

2010

Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity

Brittany Ems
emsbm@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>

 Part of the [Law Commons](#)

Recommended Citation

Ems, Brittany (2010) "Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity," *Saint Louis University Law Journal*: Vol. 54 : No. 4 , Article 15.
Available at: <https://scholarship.law.slu.edu/lj/vol54/iss4/15>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

**PREPARING THE WORKPLACE FOR TRANSITION:
A SOLUTION TO EMPLOYMENT DISCRIMINATION BASED ON
GENDER IDENTITY**

INTRODUCTION

For over fifty-five years stories about transgenders have appeared in newspapers, magazines, and tabloids, captivating an intrigued American audience. Indeed, America's fascination with stories of sexual transformation began with George Jorgensen in 1955.¹ George captured the country's attention when he publicly announced his sex reassignment surgery and changed his name to Christine.² Tabloids and newspapers sensationalized Jorgensen's transgenderism with headlines such as, "Bronx GI Becomes a Woman!"³ and "Bronx 'Boy' Is Now A Girl."⁴ But, "rather than withdraw from public attention, [Christine] turned the notoriety to her advantage with a series of lucrative tours on the lecture and nightclub circuit."⁵ Doctor Joanne Meyerowitz, a history professor at Indiana University, claims Christine's publicity changed American attitudes toward transgenders.⁶ "By cultivating the demeanor of a lady and by refusing to call herself homosexual," Christine was able to remove some of the stigma associated with transgenderism.⁷

Ultimately, Christine Jorgensen's publicity helped pave the way for other transgenders not only to "come out," but also to gain legal rights in the process.⁸ Dr. Renee Richards, for instance, an eye surgeon, amateur tennis player, and male-to-female transgender,⁹ became famous after "the New York County Supreme Court ruled that [she] . . . could play in women's tennis

1. John T. McQuiston, *Christine Jorgensen, 62, Is Dead; Was First to Have a Sex Change*, N.Y. TIMES, May 4, 1989, at D22.

2. *Id.* Christine Jorgensen was the first transgender in American history to publicly announce her sexual transformation. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Dinitia Smith, *On Being Male, Female, Neither or Both*, N.Y. TIMES, Oct. 29, 2002, at F5 (reviewing CHRISTINE JORGENSEN, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES (2002)).

7. *Id.*

8. *See id.*

9. Joyce Wadler, *The Lady Regrets*, N.Y. TIMES, Feb. 1, 2007, at F1, available at <http://www.nytimes.com/2007/02/01/garden/01renee.html>.

tournaments despite being genetically male.”¹⁰ Thomas Beatie, a female-to-male transgender, became a worldwide media obsession after announcing his pregnancy on national television in 2008.¹¹ Thomas also became the center of a legal controversy when the state of Oregon refused to recognize him as his daughter’s “father” and his wife, as his daughter’s “mother,” on their baby’s birth certificate.¹² While the transgender community undoubtedly celebrates any legal victory, participation in amateur sporting events, and challenges to parental titles on birth certificates likely do not affect the majority of the estimated 750,000 to 3 million transgender people living in America today.¹³

Instead, the National Center for Transgender Equality (NCTE), a national social justice organization devoted to transgender issues, lists joblessness, homelessness, and hate crimes among the top legal issues that negatively impact transgenders’ lives.¹⁴ It is not surprising that unemployment ranks high on the list considering most jurisdictions do not provide legal protections for transgenders against discrimination in the workplace.¹⁵ In fact, more than thirty states currently lack antidiscrimination legislation for transgenders in the employment arena.¹⁶ Consequently, employers in those states are permitted to discriminatorily fire transgender employees solely because they are transgenders. Unfortunately, the federal government provides little more protection.

Even though Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of . . . sex,”¹⁷ circuits are split as to whether Title VII protects transgender plaintiffs.¹⁸ This is legally significant because Title VII’s legislative history fails to address the issue,¹⁹ and the Supreme Court has yet to tackle it. This Comment argues that, in light of conflicting case law, Congress

10. Smith, *supra* note 6, at F5.

11. *Pregnant Man Thomas Beatie Is Pregnant Again*, OBESITY, FITNESS & WELLNESS WEEK, Dec. 6, 2008.

12. Joneil Adriano, *Pregnant Man, Other Transgender Parents Face Legal Questions*, Nov. 14, 2008, <http://abcnews.go.com/TheLaw/Story?id=6246058&page=1>.

13. Shannon H. Tan, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 582 (2008) (citing Debra Rosenberg, *(Rethinking) Gender*, NEWSWEEK, May 21, 2007, at 50, available at <http://www.msnbc.msn.com/id/18630323/site/newsweek>).

14. National Center for Transgender Equality, available at <http://www.nctequality.org/issues.html> (last visited Aug. 1, 2010).

15. *Id.*

16. TRANSGENDER L. & POLICY INST., TRANSGENDER ISSUES: A FACT SHEET, <http://transgenderlaw.org/resources/transfactsheet.pdf> (the thirteen states that provide protection are California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and Washington, D.C.).

17. 42 U.S.C. § 2000e-2(a) (2006).

18. For a discussion on the circuit split, see *infra* Part III.

19. For a discussion on Title VII’s legislative history, see *infra* Part II.

should enact federal legislation to settle the issue. Specifically, Congress should enact a transgender-inclusive Employment Non-Discrimination Act (ENDA). A transgender-inclusive ENDA would provide transgender plaintiffs with standing to sue, the opportunity to have their cases heard on the merits, and effective protection from employment discrimination.

Part I of this Comment will define important terms and explain employment issues currently facing transgenders. Part II will examine Title VII, including congressional intent and standing. Part III will focus on courts' interpretation of Title VII before and after the quintessential *Price Waterhouse* case.²⁰ Part IV will examine the recent and potentially pivotal decision in *Schroer v. Billington*.²¹ Part V will discuss the ENDA, Congress' attempts to protect against discrimination based on sexual orientation and gender identity, and the Act's potential effect on employers. Finally, Part VI will argue that Congress must enact a transgender-inclusive ENDA to effectively ban employment discrimination based on gender identity and adequately safeguard transgenders from discrimination in the workplace.

I. TERMINOLOGY AND EMPLOYMENT ISSUES

A. Terminology

Title VII bans discrimination "because of . . . sex." So, what exactly does that mean? According to Merriam-Webster's Medical Dictionary, "sex" is the "sum of the structural, functional, and behavioral characteristics of living things . . . that distinguish males and females."²² More specifically, biological sex is "defined by chromosomes, internal and external genitalia, hormones, and gonads."²³ While the term "sex" is often used synonymously with "gender," gender is different and is usually defined as the "behavioral, cultural, or psychological traits typically associated with one sex."²⁴ Because Title VII bans employment discrimination "based on sex," and not gender or sexual orientation, many courts interpret Title VII to prohibit discrimination based on biological sex only.²⁵ Applying this strictly physical definition leaves no room for a mental, psychological, or behavioral analysis, posing potential problems for transgender plaintiffs. While many courts have consistently interpreted

20. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

21. *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

22. MERRIAM-WEBSTER'S MEDICAL DICTIONARY 631 (1995) [hereinafter MEDICAL DICTIONARY].

23. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.6 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (Apr. 15, 1985) (citing T.N. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria*, 29 MED. TRIAL TECH. Q. 167, 169 (1982)).

24. MEDICAL DICTIONARY, *supra* note 22, at 255.

25. Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J.L. GENDER & SOC'Y 41, 56 (2008).

“sex” as a permanent, immutable, biological trait, transgenders argue “sex” should be interpreted more broadly, as a mutable characteristic encompassing one’s gender identity.²⁶

Terms such as transgender and transsexual and phrases such as “cross-gender living” and “gender transition” can sound confusingly similar when discussed simultaneously. This discussion, therefore, first warrants a clear definition of these and other important terms. First, transgender is a broad term that applies to a wide range of people who express themselves as the opposite sex, including “transsexuals, cross-dressers . . . , intersexed people (also known as hermaphrodites), womanish men, [and] mannish women”²⁷ Transgendered people typically “do not conform to societal stereotypes of what it means to be ‘male’ or ‘female,’”²⁸ and generally, do not choose to be the way they are.²⁹ Instead they “act[] on ‘deep-seated and irreversible feelings’” which are “atypical to that of their birth sex.”³⁰ A transgendered person’s internal sexual identity, not biological sex, defines sexual being.³¹ Sexual identity gives a transgendered person an “internal . . . sense of being male or female, or something or other in between.”³² For example, a transgender biological male will internally perceive himself as female, and a transgender biological female will internally perceive herself as male.³³ Believing they are born in the wrong bodies, some transgenders decide they would rather undergo sex reassignment surgery than be uncomfortable in their own skin.³⁴ Transgenders who choose to undergo reassignment surgery are generally categorized as transsexuals.³⁵

26. Amanda S. Eno, *The Misconception of “Sex” in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765, 769–70 (2008).

27. Carey Goldberg, *Shunning ‘He’ and ‘She,’ They Fight for Respect*, N.Y. TIMES, Sept. 8, 1996, at 24.

28. Tan, *supra* note 13, at 582. Intersexed people are people born with “sexual anatomy that mixes male and female characteristics in ways that make it difficult, even for an expert, to label them male or female.” Jamison Green, *Introduction to Transgender Issues*, in Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers*, at 5 (Policy Inst. Natl. Gay & Lesbian Task Force 2000), <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>. Some intersexed people may have internal reproductive organs of the sex opposite from his or her birth sex. *Id.*

29. *See* Eno, *supra* note 26, at 769–70.

30. *Id.* at 771–72.

31. *Id.* at 769–70.

32. *Id.* at 770.

33. *Id.*

34. Douglas Mason-Schrock, *Transsexuals’ Narrative Construction of the “True Self,”* 59 SOC. PSYCHOL. Q. (SPECIAL ISSUE), 176, 176, 179 (1996).

35. Thomas Kando, *Passing and Stigma Management: The Case of the Transsexual*, 13 SOC. Q. 475, 476 (1972). Transsexualism is “operationally defined as having *de facto* undergone the surgical sex change.” *Id.* at 476.

Transgenderism is sometimes diagnosed as a psychiatric condition known as gender identity disorder (GID).³⁶ Psychologists explain that a person with GID experiences “strong and persistent cross-gender identification and persistent discomfort with his or her anatomical sex.”³⁷ This discomfort may cause transgenders to experience “depression, anxiety, or other mental health issues.”³⁸ For these and other reasons, transgenders choose to transition.³⁹

One transition option is sex reassignment surgery, which changes the transgender’s biological genital sex to the desired sex.⁴⁰ Sex reassignment is an irreversible medical procedure and, as with any type of irreversible procedure, doctors often worry the patient may regret his or her decision after it has been completed.⁴¹ This is especially true with sex reassignment surgery because after reassignment, a transgender of either sex is “absolutely incapable of procreation.”⁴² Thus, most surgeons require one or more mental health professionals assess the patient before surgery.⁴³

Before surgery, transgenders are required to “undergo a . . . trial period of cross-gender living which includes employment in the desired gender role.”⁴⁴ This period is called the “real life experience”⁴⁵ and also requires transgenders

36. Eno, *supra* note 26, at 771–72. Even though “transgender” is an umbrella term often used to describe both people with and without GID, for purposes of this Comment I will use the term only as it refers to those with GID. Thus, this Comment will only address the legal issues facing transgenders diagnosed with GID, whether they have undergone sex reassignment surgery or not, and it will not address the legal issues of transgenders who do not suffer from GID.

37. Amanda Kennedy, Note, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN’S L.J. 281, 282 (2008) (quoting DAVID SUE, DERALD W. SUE & STANLEY SUE, UNDERSTANDING ABNORMAL BEHAVIOR 307 (6th ed. Houghton Mifflin Co. 2000)). Doctor Richard Green, a psychiatrist, has testified that a GID diagnosis “is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia.” *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984).

38. OLIVIA ASHBEE ET AL., TRANS CARE GENDER TRANSITION: GETTING SEX REASSIGNMENT SURGERY 10 (2006).

39. Kennedy, *supra* note 37, at 282.

40. See Eric Matusewitch, *Does Title VII Protect Transsexuals at Work? Federal Prohibitions Against Discrimination Are Nonexistent*, 214 LEGAL INTELLIGENCER 9, 9 (1996). A male-to-female transsexual surgery “‘involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics,’ such as breast development.” *Ulane*, 742 F.2d at 1083 n.4 (quoting Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 970 n.37 (1971)).

41. ASHBEE ET AL., *supra* note 38, at 7.

42. Matusewitch, *supra* note 40, at 9.

43. ASHBEE ET AL., *supra* note 38, at 7.

44. Matusewitch *supra* note 40, at 9.

45. ASHBEE ET AL., *supra* note 38, at 10.

live openly as the desired sex at home and in public.⁴⁶ Because transgenders who are cross-living for the first time will likely encounter harassment, discrimination, and possibly violence,⁴⁷ it is important the transgender understands how transition will change his or her life before making an irreversible decision.

While sex reassignment surgery is a popular choice among transgenders who wish to transition, it is not the only option. Alternatively, transgenders may choose to undergo hormone therapy,⁴⁸ or seek breast, chest, and/or facial surgery.⁴⁹ “While the method and extent of transition will differ for everyone, psychological well-being is the ultimate goal.”⁵⁰

B. *Employment Issues Facing Transgenders*

While many employers may never encounter a transgender employee, consultants recommend employers prepare for the possibility.⁵¹ Employers can start by making sure company policies are in compliance with state law and city ordinances.⁵² Then, if an employee “comes out” at the workplace, guidelines will be in place to answer important questions such as, “What restroom will the employee use?”⁵³ and “What dress code will the employee

46. *Id.* at 10–11. The Harry Benjamin International Gender Dysphoria Association (HBIIGDA), the leading organization for the study and treatment of GID, has devised standards of care for the treatment of patients with GID and recommends transgenders live full-time as the desired gender for at least one year prior to surgery. *Schroer v. Billington*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006). To be eligible for surgery, physicians believe a real life experience is important because even though some transgenders are fully prepared for transition, others have unrealistic expectations about reassignment and need more time to think through their decision. *ASHBEE ET AL.*, *supra* note 38, at 10–11.

47. *ASHBEE ET AL.*, *supra* note 38, at 12.

48. *Kennedy*, *supra* note 37, at 282.

49. *See ASHBEE ET AL.*, *supra* note 38, at 11 (listing different assessment standards for alternative sexual reassignment surgeries). Physicians do not require a “real life experience” when choosing one of these alternatives. *Id.* Nevertheless, the HBIIGDA standards recommend transgenders live full-time as the gender that matches his or her identity for three months, understand the effects and risks of surgery, and be competent to make care decisions before undergoing breast or chest surgery. *Id.* at 5. On the contrary, the HBIIGDA standards have no recommendations for transgenders who undergo only face or voice surgery. *Id.*

50. *Kennedy*, *supra* note 37, at 283. The World Professional Association for Transgender Health, Inc., states that “the general goal of psychotherapeutic, endocrine, or surgical therapy for persons with [GID] is lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment.” *Id.* at 282–83.

51. Kelly P. Dwyer, *An Employee, Hired as a Man, Becomes a Woman. Now What?*, N.Y. TIMES, July 31, 2005, at 10-11.

52. *Id.*

53. *Id.*

follow?”⁵⁴ Many employers have already recognized the importance of such procedures and have instituted antidiscrimination policies even though such policies sometimes cause the employer to lose support among other employees.⁵⁵ Gerald Maatman, Jr., an attorney representing employers in cases involving transgender employees, has said that implementing antidiscrimination policies “creates some vexing problems for the employer,” which include showing respect for the transgender employee while acknowledging the fears and tensions of other employees.⁵⁶ Attaining a balance may be difficult, yet more than 150 Fortune 500 companies manage to do so by including gender identity in their nondiscrimination policies.⁵⁷

A human resources official with Intel Corporation, Pffron Doss, explained that Intel has not only implemented antidiscrimination policies, but also maintains a specific set of guidelines for supporting transgenders as they transition in the workplace.⁵⁸ Doss explains that for the other employees, it is “initially a fear of the unknown.”⁵⁹ Intel, therefore, works not only to support the transgender but also his or her co-workers by informing and educating them about working with a transitioning transgender.⁶⁰

Regrettably, not all companies are as prepared as Intel. For instance, when Carlos (Carla) Enriquez, a transgender and doctor at West Jersey Health Systems, decided to treat her GID by transitioning, she was fired.⁶¹ Specifically, when Carlos changed her name to Carla, began “shaving her beard, piercing her ears, growing long hair and wearing a ponytail, and, by virtue of hormonal therapy, [began] to grow breasts,” Carla’s employer instructed her to ““stop all this and go back to your previous appearance!””⁶² Carla refused and was consequently terminated.⁶³ Fortunately for Carla, a

54. See Joanna Grossman, *Transsexuals, Dress Codes, and the Law: A New Jersey Court Decision Embraces a Broad Concept of Sex Discrimination*, FINDLAW, July 17, 2001, <http://writ.news.findlaw.com/grossman/20010717.html>.

55. See, e.g., Dwyer, *supra* note 51, at J1 (finding that Intel has implemented antidiscrimination policies).

56. *Id.*

57. Keith Ecker, *Out in the Office: Employers Grapple with Lesbian, Gay, Bisexual and Transgender (LGBT) Workplace Issues*, INSIDECOUNSEL, May 2008, at 56. Companies including gender identity in their non-discrimination policies include American Airlines, Capital One, Ford Motor Company, Microsoft, and Xerox, among others. BRIAN MOULTON & LIZ SEATON, HUMAN RIGHTS CAMPAIGN, *TRANSSEXUAL AMERICANS: A HANDBOOK FOR UNDERSTANDING* 17 (2008).

58. See, e.g., Dwyer, *supra* note 51, at J1.

59. *Id.*

60. *Id.*

61. Suzanne Marasco, *Redefining Sexual Classification in the Discrimination Sector: Seeking to Protect Individuals Who Have Transgender Status*, 63 N.J. L.J., June 16, 2008, at 1.

62. Grossman, *supra* note 54.

63. *Id.*

New Jersey appellate court decided that New Jersey's Law Against Discrimination protected her from employment discrimination on the basis of both disability and gender identity.⁶⁴

Unfortunately, for other transgenders like Carla, not all states have laws protecting against discrimination based on sexual or gender identity. Since federal law also fails to adequately protect transgenders from employment discrimination, many transgenders have no legal recourse when faced with discrimination in the workplace.⁶⁵

II. TITLE VII: A LACK OF PROTECTION

A. *Congressional Intent*

Traditionally, Congress' purpose in enacting antidiscrimination legislation has been to neutralize widespread prejudice against people with stigmatizing characteristics and eliminate faulty judgments about their capabilities.⁶⁶ Whether the category of discrimination is mutable, such as religion or marital status, or immutable, such as race or national origin, antidiscrimination laws forbid differential treatment.⁶⁷ Congress' aim was no different when it enacted Title VII of the Civil Rights Act of 1964. When Congress announced, "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees,"⁶⁸ Congress "intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth" rather than by their exterior traits.⁶⁹ As a result, Title VII requires employers to disregard race, sex, religion, and national origin when making employment decisions.⁷⁰ But what exactly does it mean to disregard "sex"?

Title VII's legislative history provides little guidance. Because "sex" was added just one day before the House approved Title VII, legislators had neither debated its meaning nor held hearings on what constituted "sex" for purposes of interpreting the legislation.⁷¹ Indeed, when referencing the addition,

64. Marasco, *supra* note 61, at 2.

65. *See infra* Part VII.

66. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000).

67. *Id.*

68. *Id.* at 10 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion)).

69. *Id.* (quoting *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972)).

70. *Id.* This is true "except in exceptional and discrete circumstances such as affirmative action." *Id.* at 11.

71. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (citations omitted) ("Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."). "Th[e] sex amendment was the gambit of a congressman

legislators spoke only of providing equality in the workplace for women,⁷² which left open inevitable questions including how this legislation would affect the homosexual, bisexual, and transgender communities. The United States Supreme Court has refused to address the issue, thus leaving federal district and appellate courts to grapple with these questions.

B. Standing

Courts have been reluctant to grant standing to transgender plaintiffs who claim they have been discriminated against “because of sex” under Title VII.⁷³ As a result, transgender discrimination claims are rarely decided on the merits. Although some plaintiffs have presented compelling arguments in favor of Title VII protection for transgenders,⁷⁴ many courts have consistently held transgenders cannot claim discrimination “because of . . . sex.”⁷⁵ So instead of eliminating discrimination based on prejudice and faulty perceptions in these instances, Title VII, as many courts interpret it, allows discrimination based on gender identity.

III. FEDERAL CASE LAW

The first cases brought by transgenders claiming employment discrimination under Title VII were almost uniformly dismissed, with courts holding that transgenders did not have standing because they were not a protected class under Title VII. Relying heavily on the lack of legislative history and Congress’s failed attempts to enact antidiscrimination legislation to protect homosexuals, these courts held that the word “sex” in Title VII should be given its plain meaning and provided protection for discrimination based on biological sex only.

seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute’s prohibition against race discrimination.” *Ulane*, 742 F.2d at 1085; see Tan, *supra* note 13, at 584 n.33 (quoting 110 CONG. REC. 2720 (1964), reprinted in EEOC, 1 LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3231 (1968) (quoting Rep. Green’s statement that some supporters of adding the “sex” amendment were “openly and honestly seeking to kill the entire bill”).

72. Tan, *supra* note 13, at 584 n.34 and accompanying text (noting that addition of Title VII “sex” provision was aimed at male–female equality).

73. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002); *Ulane*, 742 F.2d at 1086; *Holloway*, 566 F.2d at 662; *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (C.D. Cal. 1975).

74. See, e.g., *Etsitty*, 502 F.3d at 1221. In that case, the transgender plaintiff argued discrimination against a person’s identity as a transgender “is directly connected to the sex organs she possesses,” and therefore, “discrimination on [that] basis must constitute discrimination because of sex.” *Id.*

75. For a list, see *supra* note 73.

A. *Voyles v. Ralph K. Davies Medical Center*⁷⁶

The first transgender plaintiff to claim Title VII employment discrimination was Charles (Carrie) Voyles.⁷⁷ When Voyles, a hemodialysis technician, informed her employer that she planned to undergo sex reassignment surgery, the medical center fired her.⁷⁸ The medical center thereafter admitted they fired Voyles because she intended to change her sex, and “such a change might have a potentially adverse effect on both the patients receiving treatment at the dialysis unit and on plaintiff’s co-workers.”⁷⁹ The court focused almost exclusively on legislative intent and held transgenderism did not fall within the purview of Title VII.⁸⁰ The court stated,

[E]ven the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress’ paramount, if not sole, purpose in banning employment practices predicated upon an individual’s sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving trans[genders], homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.⁸¹

Thus, the court effectively allowed the medical center to fire Voyles for a discriminatory purpose without facing legal repercussion.

B. *Holloway v. Arthur Andersen & Co.*⁸²

Two years later, the Ninth Circuit became the first federal court of appeals to decide this issue in *Holloway v. Arthur Andersen & Co.*⁸³ Robert (Ramona) Holloway had been working for Arthur Andersen, an accounting firm, for five years when she informed her supervisor that she planned to undergo sex reassignment surgery.⁸⁴ Upon receiving the news, Holloway’s supervisor suggested that she pursue a new job—one where her transgenderism was unknown.⁸⁵ Five months later, Holloway requested her records be changed to

76. 403 F. Supp. 456 (C.D. Cal. 1975).

77. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 567 (2007).

78. *Voyles*, 403 F. Supp. at 456.

79. *Id.*

80. *Id.* at 457.

81. *Id.*

82. 566 F.2d 659 (9th Cir. 1977).

83. *Id.* at 661. The *Holloway* interpretation of “sex” has since been overruled by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See *infra* Part III.D. The purpose of citing to *Holloway* and the other cases in this section is to illustrate how “sex” may be interpreted under Title VII, even if those interpretations are no longer legally recognized. *Price Waterhouse* has replaced most of these narrow interpretations. See *id.* at 250–53.

84. *Price Waterhouse*, 490 U.S. at 250–53.

85. *Id.*

reflect her new first name, Ramona.⁸⁶ After Arthur Andersen complied with her request, Holloway was terminated.⁸⁷

When the case came to the Ninth Circuit, the court noted that the district court did not decide Holloway's case on the merits and posed the issue as "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."⁸⁸ The court then discussed legislative history and determined that Title VII's prohibition on discrimination based on "sex" was meant only to "place women on an equal footing with men."⁸⁹ Citing Congress' unsuccessful attempts to amend Title VII to include protection for discrimination based on "sexual preference," the court found that Congress did not intend to protect transgenders from employment discrimination and concluded Holloway failed to state a claim.⁹⁰

C. *Ulane v. Eastern Airlines, Inc.*⁹¹

Breaking from previous decisions, in *Ulane v. Eastern Airlines Inc.*, the United States District Court for the Northern District of Illinois held that Title VII provided protection for transgenders.⁹² In 1968, after serving in the United States Army in Vietnam, Kenneth (Karen) Ulane⁹³ began flying for Eastern Airlines.⁹⁴ Eleven years later, she was diagnosed with GID.⁹⁵ Ulane explained that "although embodied as a male, from early childhood she felt like a female."⁹⁶ After her diagnosis Ulane began hormone therapy and eventually underwent sex reassignment surgery.⁹⁷ Eastern Airlines terminated Ulane after discovering she was a transgender.⁹⁸

Judge Grady, writing for the district court, reasoned "sex is not a cut-and-dried matter of chromosomes" and that the word "sex," as used scientifically and within the statute, "can be and should be reasonably interpreted to include . . . the question of sexual identity and . . . therefore, trans[genders] are protected by Title VII."⁹⁹ Judge Grady's opinion focused primarily on

86. *Id.*

87. *Id.*

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

89. *Id.* at 662.

90. *Id.* at 662–64.

91. 581 F. Supp. 821 (N.D. Ill. 1983).

92. *Id.* at 825.

93. Associated Press, *Karen Ulane, 48, Pilot Who Had Sex Change*, N.Y. TIMES, May 24, 1989, at D25 (explaining in her obituary that Karen Ulane was known as "Kenneth" prior to her surgery).

94. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

95. *Id.* at 1083.

96. *Id.*

97. *Id.*

98. *Id.* at 1084.

99. *Ulane*, 581 F. Supp. at 825.

transgenders' affliction with sexual identity and refused to recognize Title VII protection for cross-dressers or homosexuals because they are not persons with "sexual identity problems."¹⁰⁰ Judge Grady explained that the statute "was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference . . . or the matter of sexual gratification from wearing the clothes of the opposite sex," however, it is "an altogether different question as to whether the matter of sexual identity is comprehended by the word, 'sex.'"¹⁰¹

When Eastern Airlines appealed, the Seventh Circuit Court of Appeals was confronted with the rare opportunity to overturn a district court ruling in favor of a transgender plaintiff.¹⁰² Without much hesitation, the Seventh Circuit reversed.¹⁰³ Similar to *Voyles* and *Holloway*, the Seventh Circuit's opinion in *Ulane* relied on congressional intent, or rather lack thereof, and held that transgenders are not protected under Title VII.¹⁰⁴ The Seventh Circuit examined the last-minute addition of "sex" to the Civil Rights Act and stated, "The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption, clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."¹⁰⁵

Giving the words in the statute their plain meaning, the court found that "discrimination based on sex" meant to "discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . ."¹⁰⁶ Nor does Title VII prohibit "discrimination based on an individual's . . . discontent with the sex into which they were born."¹⁰⁷ The court stated that while they did not wish to "condone discrimination in any form,"¹⁰⁸ they could not find a statutory basis for *Ulane's* claim.¹⁰⁹ Any new definition or interpretation "must come from Congress."¹¹⁰

100. *Id.* at 823.

101. *Id.* In his opinion, Judge Grady notes that prior to his participation in this case he never considered a definition of sex beyond male and female. *Id.* But "[a]fter listening to the evidence in this case, it [became] clear to [him] that there is no settled definition in the medical community as to what we mean by sex." *Id.* Noting perception, both the individual's perception of himself and society's perception of the individual, has given rise to Title VII protection in the past, Judge Grady argues for a liberal construction of Title VII, one that provides protection to victims of group discrimination who perceive themselves differently from non-discriminated racial and sexual groups. *See Ulane*, 581 F. Supp. at 825.

102. *Turner*, *supra* note 77, at 568–69.

103. *Ulane*, 742 F.2d at 1084.

104. *Id.* at 1085.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Ulane*, 742 F.2d at 1084.

D. *Price Waterhouse v. Hopkins*¹¹¹ and the *Sex Stereotyping Argument*

The plaintiff in *Price Waterhouse v. Hopkins* was not discriminated against for her sexual preferences nor diagnosed with GID,¹¹² yet her claim—and the United States Supreme Court’s subsequent ruling in her favor—have become extremely important and particularly relevant for the homosexual, cross-dressing, and transgender communities. After working at Price Waterhouse, a nationwide professional accounting firm, for five years, Ann Hopkins was nominated for partnership.¹¹³ During her time at Price Waterhouse, Hopkins was a tremendously successful senior manager who was respected and praised for her accomplishments not only by her co-workers, but also her clients.¹¹⁴ Indeed, partners at Hopkins’ office said she was “‘an outstanding professional’ who had a ‘deft touch,’ a ‘strong character, independence, and integrity.’”¹¹⁵ Yet despite her achievements, some partners opposed Hopkins’ partnership and recommended it be held for reconsideration until the following year¹¹⁶ due to Hopkins’ aggressive, sometimes abrasive, personality and unsatisfactory “inter-personal skills.”¹¹⁷

After hearing specific partners’ reasons for denying Hopkins’ partnership, the court found clear signs that “some of the partners reacted negatively to Hopkins’ personality because she was a woman.”¹¹⁸ For instance, one partner stated that she “overcompensated for being a woman,” while others described her as “macho.”¹¹⁹ Some criticized her vulgar language, one objecting to her swearing only “because it’s a lady using foul language,” and another advising that she take “a course at charm school.”¹²⁰ The Court found especially disturbing the fact that one partner advised Hopkins that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” to improve her chances for partnership the next year.¹²¹

To complicate matters, the district court found evidence that “[i]n previous years, other female candidates for partnership also had been evaluated in sex-based terms. . . . [C]andidates were viewed favorably if partners believed they

109. See Turner, *supra* note 77, at 569.

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

111. 490 U.S. 228 (1989).

112. *Id.* at 235.

113. *Id.* at 233.

114. See *e.g.*, *id.* at 234.

115. *Id.*

116. *Price Waterhouse*, 490 U.S. 233 (1989).

117. *Id.* at 234–35.

118. *Id.* at 235.

119. *Id.*

120. *Id.* (quoting a partner at the law firm).

121. *Price Waterhouse*, 490 U.S. 235.

maintained their femin[in]ity while becoming effective professional managers.”¹²² The Supreme Court thus affirmed the finding of the lower courts, in accordance with strong evidence in the record, that Hopkins was discriminated against, at least in part, because “she did not conform to stereotypes associated with her sex.”¹²³

The Court held that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”¹²⁴ The Court further affirmed,

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹²⁵

Whether purposefully or not, the Supreme Court in *Price Waterhouse* provided transgender plaintiffs with a claim for relief under Title VII. In the future, transgenders would successfully use the sex stereotyping argument to obtain standing and have their cases decided on the merits.

E. *Smith v. City of Salem*¹²⁶

With no federal law prohibiting employment discrimination based on sexual orientation or identity, plaintiffs started bringing claims for discrimination using the *Price Waterhouse* sex stereotyping theory. Surprisingly, some courts that have heard transgenders’ sex stereotyping claims have not only listened to the merits of the case, but have also decided in favor of transgender plaintiffs.¹²⁷ In *Smith v. City of Salem*, a Sixth Circuit case, Jimmie Smith, a transgender diagnosed with GID, was terminated from his position as lieutenant in the Salem Fire Department after informing his supervisor of his plans to “eventually . . . complete physical transformation from male to female”—despite his seven years of service without any negative incidents.¹²⁸

Analyzing Smith’s case in light of the Supreme Court’s pronouncements in *Price Waterhouse*, the Sixth Circuit found Smith “sufficiently pleaded claims

122. *Id.*

123. Turner, *supra* note 77, at 575.

124. *Price Waterhouse*, 490 U.S. at 250.

125. *Id.* at 251 (quoting *City of Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

126. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

127. Turner, *supra* note 77, at 577. For examples of such cases, see *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *infra* note 148 and accompanying text.

128. *Smith*, 378 F.3d at 568.

of sex stereotyping and gender discrimination.”¹²⁹ The Sixth Circuit found that in *Price Waterhouse* the Supreme Court clearly extended Title VII’s discrimination prohibition to victims of “gender” discrimination.¹³⁰ According to the court, *Price Waterhouse* “eviscerated” the *Ulane* approach and overturned other cases holding that Title VII was limited to discrimination based on biological sex.¹³¹ The court concluded,

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.¹³²

F. *The Sixth Circuit Affirms Smith in Barnes v. City of Cincinnati*¹³³

The Sixth Circuit affirmed their decision in *Smith* less than a year later in *Barnes v. City of Cincinnati*.¹³⁴ In that case, a preoperative male-to-female transgender police officer brought a Title VII claim against the City of Cincinnati alleging she was demoted because of sex discrimination based on her failure to conform to sex stereotypes.¹³⁵ After Phillip (Philecia) Barnes was denied a promotion, she was placed on probation and singled out for a special program, which one of Barnes’ reviewing sergeants testified had “target[ed] [her] for failure.”¹³⁶ As part of the program, Barnes’ superiors evaluated her performance on a daily basis for over three months.¹³⁷ In these evaluations, Barnes was repeatedly told that she failed to display appropriate “command presence,”¹³⁸ and on one occasion, was told she needed to appear more “masculine” and “stop wearing makeup.”¹³⁹ Due to poor scores on her evaluations, Barnes failed the special program and her probation.¹⁴⁰

129. *Id.* at 572.

130. *Id.* at 573. “The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination: ‘In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.’” *Id.* at 572 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

131. *Smith*, 378 F.3d at 573.

132. *Id.* at 574.

133. 401 F.3d 729 (6th Cir. 2005).

134. *Id.* at 747.

135. *Id.* at 733.

136. *Id.* at 735.

137. *Id.* at 734.

138. *Barnes*, 401 F.3d at 735.

139. *Id.*

140. *Id.*

At trial, Barnes' expert testified that she could not understand why Barnes was denied a promotion when her scores on the evaluation tests were "higher than at least one other probationary sergeant."¹⁴¹ The City's actions further appeared discriminatory since Barnes was the only person placed in the special program and the only officer to fail probation between 1993 and 2000.¹⁴²

To establish a Title VII sex discrimination claim for denial of a promotion, Barnes had to demonstrate that she was a member of a protected class.¹⁴³ Citing *Smith* as precedent, the Sixth Circuit again held that transgenders are a protected class under the sex stereotyping argument stating, "a label, such as 'transsexual,' is not fatal to a sex discrimination claim"¹⁴⁴

In response to the City's argument that Barnes failed to establish a prima facie case because she failed to identify a similarly situated employee who was not a member of the protected class but received a promotion, the court held "Barnes need not demonstrate an exact correlation with the employee receiving more favorable treatment"¹⁴⁵ Instead, Barnes needed only to show that the other employee and she were similar in "all of the relevant aspects."¹⁴⁶ Since Barnes demonstrated that she was the only sergeant to fail probation in seven years and another sergeant with lower probationary scores, who was not a member of the protected class, passed probation, the court concluded that Barnes satisfied her burden.¹⁴⁷

After *Smith*, *Barnes*, and several other similar district court opinions,¹⁴⁸ it appeared that Title VII protection would be extended to protect individuals

141. *Id.*

142. *Id.*

143. *Barnes*, 401 F.3d at 736–37.

144. *Id.* at 737 (quoting *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)).

145. *Id.*

146. *Id.* (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir.1998)).

147. *Id.*

148. *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4, *5 (W.D.N.Y. Sept. 26, 2003) (holding that transgender employee stated an actionable claim under Title VII when discriminated against for failing to "act like a man"); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630, at *3 (N.D. Ind. Aug. 3, 2007) (stating a transgender plaintiff can state a sex stereotyping claim if the claim is that the plaintiff has been discriminated against for failing to appear masculine or feminine enough for the employer); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender"); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (finding plaintiff's transgenderism was not a bar to her sex stereotyping claim); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (remanding the case in light of plaintiff's potential sex stereotyping claim); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173, at *1 (W.D. Pa. Feb.17, 2006) (holding the Supreme Court in *Price Waterhouse* "clearly stated that Title VII requires that gender be irrelevant to employment decisions"); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. 02-

who had been discriminated against because they did not conform with gender stereotypes despite labels such as “transsexual” or “transgender.” Yet, a few district courts have refused to accept *Price Waterhouse* as binding precedent.

G. *Oiler v. Winn-Dixie Rejects the Sex Stereotyping Argument*

Even though cases like *Smith* and *Barnes* tend to suggest otherwise, transgenders arguing sex stereotyping have not always been successful. For instance, in *Oiler v. Winn-Dixie*,¹⁴⁹ the court rejected Peter (Donna) Oiler’s sex stereotyping argument in favor of a more traditional interpretation of Title VII.¹⁵⁰ Despite the fact that he had never cross-dressed at work, Oiler was fired after informing his supervisor that he was a transgendered cross-dresser.¹⁵¹ The company president and Oiler’s supervisor explained that they fired Oiler because they believed if customers recognized him as a cross-dresser, they would disapprove of his lifestyle and shop elsewhere.¹⁵² Simply put, Oiler suffered an adverse employment action because Winn-Dixie thought he was a liability to the company.¹⁵³

Quoting *Ulane* extensively, the court in *Winn-Dixie* followed the Seventh Circuit’s line of reasoning and held that Title VII does not outlaw discrimination against someone based on his or her sexual identity disorder.¹⁵⁴ Rejecting Oiler’s sex stereotyping argument, the court held that this was not a situation where the plaintiff was discharged for failing to conform to a sex stereotype.¹⁵⁵ Instead, the court found that the “plaintiff was terminated because he is a man with a sexual or gender identity disorder”¹⁵⁶

Although the court *appeared* to apply the sex stereotyping rule from *Price Waterhouse* when it found “no evidence that plaintiff was discriminated against because he was perceived as being insufficiently masculine,”¹⁵⁷ the court subsequently held *Price Waterhouse* was inapplicable because Ann Hopkins “may not have behaved as the partners thought a woman should have,

1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (“It is well settled that Title VII’s prohibition on sex discrimination encompasses discrimination against an individual for failure to conform to sex stereotypes.”).

149. *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

150. *Id.* at *3.

151. *Id.* at *1–2. Oiler is not the typical transgender plaintiff. Although he has been diagnosed with GID, Oiler remains a married heterosexual. *Id.* at *1.

152. *Id.* at *2.

153. *Id.*

154. *Oiler*, 2002 WL 31098541 at *3–4.

155. *Id.* at *5.

156. *Id.*

157. *Id.* at *5 n.60.

but she never pretended to be a man or adopted a masculine persona.”¹⁵⁸ Where other courts have held differently, the *Winn-Dixie* court indicated that the sex stereotyping argument could never apply to a transgendered employee.¹⁵⁹

H. *Etsitty v. Utah Transit Authority and Avoiding the Sex Stereotyping Argument*

In *Etsitty v. Utah Transit Authority*,¹⁶⁰ Michael (Krystal) Etsitty, a preoperative male-to-female transgender bus operator claimed she was terminated both because she was transgendered and because she failed to conform to her employer’s expectations of stereotypical male behavior.¹⁶¹ As a bus operator for the Utah Transit Authority (UTA), Etsitty drove routes requiring her to use public restrooms.¹⁶² In preparation for sex reassignment surgery, Etsitty began her real-life experience as a female by cross-dressing at work, wearing make-up, jewelry, acrylic nails, and using female restrooms while on her route.¹⁶³ After discovering that Etsitty still had male genitalia, the UTA terminated her employment citing potential liability arising from Etsitty’s restroom usage as their non-discriminatory reason.¹⁶⁴

The court said that it “need not decide whether [a sex stereotyping] claim may extend Title VII protection to trans[gender]s who act and appear as a member of the opposite sex” because a sex stereotyping claim is available and that Etsitty satisfied her prima facie burden.¹⁶⁵ Assuming Etsitty established her prima facie case allowed the court to shift the burden onto the UTA to articulate a legitimate, non-discriminatory reason for firing Etsitty.¹⁶⁶ The court then accepted the UTA’s proffered reason for terminating Etsitty as legitimate and non-discriminatory, namely the UTA’s concern that use of a women’s public restroom by a male employee would result in liability.¹⁶⁷

158. *Id.* at *6.

159. Turner, *supra* note 77, at 586 (“The court . . . seemed to endorse the notion that *Price Waterhouse*’s gender-stereotyping theory could never apply to a transgender employee.”).

160. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007).

161. *Id.* at 1218.

162. *Id.* at 1219.

163. *Id.*

164. *Id.*

165. *Etsitty*, 502 F.3d at 1224.

166. *Id.*

167. *Id.* Even though the court claimed analyzing Etsitty’s sex stereotyping claim was unnecessary, it later rejected it noting that “[h]owever far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms.” *Id.* The court stated, “Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.” *Id.*

Winn-Dixie, *Etsitty*, and other rejections and avoidances of sex stereotyping claims shows that the argument fails to adequately safeguard transgenders from employment discrimination.¹⁶⁸ With only the Sixth Circuit granting transgender plaintiffs standing, and the Supreme Court refusing to resolve the split,¹⁶⁹ it seems uniform protection is highly unlikely, absent a new approach.

IV. DISCRIMINATION “BECAUSE OF . . . SEX”: A NEW APPROACH

The District Court for the District of Columbia recently held in *Schroer v. Billington*¹⁷⁰ that the transgender plaintiff stated a claim by alleging that an employer refused to hire her solely because of her gender identity, and in doing so, discriminated against her “because of . . . sex” in violation of Title VII.¹⁷¹ Dave (Diane) Schroer “applied for, was offered, and accepted, a position as a senior terrorism research analyst” with the Congressional Research Service (CRS) within the Library of Congress.¹⁷² As a twenty-five year veteran of the Army who worked with the United States Special Operations Units in planning, directing, and executing special operations in the War on Terror, Schroer was highly qualified for the position.¹⁷³ After accepting the offer, Schroer informed the CRS she was a transgender and planned to transition from male to female.¹⁷⁴ Schroer explained that although she did not plan on having sex reassignment surgery for at least a year, she did plan to wear traditionally feminine clothing at work and go by a feminine name.¹⁷⁵ Her offer was subsequently rescinded.¹⁷⁶

Schroer filed suit, alleging that CRS’s decision was “based on [a] concern she would not be viewed as a credible authority on terrorism because her appearance as a female would not conform to members of Congress’ social

168. See, e.g., *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Pa. 1993) (holding plaintiff was not discriminated against due to “stereotypic concepts” about her ability to perform her job); *Underwood v. Archer Mgmt. Svcs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (finding the transgender plaintiff was not discriminated against based on her “personal appearance”); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003) (rejecting the notion that Price Waterhouse’s sex stereotyping argument extends to transgenders).

169. See *Ulane v. E. Airlines, Inc.*, 471 U.S. 1017 (1985) (denying certiorari to Karen Ulane’s petition for the writ); *City of Cincinnati v. Barnes*, 546 U.S. 1003 (2005) (denying certiorari to Philecia Barnes’ petition for the writ).

170. *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

171. *Id.* at 205.

172. Marcia Coyle, *Library of Congress Bias Case May Have Key Impact*, THE NAT’L L.J., Aug. 18, 2008, at 6.

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

174. Coyle, *supra* note 172, at 6.

175. *Id.*

176. *Schroer*, 424 F. Supp. 2d at 206.

stereotypes regarding how women should look.”¹⁷⁷ Comparing *Price Waterhouse* to Schroer’s claim, the court explained,

The actionable discrimination in *Price Waterhouse* proceeded from the opinion of the employer that the plaintiff was not sufficiently feminine for her sex. But there is a difference between “macho” women or effeminate men, whether trans[gender] or not, and persons such as Schroer whose adoption of a name and choice of clothing is part of an intentional presentation of herself as a person of a different sex than that of her birth.¹⁷⁸

The court found that the sex stereotyping argument protects women who are penalized for acting masculine and men who are admonished for acting effeminate, but does not protect transgender men, effeminate or not, or transgender women, masculine or not, who present themselves as the opposite sex.¹⁷⁹ The difference is that transgenders do not wish “to go against the gender grain.”¹⁸⁰ Rather, the court found transgenders like Schroer embrace cultural norms and seek to adopt them, for instance, by adopting a feminine name and wearing feminine clothing.¹⁸¹ The court thus found CRS rescinded Schroer’s offer not because she failed to conform to sex stereotypes, but, more simply, because her gender identity did not match “her anatomical sex.”¹⁸²

The court then suggested that the district court’s decision in *Ulane*, overturned by the Seventh Circuit, served as a better justification for Title VII protection for transgenders: “[I]t may be time to revisit Judge Grady’s conclusion in *Ulane I* that discrimination against trans[gender]s ‘because they are trans[gender]s’ is ‘literally’ discrimination ‘because of . . . sex.’”¹⁸³ In other words, the *Schroer* court advocated for a per se rule providing employment discrimination protection to transgenders under Title VII. This straightforward approach would provide a clear way to manage “the factual complexities that underlie . . . real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and . . . with social, psychological, and legal conceptions of gender.”¹⁸⁴ After all, “scientific observation may well confirm . . . that ‘sex is not a cut-and-dried matter of chromosomes.’”¹⁸⁵ But the court stopped short, explaining that a decision to reinterpret Title VII

177. Ellen Martin, *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, 782 PRACTISING L. INSTITUTE 441, 449 in EMPLOYMENT LAW INSTITUTE (2008).

178. *Schroer*, 424 F. Supp. 2d at 210.

179. *Id.*

180. *Id.* at 211.

181. *Id.*

182. *Id.*

183. *Schroer*, 424 F. Supp. 2d at 212.

184. *Id.* at 212–13.

185. *Id.* at 213 (quoting *Ulane*, 581 F.Supp at 825).

cannot be made at the pleading stage.¹⁸⁶ Instead, the court simply denied the Library of Congress' motion to dismiss,¹⁸⁷ giving Schroer hope that it might later expand the definition of discrimination "because of . . . sex" under Title VII to include discrimination against transgenders solely because they are transgendered.

While the court in *Schroer* indicated Title VII's discrimination prohibition should apply to transgenders, it is doubtful other courts will do the same. Given Title VII's lack of legislative history and Congress' failed attempts to pass sexual orientation and gender identity employment discrimination legislation,¹⁸⁸ courts have little reason to deviate from precedent. Thus, even though *Schroer* offers some hope, a congressional measure is likely the best option for ensuring transgender individuals protection from discrimination.

V. THE EMPLOYMENT NON-DISCRIMINATION ACT

A. Congressional Initiatives

Since 1975, Congress has considered amending Title VII to include a ban on employment discrimination based on sexual orientation.¹⁸⁹ After several failed attempts, gay advocates abandoned the fight for an amendment and proposed an entirely different piece of legislation, the Employment Non-Discrimination Act (ENDA).¹⁹⁰ The first version of the ENDA, House Resolution 2015, included protection for gays, lesbians, and transgenders by barring employment discrimination based on sexual orientation and gender identity.¹⁹¹ Specifically, the Act prohibited private employers with fifteen or more employees; federal, state and local governments; labor unions; and employment agencies from:

- Firing, refusing to hire, or taking any other action that would harm a person's status as an employee based on that person's sexual orientation or gender identity, whether perceived or actual.
- Discriminating against an employee as a result of the sexual orientation or gender identity of someone with whom the employee associates.

186. *Id.*

187. *Id.*

188. *See* Tan, *supra* note 13, at 604–05.

189. *Id.* at 604.

190. *Id.* at 605.

191. H.R. 2015, 110th Cong. (1st Sess. 2007).

- Discriminating against an individual because that person has opposed an unlawful employment practice or one the individual reasonably believed was an unlawful employment practice.
- Discriminating against an employee who participated in any manner in an investigation, proceeding or hearing under the ENDA.¹⁹²

House Resolution 2015 allowed employers to impose reasonable dress codes, but it contained special consideration for transgenders undergoing transition procedures.¹⁹³ Additionally, the Act gave the Equal Employment Opportunity Commission (EEOC) enforcement power and permitted transgenders, whose complaints could not be resolved by the EEOC, to file suit in federal court for damages, including attorneys' fees.¹⁹⁴ This version of the ENDA was introduced in 1995, 1997, 1999, 2001, and 2003, but failed in the House on each occasion.¹⁹⁵

After a survey of House members revealed that an amended ENDA protecting sexual orientation but not gender identity would likely pass, interest groups supporting the bill shifted gears.¹⁹⁶ Speaker Nancy Pelosi (D-Cal.) and other Democrats, including Representative Barney Frank (D-Mass.), an openly gay congressman, removed language that banned discrimination based on gender identity.¹⁹⁷ Thus, the newer version of the ENDA, House Resolution 3685, prohibited discrimination based on sexual orientation¹⁹⁸ but left transgenders vulnerable.¹⁹⁹ This decision infuriated the National Gay and Lesbian Task Force and other lesbian, gay, bisexual, and transgender rights organizations²⁰⁰ who consequently withdrew their support for the sexual orientation-only ENDA.²⁰¹ Even without the support of the gay and transgender communities, the House Education and Labor Committee

192. Carolyn M. Plump, *Some Anti-Gay Bias Is Already Against the Law*, NAT'L L.J., Oct. 1, 2007, at S1.

193. See H.R. 2015, 110th Cong. (1st Sess. 2007); see also Philip M. Berkowitz, *Employment Law Issues Post-Summer Roundup: Court Rulings, Legislative Proposals*, N.Y. L.J., Sept. 13, 2007, at 5.

194. Plump, *supra* note 192.

195. Tan, *supra* note 13, at 604.

196. *Id.* at 606.

197. David Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1.

198. H.R. 3685, 110th Cong. (1st Sess. 2007).

199. David Herszenhorn, *Party's Liberal Base Proves Trying to Democrats*, N.Y. TIMES, Oct. 12, 2007, at A23.

200. *Id.*

201. Tan, *supra* note 13, at 605. Over 380 civil rights groups vehemently opposed the change and insisted that gender identity be included in the proposed bill. Letter from United ENDA Coalition to Nancy Pelosi, Speaker of the House of Representatives (Oct. 1, 2007).

approved the sexual orientation-only bill on October 18, 2007.²⁰² On November 7, 2007, the House of Representatives passed the sexual orientation-only version of the ENDA by a vote of 235–184.²⁰³ While many Democrats were excited about finally passing a bill protecting sexual orientation, others were disappointed at the omission of protection for transgenders.²⁰⁴

Although the ENDA was never introduced in the Senate during the 110th session, some senators indicated that they would support the sexual orientation-only version.²⁰⁵ “Senator Susan Collins, Republican of Maine, said that she would be the lead co-sponsor of the Senate bill.”²⁰⁶ In her statement, Senator Collins said “the House vote ‘provides important momentum’ and that ‘there is growing support in the Senate for strengthening federal laws to protect American workers from discrimination based on sexual orientation.’”²⁰⁷ The late Senator Edward Kennedy (D-Mass.) also expressed support.²⁰⁸ On November 8, 2007, one day after the House passed the sexual orientation-only ENDA, Kennedy stated that he hoped the Senate would pass the bill in 2008.²⁰⁹ Even though the proposed bill lacked protection for transgenders, Kennedy’s spokesperson said he would support it as the only realistic chance of passing the ENDA during Congress’ 2007–08 session.²¹⁰

Despite visible signs of support, some members of the gay, bisexual, lesbian, and transgender communities doubted the Senate’s commitment to enacting the ENDA quickly.²¹¹ After all, political observers predicted Republican senators opposing the ENDA would filibuster the legislation,²¹² and the White House confirmed that President Bush would veto any version of the ENDA—whether transgender-inclusive or not—that reached the oval office.²¹³ These developments prompted the United ENDA Coalition, an alliance of gay and transgender organizations led by the National Gay and Lesbian Task Force, to question why the Human Rights Campaign (HRC) and

202. 153 CONG. REC. D1381 (daily ed. Oct. 18, 2007) (House Labor and Education Committee ordered that H.R. 3685 be reported).

203. 153 CONG. REC. D1489 (daily ed. Nov. 7, 2007) (recording vote on H.R. 3685); *see also* Tan, *supra* note 13, at 606.

204. Herszenhorn, *supra* note 197, at A1.

205. *See id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Lou Chibbaro, *Kennedy Favors ‘08 Senate Vote on ENDA: Leaked HRC Memo Suggests Putting Measure on Hold Until Next Year*, WASH. BLADE, Jan. 4, 2008, available at http://www.thetaskforce.org/TF_in_news/08_0128/stories/6_kennedy_enda.pdf.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

congressional Democrats were pushing to pass the ENDA in 2007–08.²¹⁴ The United ENDA Coalition advocated, instead, for postponing a vote until 2009—when the coalition believed Congress would more likely pass a transgender-inclusive ENDA, and a newly-elected Democratic president would more likely sign the bill into law.²¹⁵

In the end, the Congressional session lapsed before the Senate voted on H.R. 3685,²¹⁶ leaving the ENDA's fate in the hands of the 111th Congress and President Obama. Mara Keisling, Executive Director of the National Center for Transgender Equality, stated she has “no doubt” a transgender-inclusive ENDA will be passed during Congress' 111th session.²¹⁷ Even though she does not expect the ENDA to be first on Congress' agenda, Keisling stated she is confident there will be sufficient votes to pass the ENDA this time around.²¹⁸ In an interview before the election, Representative Barney Frank (D-Mass.) agreed. Frank stated, “If [the House] can pick up 15 Democratic seats, then I think we are in a good position to pass a transgender-inclusive ENDA.”²¹⁹

If Representative Frank is correct, Democrats should have no problem passing the ENDA during Congress' 111th session. For the first time since 1994 Democrats control both houses of Congress.²²⁰ President Obama's Democratic administration is committed to passing the ENDA, too. In fact, as part of his own civil rights agenda, the President promised to work to pass a transgender-inclusive ENDA because he “believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity.”²²¹ To prove his devotion to the issue, President Obama pledged to ban discrimination based on gender identity when hiring his own

214. Chibbaro, *supra* note 209.

215. *Id.*

216. *2007 History of Bills Online*, H.R. 3685, 110th Cong. (2007) (showing bill calendared in Senate but no further action taken).

217. Mara Keisling, *The Employment Non-Discrimination Act H.R. 3017/S. 1584*, Sept. 3, 2008, <http://www.nctequality.org/ENDA.html>.

218. Sean Bugg, *Online Extra: Mara Keisling, Executive Director, National Center for Transgender Equality: We Won, We Lost. What's Next for 2009?*, METRO WEEKLY, Nov. 13, 2008 <http://www.metroweekly.com/feature/?ak=3899>.

219. Mark Segal, *Interview with Barney Frank*, 365GAY.COM, Aug. 25, 2008, available at <http://www.365gay.com/features/interview-with-barney-frank>.

220. Office of the Clerk, U.S. House of Representatives, *House History: Party Divisions of the House of Representatives (1789 to Present)*, available at http://clerk.house.gov/art_history/house_history/partyDiv.html (last visited June 12, 2010); Senate Historical Office, U.S. Senate, *Party Division in the Senate, 1789–Present*.

221. The White House, *Civil Rights*, available at http://www.whitehouse.gov/agenda/civil_rights/ (last visited Aug. 1, 2010).

administration.²²² Thus, even though a transgender-inclusive ENDA failed to muster enough votes on six previous occasions,²²³ it seems that if the seventh vote takes place during the 111th congressional session, there is a strong possibility that a different outcome would result.

B. *Effects of the ENDA*

If the ENDA becomes law, transgender employees would have greater opportunity to assert their rights in the workplace. Jurisdictions and corporations that ban gender identity discrimination have already experienced this phenomenon.²²⁴ Lee Schreter, a shareholder in Littler Mendelson, explains,

In the past, the issue often wouldn't come up because the employee who was getting ready to transition would move to avoid the difficult problems of having to come to terms with people who knew them before[.] . . . Now with all the changes in the law you can expect that more and more people will come forward and ask for their employer's assistance.²²⁵

The ENDA would force employers to consider how they will handle issues that accompany transgenders in the workplace. Fortunately, several companies that currently employ transgenders are already managing the task.²²⁶ These companies can serve as examples for how to deal with supporting employees who remain at the workplace during their period of transition.

1. Amending Non-Discrimination Policies

If the ENDA is enacted, the first step towards compliance for many businesses will likely be amending non-discrimination policies to ban discrimination based on sexual orientation and gender identity. Many companies have already done just that. In fact, in the last five years the number of Fortune 500 companies that include gender identity in their Equal Employment Opportunity (EEO) policies rose from twenty-seven to more than 150.²²⁷ According to Michael Cohen, a partner in WolfBlock's employment services group,

Employers are becoming more proactive in this area for two reasons
First, they don't want to get sued for discrimination. Second, they realize that

222. Bill Leonard, *Obama Transition Team's EEO Policy Protects Gender Identity*, H.R. MAG., Jan. 2009, at 18.

223. Tan, *supra* note 13, at 604.

224. Mary Swanton, *Identity Issues: Rapidly Changing Legal Landscape Supports Transgendered Employees' Rights*, INSIDECOUNSEL, Oct. 2007, at 30, 32–33.

225. *Id.* at 30.

226. MOULTON & SEATON, *supra* note 57, at 17.

227. Ecker, *supra* note 57, at 56.

the fairness issue is an important one. Why would you want someone treated differently based on [his or her] sexual orientation or transgender status? It just doesn't make sense.²²⁸

Moreover, companies that have amended their policies claim it makes good business sense by encouraging a collaborative environment, enhancing internal morale, and providing a competitive advantage.²²⁹ Such a change may give rise to more benefits than employers would expect.

Scott Turner, managing partner at Nixon Peabody, claims his company encourages diversity in the workplace not only because it is the right thing to do, but also because it lends itself to a more cooperative, collaborative, and welcoming environment both internally and among clients.²³⁰ When employers vow to make hiring decisions based on merit and ability rather than on other irrelevant factors, morale in the workplace is higher.²³¹ This, in turn, can also result in higher productivity for the employer.²³² Companies that amend their non-discrimination policies tend to get better work out of their gay, bisexual, lesbian, and transgender employees—likely because those employees feel supported, accepted, and appreciated by their employers.²³³

Companies with more inclusive nondiscrimination policies have also found that such changes have “improve[d] recruitment and retention of not just transgender employees, but also ‘other fair-minded employees.’”²³⁴ “Protections based on gender identity send a strong message to transgender job-seekers.”²³⁵ Thus, employers who provide those protections “will have a larger pool of candidates to select from because no one is self-selecting himself out of the process or being eliminated based on factors that have no bearing on job performance.”²³⁶ Moreover, employers that actively support transgenders in the workplace have a lasting impact on the transgender employee's performance, attitude, and commitment to that employer.²³⁷ “According to a 1997 study by the Families & Work Institute, ‘the quality of the workers’ jobs and the supportiveness of their workplaces are the most powerful predictors of productivity, job satisfaction, commitment to their employers and

228. *Id.* at 48.

229. See Elizabeth Stull, *Rochester-Area Companies Lead Equality Index*, DAILY REC., Sept. 4, 2008; Plump, *supra* note 192, at S9.

230. Stull, *supra* note 229.

231. Plump, *supra* note 192, at S9.

232. *Id.*

233. Ecker, *supra* note 57, at 58.

234. HUMAN RIGHTS CAMPAIGN FOUND., *TRANSGENDER INCLUSION IN THE WORKPLACE* 14 (2d ed. 2008) [hereinafter *TRANSGENDER INCLUSION*].

235. *Id.*

236. Plump, *supra* note 192, at S9.

237. *TRANSGENDER INCLUSION*, *supra* note 234, at 15.

retention.”²³⁸ Brad Salavich, former program manager for the gay, bisexual, lesbian, and transgender workforce diversity at IBM, says that gender identity inclusive policies are used not only to recruit transgenders, but also as a signal to other protected classes of individuals, such as women and minorities, that they will be accepted too.²³⁹

1. Establishing Bathroom and Locker Room Protocol

Not all issues are as easy to solve as amending non-discrimination policies. Not surprisingly, the most controversial issue for employers with a transitioning employee involves the use of bathroom facilities. Often this is not only an issue for the transitioning employee, but also for his or her co-workers.²⁴⁰ There are two generally accepted approaches to solving this dilemma.²⁴¹ The first involves offering a unisex or third restroom.²⁴² This helps balance the interests of the transitioning employee with the concerns of any uncomfortable co-workers.²⁴³ “The second tactic, the one experts feel is most equitable, is to allow the transitioning employee to use the restroom that matches [his or her] gender presentation.”²⁴⁴ Co-workers who are uncomfortable using the same restroom as the transgender should then be given the option of using an alternate restroom.²⁴⁵

Locker rooms in the workplace present a similar challenge. The HRC recommends that employers install stalls or curtains to offer privacy in changing and shower areas.²⁴⁶ But if creating a private area is not possible, employers are encouraged to organize a changing and showering schedule in the public area, or find a nearby private area for transgenders to use.²⁴⁷ Obviously, no single solution will work for every employer; but if companies can provide accommodations that maintain the dignity of all employees in a respectful manner, they will likely avoid violating the ENDA.

More often than not, the only reason bathroom and locker room use presents an issue is because co-workers are not informed about transgender issues. Stephanie Marnin, an associate in the lesbian, gay, bisexual, and transgender practice group at a plaintiff’s firm explains, “Often it’s about people being afraid and not understanding that men who are going to assault

238. *Id.* (quoting James T. Bond, Galinsky, Ellen, and Jennifer E. Swanberg, *The 1997 National Study of the Changing Workforce* (New York: The Families and Work Institute), 1998).

239. *Id.* at 14.

240. Marasco, *supra* note 61, at 2.

241. Ecker, *supra* note 57, at 56.

242. *Id.* at 56–58.

243. *Id.* at 58.

244. *Id.*

245. TRANSGENDER INCLUSION, *supra* note 234, at 24.

246. *Id.* at 34.

247. *Id.*

women in bathrooms are not going to dress as a woman.”²⁴⁸ If employers and co-workers are educated about the transitioning process, they will realize that this is not a legitimate concern.²⁴⁹ Employers can, and often do, handle this issue by informing and educating their employees.

2. Informing and Educating Other Employees

Learning that a fellow co-worker who employees thought was a man is actually a woman can be disruptive in the workplace if it is not handled carefully.²⁵⁰ According to Lee Schreter, there is usually a thirty to sixty day period where everyone is talking about the transition, “[b]ut if it is handled properly, it becomes a non-issue.”²⁵¹ Involving senior management is one way that companies can send a strong and clear message of support, while setting examples for other employees.²⁵² Since managers are watched and mimicked by employees, companies seeking to minimize the likelihood of harassment in the workplace should make sure they are careful to treat the transitioning employee with respect, especially when addressing the employee as he or she wishes to be addressed. This includes using the employee’s new name and the appropriate pronoun.²⁵³

According to Christine Duffy, a senior staff attorney at the Pro Bono Partnership and a male-to-female transgender, “Nothing succeeds unless there is a corporate buy-in. The head of an organization needs to make it clear they are behind [the transgender employee] and they won’t tolerate harassment or discrimination.”²⁵⁴ Duffy recommends the employer and transgender employee work together to determine how much information the transgender feels comfortable sharing with his or her co-workers.²⁵⁵ That way, the employer can create a communication plan before rumors begin to spread.²⁵⁶ Some employers will opt to give the transgender employee time off from work while they explain the situation to the other employees and educate them on gender identity issues.²⁵⁷ This allows time for the information to sink in and the shock to wear off.

After employees are informed of the transition, employers will generally follow up with antidiscrimination and harassment training. Employers do so by either incorporating gender identity into a larger diversity training program,

248. Swanton, *supra* note 224, at 35.

249. Ecker, *supra* note 57, at 58.

250. Swanton, *supra* note 224, at 35.

251. *Id.*

252. TRANSGENDER INCLUSION, *supra* note 234, at 26.

253. Swanton, *supra* note 224, at 35.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

or by facilitating a full-fledged educational program on gender identity issues alone.²⁵⁸ At a minimum, employers provide guidance regarding appropriate workplace behavior and the consequences for failing to comply with non-discrimination policies.²⁵⁹

Without a doubt, if the ENDA is passed, employers will be forced to consider these and other issues concerning transgenders in the workplace. Although a few accommodations would likely be necessary, the ENDA would largely require nothing more than equal treatment for transgenders. If employers abide by the ENDA and handle transgender employees' transitions with understanding and respect, transgenders will no longer suffer silently from unemployment, underemployment, harassment, and other forms of discrimination.

VI. PROPOSAL

A. *Protection Is Needed*

According to the National Center for Transgender Equality “transgender people face disproportionate amounts of discrimination in all areas of life, [but] especially in employment.”²⁶⁰ As a result, transgenders experience not only unemployment, but also underemployment.²⁶¹ In fact, “Within the transgender community, it is not uncommon to find people dramatically underemployed regardless of their experience or background.”²⁶² Even highly trained and proficient transgender employees are often unable to secure full-time employment.²⁶³ They are instead forced to take on one or more part-time

258. TRANSGENDER INCLUSION, *supra* note 234, at 27.

259. *Id.* While amending non-discrimination policies, establishing bathroom and locker room protocol, and informing and educating transgenders' co-workers are certainly among the most important issues facing employers with transitioning employees, they are not the only ones. Other issues include dress codes, medical leave for transition, health benefits for transition procedures, and appropriately addressing the transitioning employee. *See id.* at 35 (discussing dress codes and suggesting that gender neutral dress codes that require professionally appropriate attire are acceptable while dress codes that revolve around stereotypes are not); *id.* at 36–39 (discussing the Human Rights Campaign Foundation's suggestions regarding medical leave and healthcare insurance for transition procedures); MOULTON & SEATON, *supra* note 57, at 7 (“A transgender person who presents herself as a woman should be called ‘she.’ Likewise, a transgender person who presents himself as a man should be referred to with male pronouns. If you are not certain of someone's gender, it is appropriate to respectfully ask his or her name and what pronoun he or she prefers that you use.”).

260. National Center for Transgender Equality, <http://www.nctequality.org/Issues/employment.html> (last visited Aug. 1, 2010).

261. MOULTON & SEATON, *supra* note 57, at 11.

262. *Id.*

263. *Id.*

positions and forego healthcare and other benefits.²⁶⁴ If transgenders are lucky enough to maintain full-time employment during and after transition, they will almost certainly experience blatant discrimination from fellow employees who knew them before transition and refuse to accept their new gender identity.²⁶⁵

Empirical studies confirm that workplace discrimination is a pervasive problem for the transgender community. For instance, six studies regarding employment discrimination against gays, bisexuals, lesbians, and transgenders that were conducted between 1996 and 2006 revealed that twenty to fifty-seven percent of transgender participants encountered employment discrimination during that time period, “including being fired, denied a promotion, or harassed.”²⁶⁶ Another study, conducted in 2007, found that as many as 68% of gays, bisexuals, lesbians, and transgenders experience employment discrimination; but only 15%–57% percent of transgenders reported that discrimination to their employers.²⁶⁷ It can thus be concluded that many transgenders feel pressure to hide their true gender identities in order to maintain their livelihoods.²⁶⁸

B. *The Sex Stereotyping Argument Fails to Adequately Protect Transgenders*

Current law does not provide transgenders sufficient protection from employment discrimination. Under federal law and the law in more than thirty states, employers can legally fire, refuse to hire, and refuse to promote transgender employees for discriminatory purposes.²⁶⁹ Transgender plaintiffs who suffer adverse employment actions in states without protection are virtually left without legal recourse. While they may proceed with a sex stereotyping argument, the likelihood of success on the merits remains slim.

Contrary to the views of many commentators,²⁷⁰ previous success for transgender sex stereotyping claims in the Sixth Circuit is unlikely to benefit

264. *Id.*

265. *Id.*

266. TRANSGENDER INCLUSION, *supra* note 234, at 17.

267. Ecker, *supra* note 57, at 48 (citing a 2007 study performed by the Williams Institute entitled “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination”).

268. MOULTON & SEATON, *supra* note 57, at 13.

269. Tan, *supra* note 13, at 581.

270. *See, e.g.,* Melinda Chow, Comment, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J.L. & GENDER 207, 214 (2005) (“The Sixth Circuit’s holding and reasoning in *Smith* represents a significant victory for transgendered people. By reiterating that discrimination based on both sex and gender is forbidden under Title VII, the court steers transgendered jurisprudence in a more expansive and just direction.”); *see also* Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 157 (2004) (explaining that because of the Sixth Circuit Court’s decision, transgender employees may benefit from more protections against discrimination in the workplace); Abigail W. Lloyd, *Defining the Human: Are Transgender*

many transgenders in Title VII cases. While transgender plaintiffs who file cases in the Sixth Circuit will likely obtain standing, plaintiffs in the other circuits will never have their cases decided on the merits. With courts like *Winn-Dixie* and *Etsitty* refusing to extend sex stereotyping protection to transgenders in the Seventh and Tenth Circuits, and courts like *Schroer* denying its application to transgenders in the District of Columbia, the sex stereotyping argument has had little effect outside the Sixth Circuit.

Courts refusing to extend the holding in *Price Waterhouse* to transgenders have taken two approaches in denying protection from sex stereotyping to transgenders. First, courts have held that the sex stereotyping argument is inapplicable to transgenders because, in passing the Civil Rights Act, Congress intended to prohibit discrimination against women, not transgenders.²⁷¹ These courts correctly explain that the sex amendment's sparse legislative history indicates that Congress never considered nor intended to protect transgenders from employment discrimination.²⁷² Indeed, Representative Smith, the Congressman who proposed the addition of "sex" to the 1964 legislation, explained that he did so "to prevent discrimination against another minority group, the women," and "to correct the present 'imbalance' which exists between males and females in the United States."²⁷³ To be sure, Congress never discussed any connection between the discrimination prohibition and transgenders' civil rights. Second, courts have held that the sex stereotyping argument is inapplicable to transgenders because transgenders are categorically different from effeminate men or masculine women.²⁷⁴ While effeminate men and masculine women are discriminated against for failing to conform to gender stereotypes, these courts argue transgenders are discriminated against because their gender identity does not match their anatomical sex.²⁷⁵

As long as a circuit split remains, transgenders will be denied uniform treatment under the law. Courts will continue using one or both of the approaches outlined above to reject transgenders' sex stereotyping claims. Absent clear guidance from the Supreme Court, a judicial solution will not

People Strangers to the Law?, 20 BERKELEY J. GENDER L. & JUST. 150, 179–80 (2005) (discussing the court's decision in *Smith* to apply Title VII to transsexuals when they are discriminated because of sex stereotypes); Johnny Lo, Note, *Smith v. City of Salem, Ohio*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 277, 281 (2005) (discussing the Sixth Circuit's decision to protect people suffering from sex discrimination under Title VII); James G. O'Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1120 (2007) (explaining the Sixth Circuit's reasoning in *Smith*).

271. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Oiler*, No. Civ.A. 00-3114, 2002 WL 31098541, at *3 (E.D. La. Sept. 16, 2002).

272. See 110 CONG. REC. 2577 (1964).

273. *Id.* (statement of Rep. Howard Smith).

274. See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 210 (D.C. 2006).

275. See, e.g., *id.* at 211; *Etsitty*, 502 F.3d at 1224; *Oiler*, 2002 WL 31098541, at *5.

likely bring an end to the pervasive problem of employment discrimination against transgenders. Because several courts interpreting Title VII have pointed to the lack of legislative history surrounding the addition of “sex” as an indication that Congress did not intend to protect transgenders with the 1964 legislation,²⁷⁶ a transgender-inclusive ENDA—with sufficient congressional history to explain whom Congress aims to protect—is necessary to fully protect transgenders from employment discrimination. This legislation would finally provide transgenders with standing to sue and the opportunity to have their cases decided on the merits.

C. Protection Against Employment Discrimination Based on Gender Identity

To best protect transgenders from employment discrimination, Congress must pass, and the President must sign into law, a transgender-inclusive ENDA. Only a transgender-inclusive ENDA, similar to House Resolution 2015, will adequately protect transgenders from employment discrimination. This legislation would effectively address discrimination in the workplace by making it illegal to fire, refuse to hire, or refuse to promote an employee simply based on his or her gender identity.

Like the Age Discrimination in Employment Act of 1967 and Americans with Disability Act of 1990,²⁷⁷ the ENDA’s legislative history should begin with an examination of the overall purpose of employment antidiscrimination law. As those acts acknowledge, the general goal of antidiscrimination legislation is to promote employment decisions based on individual ability rather than stereotypic assumptions or membership in a disfavored group.²⁷⁸ This introduction will serve as a reminder that the ENDA is modeled after existing federal civil rights laws and is meant to ensure that the gay, bisexual, lesbian, and transgender communities receive the same treatment under the law as other protected classes.

The ENDA should also include an accurate description of whom Congress intends to protect. When antidiscrimination legislation fails to unambiguously define the protected class, standing problems arise, as evidenced by various courts’ different interpretations of “sex” in Title VII. To ensure uniform interpretation of the ENDA, terms such as gender identity, sexual orientation, and gender expression should be explicitly defined. Explicit definitions accompanied by a clear discrimination prohibition will best serve all interested parties, including employers, transgendered employees, and the courts. First, specific definitions and unambiguous antidiscrimination guidelines would

276. See *supra* notes 264–66 and accompanying text.

277. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000); Americans with Disability Act of 1990, 42 U.S.C. § 12101(7) (2000).

278. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000); Americans with Disability Act of 1990, 42 U.S.C. § 12101(7) (2000).

provide clear guidance to employers who would then know their responsibilities under the law and could formulate policies and monitor their practices in accordance with the legislative mandate. Second, this combination would allow transgender employees to understand their rights and initiate lawsuits when those rights are infringed. Finally, this clearly constructed legislation would equip courts with a usable framework to analyze and decide cases of employment discrimination under the ENDA.

A transgender-inclusive ENDA would also cure the problems associated with interpreting Title VII's sex provision and the circuit split on the sex stereotyping argument. As of now, transgenders who live inside the Sixth Circuit have the benefit of the sex stereotyping argument, while those outside the Sixth Circuit are denied protection. Realistically, this difference creates "a conflict in enforcement of Title VII's sex discrimination provisions."²⁷⁹ Employers with operations in and outside of the Sixth Circuit are forced to either use different employment guidelines or alter employment policies regarding transgenders in all locations.²⁸⁰ For example, if a company has offices in Cincinnati and Chicago, and each office fires a transgender, one office may face liability for sex stereotyping, while the other will not. Even though companies such as these can reduce the possibility of any liability by adopting uniform antidiscrimination policies, employers should not be forced to choose between competing interpretations of Title VII. Thus, the best solution would be to create a uniform law, which would in turn lead to uniform business practices.

D. *The Time Is Ripe*

Common sense dictates that discrimination should not be legal. No person should be denied equal opportunity in employment because of membership in a minority group. Yet, employers in over thirty states are currently allowed to fire, refuse to hire, and refuse to promote employees based on their gender identities.²⁸¹ It is time our federal government recognize a cause of action for blatant and unsubstantiated prejudice against transgenders in the workplace. Current law bars employment discrimination on the basis of race, color, religion, national origin, sex, age, and disability.²⁸² In the words of ENDA supporter, Representative Betty McCollum, "It is time to extend these

279. O'Keefe, *supra* note 270, at 1120.

280. *Id.* at 1121.

281. TRANSGENDER L. & POLICY INST., *supra* note 16.

282. See Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964); Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967); Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

protections to all Americans.”²⁸³ It is time federal law recognizes a cause of action for employment discrimination against transgenders.

The growing number of corporations, cities, and states that have amended their antidiscrimination policies to include protection for transgenders provides evidence that people in America acknowledge the transgender community deserves adequate safeguards against employment discrimination. In fact, since the introduction of the ENDA in the House of Representatives, over 230 major corporations in the United States have amended their non-discrimination policies to include protection for homosexuals and transgenders.²⁸⁴ In addition, thirteen states, the District of Columbia, and ninety-one cities and counties now explicitly forbid discrimination against transgenders in the employment setting.²⁸⁵

Recent polls confirm that the American people recognize the importance of adequately safeguarding transgenders from employment discrimination. According to the HRC, “polling shows that most Americans [not only] understand what the term *transgender* means” but also “support fundamental fairness for transgender people, including protection from discrimination on the job.”²⁸⁶ “In July 2002, HRC commissioned the first national poll on attitudes of American voters toward transgender people and public policy issues”.²⁸⁷

On public policy issues, an overwhelming majority of people felt that our nation’s laws should protect transgender people. Sixty-one percent of those polled believed that we needed laws to protect transgender people from job discrimination, a number confirmed in a September 2004 poll, when 65 percent of respondents thought it should definitely be illegal to fire and refuse employment to someone just because they’re transgender and 13 percent said it probably should be illegal.²⁸⁸

Controlling the House, 257–178,²⁸⁹ the Senate, 58–40,²⁹⁰ and the Presidency, Democrats have the best chance at passing the ENDA in more than

283. 153 CONG. REC. E2446-01 (daily ed. Nov. 7, 2007) (statement of Rep. McCollum).

284. Tan, *supra* note 13, at 604.

285. See TRANSGENDER L. & POLICY INST., *supra* note 16; ABA Res. 122B at 4. “Among these jurisdictions are some of the largest cities in America, including Chicago, Dallas, Los Angeles, and New York.” MOULTON & SEATON, *supra* note 57, at 17.

286. MOULTON & SEATON, *supra* note 57, at 3.

287. *Id.* at 9.

288. *Id.* at 11. “In July 2002, HRC commissioned the first national poll on attitudes of American voters toward transgender people and public policy issues.” *Id.*

289. Office of the Clerk, U.S. House of Representatives, *House History: Party Divisions of the House of Representatives (1789 to Present)* available at http://clerk.house.gov/art_history/house_history/partyDiv.html.

290. United States Senate, *Party Division in the Senate, 1789–Present*, available at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.

a decade. Understandably, ENDA advocates, both within and outside Congress, are extremely hopeful the ENDA will be passed during Congress's 111th session. With support from President Obama, whose platform for the 2008 election included transgender employment rights, protection for transgenders against employment discrimination is on the horizon. If ENDA supporters in Congress are able get the bill on his desk, there is no question President Obama will sign it into law.

CONCLUSION

Unlike individuals who experience discrimination on the basis of race, color, religion, national origin, sex, age, and disability, individuals who experience discrimination on the basis of gender identity have little to no legal recourse to redress such discrimination. Transgenders deserve protection from employment discrimination, just as other classes have deserved protection, simply because it is unjust to fire, refuse to hire, or refuse to promote someone based on his or her immutable gender identity.

By enacting a transgender-inclusive Employment Non-Discrimination Act, Congress would be protecting yet another minority group from unwarranted discrimination in the workplace. A transgender-inclusive ENDA is the best option for protection—better than relying on the courts to arrive at a judicial resolution—because the ENDA would mandate uniform protection across the country. Furthermore, the ENDA, if passed, would provide the gay, bisexual, lesbian, and transgender communities with a sense of security while sending a clear message to employers that they can no longer discriminate on the basis of on sexual orientation, gender expression, or gender identity.

BRITTANY EMS*

* J.D. Candidate, St. Louis University School of Law, 2010; B.A., Missouri State University, 2007. I would like to thank my parents, sister, and brother for their unwavering love and support throughout all of my academic endeavors.

