title VII protects transsexuals from discrimination in employment even absent evidence of discrimination based on gender non-conforming behavior. As recently decided in *Schroer v. Billington*, transsexuals are protected from discrimination based on Title VII's requirement that discrimination occurs "because of . . . sex."<sup>18</sup>

This paper will evaluate the following topics in reaching the conclusion that Title VII, as currently written, protects transsexuals from discrimination in the workplace: (I) early interpretation of Title VII's prohibition of discrimination based on "sex," including legislative history and judicial decisions involving transsexual plaintiffs; (II) Supreme Court decisions broadening the definition of "sex" and therefore, expanding the scope of Title VII; (III) overview of appellate court, district court, and state court decisions involving transgender plaintiffs in the wake of the Supreme Court's *Price Waterhouse v. Hopkins*, and *Oncale v. Sundowner* decisions; and (IV) concluding that Title VII's requirement that discrimination be "because of . . . sex," includes transsexual discrimination.

## **I. Title VII and Early Decisions and the Definition of "Sex."**

Title VII, enacted in 1964, establishes:

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<sup>16</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), *overruled by* *Schwenk v. Hartford*, 204 F.3d 1187, 1201; *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

<sup>17</sup> *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (establishing discrimination on the basis of sex includes discrimination targeted at employees who fail to conform to gender stereotypes of how women and men should behave); *Oncale v. Sundowner*, 523 U.S. 75 (1998) (establishing that discrimination based on sex may include same-sex discrimination and harassment).

<sup>18</sup> *Schroer v. Billington*, No. 05-1090, 2008 WL 4287388 (D.D.C. Sept. 19, 2008).

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>19</sup>

The intent of the statute is to “drive employers to focus on qualifications rather than on race, religion, sex, or national origin,” and therefore ignore these characteristics when making employment decisions.<sup>20</sup> Although the legislative history reveals the intent of the statute, it fails to provide any insight into what exactly Congress meant when it hastily included the term “sex” as one of the prohibited classifications.<sup>21</sup> Congress not only failed to include a definition for the term within the statute, it also failed to discuss, in either committee hearings or floor debate, the term's meaning. Thus, courts have been left to interpret what is meant not only of the term “sex” and the statutory requirement that discrimination occur, “because of . . . sex.”

In the years following enactment of Title VII, courts interpreted “sex” based on its plain meaning. The plain meaning of “sex” is straightforward: biological male or biological female. Therefore, the only basis of sex discrimination must have related to the individual's biological sex and the individual's anatomical makeup corresponding to the biological sex. This early interpretation is not surprising in light of the statute's focus on discrimination against women. At that time, Congress never could have contemplated the complex discrimination arising in later years. However, this narrow interpretation made it impossible for a transsexual plaintiff alleging employment discrimination based on sex to establish a cognizable claim under Title VII.

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<sup>19</sup> 42 USC §2000e-2(a)(1) (2000).

<sup>20</sup> *Price Waterhouse*, 490 U.S. at 243.

<sup>21</sup> *See Holloway*, 566 F.2d at 662 (discussing limited legislative history on the sex amendment to Title VII).

One of the earliest decisions in the appellate courts involving a transsexual plaintiff was decided by the Eighth Circuit in 1982.<sup>22</sup> In *Sommers v. Budget Marketing, Inc.*, a male-to-female transsexual was hired by the employer on April 22 and fired two days later on April 24, when the employer accused the plaintiff of misrepresenting herself as female. Although the plaintiff's amended complaint alleged a violation of Title VII because she was a female with the anatomical parts of a male, the Court refused to interpret "sex" to include such a plaintiff. Rather, concluding that the "major thrust" of including "sex" in Title VII was to provide equal protection for women in the workplace, the court stated it "does not believe that Congress intended by its laws prohibiting sex discrimination to require courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual."<sup>23</sup> It reached this conclusion by noting that Congress did not intend to protect transsexuals from discrimination, as evidenced by its repeated failed efforts to amend Title VII to prohibit discrimination based on sexual orientation. Similar to many of the earlier decisions interpreting Title VII and whether it protected transgender employees from discrimination, the Eighth Circuit overreached when it attempted to draw conclusions from Congress's inaction on sexual orientation.<sup>24</sup>

The rationale in *Sommers* was repeated in other circuits interpreting sex by its plain meaning, resulting in adverse rulings for transsexual plaintiffs. In the oft-cited case of *Ulane v. Eastern Airlines*, the lower court, after much analysis attempted to broaden sex beyond its plain meaning.<sup>25</sup> In a sign of progressive thinking on the meaning of sex, district court Judge Grady

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<sup>22</sup> *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

<sup>23</sup> *Sommers*, 667 F.2d at 749, 750.

<sup>24</sup> Congress's failed attempts to amend Title VII to prohibit discrimination based on sexual orientation and the relationship to transsexuals is discussed in Part IV, *infra*.

<sup>25</sup> *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 824 (N.D.Ill. 1984), *rev'd*, *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

noted that Title VII, as a remedial statute, must be liberally construed and went on to discuss the relationship between sex and gender.<sup>26</sup> Recognizing the complicated nature of defining the meaning of “sex,” he emphatically stated that “‘sex’ as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.”<sup>27</sup>

However, the Seventh Circuit was not prepared to follow Judge Grady’s analysis regarding Title VII. Although it paid deference to the conflict within the scientific community regarding the exact meaning of “sex,” i.e. either simply biologically male or biologically female; or encompassing individual’s psychological sex or assumed sex role, the Seventh Circuit adhered to the plain meaning rule of statutory construction.<sup>28</sup> In so doing, the court did not distinguish between homosexuals, transvestites or transsexuals. Instead, it simply stated that Title VII’s prohibition of discrimination based on sex encompasses only discrimination “against women because they are women and against men because they are men.”<sup>29</sup> The Seventh Circuit justified this position by pointing to the lack of legislative history when the Civil Rights Act of 1964 was adopted.<sup>30</sup> Additionally, similar to the Eighth Circuit in *Sommers*, the Seventh Circuit supported its interpretation of the meaning of sex by pointing to Congress’s repeated failure to amend Title VII to prohibit discrimination on the basis of sexual orientation.<sup>31</sup>

Although the reasoning in *Ulane* seems somewhat strained in today’s world, many jurisdictions followed its reasoning and reached similar conclusions when transsexual plaintiffs alleged discrimination in the workplace. These jurisdictions dismissed these complaints either

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<sup>26</sup> *Ulane*, 581 F. Supp. at 824.

<sup>27</sup> *Ulane*, 581 F.Supp. at 825.

<sup>28</sup> *Ulane*, 742 F.2d at 1083, fn.6, 1085.

<sup>29</sup> *Ulane*, 742 F.2d at 1085.

<sup>30</sup> *Ulane*, 742 F.2d at 1085.

<sup>31</sup> *Ulane*, 742 F.2d at 1086; *Sommers*, 667 F.2d at 750.

on motions to dismiss or motions of summary judgment, in favor of the employer. Even today, courts cite *Ulane*'s plain meaning rationale to support adverse rulings for transsexual plaintiffs alleging sex discrimination despite recent decisions by the Supreme Court raising significant questions regarding this rationale.<sup>32</sup>

Even before *Ulane* and *Sommers*, the Ninth Circuit upheld an employer's motion to dismiss a transsexual plaintiff's Title VII claim of sex discrimination, where it concluded that the plaintiff could not state a claim of sex discrimination under Title VII.<sup>33</sup> In *Holloway*, the plaintiff was discharged after informing her employer of her decision to undergo gender reassignment surgery. As stated by the Ninth Circuit, the issue was whether an employer could discharge an employee from employment for initiating the process for sex transformation without violating Title VII.<sup>34</sup>

The plaintiff unsuccessfully argued that within the definition of "sex" is the concept of "gender" which includes transsexuals.<sup>35</sup> Not surprisingly, the Ninth Circuit followed the employer's argument that "sex" refers to "traditional notions" of sex and, thus, refers to anatomical characteristics.<sup>36</sup> Again, supporting its position, the court pointed to the lack of legislative history on the sex amendment but stated that the purpose of Title VII was to "place women on an equal footing with men."<sup>37</sup>

Interestingly, the Ninth Circuit did not completely close the door for transsexual plaintiffs claiming discrimination in the workplace. In dicta, the court left open the possibility that a transsexual plaintiff may be able to state a valid claim of discrimination based on sex stating,

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<sup>32</sup> See *Etsitty v. Utah Transportation Authority*, 502 F.3d 1215 (10th Cir. 2007).

<sup>33</sup> *Holloway v. Arthur Anderson*, 566 F.2d 659 (9th Cir. 1977).

<sup>34</sup> *Holloway*, 566 F.2d at 661.

<sup>35</sup> *Holloway*, 566 F.2d at 662.

<sup>36</sup> *Holloway*, 566 F.2d at 662.

<sup>37</sup> *Holloway*, 566 F.2d at 662.

“transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.”<sup>38</sup> In this regard, the Ninth Circuit went a little further in protecting transsexuals from workplace discrimination than either the *Ulane* or *Sommers*, which prohibited a transsexual from claiming discrimination because Congress did not intend to protect transsexuals within Title VII’s ambit.

After *Ulane*, *Sommers*, and *Holloway*, the possibility of a transsexual plaintiff stating a valid Title VII claim of discrimination based on sex was virtually impossible. After all, these plaintiffs were unable to demonstrate that the discrimination they faced was based on their anatomical sex. Fortunately, the Supreme Court rejected this narrow interpretation of sex, thus providing a slightly greater opportunity for a transsexual to establish a valid Title VII claim.

## **II. Broadening the Meaning of “Sex”: *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner*.**

Throughout the 1980’s and 1990’s, the Supreme Court made significant progress in defining Title VII’s prohibition of workplace discrimination based on one’s sex, despite the lack of legislative history.<sup>39</sup> Of significance for transsexual plaintiffs are the decisions of *Price Waterhouse* and *Oncale*. Although neither decision holds that “sex” includes the transsexual plaintiff, both decisions bring into doubt the validity of the plain meaning interpretation of “sex,” contained in *Ulane* and its progeny.

In *Price Waterhouse*, the Court was confronted with a claim of sex-based discrimination arising from unique facts.<sup>40</sup> The plaintiff, Ann Hopkins, was an employee for Price Waterhouse and a candidate for partnership in the national accounting firm. As part of the process for

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<sup>38</sup> *Holloway*, 566 F.2d at 664.

<sup>39</sup> *Meritor v. Vinson*, 477 U.S. 57 (1986); *Price Waterhouse*, 490 U.S. 228 (1989); *Harris v. Forklift*, 510 U.S. 17 (1993); *Oncale*, 523 U.S. 75 (1998).

<sup>40</sup> *Price Waterhouse*, 490 U.S. at 232-235.

evaluating candidates for partner, the employer's current partners were invited to make comments on the evaluations. While receiving significant praise, Hopkins also received the following negative comments: she was "overly aggressive, unduly harsh"; "macho"; "she 'overcompensated for being a women'"; she needed to "take a course at charm school"; partners objected to Hopkins use of foul language "because it's a lady using foul language"; and most alarmingly, one partner stated that Hopkins "should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her styled, and wear jewelry.'" <sup>41</sup> Despite above-average performance evaluations, Hopkins was denied partnership and placed on "reconsideration" status, meaning she would be reevaluated. Prior to the reconsideration period, Hopkins was informed that she would not be reconsidered and as a result, she resigned. <sup>42</sup> Subsequently, Hopkins filed a Title VII claim alleging discrimination on the basis of sex.

Among other issues, the Court evaluated whether the evidence demonstrated that Hopkins was discriminated against because of her sex. As noted in Part I, *supra*, the lower courts were interpreting sex by its plain meaning and under this interpretation Hopkins could not establish a successful sex discrimination claim. After all, there was no evidence demonstrating that Hopkins was discriminated against because she was a woman. In fact, there were seven female partners at the firm. <sup>43</sup> Rather, the presence of the evaluators' comments raised the specter that Hopkins was denied partnership because she was a woman who failed to act like a woman, not simply because she was biologically female. For Hopkins to be successful, the Court needed broaden the meaning of sex, as interpreted under Title VII, and in fact did so by holding, in part, that Hopkins was discriminated on the basis of sex.

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<sup>41</sup> *Price Waterhouse*, 490 U.S. at 234-235.

<sup>42</sup> *Price Waterhouse*, 490 U.S. at 233, fn. 1.

<sup>43</sup> *Price Waterhouse*, 490 U.S. at 233.

In reaching its conclusion, the Court first evaluated the legislative history of Title VII, emphasizing the statute was intended to focus employers on an applicant's or employee's qualifications for a particular position rather than their race, religion, color, national origin, or sex.<sup>44</sup> Rather than drawing a narrow interpretation of the meaning of "sex," the Court went beyond the basic notion that Title VII prohibits discrimination "against women because they are women and against men because they are men."<sup>45</sup> According to the Court, within the meaning of "sex," Title VII prohibits discrimination against women who do not behave or dress like women and men who do not behave or dress like men.<sup>46</sup>

The Supreme Court held that within Title VII's prohibition of "discrimination . . . because of . . . sex," the statute prohibits discrimination based on sex stereotyping. It stated, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>47</sup> Moreover, in its rejection of the Employer's argument that sex stereotyping lacked legal relevance, the Court stated:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>48</sup>

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<sup>44</sup> *Price Waterhouse*, 490 U.S. at 242-44.

<sup>45</sup> *Ulane*, 742 F.2d at 1085.

<sup>46</sup> *Price Waterhouse*, 490 U.S. at 250-51.

<sup>47</sup> *Price Waterhouse*, 490 U.S. at 250.

<sup>48</sup> *Price Waterhouse*, 490 U.S. at 251, *quoting* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978), *quoting* Sprogix v. United Air Lines, Inc., 444 F.2d 1994 (7th Cir. 1971).

After *Price Waterhouse*, the Court continued to expand the scope of Title VII, by prohibiting forms of sex discrimination unforeseen when the statute was adopted. In *Oncale*, the Court raised further doubts about interpreting “sex” based on its plain meaning.<sup>49</sup> The issue before the Court was whether a plaintiff could raise a claim of sexual harassment against a same-sex harasser. *Oncale*, the male plaintiff worked on an offshore oil platform in the Gulf of Mexico as part of an eight-man crew. While on the rig, he was subjected to “sex-related, humiliating actions against him . . . also physically assaulted . . . in a sexual manner . . . and . . . threatened with rape.”<sup>50</sup> When his complaints to supervisory personnel went unresolved, *Oncale* quit stating that he feared “that if [he] didn’t leave [his] job, that [he] would be raped or forced to have sex.”<sup>51</sup>

In holding that Title VII protects plaintiffs subjected to harassment by same-sex harassers, Justice Scalia emphasized that Title VII must be interpreted to address discrimination that may not have been foreseeable to Congress when it adopted Title VII. Contrary to his traditional textualist bent, Scalia stated:

[although] male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>52</sup>

Despite recognizing that a cognizable claim for sexual harassment may include same-sex harassment, the Court was careful to keep the holding narrow by reiterating, true to the statutory

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<sup>49</sup> *Oncale*, 523 U.S. 75 (1998).

<sup>50</sup> *Oncale*, 523 U.S. at 77.

<sup>51</sup> *Oncale*, 523 U.S. at 77.

<sup>52</sup> *Oncale*, 523 U.S. at 79.

text, the plaintiff must be able to demonstrate that the harassment was “because of . . . sex.” In responding to the employer’s argument that prohibiting same-sex harassment raises the risk that Title VII will become a “general civility code for the workplace,” the Court stated that the risk is possible in all claims of harassment but it is “adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discriminat[ion] . . . because of . . . sex.’”<sup>53</sup> Further, the Court stated, “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”<sup>54</sup> Similarly, these statements apply equally to a transsexual plaintiff who must establish discrimination occurs “because of . . . sex.” As is the case of the same-sex plaintiff, the transsexual plaintiff will always bear the burden of demonstrating that the discrimination occurring in the workplace meets the statutory requirements and thus, “mere utterances” of a sexual nature will be insufficient for a successful Title VII claim.

When interpreted together, *Price Waterhouse* and *Oncale* indicate a willingness by the Court to move beyond addressing the “principal evils” Title VII was enacted to address. It recognizes that statutes must be interpreted to address an ever changing society, while still remaining true to a statute’s original purpose. Although *Price Waterhouse* broadens the meaning of sex, *Oncale* ensures that plaintiffs alleging discrimination maintain the burden of providing facts establishing the discrimination occurred “because of . . . sex.”

### **III. Transsexual Plaintiffs: Post-*Price Waterhouse* and *Oncale*.**

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<sup>53</sup> *Oncale*, 523 U.S. at 80.

<sup>54</sup> *Oncale*, 523 U.S. at 82.

Since the Supreme Court decided *Price Waterhouse* and *Oncale*, earlier decisions interpreting “sex” by its plain meaning arguably is no longer an acceptable rationale for preventing transsexual plaintiffs from getting into court. However, some courts stubbornly adhere to this rationale in justifying dismissal of claims against employers allegedly discriminating against transsexual applicants or employees.<sup>55</sup> Conversely, there are courts willing to broaden the definition of sex and go beyond the “principal evil” Title VII was meant to address and allow the transsexual plaintiff an opportunity to bring her claim of discrimination before the court.<sup>56</sup>

Courts willing to interpret “sex” beyond its plain meaning, permit the transsexual plaintiff to state a valid Title VII claim of discrimination based on either of the following theories: (1) a claim of sex stereotyping, whereby the transsexual plaintiff alleges she was discriminated against for failing to conform to the employer’s notion of how she should behave or look, either as a biological male or as a transsexual female; or (2) the meaning of sex encompasses gender, and as transsexuality relates to gender and gender identity, Title VII’s prohibition against discrimination “because of . . . sex” includes discrimination on the basis of transsexuality. Plaintiffs establishing a discrimination claim based on *Price Waterhouse’s* sex

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<sup>55</sup> *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007); *Oiler v. Winn-Dixie Louisiana*, No. Civ.A. 00-3114, 2002 WL 31098541 (E.D.La. Sept. 16, 2002).

<sup>56</sup> *See Myers v. Cuyahoga County*, 182 Fed.Appx. 510 (6th Cir. 2006) (unpublished) (dismissed on summary judgment because facts were not sufficient to establish claim of discrimination based on sex stereotyping theory); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Trevino v. Center for Health Care Services*, No. SA-08-CV-0140 NN, 2008 WL 4449939 (W.D. Tex. Sept. 29, 2008); *Schroer v. Billington*, No. 05-1090, 2008 WL 4287388 (D.D.C. Sept. 19, 2008); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F.Supp.2d 653 (S.D. Tex. 2008); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *See also Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (sexual orientation discrimination claim which noted that while Title VII does not prohibit discrimination based on sexual orientation, sex refers “to membership in a class delineated by gender”); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (interpreting language in Title VII and the Gender Motivated Violence Act to include the broader concept of gender in light of *Price Waterhouse*); and *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (N.Y. Sup. 2005) (interpreting similar state legislation to include transsexual in the meaning of “sex”).

stereotyping theory are more likely to be successful than a plaintiff arguing that discrimination occurred because they were transsexual.

The Sixth Circuit, in two opinions, was the first federal appellate court to expand protections of Title VII to transsexual plaintiffs stating a claim of discrimination based on sex stereotyping.<sup>57</sup> First, in *Smith v. City of Salem*, the plaintiff, while working as a lieutenant for the fire department was diagnosed with gender identity disorder. At that point, he began acting and dressing more feminine. He revealed his diagnosis to his supervisor and requested the information be kept confidential. However, the supervisor immediately informed the Chief of the Fire Department, who contacted the City's law department. The plaintiff was then required to undergo burdensome psychological evaluations with the hope that he would refuse to comply, thus providing the employer with grounds for termination. Smith filed a charge of discrimination with the EEOC, later received a right to sue letter, and four days later was suspended.<sup>58</sup>

The District Court dismissed Smith's claim of discrimination based on sex stereotyping finding that she used the sex stereotyping theory to bootstrap a claim of discrimination based on transsexuality, which is not prohibited discrimination under Title VII.<sup>59</sup> In support of its ruling, the District Court relied on pre-*Price Waterhouse* cases, including *Ulane*, *Sommers*, and *Holloway*.<sup>60</sup> The Sixth Circuit rejected the logic of those earlier decisions in light of *Price Waterhouse*, which it interpreted as establishing that, "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is,

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<sup>57</sup> *Smith v. City of Salem*, 378 F.3d 566; *Barnes v. City of Cincinnati*, 401 F.3d 729.

<sup>58</sup> *Smith*, 378 F.3d at 568-69.

<sup>59</sup> *Smith*, 378 F.3d at 571.

<sup>60</sup> *Smith*, 378 F.3d at 572-73.

discrimination based on a failure to conform to stereotypical gender norms.”<sup>61</sup> Thus, it reasoned, just as Ann Hopkins was able to establish a valid claim of discrimination where she was punished by her employer for not acting like a woman, a transsexual plaintiff can establish a valid Title VII claim of discrimination whereby the plaintiff was punished for failing to “act and/or identify with his or her gender.”<sup>62</sup> As a result, the court reversed the lower court’s dismissal of Smith’s claim.

Additionally, the Sixth Circuit took direct issue with those courts dismissing a transsexual plaintiff’s claim of discrimination simply because they are transsexual. According to the court, those jurisdictions wrongfully permit transsexual discrimination by distinguishing it from the discrimination Ann Hopkins was subjected, despite both plaintiffs being subjected to discrimination simply for not behaving as one might expect a person to behave given their biological sex. It stated that these courts permit wrongful discrimination by “superimpos[ing] classifications such as ‘transsexual’ on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.”<sup>63</sup> The Sixth Circuit concluded that both scenarios are indistinguishable and represent prohibited discrimination based on sex stereotyping, regardless of whether the plaintiff is transsexual.

In *Barnes v. City of Cincinnati*, the Sixth Circuit followed the reasoning of *Smith* when it upheld a jury verdict in favor of Barnes, a pre-operative transsexual.<sup>64</sup> Since 1981, Barnes had been employed by the City’s police department as a police officer. Although the police department did not know of Barnes’ gender identity disorder, it believed he was homosexual,

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<sup>61</sup> *Smith*, 378 F.3d at 573.

<sup>62</sup> *Smith*, 378 F.3d at 575.

<sup>63</sup> *Smith*, 378 F.3d at 574.

<sup>64</sup> *Barnes*, 401 F.3d at 733.

bisexual or a cross dresser because the City's vice squad photographed Barnes in the evening, when he frequently dressed as a woman. In 1998, he took and passed a promotional test to become a sergeant. When Barnes passed the test and was given the promotion, he was placed on probation. During that time, he was subjected to repeated evaluations which were stressful and significantly different from other probationary sergeants. Eventually, he was denied the promotion.<sup>65</sup>

Again, the Sixth Circuit reiterated its holding in *Smith*:

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.<sup>66</sup>

The reasoning in *Smith* and *Barnes* has been followed by other courts willing to include within the scope of Title VII, prohibitions of discrimination against transsexuals based on sex stereotyping.<sup>67</sup> Although courts have been willing to recognize a claim of discrimination against a transsexual plaintiff based on sex stereotyping, it has been difficult for transsexual plaintiffs to establish sufficient facts to support the theory.<sup>68</sup> This careful analysis of the facts and unwillingness to allow the transsexual plaintiff the opportunity to go to trial simply by alleging that they were discriminated against because they "did not sufficiently conform to their

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<sup>65</sup> *Barnes*, 401 F.3d at 733-35.

<sup>66</sup> *Barnes*, 401 F.3d at 737, quoting *Smith*, 378 F.3d at 575.

<sup>67</sup> See *Morales v. ATP Health & Beauty Care*, No. 3:06CV01430, 2008 WL 3845294 (D.Conn. Aug. 18, 2008); *Lopez*, 542 F.Supp.2d 653; *Mitchell v. Axcan Scandipharm Inc.*, No. 05-243, 2006 WL 986971 (W.D.Pa. March 13, 2006) *aff'g* *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 (E.D.Wash. June 23, 2005); *Tronetti*, No. 03-CV-0375E, 2003 WL 22757935 at \*4.

<sup>68</sup> See *Myers v. Cuyahoga County*, 182 Fed. Appx. at 518 (plaintiff presented no evidence demonstrating she was discriminated against based on gender non-conforming behavior).

[Employer's] expectations of what a woman should look or act like,"<sup>69</sup> ensures that Title VII will not be "transform[ed] . . . into a general civility code for the American workplace."<sup>70</sup> Like all plaintiffs alleging discrimination, the transsexual plaintiff has the burden to demonstrate that she was discriminated "because of . . . sex."

Although more courts provide transsexual plaintiffs the opportunity to state a valid claim of discrimination based on sex stereotyping, only a minority of courts have gone as far as broadening the scope of Title VII to incorporate the concept of gender.<sup>71</sup> As detailed in Part IV, *infra*, these courts recognize that the concept of sex is complex and goes beyond biological classification.

#### **IV. Transgender Discrimination is Discrimination "Because of . . . sex."**

It is not surprising that there has been a significant increase in claims of discrimination by transsexual plaintiffs given transsexuals' increased willingness to disclose their GID status. When Title VII was adopted there was no need to further clarify that the "because of . . . sex" requirement applies to transsexuals. As stated by a federal court in Louisiana:

In the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted. Thirty-eight years later, however, sexual identity

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<sup>69</sup> *Myers*, 182 Fed. Appx. at 518.

<sup>70</sup> *Oncale*, 523 U.S. at 80.

<sup>71</sup> *Schroer v. Billington*, 2008 WL 4287388 (D.D.C. 2008); *Trevino v. Center for Health Care Services*, 2008 WL 4449939 (W.D.Tex. 2008); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (interpreting sex to incorporate the concept of gender); *Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003 WL 22757935 at 4 (W.D.N.Y. 2003) (transsexuals are not gender-less and thus protected under Title VII if they are discriminated against on the basis of sex). See also, *Simonton v. Runyon*, 232 F.3d 33, 36 (2d. Cir. 2000) (determining that sexual orientation is not covered by Title VII by interpreting "sex" to include the concept of gender but not the unrelated concept of sexual activity); *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752, (N.Y.Supp. 2005) (interpreting "sex" in state human rights act with language similar to Title VII, as including transsexuals); *Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003 WL 22757935 at 4 (W.D.N.Y. 2003) (transsexuals are not gender-less and thus protected under Title VII if they are discriminated against on the basis of sex).

and sexual orientation issues are no longer buried and they are discussed in the mainstream.<sup>72</sup>

Although society is becoming more comfortable and accepting of people who do not fit within traditional notions of sex, the courts have not been quite as comfortable. Thus, the majority of courts remain unwilling to interpret “sex” as including the broader concepts of gender and gender identity. As a result, transsexuals remain unprotected by Title VII, absent sufficient facts demonstrating discrimination based on gender non-conforming behavior. However, discrimination against transsexuals is typically more straightforward: transsexuals are discriminated against simply because they are transsexuals. Until courts are willing to recognize a Title VII violation where employers discriminate against transsexuals simply for being transsexuals, there will remain a huge gap in legal protections for these workers. However, this gap need not, and should not continue, even absent an amendment to Title VII explicitly including transsexuals within the statute’s ambit. It is clear that in light of *Price Waterhouse* and *Oncale* broadening “sex,” as used in Title VII, discrimination against transsexuals is literally, discrimination “because of . . . sex.”

There is much confusion in the courts and society regarding issues of sexual preference and sexual orientation. The courts often conflate the terms and assume they are synonymous. Thus, in deciding these cases, courts must be able to properly define and distinguish the following terms: sexual orientation, homosexual,<sup>73</sup> transgender,<sup>74</sup> transsexual, and cross-

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<sup>72</sup> *Oiler*, No. 00-3114, 2002 WL 31098541 at \*4.

<sup>73</sup> See *Ulane*, 742 F.2d at 1083, fn. 3 (homosexual refers to people who are sexually attracted to persons of the same sex).

<sup>74</sup> See Samir Luther, *Transgender Inclusion in the Workplace*, 2 (2d Ed., Human Rights Campaign Found. 2008) (“Transgender” is an umbrella term encompassing people who experience and/or express their gender differently from conventional or cultural expectations—either in terms of expressing a gender that does not match the sex listed on their original birth certificate or physically altering their sex. The term includes transsexuals, cross-dressers and other gender-variant people; not all people who consider themselves or who may be considered by others as transgender will undergo a gender transition.).

dresser.<sup>75</sup> It is not necessarily the case that a transsexual is homosexual,<sup>76</sup> or that such individuals necessarily suffer from gender identity disorder. It is important that courts distinguish these terms, particularly in light of the fact that courts are nearly unanimous in concluding that Title VII does not prohibit discrimination on the basis of sexual orientation but has not reached a similar consensus with respect to transsexuals.<sup>77</sup>

The scientific and medical communities define sex as incorporating a number of components. In *Schroer*, the court denied the employer's motion to dismiss and ordered that the factual record be developed to "reflect[] the scientific basis of sexual identity in general, and gender dysphoria in particular."<sup>78</sup> In response, the parties submitted affidavits and conducted depositions of experts in the field of sexual identity.<sup>79</sup> According to the plaintiff's expert, Dr. Walter Bockting, the scientific community has accepted that sex is made up of nine factors, including gender identity.<sup>80</sup> As described by Dr. Bockting, gender identity refers to "one's personal sense of being male or female."<sup>81</sup> Conversely, the Employer's expert, Dr. Chester Schmidt, rejected the scientific community's belief that gender identity is one of the components of sex. Instead, Dr. Schmidt testified that gender identity is a component of sexuality. According to Dr. Schmidt, sex refers to only biological components.<sup>82</sup>

Although the majority of the scientific community has been able to define the scientific meaning of sex, it does not necessarily follow that the courts must interpret or follow scientific

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<sup>75</sup> See Samir Luther, *Transgender Inclusion in the Workplace*, 2 (2d Ed., Human Rights Campaign Found. 2008) ("Cross Dresser" refers to people who wear the clothing and/or accessories considered by society to correspond to the "opposite sex." Unlike transsexuals, cross-dressers typically do not seek to change their physical characteristics and/or manner of expression permanently or desire to live full-time as a gender different than their birth sex).

<sup>76</sup> Samir Luther, *Transgender Inclusion in the Workplace*, 2 (2d Ed., Human Rights Campaign Found. 2008)(noting that "Gender identity and sexual orientation are not the same").

<sup>77</sup> See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000).

<sup>78</sup> *Schroer*, 424 F.Supp.2d at 213.

<sup>79</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \* 11.

<sup>80</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*11.

<sup>81</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*11.

<sup>82</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*11.

interpretations of words in order to interpret a word's legal meaning. Thus, the court in *Schroer*, while requiring such evidence in the record, determined that interpreting and weighing the significance of such evidence is not within the court's competence.<sup>83</sup> Moreover, it determined that such evidence was not necessary in assessing whether sex incorporates gender identity for purposes of Title VII.

According to *Schroer*, it is not necessary to go beyond the plain meaning of sex to conclude that discrimination against transsexuals is prohibited by Title VII.<sup>84</sup> After all, “[t]ranssexuals are not gender-less, they are either male or female and are thus protected under Title VII . . . .”<sup>85</sup> Contrary to the assertion by courts interpreting sex to mean biological sex, *Schroer* asserts that these courts improperly use “‘judge-supposed legislative intent,’” and “allow their focus on the label of ‘transsexual’ to blind them to the statutory language itself.”<sup>86</sup> Thus, just as Title VII is violated when an employer discriminates against someone who has chosen to change their religion, it is also the case that Title VII is violated when someone chooses to change their sex.<sup>87</sup> It strains the plain meaning of the statute to interpret it otherwise.

Additionally, courts interpreting the meaning of “sex” under other discrimination statutes have interpreted the term to include transsexuals within the statutes’ coverage. Most notably, the Ninth Circuit, in reversing its early decision in *Holloway*, interpreted “gender” in the Gender Motivated Violence Act (GMVA).<sup>88</sup> In *Schwenk*, a transsexual inmate was sexually assaulted by a prison guard. The inmate filed a claim under the GMVA. The court analyzed whether the

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<sup>83</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*11.

<sup>84</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*12.

<sup>85</sup> *Tronetti*, No. 03-CV-0375E, 2003 WL 22757935 at \*4. *See also*, *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (N.Y.Sup., 2005).

<sup>86</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*12, *quoting* *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S.Ct. 1534, 1551 (2007) (Scalia, J., dissenting).

<sup>87</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*12.

<sup>88</sup> Gender Motivated Violence Act, 42 USC §13981(c), *invalidated by* *U.S. v. Morrison*, 529 U.S. 598 (2000). *See* *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

plaintiff could demonstrate that the assault was gender motivated where both the accused and the plaintiff were anatomically male. In concluding that the plaintiff satisfied the statute's requirement that the attack be gender motivated, the court equated that statute's requirement with Title VII's requirement that discrimination occur "because of . . . sex."<sup>89</sup> The Ninth Circuit rejected pre-*Price Waterhouse* decisions narrowly interpreting sex and excluding transsexual plaintiffs such as Schwenk from protection under both the GMVA and Title VII. Rather, it interpreted *Price Waterhouse* as expanding the definition of sex to include the broader concept of gender.<sup>90</sup> Noting that the GMVA was drafted after *Price Waterhouse*, the court stated:

We may presume that Congress, in drafting the GMVA, was aware of the interpretation given by the pre-*Price Waterhouse* federal courts to the terms 'sex' and 'gender' under Title VII and acted intentionally to incorporate the broader concept of 'gender.'<sup>91</sup>

Similarly, the First Circuit interpreted the Equal Credit Opportunity Act (ECOA) which prohibits a creditor from discriminating against an applicant, "with respect to any aspect of a credit transaction" on the basis of sex.<sup>92</sup> In *Park*, a biological male dressed as a female requested a loan application from the bank. A bank employee refused plaintiff, Rosa, the application after requesting three forms of identification indicating that Rosa was male. The employee told Rosa that he would need to go home and change his clothing so that he resembled the individual on one of the identification cards. Rosa argued that the bank's requirement that he change his clothing to conform to male gender identity was prohibited discrimination under the statute on the basis of sex. The court agreed that such discrimination was prohibited by the statute and denied the employer's motion to dismiss.

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<sup>89</sup> *Schwenk*, 204 F.3d at 1202 (stating that both statutes prohibit discrimination based on both gender and sex.)

<sup>90</sup> *Schwenk*, 204 F.3d at 1202, fn. 12.

<sup>91</sup> *Schwenk*, 204 F.3d at 1202, fn. 12.

<sup>92</sup>Equal Credit Opportunity Act, 15 USC §1691 *et seq.* See *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st. Cir. 2000).

Additionally, a federal court in New York determined that language in Title IX of the Education Amendments of 1972, which is similar to Title VII, prohibits sex discrimination where the plaintiff is transsexual.<sup>93</sup> Like Title VII, Title IX of the Education Amendments of 1972 provides the following: “No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>94</sup>

In *Miles*, the plaintiff was a male-to-female transsexual who was sexually harassed by her professor. At the time of the harassment, neither the professor nor the University was aware of Miles’ transsexual status. Despite the plaintiff’s reports to the University regarding the professor’s conduct, no action was taken against him despite a history of engaging in similar conduct toward other students. Miles brought a claim of discrimination under Title IX. In response, the University and the professor argued that Title IX did not protect transsexuals from discrimination. In denying the Employer’s motion for summary judgment, the district court rejected this argument and instead concluded that conduct toward Miles, despite her transsexual status, satisfied the statute’s requirement that unlawful discrimination occur “on the basis of . . . sex.” Moreover, the district court interpreted Title IX’s prohibition against discrimination “on the basis of . . . sex” in the same manner of Title VII’s prohibition against discrimination “because of . . . sex.”<sup>95</sup>

Finally, in a brief decision, a New York state court interpreted the New York State’s Human Rights Laws which contains parallel language to Title VII.<sup>96</sup> The transsexual plaintiff alleged sex discrimination. In its denial of the employer’s motion to dismiss, the court affirmed

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<sup>93</sup> See *Miles v. New York Univ.*, 979 F.Supp. 248 (S.D.N.Y. 1997).

<sup>94</sup> 20 USC §1681(a) (2000).

<sup>95</sup> *Miles*, 979 F.Supp. at 250, fn. 4.

<sup>96</sup> New York State Human Rights Laws, Executive Law §296(1)(a). See *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (N.Y.Sup. 2005).

earlier decisions concluding that “sex” within the state Human Rights Laws includes transsexuals, reasoning that “[t]ransgendered persons are either male or female.”<sup>97</sup> It stated, “[c]ase law supports the view that a transgendered person states a claim pursuant to New York State’s Human Rights Law on the ground that the word ‘sex’ in the statute covers transsexuals.”<sup>98</sup>

Although none of these statutes explicitly define “sex,” a transsexual plaintiff in a Title VII claim of discrimination may reasonably rely on various court interpretations of similar language under other statutes. When analyzing decisions of discrimination based on violations of these statutes, along with Ninth Circuit’s interpretation of Gender Motivated Violence Act, it demonstrates a willingness by some courts to recognize sex as encompassing more than simply biology and include the broader concept of gender.

Most of the courts refusing to extend Title VII protection to transsexuals emphasize that Congress can protect transsexuals from discrimination by amending Title VII explicitly to include transsexuals as a protected class. Clearly, these courts reason, Congress’s inaction on this issue demonstrates an unwillingness to include protection for transsexuals. These courts provide numerous cites to the Congressional Record where Congress failed to amend Title VII to include protection from discrimination based on sexual orientation.<sup>99</sup> However, as the Supreme Court stated, “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing

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<sup>97</sup> *Buffong*, 824 N.Y.S.2d at 752. *See also* *Rentos v. OCE-Office Systems*, No. 95-CIV-7908, 1996 WL 737215 \*4 (transsexual plaintiff was able to demonstrate she was a member of a protected class defined as transgendered female and thus state a claim of discrimination under the New York State Human Rights Laws).

<sup>98</sup> *Buffong*, 824 N.Y.S.2d at 752.

<sup>99</sup> *See Oiler v. Winn-Dixie La.*, No. --03114, 2002 WL 31098541 at \*4, n. 53 (listing proposed legislation to amend Title VII to include discrimination based on sexual orientation).

legislation already incorporated the offered change.”<sup>100</sup> Not only is it improper to draw any conclusions of Congressional intent from its inaction, “the failure of numerous attempts to broaden Title VII to cover sexual orientation says nothing about Title VII’s relationship to sexual identity, a distinct concept that is applicable to homosexuals and heterosexuals alike.”<sup>101</sup>

Opponents may also point to Congress’s recent failure to pass the Employment Non-Discrimination Act (ENDA).<sup>102</sup> Congress introduced two pieces of similar legislation which would have extended protection from discrimination in employment based on sexual orientation and gender identity. However, H.R. 3685, which was approved by the House of Representatives but not acted upon by the Senate excluded protection for transsexuals. Again, opponents will argue that had Congress wanted to extend Title VII protection to transsexuals it would have approved H.R. 2015, the legislation which included a prohibition of discrimination based on gender identity. Conversely, an equally tenable interpretation is that the omission of transsexuals from the legislation indicates that Congress properly interpreted *Price Waterhouse* as broadening the meaning of sex and thus, it believes that “Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation.”<sup>103</sup>

Furthermore, statutory construction assumes that Congress has the requisite expertise to properly draft statutes and thus, if it intended to exclude transsexuals from Title VII it certainly has the knowledge to draft such an exclusion. For example, in both the Americans with Disabilities Act (ADA)<sup>104</sup> and the Rehabilitation Act,<sup>105</sup> Congress excluded from the statutes’

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<sup>100</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*13, quoting *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

<sup>101</sup> *Schroer*, 424 F.Supp.2d at 212.

<sup>102</sup> Employment Non-Discrimination Act, H.R. 2015, 110th Cong. (2008) (included sexual orientation and gender identity discrimination); Employment Non-Discrimination Act, H.R. 3686, 110th Cong. (2008) (prohibited discrimination based on sexual orientation but not gender identity).

<sup>103</sup> *Schroer*, No. 05-1090, 2008 WL 4287388 at \*13.

<sup>104</sup> Americans with Disabilities Act, 42 USC §12208, 12211(b)(1).

<sup>105</sup> Federal Rehabilitation Act, 29 USC §705(20)(F)(i).

protection disabilities related to gender identity disorders or “because that individual is a transvestite.” Thus, Congress’s refusal to amend Title VII to explicitly exclude transsexuals may demonstrate that it is not prepared to eliminate a class of citizens from Title VII’s protection. Further, contrary to a recent scholarly article,<sup>106</sup> Congress’s exclusion of transvestites from the ADA and Rehabilitation Act does not demonstrate that Congress generally believes that transsexuals, as a class, are to be universally excluded from statutes protecting Americans from various civil rights violations, including Title VII. In fact, courts do not hold that transsexuals as a class cannot bring valid ADA claims; rather, courts conclude that conditions such as gender identity disorder do not fall within the statute’s definition of “disability.”<sup>107</sup>

Finally, it must be acknowledged that although discrimination against transsexuals is literally discrimination “because of . . . sex” and thus, prohibited by Title VII, many federal courts will continue interpret the meaning of “sex” narrowly. These courts will continue to hold that Title VII was not adopted to prevent discrimination against transsexuals and it will not interpret Title VII to prohibit such discrimination. They will not strain to interpret sex beyond biological differences between men and women and will continue to assert that such inclusion is a “broad sweeping of the untraditional and unusual within the term ‘sex.’”<sup>108</sup> Thus, believing that “[o]nly Congress can consider all the ramifications to society of such a broad view,”<sup>109</sup> the courts will not broadly interpret Title VII without an amendment explicitly including transsexuals as a protected class. As a result, the transsexual plaintiff will be in the position of

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<sup>106</sup> James G. O’Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DePaul L. Rev. 1101, 1105 (2007).

<sup>107</sup> See *Myers v. Cuyahoga County*, 182 Fed. Appx. 510 (plaintiff was unable to state a valid ADA claim by arguing that she suffered a disability as a result of her adjustment disorder); *Kastl v. Maricopa County Community College*, No. 02-1531PHX-SRB, 2004 WL 20089854 (D.Ariz. June 3, 2004) (ADA claim dismissed where transsexualism and “gender identity disorders not resulting from physical impairments” excluded from statute’s definition of disability).

<sup>108</sup> *Oiler*, No. 00-3114, 2002 WL 31098541 at \*6.

<sup>109</sup> *Oiler*, No. 00-3114, 2002 WL 31098541 at \*6.

hoping for a judge who understands that in light of *Price Waterhouse* and *Oncale*, sex incorporates gender and consequently, transsexual discrimination is discrimination “because of . . . sex.” This presents an unfortunate situation for transsexuals subjected to discrimination. Thus, it may be more efficient for the transsexual community to continue its efforts to amend Title VII until it is confident that transsexual discrimination is interpreted throughout the legal community as literally discrimination “because of . . . sex.”

## V. CONCLUSION

The transsexual community has reason to feel optimistic regarding their standing in the American workplace. As society becomes increasingly open to individuals who fail to adhere societal norms and traditions, transsexuals, homosexuals, cross-dressers, and transvestites are becoming more comfortable disclosing their non-traditional status in the workplace. Additionally, businesses and some states are recognizing the value of protecting these individuals from discrimination in the workplace, thus, ensuring these individuals are valued members of the American workforce. However, protection from discrimination remains limited and until federal courts recognize the importance of protecting transsexuals, this class of workers will remain unprotected.

Although Title VII was not created to become a “general civility code” for the workplace, and it was also not intended to provide protection for transsexuals, even absent amendment, Title VII clearly prohibits discrimination aimed at transsexuals as discrimination “because of . . . sex.”<sup>110</sup> In light of *Price Waterhouse* and *Oncale*, the Supreme Court has broadened the scope of Title VII to protect workers subject to incomprehensible harassment and discrimination in the workplace, despite not fitting within protected classes initially foreseeable in 1964 when Title VII was enacted.

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<sup>110</sup> *Oncale*, 523 U.S. at 80.

Clearly, decisions such as *Schroer*, *Schwenk*, *Rosa*, *Smith*, and *Barnes* recognize the broadening scope of Title VII and have expanded “sex” to include the broader concept of gender, but this change is not universal. A majority of courts stubbornly adhere to the early plain meaning interpretation of “sex” and will continue to exclude transsexuals from establishing a valid Title VII claim of discrimination until Title VII is amended to explicitly include transsexuals within the statute’s coverage. These courts are failing to adhere to Congress’s intent when it enacted Title VII of ensuring workers be judged on work performed rather than personal characteristics. Rather, these courts are imposing their own “judicial intent” of the legislation while further failing to recognize the statute’s remedial purpose.

Until courts are properly able to interpret Title VII’s requirement that discrimination occur “because of . . . sex,” the transsexual community must continue its efforts to amend Title VII to include them as a protected class, while at the same time educating the broader legal community of the meaning of “sex.” These efforts will surely result in decisions more similar to *Schroer* than *Ulane*, while at the same time ensuring American business competitiveness in the global economy by protecting all individuals from discrimination in employment.