

(TRANS)FORMING TRADITIONAL INTERPRETATIONS OF TITLE VII: “BECAUSE OF SEX” AND THE TRANSGENDER DILEMMA

MARY KRISTEN KELLY*

INTRODUCTION

On April 22, 2009, a Colorado judge sentenced Allen Ray Andrade to life in prison for first degree murder and a hate crime.¹ That hate crime was the bludgeoning to death of Angie Zapata, his date for the evening of July 16, 2008.² When Andrade discovered that Angie was a male to female transsexual, he flew into a rage and beat her to death with a fire extinguisher.³ Colorado is now one of the first states to convict a person of a hate crime for violence against a transgender individual, and LGBT groups applauded this conviction as a victory for transgender individuals in the United States. There has recently been a push to pass federal legislation that would include “gender identity” in a list of protected characteristics that could qualify a crime as a hate crime, which is good news for the transgender community. However, what if discrimination against transgender individuals can be stopped before a violent act occurs? What if the means to accomplish this already exist within the legal system?

Title VII of the Civil Rights Act of 1964 offers protection against discrimination in the workplace based on certain enumerated characteristics, sex being one of them. Title VII’s aim is to ensure that employment decisions are not made based on any characteristic other than an employee’s or applicant’s qualifications for the job. Through these protections, we ensure that our workplace is diverse and that each individual hired or promoted is the best candidate for that position. Title VII can also play a broader role in governing society, without becoming a general code of civility. We aim to regulate the workplace not just out of concern for economic productivity but also because workplace regulation is a way in which we can purge individuals of their stereotypes and teach them to work with and interact with people they would not ordinarily, in hopes that what they learn will translate to other aspects of their daily lives. Perhaps if Allen Ray Andrade had more exposure to

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1. See Nicholas Riccardi, *Man guilty of hate crime, first degree murder in transgender slaying*, L.A. TIMES, Apr. 22, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-na-transgender23-2009apr23,0,4138169.story>.

2. *Id.*

3. *Id.*

transgender individuals in this manner, this violent act would have been prevented.

There is clear evidence that transgender individuals often experience discrimination at some point during the employment process. Thirty-seven percent of transgender individuals nationwide report having experienced some form of employment discrimination.⁴ A 2003 survey of the transgender population in San Francisco revealed that one in two individuals who identify as transgender have experienced employment discrimination.⁵ When confronted with cases of clear discrimination against transgender individuals, most federal courts have refused to extend protection to them under Title VII on the basis of sex. Courts rely on a trilogy of cases decided several years after Title VII was passed that interpret “sex” narrowly, and rely on outdated notions of how we now understand that term. Since those cases were decided, Title VII jurisprudence has expanded the meaning of “sex” from simply male or female to include notions of sex stereotypes and gender non-conformity. The courts have recognized claims for pregnancy discrimination, male on male sexual harassment, and so-called sex-plus claims, all of which transcend traditional interpretations of what discrimination “because of sex” means under Title VII. Yet when it comes to transgender plaintiffs, the courts revert to a strict interpretation of Title VII’s language. Because one’s gender identity is inherently part of one’s sex, sex discrimination should necessarily include discrimination based on gender identity. Title VII’s prohibition on sex discrimination has already been interpreted broadly in many types of cases, and the courts’ withholding of that broad interpretation for transgender individuals undermines much of the modern sex discrimination jurisprudence as well as the goals of Title VII itself as a remedial statute.

Part I of this Note will explore the meaning of “transgender” as it is currently understood in the medical and psychological professions as well as within current LGBT communities. Part II will explore the current legal landscape of the federal circuits’ interpretation of Title VII’s prohibition of sex discrimination in the workplace in general as well as how this interpretation specifically applies – or, more often does not apply – to transgender employees. This section will also argue that the sex stereotyping claim alone is an insufficiently narrow cause of action for transsexual plaintiffs. Part III of this Note will explore the ways in which state and local governments have reacted to interpretations of Title VII in interpreting their own employment and human rights laws or in drafting their own gender identity discrimination legislation and will suggest that federal courts heed the states’ approach in interpreting anti-discrimination legislation as remedial and therefore broad. Part IV of this Note will focus on the implications of the debates surrounding the Employment Non-Discrimination Act (ENDA), its ultimate failure to include gender identity discrimination, and whether this failure will or should have broader consequences for the interpretation of what constitutes sex discrimination under

4. M.V. LEE BADGETT, ET AL., THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 7 (2007).

5. CHRIS DALEY & SHANNON MINTER, TRANSGENDER LAW CENTER, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES 12 (2003).

Title VII. Part V will then argue that the solution to finding a federal remedy for gender identity discrimination is through a broader interpretation of “sex” under Title VII in order to allow transgender employees a cause of action “because of” their transgender status and not simply through the often rejected and problematic gender stereotyping line of cases. This section will also suggest that because “sex” under Title VII has already been interpreted quite broadly with respect to other kinds of sex discrimination claims, transsexual plaintiffs have been categorically excluded from a logical protection under the “because of sex” cause of action.

I. WHAT IS TRANSGENDER?

As the transgender movement has gained momentum over the past thirty years,⁶ the term *transgender* has taken on many different incarnations.⁷ In most LGBT circles, *transgender* is used as an umbrella term that includes people who experience or express their gender in a way that runs against conventional expectations of how one should perceive and express his or her gender in relation to the sex listed on one’s birth certificate.⁸ In other words, transgender means that a person’s physiological sex is different from his or her psychological perception or expression of his or her sex.⁹ The term *transgender* has been used to describe individuals who identify as transsexuals or cross-dressers, as well as other gender-variant individuals.¹⁰ Transsexuals are individuals who have changed or who are in the process of changing their physical sex to conform to their inner sense of gender identity.¹¹ The term *transsexual* can also refer to individuals who live full-time as a gender that is different from the one assigned to them at birth, but who do not undergo surgical procedures to alter their physical sex.¹² Cross-dressers are people who wear the clothing usually worn by persons of the sex opposite to the one assigned to these individuals at birth.¹³ Cross-dressers typically do not change their physical characteristics permanently, nor do they live full-time as a member of the opposite gender.¹⁴

The gender transition process for transsexuals can include any of the following steps: hormone therapy, sex reassignment surgery, telling one’s friends, family and co-workers, and changing one’s name and/or gender on

6. PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER, *Introduction to Transgender Rights*, in TRANSGENDER RIGHTS xiii (Paisley Currah, Richard M. Juang & Shannon Price Minter eds. 2006) [hereinafter INTRODUCTION TO TRANSGENDER RIGHTS].

7. *Id.* at xiv–xv.

8. See HUMAN RIGHTS CAMPAIGN FOUNDATION, TRANSGENDER INCLUSION IN THE WORKPLACE 2 (2008) [hereinafter HRC TRANSGENDER REPORT].

9. See *id.*

10. *Id.*

11. *Id.* at 3.

12. *Id.* *Transsexual* is not an umbrella term; many individuals who identify as transgender do not necessarily identify as transsexual. *Id.* Individuals who transition from male to female are referred to as MTFs or transwomen. *Id.* Those who transition from female to male are referred to as FTMs or transmen. *Id.*

13. *Id.*

14. *Id.*

legal documents.¹⁵ Gender transitions are usually supervised by a medical professional and are carried out according to regimented standards that have been developed by the medical community.¹⁶ The most commonly followed standards of care were developed by the Harry Benjamin International Gender Dysphoria Association, which is now known as the World Professional Association for Transgender Health (WPATH).¹⁷ These standards are generally highly successful, as very few transsexuals who undergo gender reassignment surgery report experiencing regret.¹⁸ The Human Rights Campaign observes that the degree of success of a gender transition is often strongly influenced by a person's ability to maintain a stable job and income during the transition, as well as by support within the work environment.¹⁹

Many transsexual individuals experience extreme discomfort from their internal sense that their gender identity does not match their physical bodies.²⁰ The medical profession has labeled this discomfort as "Gender Identity Disorder" (GID).²¹ This condition has also been known as "gender dysphoria," and the two terms are often used interchangeably.²² The American Psychiatric Association lists GID as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).²³ Transgender individuals do not always seek a diagnosis of GID because it carries a significant social stigma, as it labels them "disordered."²⁴ Many transgender people also do not seek a diagnosis because it is often done in preparation for sex reassignment surgery, and this surgery may not be an option financially for many transgender individuals, not to mention the medical risks involved with surgery.²⁵

The transgender population in the United States has never been measured concretely.²⁶ There are studies that have attempted to measure the number of transgender individuals in the population, but most are based on the number of transsexuals that seek sex reassignment surgery.²⁷ In evaluating these studies, which report the number of transsexual people to range anywhere from 0.25 to

15. *Id.*

16. *Id.*

17. See World Association for Transgender Health (WPATH) Standards of Care, http://www.wpath.org/publications_standards.cfm (last visited Oct. 18, 2009).

18. HRC TRANSGENDER REPORT, *supra* note 8, at 6.

19. *Id.* The Human Rights Campaign also provides a sample list of guidelines for employers to follow in implementing an internal set of gender transition guidelines for employees in order to ensure successful workplace transitions, *id.* at 26, and cite Chevron as an example of a company that has implemented a successful set of workplace gender transition guidelines. See CHEVRON, LGB AND T, TRANSGENDER @ CHEVRON (2008), available at http://www.hrc.org/documents/workplace-Chevron_Corp-Transition_Guidelines-Rev_2008.pdf.

20. HRC TRANSGENDER REPORT, *supra* note 8, at 3.

21. *Id.*

22. *Id.*

23. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 2000).

24. Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L. J. 243, 248 (2008).

25. *Id.*

26. HRC TRANSGENDER REPORT, *supra* note 8, at 4.

27. *Id.*

one percent of the population, the Human Rights Campaign observed that they likely underestimate the actual transsexual population.²⁸ The studies do not account for transsexuals that either have not undergone sex reassignment surgery, cannot have the surgery due to medical or financial reasons, or simply elect not to have the surgery.²⁹ A recent study conducted at the University of Michigan found that 1 in every 2,000 to 4,500 people is a male to female transsexual.³⁰ Though, the researchers point out that since many transsexuals do not come out to themselves or others, this range may be more along the lines of 1 in 1,000 to 2,000.³¹ This study also points out that more recent reports have estimated the number of male to female transsexuals to be more like 1 in 500, or 0.2 percent of the population.³² Since this study and recent reports only take into account transsexualism, and the number of people who fall under the transgender umbrella appears to be much larger than just the transsexual population, Olyslager and Conway predict that the number of transgender individuals is 1 in 100, or one percent of the population.³³

Though there are standards and commonly used terms associated with gender variance that make it easier to talk about the issues without too much confusion, transgender individuals identify with certain genders to varying degrees, and some commentators have described transgenderism as “an expansive and complicated social category”³⁴ or even a “gender galaxy.”³⁵ Regardless, as Paisley Currah noted in his article “Gender Pluralisms,”

[t]hose working under the trans umbrella are seeking a world in which we have the luxury of disagreeing about gender without worrying about which narrative is more compelling to those who have the power to deny access to social services, to take away children, or to dismiss discrimination claims out of hand.³⁶

This paper seeks to work under the umbrella in precisely this way. By broadening the interpretation of sex to include gender identity within the context of Title VII’s prohibition on sex discrimination in the workplace, employment protection can be afforded to transgender individuals who experience workplace discrimination, no matter on what end of the gender spectrum or what side of the “gender galaxy” they fall.

28. *Id.*

29. *Id.*

30. See Femke Olyslager & Lynn Conway, *On the Calculation of the Prevalence of Transsexualism* 23 (2007), available at <http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence%20of%20Transsexualism.pdf> (reporting that for female to male transsexuals the range is 1 in 5,500 to 8,000).

31. *Id.*

32. *Id.*

33. *Id.*

34. INTRODUCTION TO TRANSGENDER RIGHTS, *supra* note 6, at xv.

35. See Gordene O. MacKenzie, *50 Billion Galaxies of Gender*, in RECLAIMING GENDERS 193, 216 (Kate More & Stephen Whittle eds., 1999) (describing endlessly proliferating subsets of specific and historically located ways of crossing gender norms).

36. Paisley Currah, *Gender Pluralisms*, in TRANSGENDER RIGHTS 3, 24 (Paisley Currah, Richard M. Juang & Shannon Price Mintor eds., 2006).

II. CURRENT INTERPRETATIONS OF TITLE VII'S PROHIBITION ON SEX DISCRIMINATION

A. Narrow Interpretation of "Because of Sex" under Title VII

Title VII of the Civil Rights Act of 1964, amended in 1991, makes it unlawful to "refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."³⁷ One of the elements of a plaintiff's employment discrimination claim is proving that he or she falls into one of the protected categories enumerated in the statute, sex being one of them. Both men and women are protected from sex discrimination under the statute.³⁸ In cases involving transgender plaintiffs, federal courts have consistently interpreted "sex" to mean the traditional notion of biological sex - man or woman.³⁹ In early cases, the courts seemed to adopt the same basic three part analysis of why "sex" does not include transgender individuals. First, the courts looked to what they referred to as a plain language reading of the statute: sex means a biological man or a biological woman.⁴⁰ Next, the courts pointed to the lack of legislative history surrounding the meaning of "sex" in refusing to interpret the term broadly.⁴¹ Finally the courts placed great emphasis on the fact that Congress had consistently rejected legislation that would have added sexual orientation to the list of protected characteristics, which the courts interpreted to mean that Congress did not intend to extend the meaning of "sex" in any context.⁴²

The first case in which a federal court confronted the notion of expanding the meaning of "sex" within the context of Title VII came thirteen years after the statute was enacted, in *Holloway v. Arthur Andersen & Co.*⁴³ In this case, Ramona Holloway, a transsexual who began work at Arthur Andersen as Robert Holloway and who transitioned during her tenure at the firm, was terminated after she informed her supervisor that she was preparing for sex reassignment surgery and asked for her official documents to be changed to reflect her transition to the female gender.⁴⁴ Before she was terminated, an official of the company suggested to Holloway that she might be happier at a new job where her transsexualism would be unknown.⁴⁵ Holloway argued that discrimination against her because she was a transsexual was discrimination because of her sex and that such discrimination was unlawful under Title VII.⁴⁶ In interpreting the

37. 42 U.S.C. § 2000e-2(a)(1) (2000).

38. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

39. *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind").

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

41. *Holloway*, 566 F.2d at 662; *Ulane*, 742 F.2d at 1085.

42. *Holloway*, 566 F.2d at 662; *Ulane*, 742 F.2d at 1085.

43. 566 F.2d 659 (9th Cir. 1977).

44. *Id.* at 661.

45. *Id.*

46. *Id.*

meaning of “sex,” the court pointed to the dearth of legislative history surrounding the addition of “sex” as a protected characteristic under Title VII, and based its conclusion on a traditional view of sex as biological man or woman, which the court referred to as a “plain meaning” reading of the statute.⁴⁷ With no other definition of “sex” to look to, the court cited to the Webster’s Seventh New Collegiate Dictionary entry for “sex,” which defined the word as “either of two divisions of organisms distinguished respectively as male or female.”⁴⁸ The court also adopted a truly formalistic view of the goal of the sex discrimination ban as codified in Title VII by concluding that Congress passed Title VII in order to “remedy the economic deprivation of women as a class” and that the case law is consistent in interpreting the sex discrimination ban as a means of placing “women on equal footing with men.”⁴⁹ The Eighth Circuit considered similar questions in *Sommers v. Budget Marketing, Inc.*⁵⁰ That case was somewhat different than the *Holloway* case in that a male to female transsexual employee was hired as a woman and then was fired for “misrepresenting herself as an anatomical female.”⁵¹ The court still followed the same plain language reading of “sex” under Title VII and based its decision to dismiss the plaintiff’s case on the fact that there was no evidence Congress intended to include transsexualism under Title VII.⁵²

These early interpretations of sex discrimination within the context of a transgender plaintiff’s Title VII claims continued to plague federal courts faced with similar arguments. Several years after the *Holloway* decision, the Seventh Circuit dismissed a transgender plaintiff’s claim after the district court ruled for the first time that discrimination against a transsexual employee *because* she was transsexual was sex discrimination within the meaning of Title VII.⁵³ In *Ulane v. Eastern Airlines*, Kenneth (later Karen) Ulane was a male airline pilot who began transitioning to conform to her female identity eleven years after beginning

47. *Id.* at 662. Numerous commentators have speculated on the lack of legislative history surrounding the addition of “sex” as a protected characteristic in Title VII. The court in *Holloway* reasoned that Congress’s major concern in passing the Civil Rights Act of 1964 was race discrimination and that sex was added as an afterthought, without any hearings or debate. *Id.* Some commentators claim that the addition of “sex” was an attempt by certain members of Congress to prevent the passage of the legislation altogether. See Koch & Bales, *supra* note 24, at 246 (citing the court’s reasoning in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)). But see Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implications for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453–54 (1981) (arguing against this point of view of the addition of “sex” to Title VII by analyzing judicial and scholarly attitudes toward the ban on sex discrimination).

48. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 795 (1970).

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

50. 667 F.2d 748 (8th Cir. 1982).

51. *Id.* at 748. This kind of plaintiff is referred to as a “stealth transgender” person by the Human Rights Campaign. HRC TRANSGENDER REPORT, *supra* note 8, at 5. The report points out that these individuals who transitioned before beginning work with a specific employer often do not disclose their transgender status for various reasons, such as concerns about discrimination or harassment. *Id.* There is more potential for stealth transgender employees in jurisdictions that allow transgender individuals to change their government records and other documentation to match their gender identity. *Id.*

52. *Id.* at 750.

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

work for Eastern Airlines.⁵⁴ After her sex reassignment surgery, the airline learned of her transsexualism and fired her.⁵⁵ Agreeing with Ulane's argument that sex necessarily includes gender identity, the district court (*Ulane I*) found that sex was "not a cut and dried matter of chromosomes," but that it was "in part a psychological question of self-perception, and in part a social matter of how society perceives the individual."⁵⁶ The *Ulane I* court used this logic to determine that the plaintiff had been discriminated against because of her transsexuality and thus because of her sex.⁵⁷ However the Seventh Circuit reversed, following much of the same logic as the *Holloway* court.⁵⁸

B. Sex Stereotyping Claims under Title VII

1. Price Waterhouse Establishes the Sex Stereotyping Claim

*Price Waterhouse v. Hopkins*⁵⁹ was the first time the Supreme Court acknowledged a specific cause of action under Title VII for sex stereotyping as sex discrimination. Before this decision, the Supreme Court as well as lower federal courts had begun to move towards recognizing this type of claim both under equal protection jurisprudence as well as under Title VII.⁶⁰ In the well-known *Price Waterhouse* case, Ann Hopkins was the only woman out of eighty-eight candidates for partnership in the year she was being considered.⁶¹ The record showed that she had secured a \$25 million contract for the firm and had received very favorable reviews of her work.⁶² However twenty candidates, including Hopkins, were held back for reconsideration for partnership the next

54. *Id.* at 1082–83.

55. *Id.* at 1083–84.

56. *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821, 825 (N.D. Ill. 1983) (*Ulane I*).

57. *See id.* Interestingly, the court distinguished between transsexual plaintiffs and transvestites, reasoning that because transsexuals are people whose gender identity is opposite of that assigned to them at birth and "sex" necessarily includes gender identity, transsexuals should be protected by Title VII. *Id.* at 823. However, the court reasons that because transvestites (or cross-dressers, the more widely accepted term today) are "content" in the sex into which they are born, they do not have sexual identity problems and therefore do not fall within Title VII's ambit of protection. *Id.* Judge Grady says in the opinion, "I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, 'sex.'" *Id.* Based on current understandings of transgender individuals, cross-dressers and other gender-variant individuals who are not necessarily transsexuals are included under the transgender umbrella, express varying degrees of gender identity "disorders," and thus should receive protection under Title VII.

58. *Ulane II*, 742 F.2d at 1087.

59. 490 U.S. 228 (1989).

60. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that law granting different benefits to men and women based on the stereotype that husbands were breadwinners and wives were dependents was sex discrimination under the Equal Protection Clause); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("[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.").

61. *Price Waterhouse*, 490 U.S. at 233.

62. *Id.*

year.⁶³ Partners who opposed Hopkins's partnership gave reasons such as she was "overly aggressive," too "macho," that she "overcompensated for being a woman," and needed "a course at charm school."⁶⁴ One partner told her she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁶⁵ This was the partner who informed Hopkins of the reasons why she failed to make partner that year, these reasons being among them.⁶⁶ As a result, the Court held that Hopkins had not been promoted, at least in part, because she did not conform to feminine stereotypes associated with her female sex.⁶⁷ In light of this, 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."⁶⁸ Perhaps in the most influential statement of the opinion, the Court said "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."⁶⁹ Thus emerged the sex stereotyping, or gender nonconformity theory of sex discrimination which was successfully pleaded and proved by plaintiffs in lower federal courts after this decision.

2. Sex Stereotyping Claims for Transgender Plaintiffs

After the Supreme Court decided *Price Waterhouse*, the transgender community was optimistic that since the Court had recognized sex stereotypes and social understandings of gender as part of sex discrimination under Title VII, transgender plaintiffs might now fare better under Title VII than they had previously under the approach followed in *Holloway*, *Sommers*, and *Ulane*.⁷⁰

C. A Successful Transgender Sex Stereotyping Claim: *Smith v. City of Salem*

The Sixth Circuit was the first federal court of appeals to rule favorably on a transgender plaintiff's sex stereotyping claim under Title VII in *Smith v. City of Salem* in 2004.⁷¹ The plaintiff in this case, Jimmie Smith, was a lieutenant with the Salem Fire Department.⁷² After seven years of employment with the City of Salem, she began expressing a feminine appearance and was diagnosed with Gender Identity Disorder.⁷³ After Smith's co-workers began questioning her about her appearance and commenting that her mannerisms were not "masculine enough," Smith informed her supervisor of her diagnosis.⁷⁴ Once

63. *Id.*

64. *Id.* at 235.

65. *Id.*

66. *Id.*

67. *Id.* at 237.

68. *Id.* at 250.

69. *Id.* at 251.

70. See Joel W. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205, 222 (2007).

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

72. *Id.* at 568.

73. *Id.*

74. *Id.*

word of her diagnosis and of her intention to transition from male to female traveled to higher-ups in the fire department and to the Law Director of the City of Salem, officials of the fire department and the City met to formulate a plan for Smith's termination.⁷⁵ This plan included forcing Smith to undergo three psychological examinations with physicians selected by the City.⁷⁶ This was a ploy to get Smith to resign or to refuse to comply, because if she refused to comply she could be terminated on the grounds of insubordination.⁷⁷ Smith obtained legal representation and refused to comply with the plan – she was suspended and then after receiving a right to sue letter from the Equal Employment Opportunity Commission filed suit in federal court alleging, among other things, sex discrimination based on her transsexuality.⁷⁸

Smith brought her suit as a male plaintiff with GID.⁷⁹ The district court dismissed her claim of sex discrimination on the grounds that she invoked the “term of art” of sex stereotyping established by *Price Waterhouse* in order to create an end run around her real claim which was based upon her transsexuality, for which Title VII does not provide protection.⁸⁰ The Sixth Circuit reversed, holding that *Price Waterhouse* had confirmed that gender discrimination was necessarily a part of the prohibition of sex discrimination – that Ann Hopkins was not promoted to the partnership because her appearance and mannerisms failed to conform to the employer's expectations of how a woman should look and act.⁸¹ The Sixth Circuit found that Smith sufficiently pleaded a claim of sex stereotyping through her allegations that coworkers made statements about her appearance and mannerisms, and that her failure to conform to sex stereotypes of how a man should look and behave was the “driving force” behind the employer's actions.⁸²

The Sixth Circuit went even further than this, holding that *Price Waterhouse* had eviscerated the logic used in the previous cases dismissing transgender employees' claims.⁸³ The court reasoned that these prior cases (*Sommers*, *Holloway*, and *Ulane*) had all relied on the notion that Title VII's prohibition of sex discrimination did not also include gender discrimination.⁸⁴ The Sixth Circuit then pointed out that courts that refused to allow transgender plaintiffs to bring sex stereotyping claims were in essence making a false distinction between them and plaintiffs such as Ann Hopkins: “these courts superimpose classifications such as ‘transsexual’ on a plaintiff, and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the non-conformity into an ostensibly unprotected classification.”⁸⁵ According to the Sixth Circuit, after *Price Waterhouse* an employer who discriminates against a

75. *Id.*

76. *Id.*

77. *Id.* at 569.

78. *Id.*

79. *Id.* at 570.

80. *Id.* at 571.

81. *Id.* at 571–72.

82. *Id.* at 572.

83. *Id.* at 573.

84. *Id.*

85. *Id.* at 574.

man who wears makeup and dresses is just as liable for sex discrimination on the basis of sex stereotyping as an employer who discriminated against a woman because she did not wear dresses or makeup.⁸⁶

D. Remaining Roadblocks for Transgender Plaintiffs

In cases like *Smith v. City of Salem*, the prospect of bringing claims based on sex stereotyping after *Price Waterhouse* looked very optimistic for transgender employees. Many plaintiffs in the early 2000s brought successful sex stereotyping claims, reaffirming the strength of this claim, though not many were brought by transgender plaintiffs.⁸⁷ The Sixth Circuit also followed its reasoning in *Smith v. City of Salem* when it decided *Barnes v. City of Cincinnati* in 2005.⁸⁸

However, outside of the Sixth Circuit and even in one case within the Sixth Circuit, transgender plaintiffs have not been successful in bringing these sex stereotyping claims for a variety of reasons. A major roadblock for transgender plaintiffs under the sex stereotyping line of cases is that gender neutral policies may bar their claims. The Tenth Circuit in 2007 dismissed a transgender employee's claim based on a gender neutral restroom policy.⁸⁹ In this case the court agreed that the plaintiff had established a prima facie sex stereotyping claim, but dismissed the claim on the basis of the employer's asserted nondiscriminatory reason for terminating the plaintiff: the plaintiff's intent to use the women's restrooms when she was actually a biological male.⁹⁰ A district court in Indiana followed similar reasoning in dismissing a transgender employee's sex stereotyping claim on the basis of a gender neutral dress code.⁹¹ The court again recognized that the plaintiff had successfully established a sex stereotyping claim as a transgender employee; however, since as a male to female transsexual the plaintiff did not conform to the grooming standard's requirement that males maintain a conservative "socially acceptable" appearance, the employer was able to offer this noncompliance as a legitimate nondiscriminatory reason for the plaintiff's termination.⁹² As long as courts interpret Title VII to allow for "gender-neutral" policies such as these, employers will be able to use these policies as pretext for termination of transgender plaintiffs because of their transgender status. When a plaintiff

86. *Id.*

87. *See, e.g.,* *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (determining that gender stereotyping of a male gay employee by his male co-workers is actionable harassment under Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) (holding plaintiff may prove sex discrimination claim by showing that "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (deciding that harassment "based upon the perception that the plaintiff is effeminate is discrimination because of sex in violation of Title VII").

88. *Barnes v. City of Cincinnati*, 401 F.3d 729, 739 (6th Cir. 2005) (rejecting the defendant's argument that a transgender plaintiff did not have Article III standing to bring the discrimination action and holding that under *Smith*, transgender plaintiffs are members of a protected class).

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

90. *Id.* at 1225–26.

91. *Creed v. Family Express Corp.*, 2009 U.S. Dist. LEXIS 237 (N.D. Ind. 2009).

92. *Id.* at *28–29.

challenges a dress code or restroom policy based on notions of sex stereotyping and gender role expectations as these plaintiffs did, a court's finding that the policy equally burdens male and female employees will always be a fatal blow to these claims.

Courts have found other ways to poke holes in transgender plaintiffs' sex stereotyping claims. In order to bring successful sex stereotyping claims, transgender plaintiffs have had to present specific, direct evidence that employers took adverse employment actions against them because of gender stereotypes, and not because of their transgender status *per se*.⁹³ Arguably, in order for any plaintiff to establish a sex stereotyping claim, there must be direct evidence of stereotyping behavior – this is the essence of the claim. Otherwise the plaintiff would bring the claim as a “because of sex” claim based on circumstantial evidence of sex discrimination. In *Myers v. Cuyahoga County*, the otherwise sympathetic Sixth Circuit dismissed a transgender plaintiff's claim because the only evidence she was able to show was that her supervisor referred to her as a “he/she,” which the court recognized was deeply offensive to her as a transgender individual, but held did not rise to the level of direct evidence of stereotyping that is required.⁹⁴ The sex stereotyping theory will clearly only be successful for transgender plaintiffs under certain fact scenarios when statements such as “you are too masculine for a woman,” or “you are too feminine for a man” are made to the employee. It is today's reality in workplaces that the chances of co-workers making these types of comments out loud are fairly slim. In a politically correct world, it would be a “lucky” transgender plaintiff who is able to make a sex stereotyping claim on such damaging direct evidence as this. Thus, reliance on the sex stereotyping theory is simply too narrow a protection for transgender plaintiffs under Title VII.

Sex stereotyping claims can also be problematic for transgender plaintiffs in the sense that this type of claim forces the transgender employee to assert a claim either as too feminine of a man or too masculine of a woman. The majority of recorded decisions concerning stereotyping of transgender plaintiffs involve a male to female transsexual.⁹⁵ This means that an individual who has made or is in the process of making a transition from male to female must hold herself out to be a feminine male when she in fact identifies as female. The court in *Schroer v. Billington* alluded to this issue in its recent opinion, but reasoned that it did not matter whether the employer perceived the plaintiff as a masculine woman or a feminine man – the claim was still based on sex stereotyping.⁹⁶ Regardless of the *Schroer* court's broad interpretation of the sex stereotyping claim, formulating this type of claim based on a gender with which

93. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding direct evidence of stereotyping from partners' comments regarding the plaintiff's looks and mannerisms); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.C. 2008) (“*Schroer*'s case indeed rests on direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes.”).

94. *Myers v. Cuyahoga County*, 2006 U.S. App. LEXIS 13693, *26 (6th Cir. 2006).

95. See, e.g., *Schroer*, 577 F. Supp. 2d at 295; *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

96. *Schroer*, 577 F. Supp. 2d at 306.

the plaintiff no longer identifies may be problematic, especially for those who are still going through the gender transition process.⁹⁷

III. CURRENT STATE REMEDIES AVAILABLE TO TRANSGENDER EMPLOYMENT DISCRIMINATION PLAINTIFFS: AN ENLIGHTENING LINE OF REASONING FOR FEDERAL COURTS

Transgender plaintiffs have fared somewhat better at the state level than under Title VII. As a response to the failure of Title VII to extend protection to transgender plaintiffs, there is a growing trend among the states to either include sexual orientation and gender identity discrimination in their existing employment discrimination statutes or to create new statutes that deal specifically with discrimination against these individuals. As of January 1, 2009, one hundred and three cities and counties had enacted statutes that prohibit gender identity discrimination by both public and private employers.⁹⁸ Thirteen states and the District of Columbia have also enacted their own gender identity discrimination statutes.⁹⁹ However, when the populations of these states are taken into account, the National Gay & Lesbian Task Force finds that only thirty-nine percent of the population in the United States is covered by nondiscrimination laws that include gender identity.¹⁰⁰ This suggests that while states are recognizing the need for transgender-inclusive laws, this piecemeal approach to providing protection to transgender employees is inadequate.¹⁰¹ However, the thirty-nine percent statistic can also be seen in a positive light: the growing number of states that have enacted transgender-inclusive anti-discrimination laws is evidence that there is a national trend to recognize transgender rights, which could be persuasive to federal courts that are deciding whether transgender plaintiffs should be afforded protection under Title VII.

New York and New Jersey have interpreted their own employment laws that do not specifically provide for gender identity discrimination to protect transgender employees.¹⁰² These decisions focus on the remedial nature of anti-discrimination legislation and hold that through this lens of analyzing the purpose and the policies underlying Title VII, which serves as a model for both

97. See Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 95 (2008) (pointing out that in order for a transgender plaintiff to prevail on a sex stereotyping claim, she must “anchor” herself in a statutorily-protected biological sex from which she behaviorally deviates).

98. See HUMAN RIGHTS CAMPAIGN, CITIES AND COUNTIES WITH NON-DISCRIMINATION ORDINANCES THAT INCLUDE GENDER IDENTITY DISCRIMINATION (2009), http://www.hrc.org/issues/workplace/equal_opportunity/9602.htm.

99. These states are California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. See NATIONAL GAY & LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS (2008), http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf.

100. *Id.*

101. *Id.*

102. New Jersey has since amended the New Jersey Law Against Discrimination to include gender identity discrimination. N.J. STAT. ANN. §10:5-12 (West 2009).

of these states' employment laws, the federal courts' interpretation of "sex" to explicitly exclude transsexuals is too narrow.¹⁰³

1. New York – *Maffei v. Kolaeton Industries*

In 2004, a New York state court decided that a transsexual plaintiff could assert a sex discrimination claim under New York's employment discrimination statute because she was a transsexual.¹⁰⁴ Diane Maffei worked at Kolaeton starting in 1986 as a female employee.¹⁰⁵ She consistently received favorable reviews of her work along with salary raises and bonuses on a consistent basis.¹⁰⁶ In 1994, she underwent sexual reassignment surgery and returned to work as Daniel.¹⁰⁷ Upon his return to work, Maffei claimed that his supervisor degraded him, called him names, and stripped him of many of his responsibilities at work.¹⁰⁸ He brought a hostile work environment claim due to this harassment.¹⁰⁹ The defendant employer made similar arguments as employers who have faced these types of claims from employees under Title VII, since the New York statute was similarly worded in terms of its prohibition of sex discrimination in the workplace.¹¹⁰ The employer argued that as a transsexual the plaintiff was not part of a protected class and therefore could not bring a sex discrimination claim.¹¹¹ The court first looked to *Ulane v. Eastern Airlines* and rejected the reasoning as unduly restrictive, citing the fact that the common understanding of "sex" by experts today is that sex is determined by seven different factors,¹¹² including self-identity.¹¹³ The court determined that courts such as *Ulane*, *Sommers*, and *Holloway* were flawed in their reasoning that Congressional attempts to include sexual orientation among the list of protected characteristics signaled an intent to exclude transgender individuals from protection.¹¹⁴ The court also pointed to the remedial nature of antidiscrimination statutes – they should be interpreted liberally to achieve their intended purposes (to prevent discrimination of any group, majority or minority).¹¹⁵ Though the discrimination statutes were designed to protect women and minorities, they now extend protection to males and whites.¹¹⁶ Thus by looking at the broader idea of why governments (both federal and state) enact anti-discrimination laws, the court concluded that "sex" should be given a

103. *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995).

104. *Id.*

105. *Id.* at 391.

106. *Id.* at 392.

107. *Id.* at 391-92.

108. *Id.* at 392.

109. *Id.*

110. *Id.*

111. *Id.*

112. The factors the court listed were: (1) chromosomes (XX female, XY male); (2) gonads (ovaries or testes); (3) hormonal secretions (androgens for males or estrogens for females); (4) internal reproductive organs (uterus or prostate); (5) external genitalia; (6) secondary sexual characteristics; and (7) self-identity. *Id.* at 394.

113. *Id.*

114. *Id.* at 395.

115. *Id.* at 394-95.

116. *Id.* at 395.

broad interpretation and should apply to transgender plaintiffs even if Congress did not consider these individuals when the statutes were enacted.

2. New Jersey – *Enriquez v. West Jersey Health Systems*

A New Jersey state court followed similar reasoning to the *Maffei* court in holding that New Jersey sex discrimination provisions protected a transgender employee who was working as the medical director for West Jersey Health Systems.¹¹⁷ The plaintiff, Enriquez began transitioning from male to female after one year of employment and subsequently received a diagnosis of gender identity disorder.¹¹⁸ Co-workers began to comment on her appearance, and soon after she was notified that her contract would be terminated.¹¹⁹ When she contacted the company to inquire about renewing her contract, she was told, “[N]o one’s going to sign this contract unless you stop this business that you’re doing.”¹²⁰ Enriquez brought a sex discrimination claim under New Jersey’s employment statute.¹²¹ The *Enriquez* court, like the *Maffei* court, rejected the federal circuits’ interpretations of sex discrimination to exclude transgender employees finding these decisions to be too restrictive.¹²² The court cited the Supreme Court’s decision in *Price Waterhouse*, noting that notions of gender should be taken into account when deciding what “sex” means within the context of an employment discrimination statute.¹²³ Thus, the court concluded that “sex” discrimination under the New Jersey statute necessarily included gender discrimination.¹²⁴

While interpreting their own statutes that prohibit discrimination in the workplace on the basis of sex, these two states provide transgender employees with important protection against discrimination, and explicitly reject the federal circuits’ exclusion of these individuals. The reasoning used in both cases is applicable in rejecting the federal courts’ reasoning that Congress necessarily intended to exclude transgender individuals from Title VII because the initial groups targeted by the legislation were women and minorities (as protections have now been extended to men and whites), as well as the idea that simply because Congress has consistently struck down legislation that would establish sexual orientation as a protected status, Congress has no intention of protecting transgender employees against gender identity discrimination. These cases also stand for the idea that sex necessarily includes concepts of gender identity, and that “sex discrimination” within the context of an anti-discrimination statute should be read liberally to protect routinely discriminated-against groups.

117. *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 367 (N.J. Super. Ct. App. Div. 2001).

118. *Id.* at 368.

119. *Id.*

120. *Id.*

121. *Id.* at 369.

122. *Id.* at 372–73.

123. *Id.* at 371–72.

124. *Id.* at 373.

IV. THE EMPLOYMENT NONDISCRIMINATION ACT AND ITS IMPLICATIONS FOR INTERPRETATION OF TITLE VII

The Employment Nondiscrimination Act (ENDA) has gone through many incarnations over the years. First versions were proposed as amendments to the Civil Rights Act of 1964,¹²⁵ though after numerous attempts at an amendment failed, proponents of the bill suggested and proposed a stand-alone bill that would protect against discrimination on the basis of sexual orientation as well as gender identity.¹²⁶ This stand-alone bill did not contain Title VII's disparate impact claims and was stripped of affirmative action as a remedy for proven discrimination.¹²⁷ The final version of the bill that passed in the House of Representatives in 2007 did not contain protection for discrimination against transgender employees.¹²⁸ The bill's sponsor, Barney Frank, agreed to remove gender identity discrimination from the bill because it was clear that a bill containing this language would not pass a House vote.¹²⁹ Many advocacy groups withdrew their support from the bill because of this change.¹³⁰

The controversy surrounding ENDA and gender identity could have several possible outcomes for federal courts that are wrestling with whether gender identity is necessarily included in Title VII's prohibition on sex discrimination. First, courts could interpret this as a clear sign of Congressional intent to exclude transgender individuals from protection under Title VII. This line of reasoning would fall in line with the trilogy of early cases that relied upon Congress's continual failure to pass legislation that would offer protection against discrimination based on sexual orientation.¹³¹ Though in the case of ENDA, the case would be even stronger for this kind of argument – the courts in *Ulane*, *Sommers*, and *Holloway* were misguided in equating sexual orientation with gender identity and transgender status¹³² but here, one could argue that in removing "gender identity" from ENDA, this is an even clearer indication of Congress's intent.

However, in the recent case of *Schroer v. Billington*, the court considered and rejected the employer-defendant's argument that the failure of Congress to include gender identity in ENDA was a clear sign of Congressional intent that

125. Failed versions include S. 2056, 104th Cong. (1996); H.R. 1863, 104th Cong. (1995); H.R. 4636, 103d Cong. (1994); H.R. 2074, 96th Cong. (1979); H.R. 8269, 95th Cong. (1977); H.R. 166, 94th Cong. (1975).

126. The text of the bill that included language regarding sexual orientation as well as gender identity discrimination is in H.R. 2015, 110th Cong. (2007).

127. *Id.*

128. H.R. 3685, 110th Cong. (2007).

129. 153 CONG. REC. H13228–52 (daily ed. Nov. 7, 2007).

130. See, e.g., HUMAN RIGHTS CAMPAIGN, POLICY STATEMENT ON ENDA, available at <http://www.hrc.org/issues/workplace/12346.htm> (stating that Human Rights Campaign will only support a trans-inclusive version of ENDA).

131. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) ("this court will not expand Title VII's application in the absence of Congressional mandate").

132. Note that many LGBT activists insist that we keep these terms separate. Sexual orientation is one's sexual proclivity towards one sex or the other, while transgender is one's identity as male, female, or something different altogether.

transgender individuals should not receive protection under Title VII.¹³³ The court was not prepared to accept such a narrow reading of “sex” under Title VII, and followed the plaintiff’s alternative suggestion for interpretation of this legislative history: that some members of Congress believe the *Ulane* court and other early transgender discrimination cases interpreted “sex” too narrowly under Title VII.¹³⁴ According to this explanation Title VII does not require amendment, but a corrected interpretation of “sex.”¹³⁵ According to the Supreme Court, the history of subsequent legislation is not a valid basis for inferring the intent of an earlier Congress.¹³⁶ This is especially true when interpreting Congress’s intent within the context of a proposal that fails to become a law.¹³⁷ Congressional inaction lacks the persuasive significance of Congressional action because it is possible to make multiple interferences about the bases for Congress’s decisions, including the inference that previous legislation already incorporated the offered change.¹³⁸ ENDA’s failure could therefore serve either to undermine or bolster transgender plaintiffs’ sex discrimination claims under Title VII. Another alternative is that courts will find ENDA’s latest failure to be unenlightening as to the transgender debate because this legislation had many other flaws and was destined to fail for those alone, such as the lack of a disparate impact cause of action.

V. THE SOLUTION: *SCHROER V. BILLINGTON*’S SUGGESTION OF A BROADER INTERPRETATION OF “SEX” UNDER TITLE VII

A. *Schroer v. Billington* Allows Transgender Plaintiff’s “because of sex” claim to stand

In 2008, a district court in the District of Columbia decided that discrimination against a transsexual plaintiff constituted not just sex stereotyping, but discrimination because of the plaintiff’s sex.¹³⁹ Diane Schroer was a male to female transsexual who applied for the position of Specialist in Terrorism and International Crime with the Library of Congress in the Congressional Research Service.¹⁴⁰ She was no doubt qualified for the position as she had attended the National War College and the Army Command and General Staff College.¹⁴¹ When she applied for the position she had already been diagnosed with gender identity disorder and was working with a clinical social worker to develop a plan for her transition from male to female.¹⁴² She

133. *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.C. 2008).

134. *Id.* (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

135. One commentator has suggested amendments to Title VII itself rather than standalone legislation like ENDA. She recommends that “sex” be amended to “gender” in Title VII to prevent further confusion surrounding the interpretation of “sex.” See Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. 209, 210 (2008).

136. *Schroer*, 577 F. Supp. 2d at 308.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 295.

141. *Id.*

142. *Id.*

applied for the position as David Schroer.¹⁴³ When Schroer met with her potential supervisor before she was to begin work, she dressed in masculine attire but informed the supervisor of her intention to undergo sexual reassignment surgery and that she would be starting work as Diane Schroer.¹⁴⁴ This exchange resulted in Schroer's offer being rescinded by her supervisor.¹⁴⁵ The supervisor cited reasons such as concern that Schroer's contacts would no longer want to work with her because of her transgender status, her credibility when testifying before Congress could be compromised because everyone would know she had transitioned, concern that Schroer was not trustworthy because she was not up-front about her transition during her initial interviews, her transition might distract her from the job, and finally that it would affect her ability to obtain security clearance.¹⁴⁶ The court found many of these concerns to be pretextual¹⁴⁷ and went on to find that Schroer had proved both a sex stereotyping claim as well as a claim "because of sex" under Title VII.¹⁴⁸ Following the reasoning in *Smith v. City of Salem* and *Barnes v. City of Cincinnati*, Judge Robertson found that Schroer had successfully alleged a sex stereotyping claim.¹⁴⁹ However, in a previous opinion on a motion to dismiss, Judge Robertson held that sex stereotyping claims for transgender plaintiffs must arise from the employee's appearance or conduct and the employer's stereotypical perceptions.¹⁵⁰ A *Price Waterhouse* claim cannot be supported by the facts showing that an adverse employment action resulted solely from the plaintiff's disclosure of her gender identity disorder.¹⁵¹ This reasoning reflects the problematic aspects of sex stereotyping claims for transgender individuals referenced in Part II, *supra*. Presenting direct evidence of an employer's statements about an employee's appearance or conduct can be especially difficult. Upon further review of the facts on summary judgment, the court found that Schroer's sex stereotyping claim was saved by the fact that she was able to present direct evidence: the decisionmaker (the supervisor) admitted that when she saw photographs of Schroer she saw a man in women's clothing.¹⁵² The supervisor also admitted that she viewed Schroer's army background as making her an especially masculine type of man which made her comprehension of her gender transition more difficult.¹⁵³ The court viewed this evidence as support for the allegation that the employer's decision was "infected by sex stereotypes."¹⁵⁴

Judge Robertson pointed to the difficulties that transgender employees have faced in bringing sex stereotyping claims because direct evidence of

143. *Id.*

144. *Id.* at 296.

145. *Id.* at 299.

146. *Id.* at 297-98.

147. *Id.* at 300-02.

148. *Id.* at 308.

149. *Id.* at 304-05.

150. *Id.* at 304.

151. *Id.*

152. *Id.* at 305.

153. *Id.*

154. *Id.*

discrimination based on sex stereotypes may look too much like discrimination based on transsexuality itself to courts.¹⁵⁵ However, Judge Robertson ruled that even if Schroer's claim was based on transsexuality itself, she could still have maintained a claim of sex discrimination because of her sex.¹⁵⁶ Gender identity necessarily is a part of sex and therefore Title VII's prohibition of sex discrimination must include discrimination based on one's sense of gender identity.¹⁵⁷ This ruling was especially important because the court decided this explicitly, "based on the language of the statute itself."¹⁵⁸ The court even went so far as to hold that a transsexual could bring a claim as an inherently gender non-conforming transsexual.¹⁵⁹

Similar to Judge Robertson's reasoning in *Schroer*, there was a portion of the decision in *Smith v. City of Salem* discussed in Part II, *supra*, that was deleted from the final released opinion under threat of an en banc review due to the strength of the language it used.¹⁶⁰ In the unreleased version of the opinion, Judge Cole went so far as to say that if Smith had brought her claim as a transsexual individual and not just as a sex stereotyping claim, that her claim would still be viable.¹⁶¹ In other words, Judge Cole believed that even if Smith had not been able to point to specific instances in which coworkers or supervisors had criticized her mannerisms and appearance – evidence that is integral to a claim of sex stereotyping – Smith should still have been able to make out a claim of sex discrimination based on her transgender status. Though this section of the original opinion does not appear in the corrected form of the opinion released a few months later, this was the beginning of an understanding that discrimination against a transgender employee may be discrimination because of his or her sex.

B. Broad Interpretations of "Sex" Under Title VII

The *Schroer* opinion marks a broadening of the interpretation of "sex" under Title VII for transgender plaintiffs, but since the beginning of Title VII jurisprudence courts have been moving away from the original meaning of "sex" (man or woman). The courts' narrow interpretation of "sex" when a plaintiff presents a claim based on his or her transgender status can in fact be seen as an exception to the broader interpretations of "sex" that have been embraced by courts in other types of sex discrimination cases. When the *Schroer*

155. *Id.* at 308.

156. *Id.* at 306–08.

157. *Id.* at 306.

158. *Id.* at 306.

159. *Id.* at 304–05.

160. *Smith v. City of Salem*, 369 F.3d 912, 921 (6th Cir. 2004).

161. *Id.* ("Even if Smith had alleged discrimination based solely on his self-identification as a transsexual – as opposed to his specific appearance and behavior – this claim too is actionable pursuant to Title VII. By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. *Ergo*, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission – for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman – itself violates the prevalent sex stereotype that a man should perceive himself as a man.").

court held that “analysis must begin and end with the language of the statute,”¹⁶² the court was referring to the already broad interpretation of sex that other courts have systematically brushed aside when confronted with transgender plaintiffs. One of the first indications that Congress intended a broad meaning of “sex” under Title VII was the Pregnancy Discrimination Act.¹⁶³ After the Supreme Court decided *Geduldig v. Ailleo*,¹⁶⁴ holding that pregnancy discrimination was not sex discrimination and embracing the narrow view of “because of sex” that pregnancy discrimination simply distinguished between pregnant women and non-pregnant persons, Congress responded by redefining “because of sex” to include “because of pregnancy.”¹⁶⁵ This indicates intent on the part of Congress, even early in Title VII litigation, to show that “sex” means more than just being female or being male; rather, “sex” encompasses ideas of gender roles and norms that are associated with each sex.¹⁶⁶

Similar to the expansion of the understanding of “because of sex” to include “because of pregnancy,” the courts have recognized sex discrimination claims in a line of cases that are often referred to as “sex-plus” claims. Courts have developed an involved jurisprudence regarding claims that an employer has a policy that classifies employees on the basis of sex plus another characteristic such as parenthood, race, age, marital status, or child-bearing ability. Plaintiffs in these claims allege that the employer has discriminated against a specific subclass of one sex. For example, in *Phillips v. Martin Marietta Corporation* the Supreme Court held that the employer, who refused to hire women with pre-school age children but did hire men with children, violated Title VII because the statute prohibited using separate hiring policies for men and women.¹⁶⁷ Though these claims are based on differential treatment of men and women, the notion that other characteristics such as race, age, or childcare could play into a determination that the discrimination in question was motivated by sex is also a move away from traditional interpretations of sex. It is also interesting to note that both the *Phillips* case and the Pregnancy Discrimination Act were changes in Title VII jurisprudence that occurred almost simultaneously with the first three cases to address transgender employment discrimination. This tends to indicate that since courts were willing to apply broader interpretations of “sex” in some situations, but refused categorically to extend protection to transsexuals during the same time period, courts were devising a way to specifically exclude transsexuals from protection.

Finally, what should have been the proverbial nail in the coffin for the three early cases rejecting transsexual plaintiffs’ claims of sex discrimination was the

162. *Schroer*, 577 F. Supp. 2d at 306 (citing *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989)).

163. P.L. 95-555, 92 Stat. 2076.

164. 417 U.S. 484 (1972).

165. P.L. 95-555, 92 Stat. 2076.

166. Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. 209, 211 (2008) (“A Court that can perceive sex discrimination in the denial of caretaking leave has come a long way since *Geduldig*.”).

167. 400 U.S. 542, 543–44 (1971).

case of *Oncale v. Sundowner Offshore Services, Inc.*¹⁶⁸ In this case, the Supreme Court held that same-sex sexual harassment was actionable under Title VII.¹⁶⁹ The Justices saw no need for a categorical rule against male on male harassment in the workplace because “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁷⁰ This language directly undermines the holdings of *Holloway*, *Ulane*, and *Sommers*, which hold steadfast to the principal evil that Congress contemplated in passing Title VII: that there were not equal employment opportunities for men and women. Justice Scalia’s extension of Title VII to “comparable evils” in *Oncale* leads directly to the argument that discrimination against transsexual plaintiffs because they are transsexual is a comparable evil to discrimination against women because they are women, and thus under the language of Title VII discrimination based on transsexualism is discrimination based on sex.¹⁷¹ However, as one commentator has suggested, a logical consistency is not always sufficient to change the minds of judges.¹⁷² Sometimes the will of the public has to be at the tipping point before the courts recognize that a disfavored group deserves protection under existing statutory law.¹⁷³ There is quite a bit of evidence that the will of the public is heading in that direction, however, with current legislative developments at the state level, discussed in Part III, *supra*.

CONCLUSION

Sex discrimination under Title VII is broad, except when the plaintiff is a transsexual. Federal courts have blindly followed a trilogy of decisions whose reasoning has essentially been overturned by decades of jurisprudence expanding the meaning of “sex” under the statute to include notions of gender norms and non-conformity as well as “comparable evils” to those envisioned by Congress in 1964. Perhaps because transsexualism is a foreign concept to many courts, the notion of reading such a categorical exclusion into Title VII’s prohibition of sex discrimination was not as problematic as it was to the Court in *Oncale* in the case of male on male sexual harassment. However, federal courts should look to the remedial nature of anti-discrimination laws, as many of the states have done, to find that the overarching policies of Title VII dictate the extension of protection to transsexuals as a disadvantaged, discriminated against group in the workplace. Though it is indisputable that Congress did not have transsexual plaintiffs in mind in 1964, the intent of Congress is certainly not the end of the inquiry. As the sex stereotyping claim has proven not to be the premier tool in vindicating transsexual plaintiffs’ rights under Title VII, the broader “because of sex” rationale must carry the day.

168. 523 U.S. 75 (1998).

169. *Id.* at 82.

170. *Id.* at 81.

171. *Id.*

172. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 595 (2007).

173. *Id.*