ALSB Journal of Employment and Labor Law
Volume 14, 66 - 101, Spring 2013

Left Twisting in the Wind: (T)ransgenders Are Protected by Title VII but LGBs Are Not. Can This Be Right?

Dawn D. Bennett-Alexander[*]

INTRODUCTION

The lesbian, gay, bisexual and transgender (LGBT) community is estimated to be between 3.5 and 17 percent of the workplace population.[1] The term transgender (T) identifies those who believe that their physical body is not consistent their mental idea of who they are regarding gender.[2] As early as 2002, it was estimated that as many as 200,000 people had transitioned from their birth gender to the opposite gender during the past several years in the U.S. and perhaps 10,000 more do so each year.[3]

---

[*] Dawn D. Bennett-Alexander, Associate Professor of Employment Law & Legal Studies, Terry College of Business, University of Georgia (dawndba@uga.edu) & linda f. harrison, Associate Dean and Professor, Shepard Broad Law Center, Nova Southeastern University (harrisonlf@nsu.law.nova.edu). Bennett-Alexander is grateful for the able research assistance of her very capable, passionate, committed Maymester 2012 LEGL 6500 Employment Law graduate student, Robert E. Sleight.

[1] The Williams Institute estimates that there are in the workplace 7 million LGBT private sector employees, 1 million state and local employees, and 200,000 employees of the federal government employees. "Estimates of LGBT Public Employees". *The Williams Institute*. http://www.escholarship.org/uc/item/6cz123ww?display=all Retrieved 2/110/2013. Based on approximately 150 surveys, the founder of Witeck-Combs Communications estimates that 6.7% of Americans are LGBT. Carl Bialik, "Sexual Stats in the Post-Kinsey Age," *The Wall Street Journal* (April 15, 2011). A 2011 study found an estimated 9 million, or approximately 4% of the U.S. population is lesbian, gay, or bisexual, and .3% is transgender. David Badash, "How Many Gay People Are There In America? Nope — You're Wrong" (The Williams Institute, on Sexual Orientation Law and Public Policy June 2012); *Catalyst Quick Take: Lesbian, Gay, Bisexual & Transgender Workplace Issues*. New York: Catalyst, July 9, 2012. http://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues.

[2] Transgenders may wish to physically change their body through hormone therapy and/or surgery, or for any number of reasons they may not. Either way, they wish to be regarded and treated as the opposite gender. That is, there is disjunction between their sexual organs and their sexual identity. Gays and lesbians, on the other hand, do not feel this way. They are simply attracted to those of their own gender rather than the opposite gender. Bisexuals are attracted to both sexes. *See* Maffei v. Kolateon Indus., 626 N.Y.S.2d 391, 393 (N.Y. Sup. Ct. 1995) (citing Richard Green, *Spelling "Relief for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 Yale L. & Pol'y Rev. 125 (1985)). *See also* K. Koch & R. Bales, *Transgender Employment Discrimination*, 17 UCLA Women's L. J. 243, 244 (2008); Smith v. City of Salem, 369 F.3d 912, 914 (6th Cir.2004) (citing Am. Psychiatric Ass'n. Diagnostic and Statistical Manual of Mental Disorders 578 (4th Ed. 2000). The World Professional Association for Transgender Health (WPATH) denounced the classification of gender identity disorder as psychopathology and urged its removal from the DSM IV. http://www.wpath.org/publications_standards.cfm. *See also* the WPATH letter to the APA indicating its acquiescence and criticism of proposed changes at http://www.wpath.org/documents/WPATH%20Reaction%20to%20the%20proposed%20DSM%20-%20Final.pdf. Retrieved 5/27/2012.

[3] *How Frequently Does Transsexualism Occur?* Lynn Conway, 2002, http://ai.eecs.umich.edu/people/Conway/TST/TSprevalence.html cited in *For Employers: Managing Transsexual Transitions in the Workplace*, Janis Walworth, 2003, Center for Gender Sanity. http://www.gendersanity.com/shrm.html. Retrieved July 10, 2012. *See generally, Workplace Harassment Against Transgender Individuals: Sex Discrimination, Status Discrimination, or Both?* Lee M. Peterson, 36 Suffolk U. L. Rev. 227 (2002-2003); *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, Richard F. Storrow, 55:1 Maine L. Rev. 118 (2002).

Gays, lesbians, and bisexuals, on the other hand, are simply attracted to those of their own gender, (bisexuals to both genders) and have no disconnect between their physical body and their perception of their gender. Though the two groups have totally different issues, they are often lumped together for legal, political, and social purposes. Even the communities themselves have for the most part understood the need to do so and collectively present themselves as the LGBT community.[4]

The history of each of these communities, however, has been quite different. While at times the transgender community has actually been the impetus for significant gains made in the LGB community,[5] transgenders were often marginalized in the growing LGB march toward equality. Treated much like an odd relative one is ashamed of claiming for fear it will lower one's worth in the eyes of the greater community, transgenders were often rejected by the LGB community as being too ostentatious and therefore an impediment to society's acceptance of the LGB community.[6] This became quite clear in the fight for legislation protecting the LGBT community.[7]

Marked strides have been made by LGBs in the past twenty years or so. In 2000, 51% of the Fortune 500 companies had policies prohibiting workplace discrimination; by 2008, that number had increased to 85%, including 97% of the Fortune 100.[8] A 2011 Gallup poll indicated

---

[4] There are, of course, separate advocacy groups that deal with issues specific to each of the groups, e.g., The National Center for Transgender Equality, http://transequality.org/; National Center for Lesbian Rights, http://www.nclrights.org/, and so on.

[5] For instance, it is generally accepted that the basis for the modern LGBT civil rights movement was the Stonewall riots of 1969 and that the riots began when patrons of the Stonewall Inn in New York City's Greenwich Village raided the bar and attempted to haul off patrons who had heretofore been too afraid of the attention to resist. "The "drags" and the "queens", two groups which would find a chilly reception or a barred door at most of the other gay bars and clubs, formed the "regulars" at the Stonewall. To a large extent, the club was for them.... Apart from the Goldbug and the One Two Three, "drags" and "queens" had no place but the Stonewall.... The conflict over the next six days played out as a very gay variant of a classic New York street rebellion. It would see: fire hoses turned on people in the street, thrown barricades, gay cheerleaders chanting bawdy variants of New York City schoolgirl songs, Rockette-style kick lines in front of the police, the throwing of a firebomb into the bar, a police officer throwing his gun at the mob, cries of "occupy -- take over, take over," "Fag power," "Liberate the bar!", and "We're the pink panthers!", smashed windows, uprooted parking meters, thrown pennies, frightened policemen, angry policemen, arrested mafiosi, thrown cobblestones, thrown bottles, the singing of "We Shall Overcome" in high camp fashion, and a drag queen hitting a police officer on the head with her purse." Garance Franke-Ruta, "An Amazing 1969 Account of the Stonewall Uprising," *The Atlantic*, 1/24/2013, http://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/. See also, Liz Halloran, "Stonewall? Explaining Obama's Historic Gay-Rights Reference," National Public Radio, 1/22/2013, http://www.npr.org/blogs/itsallpolitics/2013/01/22/169984209/stonewall-explaining-obamas-historic-gay-rights-reference ; Paul Krugman, "Seneca, Selma and Stonewall," *The New York Times*, 1/22/2013, http://krugman.blogs.nytimes.com/2013/01/22/seneca-salem-and-stonewall/ Retrieved 2/15/2013

[6] Garance Franke-Ruta, "An Amazing 1969 Account of the Stonewall Uprising," *The Atlantic*, 1/24/2013, http://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/

[7] See, e.g., Rep. Barney Frank (D-MA)'s 10/11/2007 news conference regarding the issue of inclusion versus exclusion of transgenders in the Employment Non-Discrimination Act. http://www.youtube.com/watch?v=0XaCgLH8V_g

[8] Samir Luther, *Human http://krugman.blogs.nytimes.com/2013/01/22/seneca-salem-and-stonewall/Rights Campaign Foundation, The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans* 2007-2008 at 4 (revised Feb. 20, 2009) available at http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (cited in *Trends in Employment*

that the percentage of those who believe homosexual relationships are morally acceptable has grown from 38% in 2002 to 56% in 2011, with the greatest increase occurring within the last three years.[9]

While the transgender community has become more vocal within the past twenty years[10], there is less evidence that they are gaining as much acceptance as LGB in the workplace.[11] A 2009 national survey of more than 6,000 transgenders found that forty-seven percent had experienced adverse job actions because of gender identity and ninety-seven percent had experienced some form of anti-transgender harassment or discrimination on the job.[12] Clearly there is an urgent need for addressing workplace inequality for this community.

As discussed in detail herein, transgenders were not originally included in proposed workplace protective legislation, particularly, the Employment Non-Discrimination Act (ENDA) discussed herein. When they were finally included, there was dissension within the LGBT community because Congress was apparently willing to pass the legislation for LGB but not T. There were those in the community, particularly, the largest advocacy group for LGBT, who believed transgenders should be taken out of the legislation, the legislation allowed to pass with

---

Discrimination Against LGBT Individuals, presented by the ABA Center for Professional Development, Feb. 13, 2013.)

[9] Gallup Politics, U.S. Acceptance of Gay/Lesbian Relations Is the New Normal; For third year, majority says gay/lesbian relations are morally acceptable, May 14, 2012, http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx Retrieved 10/1/2012.

[10] The evolution of Gay Pride, alone, tells a story. Gay Pride Month celebrations are a series of LGBT-related events held across the U.S. and around the world, usually in June of each year, to commemorate the Stonewall riots of June 28, 1969. Stonewall is generally considered the beginning of the modern gay rights movement. The riot began when police officers who routinely raided gay bars and hauled LGBT patrons off to jail on various homosexual-related charges, were surprised when their generally docile group wishing to avoid public outing and humiliation, stood their ground at the Stonewall Inn Stonewall that year has evolved into Gay Pride Month now being commemorated all over the world. President Bill Clinton was the first U.S. president to issue a presidential proclamation declaring June Gay Pride Month. http://usgovinfo.about.com/library/weekly/blgaylesproc.htm This was not done again until President Barack Obama did so in 2009, followed by him again signing such proclamations in 2010, 2011, and 2012. Presidential Proclamation: Lesbian, Gay, Bisexual and Transgender Pride Month, 2012, signed by President Obama on June 1, 2012. http://www.whitehouse.gov/the-press-office/2012/06/01/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-month. See also, http://www.pbs.org/wgbh/americanexperience/blog/2011/06/09/pride-parade/ Retrieved 2/15/2013

[11] For example, 97% of transgenders reported having been harassed at work, *ENDA By The Numbers*, National Center for Transgender Equality, http://transequality.org/Resources/enda_by_the_numbers.pdf. According to the 6000+-person survey commissioned by the National Gay and Lesbian Task Force and the National Center for Transgender, Equality, *Injustice At Every Turn:* A Report of the National Transgender Discrimination Survey, "A staggering 41% of respondents reported attempting suicide compared to 1.6% of the general population, with rates rising for those who lost a job due to bias (55%), were harassed/bullied in school (51%), had low household income, or were the victim of physical assault (61%) or sexual assault (64%)." http://transequality.org/PDFs/Executive_Summary.pdf: Retrieved 2/11/2013.

[12] Conway, *Id*. The National Gay and Lesbian Task Force and the National Center for Transgender, Equality's *Injustice At Every Turn:* A Report of the National Transgender Discrimination Survey http://transequality.org/PDFs/Executive_Summary.pdf. Retrieved 2/11/2013, found that seventy-eight percent of transgender Americans say they have experienced workplace discrimination at some point. Testimony of Chad Griffin, President of the Human Rights Campaign, the largest LGBT advocacy organization in the U.S., before the Health, Education, Labor and Pensions Committee on the Employment Nondiscrimination Act (ENDA) (S. 811) on June 12, 2012. "Senate HELP Committee Holds ENDA Hearings," HRC Blog June 12, 2012. http://www.hrc.org/blog/entry/senate-help-committee-holds-enda-hearing. Retrieved 8/7/2012.

only protection for LGB, and the community would return another day and try for T protection. Of course, the trans community, by and large, did not agree.[13] The legislation has yet to pass.

In a totally odd twist given the history above, on April 2012, the Equal Employment Opportunity Commission (EEOC) issued a decision which determined that transgenders would be included in Title VII of the Civil Rights Act of 1964 as a type of gender discrimination protected by the law from workplace discrimination. This is extraordinarily good news for anyone who knows and understands the long battle for workplace protection for the LGBT community discussed herein. It is, however, a rather bizarre state of affairs.

While the LGB community hardly bemoans the good fortune of the T community in now being provided workplace protection from discrimination under the law, it is ironic that the very group that was the basis for Congress not passing the protective workplace legislation for the LGBT community, [14] is now covered in the law and the LGB community is not.

This article will discuss the recent decision by the EEOC in *Macy v. Holder.* In this landmark case, the EEOC ruled that transgenders are within the class of persons protected under Title VII's prohibition on sex-based discrimination. In that context, this article will discuss the legal evolution of the rights of the transgendered in the workplace. This includes the broader discussion of LGB issues, the confluence of LGB and transgender issues, the impact of employer-initiated workplace protections offered to LGBTs, and the Employment Non-Discrimination Act. It will also detail the evolution of court decisions which allowed for the inclusion of transgendered persons within Title VII . Finally, this article will discuss the continued exclusion of LGBs from the protection offered to the transgendered, and argue that this exclusion should be rectified by the passage of ENDA.

As a country that is governed by the rule of law, and as a democracy that trusts in the reasonableness of the governed masses to determine what is right for themselves and the country, the struggle is to do what is right and constitutional even though many different viewpoints are represented in a democracy and those viewpoints may change drastically over time. In the civil rights arena especially, these changing views have resulted in the inclusion of many groups who were originally excluded from the concept that "…all men are created equal…,"[15] including women and African Americans. No less should be done for the LGB community, particularly after the EEOC's decision to include transgenders within Title VII's protection after the history set forth above.

THE TRADITIONAL INTERPRETATION: TITLE VII'S EXCLUSION OF LGBT

Title VII of the Civil Rights Act of 1964[16] prohibits discrimination on the basis of race, color, sex, religion and national origin.[17] The category of sex has been interpreted to include

---

[13] See note 8, *supra,* 79 and 80, *infra.*.

[14] *Id.*

[15] Thomas Jefferson, The U.S. Declaration of Independence, July 4, 1776.

[16] Pub. L. 88-352, 78 Stat. 241. enacted July 2, 1964, Title 42 U.S.C. Chapter 21, 2000e-h.

[17] Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §2000e-2(a) states, in pertinent part,:

(a) It shall be an unlawful employment practice for an employer--

both sex discrimination as well as claims of sexual harassment.[18] In 1978 Title VII was amended to add pregnancy and related conditions to the law's sex-based protection.[19] Early court and EEOC decisions determined that sex discrimination did not include discrimination on the basis of sexual orientation or on the basis of an applicant or employee changing from one sex to another.[20]

As the basis for this determination, courts believed that the legislative history of Title VII,[21] sparse though it was on the issue of sex,[22] supported no conclusion other than that sex discrimination meant whether one was discriminated against in employment based on whether the employee was male or female.[23] This definition excluded issues relating to sexual orientation or transgender issues. LGBT issues were simply not part of the greater societal landscape at the time.[24] Thus, under early analysis, neither gays and lesbians,[25] nor transgenders were successful in bringing a Title VII action.

> *(1) to fail or refuse to hire or to discharge any individual, or otherwise to 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; or*
>
> *(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*

[18] Meritor Savings Bank, FSB v. Vinson, 477 U. S. 57 (1986).

[19] The Pregnancy Discrimination Act of 1978. Act of Oct. 31, 1978 (Pub. L. No. 95-555, 92 Stat. §2076 (codified at 42 U.S.C. § 2000e (k) states:

> *The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected, but similar in their ability or inability to work….*

[20] *See, e.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984), cert den. 471 U.S. 1017 (1985); EEOC Dec. No. 76-75 (1976) Employment Practice Guide (CCH) ¶ 6495 at 4266; Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977) (transgender); DeSantis v. Pacific Telephone & Telegraph, 608 F.2d 327 (9th Cir. 1979); Doe v. U.S. Postal Service, 1985 U.S. Dist. LEXIS 18959 (D.D.C. 1985); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750, (8th Cir. 1982) (*per curiam*); Blum v. Gulf Oil Corp.,597 F.2d 936, 938 (5th Cir. 1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326-27, (5th Cir. 1978); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457, (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354, (9th Cir. 1978). *See generally* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexuals in the United States*, 30 Hastings L.J. 799, 805-813 (1979); Kovarsky, *Fair Employment for the Homosexual*, 1971 Wash.U.L.Q. 527.

[21] http://www.justice.gov/crt/grants_statutes/legalman.php#II.

[22] It has been argued that sex was never intended to be a part of the Civil Rights Act of 1964 and that the category was introduced by Rep. Howard Bennett of Virginia, an avowed segregationist legislator two days before the vote, as a last ditch effort to try to stop its momentum, but the law passed with the sex provision included. However, since Smith was a long-time documented advocate for gender equality, the truth is more complicated. See, Jo Freeman, Women, Law & Public Policy, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, http://www.jofreeman.com/lawandpolicy/titlevii.htm.

[23] *See, e.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); DeSantis v. Pacific Telephone & Telegraph, 608 F.2d 327 (9th Cir. 1979); EEOC Dec. No. 76-75 (1976) Employment Practice Guide (CCH) ¶ 6495 at 4266.

[24] Of course, the LGBT have always been with us throughout the history of the world, but as a legal issue on the radar screen of our country, it is of fairly recent vintage. As mentioned earlier, the modern gay rights movement is

Gays and lesbians suffered exclusion under Title VII in an early decision rendered by the Ninth Circuit. In *DeSantis v. Pacific Telephone and Telegraph,*[26] the Court joined three claims by several gay and lesbian employees who sued their employers for various adverse employment actions they alleged violated Title VII as a type of sex discrimination. Their claims included termination and refusal to rehire because of their sexual orientation. The lower court dismissed the claims for failure to state a cause of action under Title VII,[27] concluding that Title VII did not include discrimination on the basis of sexual orientation.[28] The 9th Circuit upheld the dismissal.

In *DeSantis*, the plaintiffs offered the court two theories under which they could state a claim. First, plaintiffs raised the theory of disparate impact based on the U.S. Supreme Court's then-recent 1971 decision in *Griggs v. Duke Power Co.*[29] Under *Griggs*, the first significant case in which the U.S. Supreme Court interpreted Title VII in the workplace context, the Court had determined that the new law was to strike down all unnecessary barriers to employment for covered employees. Such barriers included not only barriers that were obvious on their face, but also those that appeared to be neutral on their face, but were shown to have a disparate impact upon a group protected under Title VII.[30] In this case this required proof that discrimination on the basis of sexual orientation disproportionately adversely impacts male employees.[31] Since

---

generally determined to have started on June 28, 1969 with the raid and arrest of patrons and performers at the Greenwich Village Stonewall Inn, a gay bar on Christopher Street in New York City. Many of the bar's regulars were transgenders and drag queens who were not welcome at "regular" gay bars (see note 6, *supra*). Such raids were routinely conducted by police at the time to root out gays and lesbians who gathered in the only places they felt a modicum of safety in a world otherwise hostile towards them. Rather than going quietly as was usually the case in order to avoid embarrassment, the event turned into a six-day riot of over 2000 people. The event galvanized the gay and allied community and the next year the event was commemorated in a few places, and is now celebrated around the world as Gay Pride Day. *See, e.g.*, Civil Liberties: The American Gay Rights Movement, http://civilliberty.about.com/od/gendersexuality/tp/History-Gay-Rights-Movement.htm. Retrieved 10/1/2012.

[25] When the term "gays and lesbians" is used, it is for convenience and not to the exclude bisexuals. They too, are included as part of this group.

[26] DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979).

[27] Civil Action No. C76 1083 SW; 1976 U.S. Dist. LEXIS 13342 (N.D. CA 1976); 13 Empl. Prac. Dec (CCH) ¶11,225 (9/7/76).

[28] *Id*. at 329.

[29] 401 U.S. 424 (1971). In Griggs, the Court was faced with a claim that the employer's newly imposed requirement that employees have a high school diploma and receive passing scores on two general intelligence tests in order to move from its lowest job to any other job at the plant discriminated against blacks. This requirement was instituted after the effective date of the 1964 Civil Rights Act, and operated to keep the status quo of consigning blacks to the only division they were permitted to work in before the law passed wherein the highest paid black employee received less than the lowest paid white employee in any other division. The Court held that the requirement, though imposed across the board on everyone, had a disparate impact on blacks, necessitating that the employer demonstrate that the requirement was necessary for the job---a mission made rather more difficult since the employer had grandfathered in existing employees, all of whom were white, many of whom did not meet the requirement.

[30] *Id.* at 431.

[31] Under Title VII, a plaintiff must be able to prove discrimination on either one of two bases: disparate treatment, or disparate impact. Disparate treatment involves intentional, generally individual discrimination. Disparate impact, on the other hand, involves unintentional group-based discrimination in which a policy neutral on its face has a negative impact on a disproportionate number of those protected by Title VII. *Id.* at 431.

more males than females suffer adverse employment decisions based on sexual orientation, it was argued that gender discrimination could be proven by using the disparate impact theory.[32]

The *DeSantis* court rejected the disparate impact argument as it applies to sexual orientation. In the court's view, "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[33] The court supported its decision by noting that the EEOC has concluded 'that when Congress used the word sex in Title VII it was referring to a person's gender' and not to 'sexual practices.'"[34] It also cited the fact that Congress had refused to amend Title VII to include sexual orientation,[35] and the court would not "employ the disproportionate impact decisions as an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally."[36]

The second theory posited in *DeSantis* was that of discrimination because of unlawful stereotyping, i.e., discrimination because the employer believes the employee does not meet the employer's idea of how someone of a particular gender should act or dress. This plaintiff was a male employee who alleged he was terminated because the employer thought it inappropriate for a male to wear a gold loop earring in his ear before the commencement of school. Plaintiff argued that the employer's reliance on a stereotype that a male should have a virile rather than an effeminate appearance violated Title VII.[37]

In refusing to give credence to this argument, the court held that "Congress intended Title VII's ban on sex discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference…discrimination because of effeminacy, like discrimination because of homosexuality, or transsexualism, does not fall within the purview of Title VII."[38] Thus, *DeSantis* closed the Title VII door on LGBT claims.

Transgendered persons fared no better under early interpretations than did gays and lesbians. Karen Ulane was a male-to-female transgendered woman who was fired by Eastern Airlines after returning to her job as an airline pilot after her sex-reassignment surgery.[39] The District Court[40] found that while homosexuals and transvestites do not enjoy Title VII protection, transsexuals do because they have sexual identity problems, not preference issues.[41] The Seventh Circuit reversed the District Court's opinion. By employing the "plain meaning" of the

---

[32] The Griggs court issued its first significant interpretation of the new civil rights law in holding that "What is required by Congress (under Title VII) is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." Griggs, 401 U.S. at 431. " The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

[33] DeSantis, 608 F.2d at 330.

[34] *Id*. at 330 n.3 (citing EEOC Dec. No. 76-75, (1976) Emp.Prac.Guide (CCH) ¶6495, at 4266.

[35] *Id.* at 329.

[36] *Id.* at 330.

[37] *Id.* at 331.

[38] *Id*. at 331-32.

[39] Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984).

[40] 581 F. Supp. 821 (N.D.IL 1983).

[41] Ulane v. Eastern Airlines, *742* F.2d . at 1084.

statute, it found that sex "implies that it is unlawful to discriminate against women because they are women and men because they are men."[42] The Court held that this "dearth of legislative history" regarding sex demonstrated that Title VII's inclusion of sex was not designed to address "discrimination based on …sexual identity…or discontent with the sex into which [one was] born."[43]

Other courts also addressed the area of effeminacy in males, a character trait often associated with being gay, as not being cognizable as a claim under Title VII. Thus, *DeSantis*, *Ulane*, and cases decided in other jurisdictions, formed the underpinning for denying LGBT persons protection against workplace discrimination on the bases of sexual orientation and sexual identity.[44]

EMPLOYERS TAKE THE LEAD AGAINST DISCRIMINATION

As the Civil Rights Act of 1964 approached its 40th birthday, discrimination on the basis of sexual orientation, though not yet included in Title VII, appeared to be becoming less acceptable to society as a whole.[45] Several events caused a change in the national dialogue. Largely due to competition for a qualified workforce, employers took it upon themselves to address LGBT discrimination and municipalities and states followed suit.[46] Without national legislation on the subject, the movement to end sexual orientation discrimination in the workplace moved from the bottom up.

---

[42] *Id.* at 1085.

[43] *Id.*

[44] *See, e.g.*, Smith v. City of Salem, 369 F.3d 912 (6th Cir. 2004); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001); Osborne v. Gordon Schwenkmeyer Corp., 10 Fed. Appx. 554 (9th Cir. 2001); 2001 U.S. App. LEXIS 11381; Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Ellert v. University of Texas, 52 F.3d 543 (5th Cir. 1995); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985); Hobson v. Wilson, 737 F.2d 1, (DC Cir. 1984).

[45] Gallup has polled on the question of support for job protection for LGBT people since 1978. Support has grown from 56% then, to 89% in the past several years. A 2007 Hart Research poll showed strong support for ENDA among whites, African American, and Latino voters. http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx. A 2011 poll conducted for HRC by Greenberg Quinlan Rosner Research found that 79% of Americans favor protecting LGBT people from workplace discrimination, including 70% Republicans, 67% Conservatives, 69% senior citizens, 74% Born-again Christians and 72% of residents of the Deep South. http://www.hrc.org/resources/entry/hrc-summer-2011-poll. Eighty-eight percent of Fortune 500 companies have implemented non-discrimination policies that include sexual orientation, and fifty-seven percent of those cover gender identity. http://www.hrc.org/press-releases/entry/the-new-normal-corporate-america-stands-with-the-lgbt-community. Retrieved 2/15/2013.

[46] See, e.g.,"The New Normal: Corporate America Stands With the LGBT Community" ("Workplace discrimination protections are the new normal in the business world, while the federal government and many state governments lag behind in addressing discrimination against LGBT workers. Businesses are also coming out in record numbers in support of marriage equality. This new reality is reflected in the fierce competition between companies to recruit and retain the best employees and to influence consumer choices, and has resulted in the improved lives of millions of LGBT Americans. That's according to the Human Rights Campaign Foundation's Corporate Equality Index (CEI), the national benchmarking tool on corporate policies and practices related to LGBT employees.") 11/14/2012, http://www.hrc.org/press-releases/entry/the-new-normal-corporate-america-stands-with-the-lgbt-community; The annual Human Rights Campaign's Corporate Equality Index can be found at http://www.hrc.org/corporate-equality-index/. Retrieved 2/15/2013.

Thousands of employers, on their own, chose to do what the federal government failed to do: protect gays and lesbians from employment discrimination.[47] Employers began to institute programs for LGBs and their families, including extending insurance coverage, leave for caring for children of gay partners and even assistance in adopting.[48] Two national polls in June 2001 indicated widespread support for protection from workplace discrimination for gays and lesbians. In fact, the survey revealed that most people thought gays and lesbians already had such protection.[49] Increasingly, transgenders were included in workplace anti-discrimination policies and the category of gender identity was added to those policies.[50]

Today, sixteen states and the District of Columbia have policies that protect employees on the basis of both sexual orientation and gender identity.[51] Over 500 municipalities have passed legislation at the local level providing workplace protection from discrimination for gays and lesbians.[52] Scores of employers have extended their anti-discrimination policies to include discrimination on the basis of sexual orientation and gender identity.[53] In 1998, President Clinton signed Executive Order 13087 prohibiting discrimination based on sexual orientation in

[47] See HRC's Corporate Equality Index: http://www.hrc.org/resources/entry/corporate-equality-index Retrieved 10/1/2012

[48] *Id.*

[49] In a poll conducted June 2001, Gallup asked respondents, "In general, do you think homosexuals should or should not have equal rights in terms of opportunities?" Eighty-five percent of respondents - an increase from 56 percent in 1977 - favored equal opportunity in employment for gays and lesbians. Only 11 percent of respondents thought gays and lesbians should be discriminated against based on sexual orientation in the workplace. A nationwide Harris Interactive study, conducted in June 2001, found that 61 percent of Americans favored a federal law prohibiting job discrimination based on sexual orientation. Additionally, the survey found that 42 percent of adults surveyed believe that such a law currently exists.

http://www.hrc.org/Template.cfm?Section=Background_Information&CONTENTID=13311&TEMPLATE=/ContentManagement/ContentDisplay.cfm Retrieved 7/10/2012.

[50] According to the American Psychological Association, gender identity "refers to 'one's sense of oneself as male, female, or transgender". http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf. Retrieved 2/17/2013.

[51] California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey (see Law Against Discrimination), New Mexico, Oregon, Rhode Island, Vermont, and Washington in the public and private sector. An additional five states–Delaware, Maryland, New Hampshire, New York, and Wisconsin–have state laws that protect against discrimination based on sexual orientation only. Five states have an executive order, administrative order, or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity: Indiana, Kansas, Kentucky, Michigan, and Pennsylvania. Delaware, Maryland, and New York prohibit discrimination based on gender identity in public employment only. An additional five states prohibit discrimination against public employees based on sexual orientation only: Alaska, Arizona, Missouri, Montana, and Ohio. Ohio previously included gender identity, until Governor John Kasich let this executive order expire in January 2011. Fifteen other states have laws that have been interpreted to protect transgender persons. *See* Jerome Hunt, *Center for American Progress Action Fund, A State-by-State Examination of Nondiscrimination Laws and Policies*, June 2012. http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

[52] *See* http://www.hrc.org/resources/entry/maps-of-state-laws-policies. Retrieved 2/15/2013.

[53] *See, e.g.,* http://www.hrc.org/resources/entry/best-places-to-work-2013. Retrieved 2/15/2013.

much of the federal civilian workforce.[54] In January 2010, the Obama Administration added gender identity as a basis for non-discrimination in federal employment.[55]

PRICE WATERHOUSE V. HOPKINS: OPENING THE DOOR FOR TRANSGENDERS

What had been made clear by prior cases was that sexual orientation and transsexual status, alone, were not protected by Title VII, and virtually all cases that decided those issues in the years since the passage of Title VII had so ruled.[56] However, one case, which at the time of its decision was important for the procedural questions it answered,[57] provided for some in the transgender community, and to a lesser extent, the LGB community, a measure of protection by recognizing discrimination based on unlawful sex-based stereotyping.

The case was the U.S. Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*.[58] Ann Hopkins had worked at Price Waterhouse for five years and was a senior manager by the time her proposal for candidacy for partnership was tabled without a decision. After not being proposed for partnership the next year, she quit.[59]

Hopkins had managed the D.C. office, was well regarded by her clients, and had played a central role in landing a $25 million contract with the State Department—something none of the other 77 male partnership candidates had done. There were many complimentary comments about Hopkins' performance by partners in their written evaluations of Hopkins used to determine her partnership candidacy; there were also several negative comments, primarily about her interpersonal skills. These included comments that Hopkins was sometimes "overly aggressive, unduly harsh, difficult to work with and impatient with staff".[60]

However, the record demonstrated that Price Waterhouse partners had an uncurbed history[61] of making gender-related comments about female partner candidates and this had likely

---

[54] Employment Non-Discrimination Act Legislative Timeline, http://www.hrc.org/resources/entry/employment-act-legislative-timeline. Retrieved 2/15/2013

[55] "Administration Adds Gender Identity To Equal Employment Opportunity Policies," http://www.aclu.org/lgbt-rights/administration-adds-gender-identity-equal-employment-opportunity-policies Retrieved 10/5/2012.

[56] *See*, *e.g*., Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978 (sexual orientation; DeSantis v. Pacific Tel. & Tel. Co. Inc., 608 F.2d 327 (9th Cir. 1979) (sexual orientation); Holloway v. Arthur Andersen, 566 F.2d 659 (9th Cir. 1977) (transgendered); Summers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982) (transgendered); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (transgendered).

[57] Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989). The only issue submitted to the Court for review was the allocation of the burdens of proof in cases involving an employment decision that was the product of both legitimate and discriminatory motives – the so-called mixed motive case.

[58] 490 U.S. 228 (1989).

[59] At the time Hopkins went up for partnership, the firm had 662 partners, 7 of whom were female. *Id*. at 233.

[60] *Id.* at 235.

[61] "In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, '[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers'; in this environment, '[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment.' In fact, the judge found that in previous years '[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers' -- yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." *Id*. at 279.

been the case with Hopkins. Expert testimony set forth that such comments likely stem from gender stereotyping rather than the actual activity alleged by the evaluator.

> One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school". But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[62]

Hopkins sued Price Waterhouse for gender discrimination, alleging a violation of Title VII. The lower courts held in her favor and the case was eventually appealed to the U.S. Supreme Court. After considering the comments made by the partners, the Court concluded that the negative comments made about Hopkins that had resulted in her not becoming a partner were primarily related to gender stereotypes about women held by the partners. In evaluating the decision-making process that used the gender stereotyping comments for at least some part of the decision about Hopkins' candidacy and holding such considerations to be impermissible, the Court stated:

> As for the legal relevance of sex stereotyping, we 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.' [citations omitted] An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[63]

The Supreme Court had ruled favorably against the use of sex stereotypes before,[64] but no case had so clearly held that adverse employer decisions that relied upon sex stereotype expectations constitute a form of sex discrimination proscribed by Title VII. *Price Waterhouse* became the lynchpin for later cases that challenged gender stereotype-based workplace decisions.[65]

---

[62] *Id*. at 235.

[63] *Id*. at 251.

[64] See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (Court rejected higher pension premiums to female employees based on mortality tables showing women outlived men on average as applying a stereotype to individual women to whom it might or might not apply); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (Court rejected state plan that required employees to choose from insurers who relied on sex-based mortality tables used to calculate benefits as the use of sex stereotypes not permitted by Title VII).

[65] *See, e.g.,* Medina v. Income Support Division, 413 F.3d 1131, 1135 (10th Cir. 2005) ("a plaintiff may satisfy her evidentiary burden [of demonstrating discrimination because of sex] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes") (citing Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001)); Back v. Hastings on Hudson Union Free School Dist., 365 F.3d 107, 119 (2d Cir. 2004) (Illegal under the Equal Protection Clause to suppose "that a woman *will* conform to a gender stereotype" as well as to suppose "that a woman is unqualified for a position because she does *not* conform to a gender stereotype"); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("Sex stereotyping [by an employer] based on a person's gender nonconforming behavior is impermissible discrimination"); Doe v. Belleville, 119 F.3d

For transgendered plaintiffs, post-*Price Waterhouse* federal courts became a friendlier place for seeking relief from workplace discrimination. Federal courts, however, struggled to balance the mandate of *Price Waterhouse* against the abundant and steadfast jurisprudence that maintained that discrimination based on sexual orientation or being transgender was not protected. Federal courts now recognized that discrimination based on sex stereotyping can occur, and if it does it is actionable.[66] However, the success of transgendered plaintiffs or plaintiffs who challenged adverse workplace actions on the basis of stereotype discrimination was spotty.[67]

THE LEGISLATIVE CALL FOR CHANGE

In the wake of these shifts in the landscape for gays, lesbians, bisexuals, and transgenders, policies regarding them began to change. Public opinion and policies began to reflect the idea that it did not seem fair that an employee or applicant's sexual orientation, or later, one's gender identity, should be the basis for workplace discrimination and other related decisions.[68] For instance, as mentioned earlier, more and more companies adopted workplace antidiscrimination policies on the basis of sexual orientation, and in some instances, gender identity.[69]

The 1990s also saw several legislative initiatives to address sexual orientation discrimination in various contexts.[70] Gays and lesbians continued to fight for Title VII to be amended to include discrimination on the basis of sexual orientation. Of primary importance in this effort was the push to enact the Employment Non-Discrimination Act (ENDA).[71]

563, 580 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) ("A man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex'").

[66] *See* Nichols v. Azteca, 256 F.3d 864 (9th Cir. 2001) (citations omitted).

[67] For a comprehensive list of cases in which gender stereotyping was alleged but the court ruled that the employer's bias was based upon hostility towards the plaintiff's sexual orientation, *see* Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 Duke J. Gender L. & Pol'y 205 (2007), at 221-222 and n. 100.

[68] Other issues of public debate included domestic partnerships, civil unions, gay marriage, hospital visitation rights, adoption by gays and lesbians, violence against gays and lesbians, employee benefits, and survivor benefits after 9/11.

[69] For instance, the Human Rights Commission's Corporate Equality Index has been published for the past ten years and each year has seen an increase in the number of employers included as having workplace equality policies. http://www.hrc.org/resources/entry/corporate-equality-index-archives.

[70] One such context was a change in the military policy excluding gays and lesbians. Having been the subject of public debate for months beforehand, in 1993, the military's Don't Ask, Don't Tell (DADT) policy took effect, institutionalizing discrimination against gays and lesbians in the military if it was discovered that they were homosexual. Pub. L 103-160, 10 U.S.C. 654. The policy was effective from Dec. 21, 1993 to Sept. 20, 2011. It was repealed by the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L 111-321.

[71] S. 2238, H.R. 4636.

Legislation to protect LGB had been introduced in every Congress since 1974 in some form or other.[72] ENDA has been introduced in Congress virtually every session since 1994.[73] In its present form, ENDA would prohibit discrimination in employment on the basis of sexual orientation and gender identity whether the orientation was perceived or actual. It would provide no special rights or privileges. Rather, it would simply codify what many Americans already think is the case, to wit, that qualified employees could not be rejected for employment or discharged from employment, for merely being or being perceived to be, gay, lesbian, bisexual or transgender. As with Title VII, there would be an exception for religious organizations.

While it did not pass, in the wake of the 1993 March on Washington for Lesbian, Gay and Bi Equal Rights, and other significant changes taking place around the issue of sexual orientation, it created a public space for talking about protecting LGBT in the workplace. Transgenders were at times included in this fight, but originally, only marginally so.[74] The primary push was to include LGBs in workplace anti-discrimination laws. The ENDA of 1995[75] failed in the Senate in 1996 by a vote of 49-50.[76] Later, when the measure came up for a vote again in 2007, it is widely believed that Congress was willing to pass the law for LGBs, but did not believe it had enough information about transgenders to be able to include them at that point.[77] There was fierce fighting within the LGBT community as to whether to go forward

---

[72] The Equality Act of 1974 was introduced by Rep. Bella Abzug (D-NY) on May 14, 1974. http://www.thetaskforce.org/issues/nondiscrimination/timeline

[73] "Sexual Identity and Gender Identity in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA)," Congressional Research Service Report for Congress, p. 1. http://www.fas.org/sgp/crs/misc/R40934.pdf.

[74] Transgenders and gays and lesbians have not always had the same agendas or seen eye to eye on issues of public policy. The two are very different and while gays and lesbians tended to be more vocal about their inclusion, transgenders, on the whole, were not included in gay civil rights until later. This did not mean that transgenders were not fighting for their rights also, but only that they were not always included in with those of gays and lesbians. Of course, this makes perfect sense, since the two are quite different, but because these issues had not been explored in any significant way in the public discourse, the two were often lumped together as if they were interchangeable. As evidence of the ambiguity between including and not including LGB and T issues together, the historic 1993 March on Washington was titled the March for Lesbian, Gay and Bi Equal Rights and Freedom. Notice that transgenders were not included. However, in its action statement preamble to the March platform, transgenders *were* included, stating: "The Lesbian, Gay, Bisexual, and Transgender movement recognizes that our quest for social justice fundamentally links us to the struggles against racism and sexism, class bias, economic injustice, and religious intolerance." PBS, POV http://www.pbs.org/pov/brotheroutsider/march/pastmarches08_lgbrights.html. The general sentiment in the LGB community was that it was pushing the envelope enough to push for LGB civil rights, but transgender issues were too far outside the mainstream to tackle along with LGB issues. However, the two were eventually merged in more recent years, though they still remain quite different issues. *See*, John Aravosis, *"How Did the T Get in LGBT?"*, Salon, 10/8/2007, http://www.salon.com/2007/10/08/lgbt/singleton/ Retrieved 10/1/2012; See notes 74 and 75, *infra*.

[75] Legislation prohibiting discrimination against gays and lesbians has been introduced into Congress since 1974, the fifth anniversary of the Stonewall riot that is considered the birth of the gay and lesbian civil rights movement. The actual Employment Nondiscrimination Act bill has been introduced in every Congress since 1994 except the 109th in 2008. *See*, http://www.hrc.org; Employment Non Discrimination Act,.

[76] http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline Retrieved 7/10/2012.

[77] Chris Geidner, "Double Defeat-In 1996 ENDA was hoped to help ease the pain of DOMA [The Defense of Marriage Act], but instead fell by one vote in a Senate focused on 'thinly disguised example of intolerance,'" *Metro Weekly*, 9/15/2011, http://www.metroweekly.com/news/?ak=6567 . Retrieved 2/9/2013.

without transgenders included in the legislation, but from 2007 on, transgenders were included in the ENDA bills and remains in the bill today.[78] The bill has yet to pass.

The ENDA was originally designed as an amendment to Title VII that would add sexual orientation to the list of categories protected from workplace discrimination. In more recent years it was instead designed as a piece of stand-alone legislation for sexual orientation and gender identity discrimination.[79] The purpose of the legislation is "to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers."[80] In addition, the proposed law would provide remedies for workplace discrimination that occurs in these areas.

The move to a stand-alone proposal derived from the fact that there were several differences between Title VII's coverage and that of ENDA that more specifically tailored ENDA to the particular type of discrimination it addresses rather than the more generic coverage of Title VII. For instance, ENDA identifies gender identity as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." [81] ENDA would also allow discrimination "based on the sexual orientation or gender identity of a person with whom the individual associates or has associated,"[82] language that is not included in Title VII. It would not allow for the theory of disparate impact (tried early on in the *DeSanti*s case) to be used as a basis for discrimination. Claimants could only use the disparate treatment theory of discrimination.[83]

In addition, the armed forces would be exempt from ENDA, as they are under Title VII[84] and veteran's preferences would not be affected.[85] Because of religious freedom and consistent with Title VII, religious organizations would also be exempt from ENDA[86] and ENDA specifically prohibits quotas or preferential treatment.[87]

---

[78] *Id; See* http://www.hrc.org.; "Barney on ENDA Transgender Controversy And He's Right" American Blog 9/28/07, http://americablog.com/2007/09/barney-on-enda-transgender-controversy-and-hes-right.html. Retrieved 2/16/2013; "HRC Finally Ready to Back Trans-Inclusive ENDA," Queerty.com, 3/26/2009, http://www.queerty.com/hrc-finally-ready-to-back-trans-inclusive-enda-20090326/. Retrieved 2/12/2013; Elizabeth Gray, "Transitions,*'* *New Republic*, 6/23/2011, http://www.newrepublic.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq# Retrieved 2/10/2013;

[79] Sexual Orientation and Gender Identity in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA), Congressional Research Service Report for Congress, pg. 1. http://www.fas.org/sgp/crs/misc/R40934.pdf.

[80] H.R. 1397/S. 811. §2, 112th Congress (2011). See Appendix.

[81] *Id.* at § 3(a)(6).

[82] *Id.* at § 4(e).

[83] *Id.* at § 4(g).

[84] *See, e.g.*, Luckett v. Bure, 290 F.3d 493 (2d Cir. 2002).

[85] H.R. 1397/S. 811, § 7, 12th Cong.

[86] *Id.* at § 6.

[87] *Id.* at § 4(f).

Even more specifically geared to issues that have previously arisen in the quest for LGBT equality, ENDA would: not prohibit an employer from imposing reasonable grooming standards, including for a trans employee who has provided notice of transition, dressing as the gender to which they are transitioning;[88] not require an employer to provide additional facilities for transgenders:[89] not require that employees be required to be in showers or other places unclothed with transgenders as long as comparable opportunities are made available to the transgender employee who has notified the employer of the need;[90] not require that employers collect statistics on LGBT employees;[91] or require that employers provide marital benefits inconsistent with their policies for married couples.[92]

THE NINTH CIRCUIT EVOLVES

Keeping in mind that ENDA is still not federal law applicable to virtually all employers, and any gains that have been made for LGBTs have been on a piecemeal voluntary basis, it is clear that there is still a lot to be done to provide workplace protection for LGBTs.

Thirteen years after the Ninth Circuit's ruling in *DeSantis*, during which time much of the above movement in gay civil rights had occurred, the Ninth Circuit was again asked to address the question that had arisen in *DeSantis* regarding Title VII's coverage of discrimination based on effeminacy. This time, after the societal sea-change that had occurred in the thirteen years between the issuance of the *DeSantis* decision and this new decision, the court's answer was different.

Nichols v. Azteca[93] involved an employee who endured an "unrelenting barrage" of verbal abuse including name-calling, vulgarities,[94] and being mocked for "walking and carrying his serving tray like a woman."[95] After a bench trial, the District Court ruled that the plaintiff had not been harassed because of his sex, nor had he suffered retaliation for his complaints.[96]

Giving the case a *de novo* review[97] the 9th Circuit reversed. Citing *Price Waterhouse v. Hopkins*, it held that the plaintiff's complaint was based on the theory that he was discriminated

---

[88] *Id*. at § 8(as)(5).

[89] *Id.* at § 8(a)(4)..

[90] *Id.* at § 8(a)(3).

[91] *Id.* at § 9.

[92] *Id*. at § 8 (b).

[93] 256 F.3d 864 (9th Cir. 2001).

[94] *Id.* at 870. Such comments included constantly referring to him with the feminine pronouns of "her" and "she," being called "faggot" and a "f*cking female whore."

[95] *Id*. at 870.

[96] Company policy required a complainant to report harassment to the corporate office. Instead, Plaintiff reported to the general and assistant manager, and a human resource officer. He later walked off the job after a heated argument with the assistant manager and was fired for leaving in the middle of his shift. The court stated that it gave credibility to the defense witnesses and concluded that the harassment did not take place because of sex. *Id.* at 871.

[97] The court ruled that the issue of whether plaintiff failed to establish his sexual harassment claim presented mixed questions of law and fact. *Id.* at 871.

against because he acted too feminine,[98] contradicting the employer's expectation that a man should be virile rather than effeminate. In deciding this issue, the court held:

> *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here. The only potential difficulty arises out of a now faint shadow cast by our decision in *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*. *DeSantis* holds that discrimination based on a stereotype that a man "should have a virile rather than an effeminate appearance" does not fall within Title VII's purview. This holding, however, predates and conflicts with the Supreme Court's decision in *Price Waterhouse*. And, in this direct conflict, *DeSantis* must lose. To the extent it conflicts with *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law. Under *Price Waterhouse*, [the employee here] must prevail.[99]

The reversing *DeSantis*, the Ninth Circuit determined that discrimination based upon male effeminacy is actionable under Title VII. In reaching its decision, the court left intact the discretion that employers have to require males and females to conform to different dress codes and grooming standards.[100] However, courts have always permitted employers wide latitude in imposing dress and grooming codes, as long as they do not violate Title VII.[101] The *Azteca* decision conforms to this.[102]

Based on *Azteca*, the issue of effeminacy in males would not just be limited to actions resulting in sexual harassment. Rather, it would extend to all workplace actions that could be traced to failure to a meet a certain gender stereotype, including failure to hire, wrongful termination, or unfair discipline, as long as it can be shown to be the result of not meeting the expected gender stereotype. This is so even though Title VII does not include in its coverage sexual orientation or gender identity.

To its credit, the Ninth Circuit seized the opportunity that *Azteca* presented to follow *Price Waterhouse* and the subsequent decisions that had followed its mandate and that mirrored the facts in *Azteca.*[103]

---

[98] *Id.* at 874.

[99] *Id*. at 874-75.

[100] *Id.* at 875.

[101] See, e.g., Harper v. Blockbuster Entertainment Corporation, 139 F.3d 1385 (112th Cir. 1998).

[102] The issue of whether there can be a cause of action for sexual harassment under Title VII when both the harasser and the harasee are the same gender, as was the case in *Azteca*, had been decided by the U.S. Supreme Court in Oncale v. Sundowner Offshore Servs., Inc.[102] three years before, in 1998. In Oncale the U.S. Supreme Court determined that Title VII struck at workplace harassment for everyone, regardless of the genders of the harassee and harasser. The Court did not allow Title VII to be constrained by the fact that the harassment may have stemmed from the perception that the victim may have been gay. It should be noted that since there is still much derision toward gays and lesbians, a majority of the cases arising in this area involve workplace harassment. Workplace harassment is covered by Title VII under Oncale because "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *See also*, Harper v. Blockbuster Entertainment Corporation, 139 F.3d 1385 (11th Cir. 1998).

[103] *See, e.g*., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) ("tomboyish female"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (effeminate gay man); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (heterosexual female suing for lesbian supervisor's actions could show

THE PATH TO TITLE VII COVERAGE FOR TRANGENDERS

With the convergence of the U.S. Supreme Court's decision in *Price Waterhouse* rejecting gender stereotyping, workplace protections offered to LGBTs by employers, and growing acceptance of the LGBT community by society as a whole, things began to change. Not only were employers instituting workplace changes on their own that included LGBTs in their diversity efforts, but court decisions began to change as the judiciary came to a different understanding of Title VII's remedial purpose and who the LGBT community actually is. The impact of *Price Waterhouse* on later cases which raised the issue of gender stereotypes cannot be overstated. Armed with Supreme Court precedent, those early decisions which refused to extend Title VII protection to victims of harassment based on stereotyping were required to revisit those previous decisions. A trilogy of cases in fairly short succession made a logical movement in the area of offering Title VII protection to transgenders.

In *Smith v. City of Salem*,[104] a seven-year veteran of the Salem Fire Department was suspended after his immediate supervisor revealed to the Chief of the Fire Department that he was undergoing male to female transformation. Smith, who had taken on a more feminine appearance at work, began to get questions about his appearance and was told that he was not "masculine enough."[105] Almost immediately, plans were devised to terminate Smith's employment. During the planning process, Smith was suspended for 24 hours for an infraction, which prompted Smith to hire an attorney. After his suspension was overturned, Smith sued, alleging sex discrimination and retaliation. Both allegations were dismissed by the district court after the court found that Smith's claim was based upon his being transsexual, and that "Title VII does not prohibit discrimination based on an individual being a transsexual."[106]

The Sixth Circuit reversed. The court noted that the earlier cases on which the District Court had relied had been eviscerated by *Price Waterhouse*. As in *Price Waterhouse*, discrimination based on gender stereotyping would not occur but for the victim's sex. Rejecting those courts who would "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity into an ostensibly unprotected classification",[107] the court stated that such notions cannot be reconciled with *Price Waterhouse.* It held that "sex-stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of the behavior."[108]

In *Schrorer v. Billington*,[109] a highly qualified applicant applied for a position as a Specialist in Terrorism and International Crime at the Library of Congress. She was a male at

---

harasser was acting to punish noncompliance with gender stereotypes); Simonton v. Runyon, 232 F. 3d 33, 37 (2d Cir. 2000) (gay man has cause of action if abuse was based on sexual stereotypes); Higgins v. New Balance Athletic Shoes, Inc., 194 F.3d 252, 261 n 4 (1st Cir. 1999) (gay man stereotyped as effeminate has cause of action); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (hetero male harassed because of his soft voice, long hair and slight physique), *vacated and remanded on other grounds*, 523 U. S. 1001 (1998).

[104] 378 F.3d 566 (6th Cir. 2004).

[105] *Id*. at 568.

[106] *Id.* at 571.

[107] *Id.* at 574.

[108] *Id* .at 575.

[109] 577 F. Supp. 2d 293 (D.D.C. 2008).

the time. After being extended an offer, the offer was rescinded after meeting with a member of the hiring committee during which she revealed her intention to transition from male to female. Prior to this meeting, there was no question that the plaintiff was the best qualified and first choice for the position.[110] Immediately after, the employer reconsidered and "lean[ed[against hiring [plaintiff]."[111] Plaintiff sued for gender discrimination in violation of Title VII.

A bench trial was conducted, after which the District Court ruled that all of the reasons offered by the employer as to why the job offer was rescinded were pretextual.[112] As evidence of this the court cited to an admission by the member of the hiring committee that "when she viewed the photographs of [plaintiff] in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing," [113] and that others would not take her seriously because "they, too, would view her as a man in women's clothing."[114] The court held that *Price Waterhouse's* proscription on gender stereotyping entitled the employee to judgment regardless of whether the employer perceived her to be "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[115] The court then went a step further.

The court agreed with plaintiff's contention that discrimination based on gender identity is sex discrimination. Using the language of the statute itself, the court found that sex discrimination against a transsexual is discrimination "because of …sex."[116] The court stated

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination because of religion easily encompasses discrimination because of a change of religion.[117]

The court reasoned that the same rationale for protecting those who suffer discrimination based on a change of religion should protect those who suffer discrimination based on a change of gender. Courts that have ruled otherwise have "allowed their focus on the label 'transsexual' to blind them to the statutory language itself."[118]

Lastly, in rebutting the oft-used argument that Congress did not extend Title VII to include sexual orientation nor transsexuals when it had the opportunity to during the introduction

---

[110] *Id*.. at 297, n.1.

[111] *Id*.. at 297.

[112] The reasons given were (1) that plaintiff would not be able to obtain a security clearance which was needed for the job; (2) plaintiff would not be able to focus on the job during her sex reassignment; (3) that she was untrustworthy; (4) that she might lack credibility with members of Congress; and (5) that she might not be able to maintain contacts in the military that they were counting on her bringing to the job. *Id.* at 300-302.

[113] *Id*. at 305.

[114] *Id*. at 305.

[115] *Id*. at 305.

[116] *Id.* at 306.

[117] *Id*. at 306.

[118] *Id*. at 307.

of the ENDA, the court posited that perhaps it was Congress's recognition that the statute does not require amendment – it already includes discrimination based on sex - but only "correct interpretation." [119] It issued a reminder that

> Subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground to rest an interpretation of a prior statute when it concerns…a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.[120]

The last in the trilogy of cases affecting transgenders was decided by the 11th Circuit in *Glenn v. Brumby.*[121] Relying heavily on Title VII and its judicial interpretations, the Court unanimously held that it was a violation of the Equal Protection Clause of the U.S. Constitution for an employee who transitioned from male to female to be terminated based on the supervisor's perception of the employee as "a man dressed as a woman and made up as a woman."[122]

In that case, Vandiver Elizabeth Glenn began working as an editor for the Georgia Office of Legislative Counsel as a male. She had been diagnosed with gender identity disorder. At the time of hire, Glenn presented as a male in the workplace but dressed as female outside of work. The following year she informed her supervisor, Sewell Brumby, of her decision to transition to female. Brumby ordered Glenn to leave a Halloween party after she came dressed as a female, and said that the decision to terminate Glenn came after he confirmed that she intended to transition. Brumby said the decision was based on "the sheer fact of transition,"[123] which Brumby found "inappropriate," "unsettling," "unnatural," and perceived it would make the other employees uncomfortable.[124] The court used this as "ample direct evidence" to support its decision that the employer acted on the basis of gender nonconformity.[125]

The court believed there were two issues before it: 1) whether discrimination on the basis of gender nonconformity constitutes discrimination on the basis of sex, and 2) whether the employee's termination violated the federal constitution's Equal Protection Clause.

As to the first issue, the court relied on *Price Waterhouse*'s gender stereotyping holding and concluded that

> all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotypes. A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . There is thus congruence between discrimination against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against transgender individuals

[119] *Id.* at 308.

[120] *Id*. at 308 (citing Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

[121] 663 F.3d 1312 (11th Cir. 2011).

[122] *Id.* at 1321.

[123] *Id*. at 1320-21.

[124] *Id.* at 1320.

[125] *Id.* at 1321.

> because of her gender-nonconformity is sex discrimination whether it's described as being the basis of sex or gender.[126]

In its view, discrimination on the basis of transgender identity is discrimination on the basis of sex stereotyping in violation of Title VII.

The second issue raised was whether terminating the employee for transitioning from male to female violated the Equal Protection Clause of the U.S. Constitution.[127] Since the Equal Protection Clause requires that those similarly situated be treated similarly by the government, the argument is that the employee was being treated differently based on his being transgender. In order for a government to justify treating those similarly situated differently, there must be a determination based on the category to which the rule is being applied. Here, the court held that the issue of transgender status as a category of gender must be judged by the intermediate scrutiny test used for gender.[128] Under this test, the government is required to prove that its discriminatory policy furthers an important governmental interest, and does so in a way that is substantially related to that interest. In the court's view, in this case the government did not show an "exceedingly persuasive justification" for the discriminatory practice, as it must do under such a test.

In the court's determination, the supervisor's decision to fire the employee based on his view that the employee's transition was "inappropriate, would be disruptive, that some would view it as a moral issue and that it would make her coworkers uncomfortable," fell short of being "exceedingly persuasive," and therefore could not withstand judicial scrutiny under the Equal Protection Clause.

This trilogy of cases not only provided a more hospitable environment for transgenders in the courtroom, but also formed the foundation for the EEOC's decision and policy change in *Macy v. Holder*.

MACY V. HOLDER: THE EEOC DECISION

> *The Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.*[129]

In a landmark case that is sure to provide much-needed clarity for these issues, the EEOC determined in *Macy v. Holder*[130] that Title VII of the Civil Rights Act of 1964[131] includes discrimination on the basis of gender identity. Macy was a former police detective who was

---

[126] *Id.* at 1316-17.

[127] The Fifth Amendment to the U.S. Constitution guarantees the right to life, liberty and property. Implicit in this and made applicable to the states through the Fourteenth Amendment, is the guarantee that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. V.

[128] The court noted that the strict scrutiny test, the highest level of review, requiring the government to show that the government's discriminatory policy is necessary to achieve a compelling interest and is the least restrictive means of achieving that interest was reserved for issues of race, national origin, ethnicity or fundamental rights such as voting and marriage. *Glenn*, 663 F.3d at 1315 n.4.

[129] *Id.*

[130] 2012 WL 1435995 (E.E.O.C. 2012)

[131] Title 42 U.S.C. 21, § 2000e.-h.

moving out of town. His supervisor told him there was a position as a ballistics technician at the Bureau of Alcohol, Tobacco and Firearms (BATF) available near where he was moving. Macy spoke with the appropriate personnel at BATF and was encouraged to apply. He was assured that he would get the job if his background check was acceptable. The position was to be handled by a contractor working for BATF.

Macy, who was certified and trained as a National Integrated Ballistic Information Network (NIBN) operator and a BrassTax ballistics investigator, proceeded with the application process over the next several weeks and things were proceeding as agreed. At some point during the process, Macy told the contractors who were handling the paperwork for his hire that he was transitioning from male to female. A few days later Macy was told that the position had been cut and was no longer available. Macy later discovered that the position had not been cut, it still existed and it had been filled with someone who was not as qualified as Macy.

Macy filed an internal claim with the BATF for gender identity discrimination, gender discrimination and sexual stereotyping. The BATF would only process Macy's gender claim under Title VII. It later issued a correction letter including the claim for sexual stereotyping, but still leaving out gender identity. After BATF rejected her gender identity claim, Macy appealed to the EEOC.

The EEOC determined that given the growing number of court cases that held that gender identity discrimination is gender discrimination under Title VII and the Equal Protection Clause, Title VII's gender category does indeed include discrimination on the basis of being transgender. By this ruling, the EEOC overruled its precedent which held to the contrary.[132] In coming to its conclusion, the EEOC looked at the reasoning in a number of cases that had been decided by courts, including those discussed above.

In the EEOC's determination, the *Price Waterhouse* decision made clear that "the term 'gender' encompasses not just a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity;"[133] it had specifically addressed the issue of "failing to act and appear according to expectations defined by gender" resulting in gender stereotyping.[134] EEOC also noted that the terms "gender" and "sex" are often used interchangeably to describe the discrimination that is prohibited by Title VII.[135]

In reaching its decision, the EEOC noted that it was important that Title VII be interpreted as prohibiting more than simply discrimination on the basis of biological sex as the U.S. Supreme Court and others had done because not to do so would mean that the only basis for a gender discrimination claim under Title VII would be when an employer preferred a male over a female, or vice versa. It believed the law to be much broader than that, and instead also encompasses the cultural aspects associated with masculinity and femininity.

As such, in the EEOC's view,

> [W]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). This is true regardless of whether an employer discriminates against an employee

[132] EEOC App. No. 0120120821; Agency No. ATF-2011-00751 at p. 14, n. 16.

[133] *Id*. at *6.

[134] *Id*. at *5 (citing Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) quoting Price Waterhouse, 490 U.S. at 239.)

[135] 2012 WL 1435995 at * 5.

> because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that 'an employer may not take gender into account in making an employment decision.' (citing *Price Waterhouse*, 490 U.S. at 244).[136]

Recognizing that Congress was unlikely to have been considering discrimination against transgenders when it enacted Title VII, it cited *Oncale v. Sundowner Offshore Systems, Inc.*,[137] to support its reasoning, stating

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] 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. Title VII prohibits 'discriminat[ion] . . . because of . . sex' in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.[138]

EEOC also made clear that gender stereotyping as presented in *Price Waterhouse* was not an independent cause of action of its own, but flowed out of gender discrimination. The key is whether the employer relied on the employee's gender in making the workplace decision. It determined that gender stereotyping is only one type of sex discrimination.

> Title VII prohibits discrimination whether motivated by hostility,[139] by a desire to protect people of a certain gender,[140] by assumptions that disadvantage men,[141] by gender stereotypes,[142] or by the desire to accommodate other people's prejudices or discomfort.[143],,[144]

---

[136] *Id*. at *7.

[137] 523 U.S. 75 (1983).

[138] *Id*. at *9 (citing Oncale, 523 U.S. 75 at 79-80. *See also* Newport News Shipbuilding Co. v. EEOC, 462 U.S. 669 (1983).

[139] *See* Oncale, 523 U.S. at 80 ("A trier of fact might reasonably find such discrimination for example, if a female victim is harassed in such sex-specific and derogatory terms by another women as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[140] *See* Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex.).

[141] *See, e.g.*, Newport News Shipbuilding, Co. v. EEOC, 462 U.S. 669 (1983), 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[142] *See, e.g*., Price Waterhouse, 490 U.S. at 250-52.

[143] *See, e.g*., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no "black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

Given this, the EEOC said that Macy would be able to demonstrate a violation of Title VII through showing either that the employer chose someone else for the job after learning of Macy's transition either because the supervisor believed men should only present as men in men's clothing, or that the supervisor was willing to hire Macy when he thought he was a male, but not when he learned Macy would now be a female.

> Owing to the progression of the cases from *DeSantis* to *Price Waterhouse* to *Azteca* to *Schrorer* and *Brumby*, as well as the growing social acceptance in the areas of sexual orientation and gender identity,[145] EEOC clarified that gender discrimination is sex discrimination with or without sex stereotyping. Rather than requiring sex discrimination to be accompanied by gender stereotyping, *Macy* holds that sex stereotyping is not itself an independent cause of action, but may be evidence of discrimination based on sex. The cause of action that forms the basis of sex discrimination can very well be the fact that the person is a transgendered individual, and that fact alone may serve as the basis for a cause of action under Title VII. As *Macy* reiterated, Title VII prohibits sex discrimination "whether based on hostility …by gender stereotypes …or by the desire to accommodate other people's prejudices or discomfort."[146]

Though not every court confronted with the issue allowed coverage of transsexuals under the *Price Waterhouse* interpretation of Title VII,[147] the EEOC's decision in *Macy* had been preceded by a steady stream of similar decisions, giving EEOC's final determination in *Macy* a solid foundation.[148]

---

[144] 2012 WL 1435995, at *10.

[145] For instance, a recent article in the *New York Times* reported that a growing number of colleges and universities are now including transgender students and employees in their health care coverage, both for hormone therapy and surgery.

> "The issue directly affects only a tiny number of students; no one knows how many. But universities recognize that their insurance plan sends a signal to the much larger number of students for whom the rights of transgender people have taken a place alongside gay rights as a cause that matters.
>
> "Students notice whether the issues that they care about, that make them feel like it's a more comfortable and welcoming place, are being discussed and addressed," said Ira Friedman, a doctor who is associate vice provost for student affairs at Stanford and director of the student health center there. Stanford began covering sex-change surgery in 2010.

Richard Perez-Pena, "College Health Plans Respond as Transgender Students Gain Visibility," *The New York Times*, 2/12/2013, http://www.nytimes.com/2013/02/13/education/12sexchange.html?emc=eta1&_r=0. Retrieved 2/12/2013.

[146] *Id.* (citations omitted).

[147] *See, e.g.*, *Etsitty v. Utah Trans. Auth*., No. 2:04-CV-616, 2005 WL 1505610 (D. Utah June 24, 2005), *aff'd on other grounds*, 502 F.3d 1215 (10th Cir. 2007); *Holloway v. Arthur Andersen & Co*, 566 F.2d 659, 663 (9th Cir. 1974).

[148] See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Michaels v. Akal Security, Inc*., No. 09-cv-1300, 2010 WL 2573988 at 4 (D. Colo. June 24, 2010); *Lopez v. River Oaks Imaging & Diag. Group, Inc*., 542 F. Supp 2d 653, 660 (S. D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc*., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp*., No. 03-CV-0375E (SC), 2003 WL 22757935 (W.D.N.Y Sep. 26, 2003); *Doe v. United Consumer Fin. Servs.* , No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001)

While not binding on courts, *Macy* should be persuasive authority to which the U.S. Supreme Court has expressed deference. In *Griggs*, it stated that:

> The administrative interpretation of the Act by the enforcing agency is entitled to great deference (citations omitted). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.[149]

THE CURRENT CONUNDRUM

The inclusion of transgendered persons within the ambit of Title VII protection by the courts and the EEOC has resulted in legal recognition for the rights of transgendered persons. As it stands, now, however, transgenders have protection under the law and LGBs do not. While those rights can be undone by the U.S. Supreme Court or by Congress in the future, for now they exist. It is possible that Congress could totally overturn EEOC's interpretation by undoing *Macy v. Holder* by legislative fiat. However, given the legal and societal progress of the last 40 years,[150] this seems unlikely, even though it has been documented that this is the most polarized Congress in the past 100 years.[151]

The question remaining is how do LGBs fully secure their rights in the workplace? For LGB employees, *Price Waterhouse* would apply only if it was determined that the discriminatory treatment was based on gender stereotyping. If, however, what was communicated to the LGB employee was that the difference in treatment was based on the employee being simply gay or lesbian, without more, the claim would fail because sexual orientation is not included in Title VII's coverage. Practically speaking, it would be unusual to find a claim based solely on the status of an employee being gay or lesbian without some type of accompanying negative act.

---

[149] Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

[150] On January 21, 2013, for the first time in U.S. history, President Barack Obama included LGBT issues in his second Inaugural speech, recognizing the history of the struggle for LGBT rights and calling for a greater inclusion and nondiscrimination for the LGBT community:

> …peace in our time requires the constant advance of those principles that our common creed describes; tolerance and opportunity, human dignity and justice. We the people declare today that the most evident of truth that all of us are created equal -- is the star that guides us still; just as it guided our forebears through Seneca Falls and Selma and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth….Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law, for if we are truly created equal, then surely the love we commit to one another must be equal, as well.

http://articles.washingtonpost.com/2013-01-21/politics/36473487_1_president-obama-vice-president-biden-free-market Retrieved 1/30/2013.

[151] John Aloysius Farrell, "Divided We Stand", *National Journal*, 3/1/12, http://www.nationaljournal.com/magazine/divided-we-stand-20120223; Ezra Klein, "14 reasons why this is the worst Congress ever," *The Washington Post*, 7/13/2012, http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/. Retrieved 10/8/2012. Steve Rattner, "How current Congress has made least votes, is most polarized," NBC's Morning Joe, 7/30/12, http://www.msnbc.msn.com/morning-joe/48393792#48393792. Retrieved 10/8/2012.

Once there is any adverse difference in treatment on that basis, it would lay a foundation for concluding that gender stereotyping is at play. However, not only does this leave LGB employees in the nerve-wracking position of trying to make their discrimination claim thread the needle presented for them by *Price Waterhouse*, but in addition, not all courts have adopted the gender stereotyping of gays as a violation of Title VII.[152] Thus, LGBs are left without solid workplace protection.

Despite the difficulty EEOC has in overcoming the hurdle placed upon it by the exclusion of sexual orientation from the Title VII's protections, it recently issued two opinions in favor of finding that treatment of gays and lesbians is gender discrimination based on stereotyping, just as it did for transgenders.[153] In *Castello v. Postmaster General*,[154] a lesbian was verbally harassed by her co-workers who spoke in crude terms of her relationships with women.[155] The Agency dismissed her complaint. However, on its own motion, the EEOC reversed, finding that her discrimination was based on the gender stereotype that "having relationships with men was an essential part of being a woman." Thus, her case was allowed to proceed.

In *Veretto v. Postmaster General*,[156] a gay man was verbally harassed, pushed, and physically threatened by his co-worker[157] after a Connecticut newspaper ran the employee's wedding announcement on the society page. The agency originally dismissed his complaint, claiming it charged only discrimination based on sexual orientation. However, on appeal, the Agency ruled that the discrimination was motivated by anger over the fact that the Complainant was a man marrying a man, rather than a woman marrying a man. This, the agency stated, was sex-stereotyping discrimination, not discrimination based on sexual orientation or preference.

Having gone as far about as it can, the EEOC is unable to rectify the unequal treatment of LGBs – this requires legislative action. As discussed earlier, LGB and T issues were not always in the same place at the same time in the push for civil rights for the LGBT community. LGB issues were virtually always in the forefront. Even when the ENDA came up for its last serious vote in Congress in 2007, it was acknowledged that the problem was that transgenders had been included in the proposed legislation and since Congress did not have the long history of information and education about the more recently-added transgender category, it was not ready to include them.[158] The LGBT community ultimately decided on including Ts in ENDA, taking a "one-for-all and all-for-one" approach.[159] In the subsequent years, ENDA has yet to pass.

---

[152] *See supra,* n.134 at 14.

[153] Both decisions were issued by the EEOC staff and not the EEOC Commission. Decisions issued by the EEOC staff, as opposed to the EEOC Commission, do not have the same breadth or precedential value. 29 C.F.R. §1601.93,. "Opinions—Title VII" http://www.gpo.gov/fdsys/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-part1601.xml#seqnum1601.93

[154] 2011 WL 6960810 (E.E.O.C. 2011)

[155] The employee alleged that her manager said "Cece [Complainant] gets more p**** than the men in the building." *Id.* at *1.

[156] 2011 WL 2663401 (E.E.O.C. 2011)

[157] Veretto alleged that he was chest-bumped, poked in the chest, yelled at, called a queer, and was told "I will beat you, you f****** queer." *Id.* at *1.

[158] See notes 8, 79, 80 *supra*.

[159] This is not to say the decision was made without intense struggle within the LGBT community. Those who favored excluded transgendered argued that the hard work by the LGB community was being undermined by the

Legislation, however, would be optimal. Now is the time to renew the push for ENDA. Without fearing the exclusion of the transgendered community, who have now been included in Title VII by EEOC, LGBs are free to push for their own protection by renewing their push for passage of ENDA.

Ironically, the peculiar state of affairs which has left LGBs unprotected in the workplace may well be the foundation upon which Congress decides to finally act favorably upon ENDA. Two events could prompt a positive vote. First, it makes little sense to now have Title VII include transgenders in its protection without also including LGBs - the group that Congress was already willing to protect. Secondly, the LGBT community may now be able to withdraw transgenders from the ENDA legislation since the EEOC's approach, coupled with federal court protection against discrimination based on stereotype, would have paved its own avenue of workplace protection through the courts and EEOC rather than Congress.

Of course, a third factor that could result in a favorable vote on ENDA is the social movement. As mentioned earlier, there is no doubt that LGBs are making strides in society. In addition to the indicators mentioned earlier, in the 2012 elections, Tammy Baldwin (D-WI) became the first openly gay member to be elected to the Senate.[160] The *Washington Post* reported that Baldwin's sexuality had little or no impact on the race.[161] Voter "Elliot Schultz, seemed similarly unconcerned. 'I didn't hear anything about that,' he said. 'I mean, I guess I knew she was gay, but nobody really cares.' Schultz, who's a cook, prefers Thompson's economic plans."[162] All 50 states have now had openly gay officeholders who came out as LGB or T before taking office.[163] LGB characters populate major award-winning television shows and movies. Even the federal government included gender identity in its general nondiscrimination policy[164] and issued guidelines on employing transgenders.[165] Society, acting through its legislators, may now be ready to act. It is time to bring cohesion to our approach to this important issue.

CONCLUSION

"johnnie-come-latelies" to the party. The proponents of including transgendered argued that it was wrong to exclude the transgendered community and move ahead on legislation without them. The proponents ultimately prevailed. See note 8, *supra*.

[160] Abby D. Phillip, "Tammy Baldwin Wins Wisconsin, Becoming the First Openly Gay U.S. Senator," ABC News, 11/6/2012 http://abcnews.go.com/Politics/wisconsin-senate-race-baldwin-openly-gay-senator/story?id=17652495 Retrieved 1/30/2013.

[161] Emily Heil, "Voters don't care that Tammy Baldwin is gay" *The Washington Post*, 11/6/2012 http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/06/voters-dont-care-that-tammy-baldwin-is-gay/ Retrieved 1/30/2013.

[162] *Id*.

[163] The Victory Fund, an organization whose mission is to increase the number of Lesbian, Gay, Bisexual and Transgender people in public office lists over 1200 LGBT people who hold public office worldwide. See, http://www.victoryinstitute.org/out_officials/view_all. Retrieved 1/30/2013.

[164] USA Jobs, Working for America, https://help.usajobs.gov/index.php/EEO_Policy_Statement. Retrieved 1/30/2013.

[165] U.S. Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, http://www.opm.gov/diversity/Transgender/Guidance.asp Retrieved 1/30/2013.

For now, we are in the position of having an incredible patchwork of state and federal legislation and workplace policies protecting (or not) the LGBT community, with the federal law itself excluding gays, lesbians and bisexuals from its protection, but including transgenders. But the EEOC's *Macy* decision does not have the same weight, impact, nor visibility[166] that federal legislation would have.

It would make more sense for LGB and Ts to be included under the protection of ENDA and for ENDA to be passed by Congress. Given the increased recognition of the LGB community within all areas of society,[167] our growing understanding of who this community is and how it impacts our society, and the toll it takes on them to remain unprotected in their ability to earn a living and be productive and contributing members of society, one more addition to our workplace protective legislation is in order.

At the very least, it is time for Congress to enact the ENDA and level the playing field for LGBs and put them on par with Ts. Perhaps that is more likely to happen now with the President of the United States, for the first time in history, mentioning equality for the LGBT community in his January 21, 2013 Inaugural speech[168] and February 13, 2013[169] State of the Union address, and a newly sworn in Congress having six openly gay members in its midst, resulting in the *New York Times* headline, "Openly Gay, Openly Welcomed in Congress."[170]

---

[166] *See*, Lisa Mottet, *National Gay and Lesbian Task Force's Movement Analysis: The Full Impact of the EEOC Ruling on the LGBT Movement's Agenda,* October 3, 2012. http://www.thetaskforce.org/reports_and_research/eeoc_movement_analysis Retrieved 1/30/2013.

[167] See, e.g., note 166, *supra*.

[168] See note 152, *supra*.

[169] http://www.whitehouse.gov/state-of-the-union-2013. Retrieved 2/17/2013; "Obama Calls for LGBT Equality in State of the Union," NewNowNext, http://www.newnownext.com/president-obama-state-of-the-union-address-speech-lgbt-gays/02/2013/ Retrieved 2/17/2013..

[170] Jeremy W. Peters, "Openly Gay, and Openly Welcomed in Congress," *The New York Times*, January 25, 2013. http://www.nytimes.com/2013/01/26/us/politics/gay-lawmakers-growing-presence-suggests-shift-in-attitudes.html?_r=0 Retrieved 1/30/2013.

Appendix
The Employment Non-Discrimination Act of 2011

S 811 IS

112th CONGRESS

1st Session

S. 811

To prohibit employment discrimination on the basis of sexual orientation or gender identity.

IN THE SENATE OF THE UNITED STATES

April 13, 2011

Mr. MERKLEY (for himself, Mr. KIRK, Mr. HARKIN, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To prohibit employment discrimination on the basis of sexual orientation or gender identity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Employment Non-Discrimination Act of 2011'.

SEC. 2. PURPOSES.

The purposes of this Act are--

(1) to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal government employers; (2) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including meaningful and effective remedies for any such discrimination; and (3) to invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.

SEC. 3. DEFINITIONS.

(a) In General- In this Act:

(1) COMMISSION- The term 'Commission' means the Equal Employment Opportunity Commission. (2) COVERED ENTITY- The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee. (3) EMPLOYEE-

(A) IN GENERAL- The term 'employee' means--

(i) an employee as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)); (ii) a State employee to which section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b(a)(1)) applies; (iii) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) or section 411(c) of title 3, United States Code; or (iv) an employee or applicant to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies.

(B) EXCEPTION- The provisions of this Act that apply to an employee or individual shall not apply to a volunteer who receives no compensation.

(4) EMPLOYER- The term 'employer' means--

(A) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees (as defined in subparagraphs (A)(i) and (B) of paragraph (3)) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986; (B) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 applies; (C) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 or section 411(c) of title 3, United States Code; or (D) an entity to which section 717(a) of the Civil Rights Act of 1964 applies.

(5) EMPLOYMENT AGENCY- The term 'employment agency' has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(6) GENDER IDENTITY- The term 'gender identity' means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

(7) LABOR ORGANIZATION- The term 'labor organization' has the meaning given the term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C.

2000e(d)).

(8) PERSON- The term 'person' has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(9) SEXUAL ORIENTATION- The term 'sexual orientation' means homosexuality, heterosexuality, or bisexuality.

(10) STATE- The term 'State' has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

(b) Application of Definitions- For purposes of this section, a reference in section 701 of the Civil Rights Act of 1964--

(1) to an employee or an employer shall be considered to refer to an employee (as defined in subsection (a)(3)) or an employer (as defined in subsection (a)(4)), respectively, except as provided in paragraph (2) of this subsection; and (2) to an employer in subsection (f) of that section shall be considered to refer to an employer (as defined in subsection (a)(4)(A)).

SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.

(a) Employer Practices- It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.

(b) Employment Agency Practices- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual or to classify or refer for employment any individual on the basis of the actual or perceived sexual orientation or gender identity of the individual.

(c) Labor Organization Practices- It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to

discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment, or would limit such employment or otherwise adversely affect the status of the individual as an employee or as an applicant for employment because of such individual's actual or perceived sexual orientation or gender identity; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training Programs- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the actual or perceived sexual orientation or gender identity of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Association- An unlawful employment practice described in any of subsections (a) through (d) shall be considered to include an action described in that subsection, taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.

(f) No Preferential Treatment or Quotas- Nothing in this Act shall be construed or interpreted to require or permit--

(1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such actual or perceived sexual orientation or gender identity in any community, State, section, or other area, or in the available work force in any community, State, section, or other area; or (2) the adoption or implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation or gender identity.

(g) Disparate Impact- Only disparate treatment claims may be brought under this Act.

SEC. 5. RETALIATION PROHIBITED.

It shall be an unlawful employment practice for a covered entity to discriminate against an individual because such individual--

(1) opposed any practice made an unlawful employment practice by this Act; or (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.

This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant (42 U.S.C. 2000e et seq.) to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a), 2000e-2(e)(2)).

SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED FORCES; VETERANS' PREFERENCES.

(a) Armed Forces-

(1) EMPLOYMENT- In this Act, the term 'employment' does not apply to the relationship between the United States and members of the Armed Forces. (2) ARMED FORCES- In paragraph (1) the term 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) Veterans' Preferences- This title does not repeal or modify any Federal, State, territorial, or local law creating a special right or preference concerning employment for a veteran.

SEC. 8. CONSTRUCTION.

(a) Employer Rules and Policies-

(1) IN GENERAL- Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity. (2) SEXUAL HARASSMENT- Nothing in this Act shall be construed to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity. (3) CERTAIN SHARED FACILITIES- Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later. (4) ADDITIONAL FACILITIES NOT REQUIRED- Nothing in this Act shall be

construed to require the construction of new or additional facilities. (5) DRESS AND GROOMING STANDARDS- Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.

(b) Employee Benefits- Nothing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits. (c) Definition of Marriage- In this Act, the term 'married' refers to marriage as such term is defined in section 7 of title 1, United States Code (commonly known as the 'Defense of Marriage Act').

SEC. 9. COLLECTION OF STATISTICS PROHIBITED.

The Commission shall not collect statistics on actual or perceived sexual orientation or gender identity from covered entities, or compel the collection of such statistics by covered entities.

SEC. 10. ENFORCEMENT.

(a) Enforcement Powers- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act--

(1) the Commission shall have the same powers as the Commission has to administer and enforce--

(A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or (B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b and 2000e-16c),

in the case of a claim alleged by such individual for a violation of such title, or of section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b(a)(1)), respectively; (2) the Librarian of Congress shall have the same powers as the Librarian of Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title; (3) the Board (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the Board has to administer and enforce the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by such individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); (4) the Attorney General shall have the same powers as the Attorney General has to administer and enforce--

> (A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or (B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b and 2000e-16c);
>
> in the case of a claim alleged by such individual for a violation of such title, or of section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b(a)(1)), respectively; (5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and the Board, respectively, have to administer and enforce chapter 5 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of section 411 of such title; and (6) a court of the United States shall have the same jurisdiction and powers as the court has to enforce--
>
> > (A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title; (B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b and 2000e-16c) in the case of a claim alleged by such individual for a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e-16b(a)(1)); (C) the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by such individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and (D) chapter 5 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of section 411 of such title.

(b) Procedures and Remedies- The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are--

> (1) the procedures and remedies applicable for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title; (2) the procedures and remedies applicable for a violation of section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b(a)(1)) in the case of a claim alleged by such individual for a violation of such section; (3) the procedures and remedies applicable for a violation of section 201(a)(1) of the Congressional Accountability Act of 1995 (2 U.S.C. 1311(a)(1)) in the case of a claim alleged by such individual for a violation of such section; and (4) the procedures and remedies applicable for a violation of section 411 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of such section.

(c) Other Applicable Provisions- With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) for a violation of this Act, title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with

respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SEC. 11. STATE AND FEDERAL IMMUNITY.

(a) Abrogation of State Immunity- A State shall not be immune under the 11th Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act. (b) Waiver of State Immunity-

(1) IN GENERAL-

(A) WAIVER- A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th Amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act for a remedy authorized under subsection (d). (B) DEFINITION- In this paragraph, the term 'program or activity' has the meaning given the term in section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(2) EFFECTIVE DATE- With respect to a particular program or activity, paragraph (1) applies to conduct occurring on or after the day, after the date of enactment of this Act, on which a State first receives or uses Federal financial assistance for that program or activity.

(c) Remedies Against State Officials- An official of a State may be sued in the official capacity of the official by any employee or applicant for employment who has complied with the applicable procedures of section 10, for equitable relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988). (d) Remedies Against the United States and the States- Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for the violation to the same extent as the remedies are available for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) by a private entity, except that--

(1) punitive damages are not available; and (2) compensatory damages are available to the extent specified in section 1977A(b) of the Revised Statutes (42 U.S.C. 1981a(b)).

SEC. 12. ATTORNEYS' FEES.

Notwithstanding any other provision of this Act, in an action or administrative proceeding for a violation of this Act, an entity described in section 10(a) (other than paragraph (4) of such section), in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. The Commission and the United States shall

be liable for the costs to the same extent as a private person.

SEC. 13. POSTING NOTICES.

A covered entity who is required to post notices described in section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10) shall post notices for employees, applicants for employment, and members, to whom the provisions specified in section 10(b) apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964.

SEC. 14. REGULATIONS.

(a) In General- Except as provided in subsections (b), (c), and (d), the Commission shall have authority to issue regulations to carry out this Act. (b) Librarian of Congress- The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees and applicants for employment of the Library of Congress. (c) Board- The Board referred to in section 10(a)(3) shall have authority to issue regulations to carry out this Act, in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), with respect to covered employees, as defined in section 101 of such Act (2 U.S.C. 1301). (d) President- The President shall have authority to issue regulations to carry out this Act with respect to covered employees, as defined in section 411(c) of title 3, United States Code, and applicants for employment as such employees.

SEC. 15. RELATIONSHIP TO OTHER LAWS.

This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State.

SEC. 16. SEVERABILITY.

If any provision of this Act, or the application of the provision to any person or circumstance, is held to be invalid, the remainder of this Act and the application of the provision to any other person or circumstances shall not be affected by the invalidity.

SEC. 17. EFFECTIVE DATE.

This Act shall take effect on the date that is 6 months after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.