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## EXPANDING THE PROTECTIONAL SCOPE OF TITLE VII “BECAUSE OF SEX” TO INCLUDE DISCRIMINATION BASED ON SEXUALITY AND SEXUAL ORIENTATION

### INTRODUCTION

Title VII of the Civil Rights Act of 1964 provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”<sup>1</sup> Although Title VII explicitly lays out these five protected categories, it does not explicitly define what “sex” entails, nor does it mention sexuality or sexual orientation as a protected class.

Additionally, there is very little legislative history on the “because of sex” clause,<sup>2</sup> allowing for more controversy and confusion over what was intended to be protected. The amendment adding the word “sex” as a protected category of the Civil Rights Act was adopted—with little debate and no prior hearings—one day before the House passed the Act.<sup>3</sup> Historically, it was believed that the main reason for this “sex” amendment was to provide equal opportunities for women.<sup>4</sup> To date, no bill has been introduced on the federal level to prohibit employment discrimination on the basis of gender identity.<sup>5</sup>

However, in recent years, some case law has provided for a controversial expansion of the protectional scope of Title VII to include those discriminated against based on their sexuality,<sup>6</sup> but not yet on sexual orientation.<sup>7</sup> While the

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1. 42 U.S.C. § 2000e-2(a) (2000).

2. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

3. *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 386 (5th Cir. 1971).

4. *Sommers*, 667 F.2d at 750; *Baker v. California Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Diaz*, 442 F.2d at 386.

5. Courtney Joslin, *The 1964 Civil Rights Act Forty Years and Counting: Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, HUM. RTS., Summer 2004, at 14, 14.

6. *See, e.g., Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). “Sexuality” is used here to include those with differing sexual identities, such as transgendered and transsexual individuals.

7. *See, e.g., Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

Sixth Circuit in *Smith v. City of Salem*,<sup>8</sup> has recently interpreted the protectional scope of Title VII in *Price Waterhouse v. Hopkins*<sup>9</sup> to include people discriminated against for not conforming to sex stereotypes, other courts disagree.<sup>10</sup>

The extension of the precedent set forth in *Price Waterhouse* that the “because of sex” clause includes those discriminated against for not conforming to gender stereotypes was correctly applied in the Sixth Circuit’s application of this principle in *Smith v. City of Salem* and *Barnes v. City of Cincinnati* to include transgendered and transsexual individuals. Additionally, under the same gender stereotyping rationale set forth in *Price Waterhouse* and subsequently utilized in the Sixth Circuit, homosexuals, in addition to transgendered and transsexual plaintiffs, should and most likely will be protected under Title VII despite some courts’ reluctance to extend to them the protection that they would otherwise be afforded had they not been a member of one of these gender non-conforming “groups.” Efforts to differentiate gender stereotyping from heterosexual norms have proven to be confusing and lacking in logic, as the two ideas are not distinct, but rather, are intertwined.

This Comment begins with a brief description of what it means to be a transgendered or transsexual individual (Part I), followed by an overview of the history of case law relating to transsexuals and transgendered individuals bringing claims under Title VII, up to and including the 1989 Supreme Court decision in *Price Waterhouse*<sup>11</sup> (Part II). Next, this Comment covers the case law after *Price Waterhouse* regarding transgendered and transsexual plaintiffs (Part III), including the ground-breaking case of *Smith v. City of Salem* which afforded protection to a transgendered plaintiff (Part IV) and the one case to have emerged in the courts since the *Smith* decision (Part V). Following the discussion of relevant case law pertaining to transgendered and transsexual plaintiffs is a discussion of the history of case law unanimously refusing to extend protection to homosexuals (Part VI). Finally, there is a discussion of the anticipated further expansion of Title VII and the consequential important implications for employers in their hiring practices (Part VII). The Comment concludes with a critical analysis of the courts’ reasoning of what the “because of sex” clause entails and who it includes (Part VIII).

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8. *Smith*, 378 F.3d 566.

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

10. *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616DS, 2005 WL 1505610 (D. Utah June 24, 2005).

11. *Price Waterhouse*, however, did not deal with a transgendered, transsexual, or homosexual plaintiff.

## I. THE MEANING OF “TRANSGENDERISM” AND “TRANSSEXUALITY”

Historically, courts typically assumed that gender should be defined in strictly biological terms.<sup>12</sup> Legal definitions of sex discrimination were far removed from the idea of gender—the social construction of sex.<sup>13</sup> The biological model of gender is rooted in the belief that gender is naturally determined and is unalterable.<sup>14</sup> It assumes that “all bodies fit into one of two biological categories—male and female—and that the social and cultural attributes associated with gender are the natural result of a person’s biological sex.”<sup>15</sup> Much of the early case law utilizing this biological model of gender was in the context of employment discrimination.<sup>16</sup> In the 1970s and 1980s, it was clear in the case law that Title VII’s sex discrimination protection only pertained to biological sex, and not to “gender presentation or identity.”<sup>17</sup>

These strictly biological definitions have allowed for a lot of uncertainty as to those who do not fit biological or social norms, such as transgendered and transsexual people. A transgendered person is one who “appear[s] as, wish[es] to be considered as, or ha[s] undergone surgery to become a member of the opposite sex.”<sup>18</sup> In other words, transgenderism is generally used to describe people who live as the opposite gender in appearance and behavior, but who may not have had their bodies surgically altered to match their gender identity.<sup>19</sup> Conversely, a transsexual is “one who has undergone a sex change.”<sup>20</sup>

In sum, both transgender and transsexual people portray themselves as the opposite sex. The difference between the two classifications is whether or not they undergo hormone therapy and/or alter their sexual organs. Transgendered individuals merely may dress as the opposite sex, whereas transsexuals are those who take hormones and/or undergo an operation to change their sexual organs. These unusual concepts have uprooted our legal system’s assumptions of the direct connection between biological sex and gender and, consequently,

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12. Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 719 (2005).

13. Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 277 (Winter 2005).

14. Romeo, *supra* note 12, at 719.

15. *Id.* (“[T]he model assumes that all people are either biologically male, and therefore present a masculine gender identity, or biologically female, and therefore present a feminine gender identity.”).

16. *Id.* at 720.

17. *Id.* at 719–20. (“Under this model, people who do not fit clearly into this dimorphic system are considered to be either unnatural or deceptive as to their true nature. As such, gender nonconformity has been held to be unworthy of legal protection.”).

18. AMERICAN HERITAGE DICTIONARY 1833 (4th ed. 2000).

19. *See id.*

20. AMERICAN HERITAGE DICTIONARY 1835 (4th ed. 2000).

have challenged our legal system and our conceptual idea of what type of discrimination is protected under the Civil Rights Act.

## II. HISTORICAL CASES INVOLVING TRANSGENDERED/TRANSEXUAL PLAINTIFFS

For years, transsexuals were unable to bring employment discrimination claims under federal and state laws prohibiting discrimination on the basis of sex or disability.<sup>21</sup> Disability has never been an avenue of protection for transgendered or transsexual individuals because the Americans with Disabilities Act (ADA), specifically states that it does not protect transsexuality or other gender identity disorders.<sup>22</sup> Historically, the “because of sex” clause under Title VII has not been a successful avenue for them either.<sup>23</sup> Much of the original denial of such claims may have revolved around notions that these types of people are social deviants who chose their “gender,” thereby refusing to accept their biological sex.<sup>24</sup> However, recent judicial and legislative developments have granted greater recognition to transsexuals claiming discrimination or retaliation.

In *Holloway v. Arthur Anderson*, the Ninth Circuit formulated the definition of “sex” in Title VII as only “the traditional definition based on anatomical differences.”<sup>25</sup> Ramona Holloway, a transsexual, was employed by

21. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1984); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

22. 42 U.S.C. § 12211(b)(1) (2000). As noted by Abigail Lloyd:

At the federal level both “transsexualism” and “gender identity disorders not resulting from physical impairments” are explicitly excluded from protection under the Federal Rehabilitation Act (FRA) and from the Americans with Disabilities Act (ADA). The language of the federal exclusions eliminates the possibility of protection for transgender people under federal disability laws. The federal statutes place transsexualism, gender identity disorders, pyromania, and pedophilia in the same subsection of exclusions thus relegating people with gender differences to the equivalent of some of society’s most abhorred members—child molesters and arsonists.

Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERK. J. GENDER, L. & JUST. 150, 182 (2005) (citations omitted).

23. *Romeo*, *supra* note 12, at 721.

24. *Id.* at 719–21.

As a general rule, Title VII protects characteristics that courts consider to be inherent or immutable. By framing gender nonconformity as a matter of choice, courts were able to characterize the discrimination suffered by transgender plaintiffs as an adverse consequence of a decision that they had made, thus removing the discriminatory acts from the purview of Title VII. In other words, courts characterized the expression of transgressive gender identities as something that the plaintiffs did, rather than as legitimate expressions of who they were, without any critical consideration of the performative nature of all gender or the societal enforcement of gender norms.

*Id.* at 720–21 (citations omitted).

25. *Holloway*, 566 F.2d at 662.

Arthur Anderson in 1969 and was known as Robert Holloway.<sup>26</sup> In 1974, Holloway was promoted and, at that time, informed his supervisor that he was receiving female hormone treatments and was preparing for anatomical sex surgery.<sup>27</sup> A few months later, Holloway's employment at Arthur Anderson was terminated.<sup>28</sup> After exhausting administrative remedies, Holloway filed suit against his employer, alleging that he was fired because of his transsexuality, which violated Title VII under the "because of sex" clause.<sup>29</sup>

The sole issue the court dealt with involved whether or not an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation.<sup>30</sup> Holloway contended that "sex" as used in the Civil Rights Act is synonymous with "gender," and that gender would encompass transsexuals.<sup>31</sup> Conversely, Holloway's employer argued that the term "sex" should be limited to a traditional definition based solely on anatomical characteristics.<sup>32</sup> The issue essentially became how broadly to construe the term "sex" as a protected class under Title VII.<sup>33</sup>

After declaring that the statute should be given its plain meaning, the court concluded that the intent of Congress was solely to include traditional notions of "sex."<sup>34</sup> The court further supported its conclusion by highlighting the fact that while several bills had been introduced to amend the Civil Rights Act to prohibit discrimination against "sexual preference," none had yet been enacted into law.<sup>35</sup> Also, after examining the traditional indicia of suspect classification, the court concluded that transsexuals are not a suspect class, as it found that "transsexuals are not necessarily a 'discrete and insular minority' . . . nor had it been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth' like race or national origin."<sup>37</sup> These arguments were reiterated in other circuits.

*Sommers v. Budget Marketing, Inc.*,<sup>38</sup> decided in the Eighth Circuit, adhered to a similarly narrow interpretation of the protectional scope of Title

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26. *Id.* at 661.

27. *Id.*

28. *Id.*

29. *Id.*

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

31. *Id.* at 662.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Holloway*, 566 F.2d at 662.

36. *Id.* at 663 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

37. *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). However, despite the fact that the court argues that transsexuality is not an "immutable characteristic," it is important to note that not all of the protected categories under Title VII are in fact immutable—such as religion, for example.

38. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748 (8th Cir. 1982).

VII. The plaintiff in *Sommers* claimed to be a “female with the anatomical body of a male.”<sup>39</sup> *Sommers* was hired by Budget on April 22, 1980 to perform clerical duties and was fired two days later.<sup>40</sup> Budget alleged that her employment was terminated because she misrepresented herself as an “anatomical female” when she applied for the job and because this misrepresentation led to a disruption of the company’s work routine.<sup>41</sup> *Sommers* brought suit against Budget, claiming that she should be afforded protection under Title VII since according to *Sommers*, the court should not be confined to the biological meaning of the term “sex,” but rather should include coverage to protect those who are psychologically female, albeit biologically male.<sup>42</sup>

Rejecting such an expansion, the trial court ruled against the plaintiff and the Eighth Circuit affirmed the judgment.<sup>43</sup> After noting that this was the first time the Eighth Circuit dealt with such an issue, it agreed with the district court that for the purposes of Title VII, the court should be bound to the plain meaning of “sex” due to the absence of clear congressional intent to the contrary.<sup>44</sup> In support of its holding, the court also emphasized that the legislative history was devoid of any intention to include transsexuals as a protected category under Title VII.<sup>45</sup>

In *Ulane v. Eastern Airlines*, the Seventh Circuit denied protection to transgendered individuals, holding that Congress intended only to prohibit discrimination “against women because they are women and against men because they are men.”<sup>46</sup> *Ulane*, hired as a pilot for Eastern Airlines in 1968, was diagnosed as a transsexual in 1979.<sup>47</sup> Later, *Ulane* started taking female hormones and, in 1980, underwent “sex reassignment surgery.”<sup>48</sup> After this surgery, Illinois gave her a revised birth certificate, indicating that *Ulane* was now a female.<sup>49</sup> *Ulane* was also re-certified as a female for her flight status.<sup>50</sup> However, upon learning of *Ulane*’s sex reassignment, Eastern Airlines terminated her employment in 1981.<sup>51</sup>

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 749.

43. *Sommers*, 667 F.2d at 748.

44. *Id.* at 750.

45. *Id.*

46. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

47. *Id.* at 1082–83.

48. *Id.* at 1083.

49. *Id.*

50. *Id.*

51. *Ulane*, 742 F.2d at 1082.

The district court ruled in favor of Ulane, noting that while homosexuals and transvestites<sup>52</sup> do not have Title VII protection, for diagnosed transsexuals who have sexual identity problems, the term “sex” in Title VII includes “sexual identity” as a protected category.<sup>53</sup> The district court justified its conclusion by finding that sex is partly a “psychological question—a question of self-perception; and . . . part[ly] a social matter—a question of how society perceives the individual.”<sup>54</sup>

The Seventh Circuit reversed, finding the district court’s holding that the statutory word “sex” applies to transsexual individuals erroneous.<sup>55</sup> In support of its reversal, the Seventh Circuit noted that with statutory construction, words should be given their ordinary, common meaning, absent a contrary definition.<sup>56</sup> Noting a “total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment’s adoption,” the court stated that “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.”<sup>57</sup>

The court also noted that other courts have specifically held that Title VII does not protect transsexuals from discrimination and that Congress has still continued to reject proposed amendments related to affectional or sexual orientation.<sup>58</sup> Additionally, the court highlighted the fact that the only two other circuit court cases that had specifically addressed the issue—*Sommers v. Budget Marketing* in the Eighth Circuit and *Holloway v. Arthur Anderson* in the Ninth Circuit—both held that discrimination against transsexuals does not fall within the protectional scope of Title VII.<sup>59</sup>

However, this more traditional and conservative line of reasoning evidenced in the Seventh, Eighth, and Ninth Circuits was overshadowed by a broader construction of sex and gender in the U.S. Supreme Court case, *Price Waterhouse v. Hopkins*.<sup>60</sup> The plaintiff, Ann Hopkins, was a female partnership candidate who was refused admission as partner in an accounting firm.<sup>61</sup> There were clear signs that some of the partners reacted negatively to Hopkins’ personality because she was a woman.<sup>62</sup> She was told that she could improve her chances for partnership if she were to take “a course at charm

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52. “Transvestite” is a synonym for “transgendered.” See WEBSTER NEW COLLEGIATE DICTIONARY 1243 (1973). In other words, transvestites dress as the opposite gender and have not necessarily taken hormones or undergone sex reassignment surgery. *Id.*

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

54. *Id.*

55. *Id.* at 1087.

56. *Id.* at 1085.

57. *Id.*

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

59. *Id.*

60. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989).

61. *Id.*

62. *Id.* at 235.



school,” “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>63</sup> In previous years, other female candidates up for partnership had also been evaluated in similarly sex-based terms.<sup>64</sup>

Despite previous arguments to the contrary, the U.S. Supreme Court held that Title VII prohibits the “entire spectrum” of discrimination on the basis of sex, including that based on gender stereotypes, as opposed to being limited to discrimination on the basis of biological sex, and emphasized that it was the original intent of Congress to do so.<sup>65</sup> The Court also noted that “in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>66</sup>

This refined understanding of sex-stereotyping expanded the protectional scope of Title VII to include those discriminated against because their behavior did not coincide with traditional gender-stereotypical expectations. Broadening the concept of sex to include social constructions of gender was a big shift in the legal understanding of the “because of sex” clause in Title VII. As far as many circuits were concerned,<sup>67</sup> the combination of the lack of legislative history and the lack of specific indication that Congress contemplated the inclusion of transsexuals and transgendered people under Title VII dictated that “sex” under Title VII should be given its plain, biologically understood, meaning. Clearly, *Price Waterhouse* took a different approach to the issue.

Interestingly, despite the fact that *Price Waterhouse* did not deal with a transsexual, transgendered, or homosexual plaintiff, but rather, a heterosexual female claiming discrimination based on her failure to conform to gender stereotypes, the findings in this U.S. Supreme Court case had far-reaching implications for other cases denying protection to transsexual, transgendered, and homosexual plaintiffs, based on a strictly narrow definition of “sex” that was formerly rooted and expressed in simple biological terms.<sup>68</sup> Former

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63. *Id.*

64. *Id.* at 236.

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

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

*Id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

66. *Id.* at 250.

67. As previously decided in the 7th, 8th, and 9th Circuits.

68. See *Romeo*, *supra* note 12, at 742.

The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. . . . What matters, for purposes of this part of

decisions uniformly denying protection to transsexual, transgendered, and homosexual individuals under Title VII soon came under scrutiny again in light of this U.S. Supreme Court decision challenging traditional notions of what it means to be discriminated against “because of sex.”<sup>69</sup>

### III. AFTER *PRICE WATERHOUSE*: CASES INVOLVING TRANSGENDERED/TRANSSEXUAL PLAINTIFFS

Despite the U.S. Supreme Court’s more expansive view of what “sex” entails under Title VII protection, some courts refused to interpret such a liberal understanding to apply to transsexual and transgendered individuals, and instead, still adhered to the more traditional approach articulated in circuit court cases preceding *Price Waterhouse*,<sup>70</sup> thereby continuing to define sex in strictly biological terms.<sup>71</sup> In *Dobre v. Nat’l R.R. Corp.*, the court held that the term “sex” should be narrowly construed, according to its biological meaning (distinct from gender) and that Title VII does not protect transsexuals from such discrimination.<sup>72</sup>

In *Dobre*, the “plaintiff asserted that she was discriminated against because of her new gender while in the process of transforming her body to conform with her psychological sexual identity.”<sup>73</sup> The court emphasized that “sex,” as used in Title VII, is not synonymous with gender and that the term “sex” in Title VII, as explained earlier in *Holloway*, refers to biological and anatomical characteristics only.<sup>74</sup> The court stated that at the very worst, the plaintiff was discriminated against because “she was perceived as a male who wanted to

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the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one.

This analysis is useful in two ways. First, it recognizes that sex discrimination claims encompass both discrimination based upon anatomical sex and discrimination based upon gender roles. Second, it acknowledges that the relevant factor in discrimination claims is the mindset of the perpetrator. Thus, the inquiry is appropriately directed towards the perpetrator’s perception of a gender nonconforming person, rather than into the legitimacy of the complainant’s gender identity or an examination of the complainant’s body.

*Id.* (citation omitted).

69. See Lloyd, *supra* note 22, at 176.

70. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

71. See Lloyd, *supra* note 22, at 177.

72. *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993).

73. *Id.* at 286.

74. *Id.*

become a female,” and the court concluded that such discrimination is not prohibited by Title VII.<sup>75</sup>

Some courts, however, have been slightly less narrow than the court in *Dobre* in their approach and interpretation of what Title VII entails.<sup>76</sup> In *Nichols v. Azteca Restaurant Enterprises, Inc.*, Antonio Sanchez claimed that he was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a stereotypical male.<sup>77</sup> The court held that although harassment based on the perception that someone is effeminate is discrimination “because of sex” in violation of Title VII, it was not meant to imply that “all gender-based distinctions are actionable under Title VII. . . . For example . . . [it] does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.”<sup>78</sup>

Despite the court’s hesitation to more broadly expand the protectional scope of Title VII, it still held that *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>79</sup> which pre-dated and conflicted with the Supreme Court’s decision in *Price Waterhouse*, is no longer good law.<sup>80</sup> As a result, *Nichols* held that a male employee is entitled to protection under Title VII if he can prove that he was discriminated against based on his refusal to conform to traditional gender stereotypes about appearance and behavior.<sup>81</sup> While the court did not seem to fully embrace *Price Waterhouse*, it still recognized the possibility of an action based on a failure to conform to traditional gender stereotypes—in some contexts.

*Oiler v. Winn-Dixie Louisiana, Inc.*,<sup>82</sup> yet another case following a more conservative interpretation of the definition of “sex” under Title VII (despite the holding in *Price Waterhouse*) showed a similar hesitation for a broader application of Title VII protection in the context of transgendered and transsexual plaintiffs. In this case, the plaintiff was diagnosed with having transvestic fetishism with gender dysphoria<sup>83</sup> and Gender Identity Disorder

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75. *Id.* at 287. The court’s arguments here showed a clear intention to treat a transsexual as one who chooses a deviant lifestyle, as it emphasized her choice and desires to be the opposite sex.

76. *See, e.g.*, *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001).

77. *Id.* at 869.

78. *Id.* at 875, n.7.

79. 608 F.2d 327 (9th Cir. 1979).

80. *Nichols*, 256 F.3d at 875.

81. *Id.* at 874.

82. No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

83. Two key criteria for a psychiatric diagnosis of “transvestic fetishism” include:

(1) Recurrent, intense sexually arousing fantasies, urges, or behavior, involving cross-dressing;  
(2) This causes clinically significant distress or impairment, whether socially, at work, or elsewhere. AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 575 (4th ed. 2000).

(GID).<sup>84</sup> Oiler was a heterosexual man and was not a transsexual, nor did he intend to become a woman—he was a male crossdresser.<sup>85</sup> After his employer discovered his cross-dressing behavior, Oiler’s employment was involuntarily terminated after he refused to resign.<sup>86</sup> After receiving a “Dismissal and Notice of Rights,” which was issued by the United States Equal Employment Opportunity Commission (EEOC), Oiler filed suit against his employer for discrimination on the basis of sexual stereotyping, alleging that termination of his employment for his off-duty acts of cross-dressing and impersonating a woman is a form of forbidden sexual stereotyping.<sup>87</sup>

The court assumed that the definition of gender stereotyping was not broad enough to include those afflicted with GID or those who dress like the opposite sex.<sup>88</sup> As with prior cases,<sup>89</sup> the *Oiler* court noted that the legislative history does not show any intention to include transsexualism in Title VII.<sup>90</sup> The court also noted that, as in these prior cases, from 1981 through 2001, thirty-one

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84. *Oiler*, 2002 WL 31098541, at \*1. Gender Identity Disorder is recognized by the American Psychological Association (APA) and is a currently diagnosable mental disorder according to the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV). This current edition of the DSM IV has five criteria that must be met before a diagnosis of Gender Identity Disorder can be given: (1) There must be evidence of a strong and persistent cross-gender identification; (2) This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex; (3) There must also be evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex; (4) The individual must not have a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia); (5) There must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning. AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 83, at 581.

85. *Oiler*, 2002 WL 31098541, at \*1. A male crossdresser is synonymous with the term “transvestite.” *Id.* The term “transgendered,” according to the court, can be defined as:

An umbrella term used to refer to a diverse group of individuals who cross or transcend culturally-defined categories of gender. They include crossdressers or transvestites (who desire to wear clothing associated with another sex), male-to-female and female-to-male transsexuals (who pursue or have undergone hormone therapy or sex reassignment surgery), transgenderists (who live in the gender role associated with another sex without desiring sex reassignment surgery), bigender persons (who identify as both man and woman), drag queens and kings (usually gay men and lesbian women who do ‘drag’ and dress up in, respectively, women’s and men’s clothes), and female and male impersonators (males who impersonate women and females who impersonate men, usually for entertainment).

*Id.* at \*1 n.9.

86. *Id.* at \*2.

87. *Id.*

88. *Id.* at \*6.

89. The court cited to such prior cases as *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977) and *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

90. *Oiler*, 2002 WL 31098541, at \*6.

proposed bills had been introduced that had attempted to amend Title VII and prohibit employment discrimination on the basis of affection or sexual orientation, yet none had passed.<sup>91</sup> Even when referencing *Price Waterhouse*, the court found this precedent not controlling because Oiler was not a plaintiff who failed to conform to a gender stereotype, but rather, was a man terminated because he was a man with a sexual or gender identity disorder who cross-dressed.<sup>92</sup>

Despite the U.S. Supreme Court's broader construction of the definition of sex for the purpose of protection against discrimination in Title VII of the Civil Rights Act, courts were very reluctant to extend protection to transsexuals, transgendered, and homosexuals.<sup>93</sup> Notwithstanding subsequent court decisions refusing to accept this expanded definition of sex, the distinction between gender stereotyping and gender-related non-conforming behavior inevitably became blurred after the decision in *Price Waterhouse*.<sup>94</sup> Consequently, this situation opened the gates for lawsuits brought by transsexual, transgendered, and homosexual individuals seeking protection pursuant to Title VII. Although there were some failed attempts, as seen in *Dobre*, *Nichols*, and *Oiler*, the Sixth Circuit decided to take another look and re-examine the rights of gender non-conformists in light of the *Price Waterhouse* decision.<sup>95</sup>

#### IV. GROUND-BREAKING CASE IN THE SIXTH CIRCUIT: *SMITH V. CITY OF SALEM*

The landmark case of *Smith v. City of Salem*, decided by the Sixth Circuit in August 2004, explicitly and deliberately expanded the scope of Title VII to protect transgendered people under the "because of sex" clause.<sup>96</sup> The plaintiff

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91. *Id.*

92. *Id.*

93. See Lloyd, *supra* note 22, at 177.

94. See Melinda Chow, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J. L. & GENDER 207, 215 (2005).

Even when courts have accepted the proposition that gender discrimination is included in the sex discrimination forbidden by Title VII and that Title VII prohibits sex stereotyping, they sometimes still deny protection to transgendered people by distinguishing Ann Hopkins's predicament in *Price Waterhouse* from more extreme forms of gender nonconformity. The courts that have taken this approach appear to believe that discrimination against transsexuals, transvestites, and transgendered people "is of a different and permissible sort." These courts insist that Title VII does not cover transsexuals because there is something categorically different between an effeminate male and a transgendered male that moves discrimination against transgendered males into the realm of permissible gender discrimination.

*Id.* at 210.

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

96. *Id.* at 568.

in *Smith* was employed by the City of Salem, Ohio, as a lieutenant in the Salem Fire Department.<sup>97</sup> He was born a male and was subsequently diagnosed with GID.<sup>98</sup> After being diagnosed, Smith began expressing himself in a more feminine manner on a full-time basis, including at work.<sup>99</sup> Soon after, his co-workers began questioning Smith and commenting on his feminine appearance, indicating disapproval of his cross-gender behavior.<sup>100</sup> Because of this, Smith notified his immediate supervisor about his GID diagnosis and treatment, as well as the likelihood that his treatment would eventually include complete physical transformation from male to female.<sup>101</sup>

Later, a meeting was held to discuss Smith and to devise a plan for terminating his employment.<sup>102</sup> A self-described transsexual, Smith brought a Title VII action against the city and various city officials alleging sex discrimination after he was fired.<sup>103</sup> The district court dismissed the claims pursuant to Rule 12(c).<sup>104</sup> However, on appeal, the Sixth Circuit reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.<sup>105</sup> Although the district court was following precedent formerly set in other circuits, the Sixth Circuit decided to re-examine this case, in light of the decision in *Price Waterhouse*.<sup>106</sup>

The main thrust of the Sixth Circuit's opinion and ultimate reasoning was supported by the U.S. Supreme Court's extension of the "because of sex" clause in *Price Waterhouse v. Hopkins* to prohibit sexual discrimination based on gender non-conforming behavior.<sup>107</sup> The Sixth Circuit merely applied this extension to transgendered individuals.<sup>108</sup> Rejecting the "rigid boundaries of sex identity laid out by other circuits,"<sup>109</sup> the Sixth Circuit recognized that

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97. *Id.*

98. *Id.* "Gender Identity Disorder" is characterized by the American Psychiatric Association as a "disjunction between an individual's sexual organs and sexual identity." *Id.* For the APA's requirements for diagnosis of this mental disorder, please see *supra* note 84.

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

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 567–68.

104. *Smith*, 378 F.3d at 569.

105. *Id.* at 578.

106. *Id.* at 571.

107. *Id.* at 573.

108. *Id.* at 575.

109. Thomas Ling, *supra* note 13, at 279.

[T]he approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated by *Price Waterhouse* . . . . By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.

discrimination based on traditional notions of masculinity and femininity for both men and women must be understood as unequal treatment that is prohibited by Title VII.<sup>110</sup>

More than protecting transsexuals, the *Smith* court's matured understanding of "sex" promises reform across the broad landscape of sexual inequality. *Smith* upturns rigid sex categories and allows both sexes to participate in the full range of gender expressions. . . .

[It] is, thus, at the forefront of an ongoing battle between individual liberty and the social impulse toward sexual conformity. But *Smith* represents more than one side of a cultural divide. It brings coherence to broken doctrines and preserves the law's respect for individual choice in matters of identity and sexual expression.<sup>111</sup>

The reasoning in *Smith* seemed to follow a more progressive and liberal interpretation of what type of rights Title VII protects. While many have argued that the categories in Title VII are protected because they are immutable and not "chosen,"<sup>112</sup> the Sixth Circuit clearly deviated from this line of reasoning in deciding to protect people who arguably "choose" their sexual identity.

There is nothing immutable about deciding to dress as the opposite sex, or taking hormones, or undergoing sex reassignment surgery. Extending protection to those people who otherwise might be considered social deviants changed the way Title VII was to be viewed. Historical notions of Title VII protecting women, just by virtue of the fact that they are born women, has become the simplest way to view sex as a protected category. Now considering "sex" to be something mutable changes original ideas and notions of what protecting someone based on their "sex" really entails. Protecting an individual's choice in the matter, especially one that diverges so drastically from current cultural norms of conforming to and accepting the sex one is biologically born with, was a surprisingly liberal and progressive approach that has yet to be embraced by other circuits.

The holding in *Smith*, which interprets *Price Waterhouse* to prohibit sexual discrimination based on gender non-conforming behavior under Title VII, was reinforced in a March 2005 decision, *Barnes v. City of Cincinnati*, which holds that based on this same premise, transsexuals are protected under Title VII.<sup>113</sup> Barnes was a police officer who was a pre-operative male-to-female transsexual.<sup>114</sup> Barnes passed the sergeants exam for the Cincinnati Police

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

110. *Smith*, 378 F.3d at 574–75.

111. Ling, *supra* note 13, at 285, 287.

112. For example, race and national origin.

113. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005).

114. *Id.* at 733.

Department but failed the probationary period after being subjected to a rigorous training program.<sup>115</sup> Claiming that this probation failure was due to illegal discrimination based on his failure to conform to sex stereotypes, Barnes brought suit against the City of Cincinnati.<sup>116</sup>

Noting the decision in *Smith v. City of Salem*, the Sixth Circuit emphasized that transsexuals, as a class, are entitled to Title VII protection.<sup>117</sup> The court stated:

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.<sup>118</sup>

Although gender identity and sexual orientation are not among Title VII's expressly protected categories, the Sixth Circuit held that the plaintiff stated a claim for illegal sex discrimination because of his failure to conform to sex stereotypes.<sup>119</sup> Labeling oneself as transgendered or transsexual does not change the fact that he or she is discriminated against for failure to conform to gender stereotypes. Other courts in the past have treated transsexuals and transgendered individuals differently than presumed heterosexuals with regard to Title VII claims based on the failure to conform to gender stereotypes. The reinforcement of the Sixth Circuit's decision, a year after the *Smith* decision, gave greater weight to the original holding in *Smith*. The consequences of the Sixth Circuit's action and subsequent affirmation of protecting transgendered and transsexual individuals has yet to be addressed in many courts across the country and surely will create much controversy, as the protected groups themselves are controversial.

#### V. REFUSAL TO EXPAND THE PROTECTIONAL SCOPE OF TITLE VII BASED ON SEXUALITY

One such case has recently surfaced regarding this very issue since the holdings in *Smith v. City of Salem* and *Barnes v. City of Cincinnati*.<sup>120</sup> The narrow line of reasoning expressed in other cases before *Smith* has not disappeared, but rather, has been reaffirmed despite the expanded reading in the Sixth Circuit. Emphasizing that only congressional intent and the plain

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115. *Id.*

116. *Id.*

117. *Id.* at 737.

118. Barnes, 401 F.3d at 737 (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

119. *Id.*

120. See *Etsitty v. Utah Transit Authority*, No. 2:04CV616DS, 2005 WL 1505610 (D. Utah June 24, 2005).



language of the statute should matter, some courts will surely disregard the Sixth Circuit's interpretation that the holding in *Price Waterhouse* protects individuals discriminated against based on gender non-conforming behavior.

Only one case has emerged since the Sixth Circuit's controversial new holdings. In *Etsitty v. Utah Transit Authority*,<sup>121</sup> a transgendered woman's discrimination claim that she was terminated because of her sex (in violation of Title VII) was dismissed. The plaintiff, Krystal Etsitty, was a transsexual who was diagnosed with GID.<sup>122</sup> In October of 2001, Etsitty accepted a job working as an operator for the Utah Transit Authority (UTA).<sup>123</sup> At the time she applied for the job with UTA and throughout her training period, Etsitty dressed as a man and used the men's restroom.<sup>124</sup> Shortly after she was hired, Etsitty told her supervisor that she was a transsexual and would be appearing more traditionally female at work.<sup>125</sup>

The manager of operations later heard that one of the employees was a man dressing like a woman.<sup>126</sup> Concern was then expressed as to the plaintiff using female restrooms if she had male genitalia.<sup>127</sup> The supervisor and manager of operations then called a meeting with Etsitty to check her status with respect to the sex change process.<sup>128</sup> Confirming that she had not yet had any kind of sex reassignment surgery, her employers became more concerned about potential UTA liability based on complaints they might receive about Etsitty using a ladies' restroom.<sup>129</sup> They ultimately decided to fire Etsitty for this reason.<sup>130</sup>

Etsitty argued that she was dismissed because of her employer's belief that she did not conform to gender stereotypes.<sup>131</sup> The court began its analysis by noting that "every federal court that has dealt directly with this issue has held that 'Title VII does not prohibit discrimination based on an individual's transsexualism.'"<sup>132</sup> Agreeing with the reasoning expressed in *Ulane*, the court emphasized that its responsibility is "to interpret th[e] congressional legislation

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121. *Etsitty v. Utah Transit Authority*, No. 2:04CV616DS, 2005 WL 1505610 (D. Utah June 24, 2005).

122. *Id.* at \*1. For a description of the requirements of a GID diagnosis, see *supra* note 84.

123. *Etsitty*, 2005 WL 1505610, at \*1.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Etsitty*, 2005 WL 1505610, at \*1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at \*3 (citing *Johnson v. Fresh Mark, Inc.*, 337 F.Supp. 2d 996, 999 (N.D. Ohio 2003), *aff'd*, No. 03-3344, 2004 WL 1166553 (6th Cir. May 18, 2004); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)).

and determine what Congress intended when it decided to outlaw discrimination based on sex.”<sup>133</sup>

As a result, the court refused to expand the application of Title VII beyond the “clear intent of Congress, absent a mandate from Congress to do so,” since in its view, Congress had a narrow concept of sex in mind when passing the Civil Rights Act.<sup>134</sup> The court further noted that a new interpretation of the “because of sex” clause of Title VII to include anything other than biological sex must first come from Congress and is otherwise unwarranted.<sup>135</sup>

Next, the court’s analysis entailed a rejection of other courts’ application of the *Price Waterhouse* prohibition against sex stereotyping to transsexuals.<sup>136</sup> The court strongly disagreed with such interpretations of *Price Waterhouse*, and instead, emphasized that

[t]here is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.<sup>137</sup>

After rejecting such an interpretation of the *Price Waterhouse* holding and other expansions of Title VII absent clear congressional intent, and essentially following the line of cases related to the holding in *Ulane v. Eastern Airlines*,<sup>138</sup> the trial judge held that transgendered people are not protected under Title VII of the Civil Rights Act of 1964.<sup>139</sup>

#### VI. UNANIMOUS REFUSAL TO EXPAND THE PROTECTIONAL SCOPE OF TITLE VII TO INCLUDE DISCRIMINATION BASED ON SEXUAL ORIENTATION

Unlike the spotty protection for transgendered and transsexual individuals, an avowedly homosexual plaintiff is limited to state and local laws prohibiting sexual orientation discrimination unless she or he can prove discrimination “because of sex” for failing or refusing to comply with socially accepted gender roles. While transgendered and transsexual individuals have achieved some success (in the Sixth Circuit in particular), courts have consistently refused to allow gender stereotyping claims to be used to “bootstrap protection for sexual orientation into Title VII.”<sup>140</sup>

Although the courts have shown some inclination to expand the protectional scope and broaden the circle of protection, as in the case with

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133. *Etsitty*, 2005 WL 1505610, at \*3.

134. *Id.* at \*4.

135. *Id.*

136. *Id.* at \*5.

137. *Id.*

138. 742 F.2d 1081 (7th Cir. 1984).

139. *Etsitty*, 2005 WL 1505610, at \*7.

140. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

transgendered and transsexuals for not conforming to gender stereotypes, it has become evident in cases involving homosexual plaintiffs that the courts have yet to protect them under this same line of reasoning, despite the fact that in preferring same-sex partners, they are in fact often discriminated against for not conforming to heterosexual gender stereotypes of engaging in activities with opposite sex partners. The way courts address the issue clearly shows an intention to keep homosexuals as a separate class not entitled to gender stereotyping protection, as many courts continue to do in refusing to extend the gender stereotyping rationale to apply to transgendered and transsexual plaintiffs based on the fact that they are transgendered or transsexual.

*DeSantis v. Pacific Telephone & Telegraph Co.*<sup>141</sup> was one of the first cases to address the rights of homosexuals under Title VII. *DeSantis* consisted of three consolidated cases, all dealing with homosexual plaintiffs who were seeking protection from employment discrimination under Title VII.<sup>142</sup> The court rejected their claims, concluding that in the drafting of Title VII, Congress only intended for its protectional scope to cover traditional notions of sex and not discrimination based on sexual orientation.<sup>143</sup> The court quoted *Holloway v. Arthur Andersen* extensively, noting the lack of legislative history and the court's decision in *Holloway* to give Title VII its "plain meaning."<sup>144</sup> The court further noted that discrimination because of effeminacy or transsexualism likewise does not fall within the protectional scope of Title VII.<sup>145</sup>

A Second Circuit decision, *Dawson v. Bumble & Bumble*,<sup>146</sup> shows how difficult it is for an openly homosexual discrimination claimant to use sexual stereotyping to gain Title VII protection. Dawn Dawson, a self-described lesbian female who did not conform to gender norms, in that she did not meet stereotypical expectations of femininity and may have been perceived as more masculine than a stereotypical woman, claimed that she suffered discrimination on the basis of sex, sex stereotyping, and/or sexual orientation.<sup>147</sup>

Refusing to extend protection to Dawson, the court noted that although "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality," Title VII does not protect homosexuals simply based on their orientation.<sup>148</sup> Quoting

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141. 608 F.2d 327 (9th Cir. 1979).

142. *Id.* at 328.

143. *Id.* at 332.

144. *Id.* at 329.

145. *Id.* at 332.

146. 398 F.3d 211 (2d Cir. 2005).

147. *Id.* at 213.

148. *Id.* at 218 (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)).

*Simonton v. Runyon*,<sup>149</sup> the court stated that “[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation.”<sup>150</sup> Because of this problem, the court noted that plaintiffs often fall short in their Title VII pursuits because they are simply trying to make sexual orientation allegations “masquerading as gender stereotyping claims.”<sup>151</sup>

Yet another case, *Kay v. Independence Blue Cross*, examined a homosexual plaintiff’s claim of employment discrimination under Title VII, but rejected the idea that *Price Waterhouse*’s holding to prohibit discrimination based on failure to conform to gender stereotypes extended to protect homosexuals.<sup>152</sup> The harassment that Kay endured while in the employment of Independence Blue Cross included such incidents as a photocopied flyer for a gay phone line that was left in Kay’s mailbox that contained a typed line of text reading “A real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a ‘real man’!!!!!!”<sup>153</sup> Additionally, one of Kay’s co-workers, referring to another male employee in front of Kay, said “I’m glad that there’s a real man on the floor.”<sup>154</sup>

Despite the fact that these comments may have been highly gender-motivated in that Kay was ridiculed for not being stereotypically masculine, the court denied protection to Kay. Interestingly, the court attempted to distinguish between discrimination based on gender stereotyping and discrimination based on sexual orientation, finding, not too surprisingly, that this particular case fell under the latter, and thus, Kay was not protected under Title VII.<sup>155</sup> The court supported this holding by explaining that since most of the discrimination and harassment he suffered was prefaced with or

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[I]ndividual employees who face adverse employment actions as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII. When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”

*Id.*

149. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

150. *Dawson*, 398 F.3d at 217. The court here made an effort to separate the idea of sexual orientation from sex stereotypes, although the two are arguably, at the very least, not mutually exclusive ideas. There is overlap and conflation that makes the argument a weak one.

151. *Id.* at 218 (quoting LEX K. LARSON, 10 EMPLOYMENT DISCRIMINATION § 168.10[1] (2d ed. 2003)).

152. *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005).

153. *Id.* at 50.

154. *Id.*

155. *Id.* at 51.

accompanied by references to his sexual orientation, he was not protected under Title VII.<sup>156</sup>

It appears from this opinion that had there not been implications or explicit reference to his sexual orientation, this would have otherwise been an actionable claim under Title VII given that the ridicule was largely based on Kay's failure to conform to gender stereotypes by being stereotypically masculine. For some elusive reason not explicitly stated in the opinion, however, the court decided that gender stereotyping did not apply in the case of a gay man who did not act like a stereotypical ("gender stereotype-conforming") straight man. The similarities between this case and the gender stereotyping that occurred in *Price Waterhouse*, where Hopkins (the plaintiff) did not act "feminine" enough for a woman, are very strong. The only apparent difference is that Kay was gay, whereas Hopkins, presumably, was not, or at least had she been a homosexual, reference to her orientation was not mentioned.

VII. ANTICIPATED EXPANSION TO INCLUDE HOMOSEXUALS: POLICY, RATIONALE, AND PROBLEMS WITH EXPANDING TO INCLUDE SEXUALITY BUT NOT ORIENTATION

The Sixth Circuit's interpretation of Title VII to protect transsexuals is at odds with prior holdings in the Seventh, Eighth, and Ninth Circuits.<sup>157</sup> Such conflicting cases include *Ulane v. Eastern Airlines*, *Holloway v. Arthur Anderson*, and *Sommers v. Budget Marketing*, which all pre-date the *Price Waterhouse v. Hopkins* holding.<sup>158</sup> Because of this conflict, since the recent Sixth Circuit decisions in *Smith v. City of Salem* and *Barnes v. Cincinnati*, these previous holdings in other circuits are susceptible to renewed challenges in the near future.<sup>159</sup> However, it is not yet clear if the Sixth Circuit is an "anomaly in an otherwise settled area of the law" or rather, if it signals a new trend.<sup>160</sup>

Despite the lack of a clear answer to this question, it is important to note that society's increasing acceptance of sexual orientations and identities other

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156. *Id.* "[T]he only reasonable reading of this record compels the conclusion that the reprehensible conduct Kay alleges was motivated by sexual orientation bias rather than gender stereotyping." *Id.*

157. Vedder Price, *Sixth Circuit Says Title VII Protects Transsexuals From Sex Stereotyping*, LAB. L. (Vedder Price), Oct. 2004, at 5, 5, available at <http://vedderprice.com/> (Follow "News & Publications" Link; Select "Labor & Employment Law" and click "Go;" Scroll to October 2004 entries and click "Labor Law").

158. *Id.*

159. *Id.* at 4.

160. Stephen Allred, *Gender Stereotyping Claims Filed by Gender Bending Employees*, WORKCITE: EMPLOYMENT AND BENEFITS LEGAL UPDATE, Oct. 27, 2005, <http://www.hmw.com/workcite/20051027.htm> (last visited Jan. 8, 2007).

than straight heterosexuality—including, but not limited to, homosexuality, transsexualism and transvestitism—may be influencing such decisions, thereby signaling a new trend.<sup>161</sup> Because of the more liberal interpretations of the “because of sex” clause within Title VII and an overall trend toward increasing acceptance toward those not conforming to heterosexual norms, employers would be well-advised to proceed accordingly in their hiring and employment practices.<sup>162</sup> In particular, “[e]mployers should proceed cautiously in dealing with employees exhibiting transsexual tendencies or declaring themselves to be transsexuals, and are encouraged to seek legal counsel on how to respond to issues as they arise.”<sup>163</sup> Despite the fact that federal law does not yet prohibit discrimination based on sexuality or sexual orientation, plaintiffs could find ways around this dilemma by phrasing their discrimination differently. At present, it is clear that the judicial reasoning is weak, at best, in trying to distinguish what types of people are protected for not conforming to gender stereotypes.

Although Congress has yet to explicitly include those discriminated against based on sexuality and sexual orientation, recent case law suggests a liberalization of such notions of discrimination based on sex, and formerly distinct lines are becoming blurred and nearly unrecognizable.<sup>164</sup> In short, “[t]he legal and social conflation of sex, gender, and sexual orientation logically require this extension of sex discrimination law.”<sup>165</sup>

[L]ike transsexuals, homosexuals can be seen as extreme nonconformers; they do not conform to the stereotype that men ought to desire women sexually or that women ought to desire men sexually. . . . Traditional notions of sex and gender are transgressed by both homosexuals and transsexuals . . . . Extending Title VII protection to people discriminated against on the basis of sexual orientation is an important step toward achieving this goal.<sup>166</sup>

Especially in the Sixth Circuit, it would be difficult to justify protection of transgendered and transsexuals under the gender stereotyping rationale, but not homosexuals. While many courts are holding fast to the traditional line of reasoning, it is problematic to ignore the precedent set forth in *Price Waterhouse* about gender stereotyping.

Despite the lack of a clear legislative mandate explicitly granting protection to those deviating from heterosexual norms, the recent broadening of courts’ interpretations as to what discrimination “because of sex”

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161. Suzanne H. Stenson, *Employment Law Blog, Not Man Enough?*, EMPLOYMENT LAW INFORMATION NETWORK (April 27, 2005), [http://www.elinfonet.com/blog/comments.php?id=19\\_0\\_1\\_0\\_C](http://www.elinfonet.com/blog/comments.php?id=19_0_1_0_C).

162. Vedder Price, *supra* note 157, at 5.

163. *Id.*

164. Ling, *supra* note 13, at 286.

165. *Id.*

166. Chow, *supra* note 94, at 215.

encompasses and the blurred notions of what constitutes sex and what constitutes sexual orientation, the likelihood of employer liability based on such discrimination is greatly increased.<sup>167</sup> Distinguishing between “because of sex” and “because of sexual orientation” has become increasingly difficult, and consequently, could be determined solely based on how the plaintiff phrases the allegations in the complaint.<sup>168</sup> As a result, it has been strongly recommended that employers refrain from taking comfort in the lack of current legislation prohibiting such discrimination.<sup>169</sup>

#### VIII. AUTHOR’S ANALYSIS AND CONCLUSION

As stated earlier, the 1989 U.S. Supreme Court decision in *Price Waterhouse* was clear. The Court held that Title VII prohibited the “entire spectrum” of discrimination on the basis of sex, including that based on gender stereotyping, as opposed to being limited to discrimination on the basis of biological sex.<sup>170</sup> The Court further emphasized that sex stereotyping occurs when an employer acts on the basis of a belief that only men can be aggressive and that women cannot be aggressive.<sup>171</sup> Such an assumption and consequent discrimination based on this belief constitutes sex stereotyping prohibited by Title VII under the “because of sex” clause.

The clarity of this holding became unnecessarily muddled when courts tried to apply it, yet still wanted to exclude transgendered, transsexual, and homosexuals from protection under Title VII. If courts had applied the sex stereotyping rationale as simply as the Supreme Court had done in *Price Waterhouse*, many claims brought by people of differing sexual identities clearly would be protected. The reluctance of courts to follow the lead of *Price Waterhouse* resulted in a creation of a type of categorical exception for those groups that courts did not want Title VII to protect.

One of the most commonly used arguments opposing extending the protectional scope of the “because of sex” clause to include more than just those people discriminated against because they were born a biological male or

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167. Todd Stanton, *Not That There’s Anything Wrong With That . . . Or Is There?*, LAB. LETTER, Feb. 2005, at 3, 3, available at <http://www.laborlawyers.com/cm/Labor%20Letter/eLLFebruary2005.pdf>.

A number of courts have broadly construed what constitutes discrimination “because of sex,” and have blurred the distinction between discrimination based on sex and discrimination based on sexual orientation. Consequently, making employment decisions based on sexual orientation or permitting a work environment hostile to gay, lesbian, and bi-sexual employees could very well lead to employer liability.

*Id.*

168. *Id.* at 4.

169. *Id.*

170. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989).

171. *Id.*

female is the lack of legislative history, as well as the lack of clearly expressed congressional intent to protect transgendered, transsexual, or homosexual individuals. Accordingly, it is important to understand the context in which the Civil Rights Act of 1964 was passed.

The main thrust behind passing the Civil Rights Act was to protect racial minorities.<sup>172</sup> The civil rights movement in the 1950s and early 1960s focused national attention on racial injustice.<sup>173</sup> In response to this national attention, President Kennedy sent a draft of the Civil Rights Bill to Congress, where it was hotly debated.<sup>174</sup> While debating, Howard W. Smith of Virginia, chairman of the Rules Committee and also a “staunch opponent of all civil rights legislation,” spoke up and offered the word “sex” to be amended to Title VII.<sup>175</sup> His efforts to do this were, in effect, motivated by a desire to defeat the bill entirely.<sup>176</sup> Much to Smith’s chagrin, after several hours of debating, the amendment passed by a vote of 168 to 133.<sup>177</sup> Simply stated, the “prohibition of employment discrimination on the basis of sex was not a widely debated, thoroughly researched policy proposal.”<sup>178</sup> Prior to the passing of this federal legislation, only two states—Hawaii and Wisconsin—had laws prohibiting sex discrimination in employment.<sup>179</sup>

While ambiguity in a statute often logically leads to examination of its legislative history, the complete lack of legislative history and clear congressional intent on the “because of sex” clause is not helpful in this instance. Nonetheless, it is commonly argued by the courts following more of a narrow interpretation of the “because of sex” clause that the absence of a clear legislative intent for a broad interpretation of the “because of sex” clause is a legitimate basis to deny protection to these individuals. As previously described, the main driving force behind Title VII was to provide protection to racial minorities. That was the main concern and purpose of the Act. The sex amendment was thrown in, quite ironically, in an attempt to defeat the Act, just hours before Congress voted on it. These circumstances were not by any means normal, and did not provide for a legislative history that would have otherwise been useful and illustrative in the present-day debate on the original intent and idea of the “because of sex” clause in Title VII. Thus, arguments focusing on the lack of legislative history and clear congressional intent as a

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172. Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 *LAW & INEQ.* 163, 163 (1991).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Freeman, *supra* note 172, at 163.

178. *Id.*

179. *Id.*



means of supporting the opposition to expansion are weak and should not be given much weight or credit as a deciding factor.

Similarly, courts focused on the fact that at the time of enactment, it could not be inferred that such individuals would be protected. To say that discrimination based on being transgendered, transsexual, or homosexual was not contemplated at the time of passing the Act should be quite obvious, if for no other reason than the fact that such individuals have only in recent decades been widely recognized in society. Still, many people today do not know what it means to be “transgendered” or “transsexual” and the corresponding differences between the two classifications. Just because a condition or classification of individuals was relatively unknown at the time of the passing of an Act does not mean that such people are not protected.

These flawed arguments were criticized by the Sixth Circuit in *Smith v. City of Salem*, where the court refused to follow the narrow line of reasoning supported by most other courts in light of the new gender stereotyping rationale enunciated in *Price Waterhouse*. In *Smith*, the Sixth Circuit recognized that discrimination based on traditional notions of masculinity and femininity for both men and women constitutes the exact type of discrimination that Title VII prohibits, as articulated by the Supreme Court in *Price Waterhouse*.<sup>180</sup> The Sixth Circuit did not shy away from *Price Waterhouse*'s holding, unlike other courts before and since *Smith* that have either tried to ignore *Price Waterhouse* or have tried to create a categorical exception for those people that are considered by some as social deviants.

For these reasons, in light of the *Price Waterhouse* holding, transgendered, transsexual, and homosexual plaintiffs should be protected under the gender stereotyping rationale that the Supreme Court set forth, without any sort of “exceptions” that seem to have been created by inferior courts since this holding, in an effort to avoid broadening the scope of Title VII to their discomfort. Using the rule, as it was stated in *Price Waterhouse*, allows for this logical extension that the Sixth Circuit permitted, broadening the scope of protection to those who have historically not been protected. Despite the fact that homosexuals have not been accepted as a protected class under this same rationale, it is probably only a matter of time before they are in fact protected.

In conclusion, it is difficult to justify a holding that a man discriminated against for not being masculine enough is protected, but an effeminate gay male or transgendered male is not protected simply because of his affection or sexual orientation. Stereotyping related to traditional gender roles and societal norms of heterosexuality are interwoven and practically cannot be teased apart as they are not mutually exclusive ideas. Granting protection to only some gender non-conformists, but not others, is not what *Price Waterhouse* anticipated or encouraged. Rather, the Supreme Court set forth the rule that

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180. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

discrimination based on traditional notions of gender roles and stereotypes is impermissible pursuant to Title VII. The courts have complicated and confused this understanding by trying to make categorical exceptions that should not exist and were not intended to be part of the issue.

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