The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 16 | Number 2 Article 5

1-1-2014

Why the EEOC Got It Right in Macy v. Holder: The Argument for Transgender Inclusion in Title VII Interpretation.

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COMMENTS

WHY THE EEOC GOT IT RIGHT IN *MACY V. HOLDER*: THE ARGUMENT FOR TRANSGENDER INCLUSION IN TITLE VII INTERPRETATION

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I. INTRODUCTION

> "I'm proud to be a part of this groundbreaking decision confirming that our nation's employment discrimination laws protect all Americans, including transgender people. . . . No one should be denied a job just for being who they are."
>
> — Mia Macy[1]

Imagine waking up one day, looking in the mirror, and being unable to identify with the person staring back at you; you do not recognize that person, and worse, it does not feel like it is really you. Imagine that happening to you every day of your life since childhood. Worse, no one around you knows the difficulties and challenges you are facing. Even if they did recognize it, chances are they would neither understand nor know how to support you. This is the nightmare many transgender or gender nonconforming[2] people deal with at some time in their lives.[3]

Now, picture having the courage to make your outward appearance match your inner feelings and perception of the world—the vindication; the empowerment. However, even with this courage you would still face even more hardship. Transgender individuals experience discrimination in virtually every aspect of their lives including housing, education, employment, medical care, and, in the face of this discrimination, encounter a significant risk of being harassed, bullied, and physically assaulted.[4]

A recent report found sixty-three percent of transgender or gender nonconforming survey participants have "experienced a serious act of dis-

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1. *Groundbreaking! Federal Agency Rules Transgender Employees Protected by Sex Discrimination Law*, TRANSGENDER L. CTR., http://www.transgenderlawcenter.org/archives/635 (last visited Nov. 9, 2013) (internal quotation marks omitted).

2. *See Fact Sheet: Transgender & Gender Nonconforming Youth in School*, SYLVIA RIVERA LAW PROJECT, http://www.srlp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school (last visited Nov. 23, 2013) ("'Transgender' and 'Gender nonconforming' are umbrella terms that often encompass other terms such as transsexual, cross dresser, gender queer, femme queen, A.G., Two Spirit, and many more. It is important to refer to people with the term they prefer."). These terms are used interchangeably throughout this piece.

3. *See generally* GENNY BEEMYN & SUSAN RANKIN, THE LIVES OF TRANSGENDER PEOPLE 39–76 (2011) (discussing the experiences of transgender survey participants).

4. *See generally* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 1–8 (2011), *available at* http://www.transequality.org/PDFs/Executive_Summary.pdf (outlining the discrimination, harassment, and violence faced by transgender individuals).

crimination—events that would have a major impact on one's quality of life and ability to emotionally or financially sustain themselves."[5] This statistic shows the need for increased transgender rights advocacy and protection for transgender people under the law. Furthermore, "workplace discrimination, unchecked, harms our economy both domestically and globally."[6] Much of the discrimination felt in the transgender community manifests in employment discrimination.[7] The effects of workplace discrimination reverberate far beyond those individuals directly discriminated against. Thus, every effort should be made to combat this problem and this Comment takes special interest in providing protection against transgender workplace discrimination.

This Comment provides a foundation of transgender employment discrimination law and argues transgender-based employment discrimination should be included within statutory construction of sex discrimination under Title VII. Part II covers the history of transgender individuals and the discrimination they endure. Part III outlines Title VII jurisprudence as it relates to transgender employment discrimination, focusing specifically on the pre-1989 prevailing court view—developed in the seminal cases *Price Waterhouse v. Hopkins*[8] and *Oncale v. Sundowner Offshore Services, Inc.*[9]—and the Federal Circuit Courts' stance, or lack thereof, on the issue. Part IV deals with the history and impact of the Equal Employment Opportunity Commission (EEOC) on transgender employment discrimination. Part V includes an in-depth look at the EEOC decision in *Macy v. Holder*,[10] focusing on the EEOC's rationale for including transgender individuals under Title VII protections, and the other court decisions that have relied on *Macy*. Finally, Part VI explores the general implications of the EEOC's decision in *Macy*, any deference its decision may receive from the Supreme Court, and its relation to the Employment Non-Discrimination Act.

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5. *Id.* at 7.

6. *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the Subcomm. on Health, Emp't, Labor, & Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 3 (2008) (statement of Hon. Robert E. Andrews, Chairman, Subcomm. on Health, Emp't, Labor, & Pensions).

7. *See* GRANT ET AL., *supra* note 4, at 3 (providing statistics on transgender and gender identity based employment discrimination); *Employment Discrimination*, TRANSGENDER L. CTR., http://www.transgenderlawcenter.org/issues/employment (last visited Nov. 9, 2013) (noting that workplace discrimination contributes to the high levels of unemployment and underemployment experienced by transgender individuals).

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

9. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

10. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012). This EEOC case is referenced as *Macy v. Holder*, as it is styled by the EEOC in its decision.

II. History and Discrimination of Transgender Individuals

A. *History*

The concept of changing one's gender[11] and sex[12] burst onto the American stage in the 1950s when Christine Jorgensen became the first U.S. citizen to publicly announce her sexual/gender identity change.[13] Prior to her operation, while Jorgensen served in the U.S. Army, she always felt "she was a woman trapped inside a man's body."[14] Although her decision and subsequent procedure to change her sexual/gender identity seemed pioneering at the time, Jorgensen's announcement did not actually reflect a new phenomenon—gender nonconformity has been acknowledged and well documented throughout human history.[15] In fact, in some cultures, gender nonconforming individuals were religious leaders given a special place in society.[16] In other cultures, deities were imagined as possessing ability to change their sex at will.[17]

A 2011 study conducted by the University of California, Los Angeles indicates there are approximately 700,000 transgender Americans, but some authorities estimate the number to be closer to three million.[18] The

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11. Sex is defined as: "the biological and physiological characteristics that define men and women." *What Do We Mean by "Sex" and "Gender"?*, World Health Org., http://www.who.int/gender/whatisgender/en (last visited Nov. 23, 2013).

12. Gender is defined as: "the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women." *Id.*

13. *See* John T. McQuiston, *Christine Jorgensen, 62, Is Dead; Was First to Have a Sex Change*, N.Y. Times, May 4, 1989, http://www.nytimes.com/1989/05/04/obituaries/christine-jorgensen-62-is-dead-was-first-to-have-a-sex-change.html.

> "Her sexual conversion began with hormone injections in 1950, when she was [twenty-four] years old. It was completed in 1952 with surgery at the Danish State Hospital in Copenhagen under the care of Dr. Christian Hamburger, a Danish hormone expert whose first name she took to form her own. On her return to the United States in 1955, her transsexualism was sensationalized in the daily tabloids . . . ."

Id.

14. *Id.*

15. *See* Deborah Rudacille, The Riddle of Gender: Science, Activism, and Transgender Rights 3 (2005) ("[F]ar from being a product of the modern world, gender variance has been documented across cultures and in every epoch of history."); Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *in* Transgender Rights 171, 171 (Paisley Currah et al., eds., 2006) ("From prehistoric times to the present, individuals whom today we might call transgendered and transsexual have played a prominent role in many societies, including our own.").

16. Rudacille, *supra* note 15.

17. *Id.*

18. *See Hearings*, *supra* note 6 (statement of Hon. Robert E. Andrews) ("[R]oughly 700,000 to 3 million transgender individuals living in America today run the risk of being fired, demoted or not even hired because of their gender identity."); *EEOC Recognizes Transgender Discrimination*, *Texas Workers Rights Blog*, John A. Wenke (May 14, 2012), http://www.johnwenke.com/eeoc-recognizes-transgender-discrimination-2 ("According to a

number of individuals who undergo sex-reassignment surgery—actually make the sex/gender transition—is much lower.[19] Various theories attempt to explain the wide variance in estimates of the transgender population. Some posit gender identity conflicts or "disorders" go unrecognized or misdiagnosed as other mental problems, while others purport some transgender individuals simply never identify themselves as such.[20]

The first organized communities in the United States for those with nonconforming gender identities emerged in the 1950s, but they were designed exclusively for heterosexual cross-dressing men.[21] Homosexuals and transsexuals were not welcomed until as late as the 1990s.[22] There was similar exclusion of transgender and transsexual individuals within the gay and lesbian community until the 1990s.[23] Some gay and lesbian communities and social establishments accepted gender nonconforming patrons and members while others did not.[24] By the early 2000s, most national gay, lesbian, and bisexual organizations had become transgender inclusive.[25]

The medical community has also played an important role in the formation and recognition of the transgender community. From the mid-1960s through the early 1990s, the medical standards imposed for transgender and transsexual individuals seeking to transition their gender were strictly applied, with stringent guidelines on what constituted transgender

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2011 UCLA study, there is an estimated 700,000 transgender people living in the United States, and an estimated 8 million people in this country who identify themselves as gay, lesbian or bi-sexual.").

19. *See* TRANSGENDER LAW & POLICY INST., TRANSGENDER ISSUES: A FACT SHEET 1 (2012), *available at* http://www.transgenderlaw.org/resources/transfactsheet.pdf ("Recent statistics from the Netherlands indicate that about 1 in 12,000 natal males undergo sex-reassignment and about 1 in 34,000 natal females.").

20. RUDACILLE, *supra* note 15, at 14.

21. Denny, *supra* note 15.

22. *See id.* at 172, 174 ("[T]hose who were open about their inclinations toward homosexuality or transsexualism were routinely dismissed from the cross-dressing organizations . . . .").

23. *Id.* at 173–74.

24. *Id.*

25. *Id.* at 174; *see also Issue: Transgender*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/transgender (last visited Nov. 9, 2013) (advocating for transgender individuals' equality); *Transgender Issues*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/transgender (last visited Nov. 11, 2013) (promoting transgender individuals right's issues).

characteristics.[26] This limited transgender individuals from "legitimately" identifying themselves as gender nonconforming.[27]

By the mid-1980s, transgender individuals began to reject the stringent medical transgender models, and by the 1990s, most communities adopted and accepted more flexible, expansive, and variant lifestyle choices.[28] This brought significant pride to the transgender community after decades of fear and shame.[29]

B. *Discrimination*

In 2011, to create a picture of transgender discrimination in the United States, the National Gay and Lesbian Task Force and the National Center for Transgender Equality conducted a survey of 6,450 transgender and gender nonconforming individuals from all fifty states.[30] The results were heartbreaking. There were three key findings from the report.[31] First, while discrimination permeated participants' responses, the combination of transgender identity and minority racial status dramatically increased the individuals' confrontation with discrimination.[32] Second, poverty among respondents was extreme, with participants being "nearly four times more likely to have a household income of less than $10,000 per year, compared to the general population."[33] Finally, forty-one percent

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26. *See* Denny, *supra* note 15, at 175–79 (providing an overview of the medical treatments used from the 1960s until the 1990s).

> To qualify for treatment, it was important that applicants report that their gender dysphorias manifested at an early age; that they have a history of playing with dolls as a child, if born male, or trucks and guns, if born female; that their sexual attractions were exclusively to the same biological sex; that they have a history of failure at endeavors undertaken while in the original gender role; and that they pass or had potential to pass successfully as a member of the desired sex.

Id. at 177. Applicants would be turned away if "they were 'too successful' in their natal gender roles[,]" were married, had read too much about transsexualism, had the "wrong" sexual orientation, would not be considered sexually attractive in the cross-gender role, or would not comply with the lifestyle requirements imposed by the clinics. *Id.*

27. *See* Denny, *supra* note 15, at 179 (claiming these models restrict gender to a binary system that views transsexualism as merely a transitory state "to becoming a 'normal' man or 'normal' woman").

28. *Id.* at 179–80.

29. *See id.* at 182 (stating it has become preferable for transgendered individuals to be open about their status and that this newly found self-confidence has led to demands for equality and justice).

30. GRANT ET AL., *supra* note 4, at 2.

31. *Id.*

32. *Id.* at 2.

33. *Id.*

of participants reported attempting suicide, compared to less than two percent of the general population.[34]

In the area of health care, participants reported "higher rates of HIV infection, smoking, [and] drug and alcohol use" than those in the general population.[35] Approximately half of respondents said they had to educate their medical provider on transgender care, and nineteen percent reported being refused medical care due to their transgender identity or gender nonconforming status.[36]

Transgender individuals experience high rates of abuse by police and within the prison system.[37] Twenty-two percent of the study's respondents who had reported interactions with police also reported harassment by police personnel.[38] Almost half of the participants reported apprehension in seeking assistance from the police because of their gender identity.[39]

Access to housing and homelessness were also reported as problematic among survey respondents. Nineteen percent reported housing refusal and eleven percent reported eviction on the basis of transgender or gender nonconforming status.[40] Nineteen percent of participants also reported experiencing homelessness at some time in their lives because of their transgender status.[41]

Employment discrimination seems to be the area most extensively surveyed, and unsurprisingly, the outcome is disappointing. "Discrimination is a major contributor to the tremendously high rates of unemployment and underemployment faced by transgender people."[42] The unemployment rate among transgender respondents was twice that of the national average and four times higher than minority respondents.[43] Specifically, the report found:

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34. *Id.* The report notes that these suicide rates increase with loss of employment, harassment and bullying in schools, low household income, and physical and sexual assault. *Id.*

35. *Id.* at 5.

36. *Id.*

37. Michelangelo Signorile, *Escalating Police Violence and Transgender People*, HUFFINGTON POST (Dec. 6, 2011, 9:43 AM), http://www.huffingtonpost.com/michelangelo-signorile/escalating-police-violenc_b_1131343.html (stating "transgender people bear the highest proportion of violence, from bashers on the streets and from the police" and noting the many instances of abuse in prisons); GRANT ET AL., *supra* note 4, at 5 (finding "[sixteen percent] of respondents who had been to jail or prison reported being physically assaulted and [fifteen percent] reported being sexually assaulted").

38. GRANT ET AL., *supra* note 4, at 5.

39. *Id.*

40. *Id.* at 4.

41. *Id.*

42. TRANSGENDER L. CTR., *supra* note 7.

43. GRANT ET AL., *supra* note 4, at 3.

> Widespread mistreatment at work:
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> Ninety percent . . . of those surveyed reported experiencing harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it.
>
> Forty-seven percent . . . said they had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender or gender non-conforming.
>
> Over one-quarter ([twenty-six percent]) reported that they had lost a job due to being transgender or gender non-conforming and [fifty percent] were harassed.
>
> Large majorities attempted to avoid discrimination by hiding their gender or gender transition [seventy-one percent] or delaying their gender transition [fifty-seven percent].
>
> The vast majority [seventy-eight percent] of those who transitioned from one gender to the other reported that they felt more comfortable at work and their job performance improved, despite high levels of mistreatment.[44]

Additionally, respondents who were unemployed or lost employment due to their gender identity indicated increased issues with health, homelessness, drug and alcohol use, incarceration, and working in the underground economy.[45]

Violence against transgender individuals should not be overlooked. "A nationwide survey of bias-motivated violence against [Lesbian, Gay, Bisexual, & Transgender (LGBT)] people from 1985 to 1998 found that incidents targeting transgender people accounted for [twenty percent] of all murders and about [forty percent] of all police-initiated violence."[46] A 2011 report showed an increase in overall violence against the LGBT community, with a disproportionate impact on "transgender communities, [Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-affected Communities (LGBTQH)] people of color communities, as well as . . . LGBTQH youth and young adults."[47] Documented violence against transgender people demonstrates that it is inflicted by both strangers and individuals they know, occurs within the home and in public, and includes

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44. *Id.*

45. *Id.*

46. TRANSGENDER LAW AND POLICY INSTITUTE, *supra* note 19.

47. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE U.S. IN 2011, at 7 (2012), *available at* http://www.avp.org/storage/documents/Reports/2012_NCAVP_2011_HV_Report.pdf.

physical and sexual assault and harassment.[48] Unfortunately, the accounts of violence highlight "that the majority of transgender people will experience violence in their lifetimes, and that risk for violence starts at an early age."[49]

While unnerving to some, these statistics and anecdotes concern real, human lives and must not be ignored. In particular, employment discrimination data illustrates the need for concrete legal protection of transgender employees: the very protection advocated by the EEOC in its *Macy v. Holder* decision.

III. TITLE VII AND TRANSGENDER EMPLOYMENT DISCRIMINATION

A. *Title VII History*

Title VII of the Civil Rights Act of 1964[50] states "it shall be an unlawful employment practice . . . to discriminate against any individual . . . because of such individual's . . . sex."[51] The Civil Rights Act of 1964 contains many titles concerning discrimination of one type or another.[52] Some of the other titles deal with "enforcement of federal voting rights,

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48. Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170, 177 (2009).

49. *Id.* at 178.

50. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (2006).

51. *Id.* § 2000e-2(a)(1) (2006). This provision of the statute specifically applies to private employers who regularly employ fifteen or more employees. *Id.* § 2000e(b) (2006).

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 . . . .

Id. § 2000e(b) (2006). As the statute indicates, the law did not originally apply to federal employers. *Id.* § 2000e(b) (2006). However, in 1972, a federal law was enacted to expand the requirements of Title VII to federal employers. *Id.* § 2000e-16 (2006); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111 (1972), *available at* http://uscode.house.gov/statutes/1972/1972-092-0261.pdf. This is the provision relied on by the EEOC in the *Macy v. Holder* decision. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *5 (E.E.O.C. Apr. 20, 2012). Since there is no substantive difference between the two provisions on what type of discrimination is prohibited—discrimination based on "race, color, religion, sex, or national origin"—the EEOC's evaluation should apply equally to private employer discrimination. *Compare* 42 U.S.C. § 2000e-16(a) (2006) (applying to government employees and employers), *with*, 42 U.S.C. § 2000e-2(a)–(d) (2006) (applying to qualifying public sector employees and employers).

52. 21 AM. JUR. TRIALS 1 § 4 (1974) ("Title VII is one of several major titles of the omnibus legislation known as the Civil Rights Act of 1964.").

elimination of discrimination in public accommodations and in facilities owned or managed by a state or by one of its subdivisions, or in programs receiving federal financial assistance, and assistance in the desegregation of public schools."[53]

Reducing racial discrimination in the workplace is the generally accepted main purpose of Title VII of the Act.[54] "Sex," an amendment proposed by Representative Howard Smith, was included in the statute just before the House of Representatives voted on the bill.[55] Because "sex" was included late in the process, there is little legislative history on the meaning and scope of "sex," as envisioned by the enacting Congress.[56] As a result, most courts have interpreted "sex" narrowly and have stuck to its traditional meaning.[57]

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53. *Id.* § 4 (footnotes omitted); *see* 42 U.S.C. § 1971(a) (2006) (voting rights); 42 U.S.C. § 2000a(a) (2006) (public accommodation discrimination); 42 U.S.C. § 2000a(d) (2006) (public accommodations in, owned, or managed by a state or a subdivision of the state); 42 U.S.C. § 2000d (2006) (discrimination in federal financial assistance programs); 42 U.S.C. § 2000c-2 (2006) (public school desegregation).

54. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination."); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (citing 1964 U.S.C.C.A.N. 2355–2519) ("The major concern of Congress at the time the Act was promulgated was race discrimination."). At that time, even the EEOC believed its main concern was to address racial discrimination. *See also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1333 (2012) ("Indeed, EEOC commissioners routinely expressed concern in this period that the law's prohibition of sex discrimination would 'interfere with its main concern, racial discrimination.'").

55. *Holloway*, 566 F.2d at 662 ("Sex as a basis of discrimination was added as a floor amendment on day before the House approved Title VII, without prior hearing or debate."). Some say this was in an effort to stall or stop passage of the Act altogether. Jason Lee, Symposium, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 429–30 (2012).

> The day before the House of Representatives was due to vote on the Act, Representative Howard Smith, a staunch opponent of the bill, introduced a floor amendment adding "sex" to the list of impermissible bases for employment discrimination as a last-ditch effort to blunt legislative support and prevent the bill's passage. Representative Smith's gamble failed and Title VII was enacted with the sex provision intact.

Id.

56. *See e.g.*, *Ulane*, 742 F.2d at 1085 (noting the "total lack of legislative history supporting the sex amendment"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (pointing out that the "sex" amendment was passed "without prior legislative hearings and little debate"); *Holloway*, 566 F.2d at 662 ("There is a dearth of legislative history on Section 2000e-2(a)(1) . . . .").

57. *See e.g.*, *Ulane*, 742 F.2d at 1085 ("Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."); *Sommers*, 667 F.2d at 750 (adhering to the idea that Congressional failure to expand Title VII coverage to "sexual preference" "indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); *Holloway*, 566 F.2d at 662 (9th Cir. 1977) ("Giving the statute its plain meaning, this court concludes that Congress

Notably, in the 1976 case *General Electric Co. v. Gilbert*,[58] the U.S. Supreme Court held "sex" under Title VII could not encompass discrimination based on pregnancy.[59] However, Congress overturned this decision by subsequently passing the Pregnancy Discrimination Act of 1978, which amended Title VII's definition of sex discrimination to include pregnancy discrimination.[60] Does this action suggest Congress intends narrow judicial construction of "sex," with exception for pregnancy accommodation discrimination? Rather, does it suggest Congress sought remediation of narrow court interpretation of "sex?" Since 1978, Congress has neither expanded nor elaborated on the meaning of "sex" pursuant to Title VII. However, since rendering its decision in *General Electric*, the Supreme Court has addressed many issues related to sex discrimination.[61]

B. *Pre-Price Waterhouse Cases*

Prior to the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins* in 1989, transgender individuals were categorically afforded no protection under Title VII. According to influential cases on the topic, transgender persons have not been *a class* of persons covered by Title VII.[62] This remains true in many cases.[63]

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had only the traditional notions of 'sex' in mind."). *But see* Franklin, *supra* note 54, at 1320 (proposing that there was significant debate at the time as to what "sex" meant, therefore negating strict fidelity to any "traditional concept" of sex).

58. Gen. Electric Co. v. Gilbert, 429 U.S. 125 (1976).

59. *Id.* at 125, 145–46.

60. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

61. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (asserting same-sex sexual harassment is covered under Title VII as sex discrimination); Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding discrimination based on "sex stereotyping" is a viable claim under Title VII); Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 73 (1986) (finding "a claim of 'hostile environment' sex discrimination is actionable under Title VII").

62. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) ("In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating."); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]."); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977) ("A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate.").

Furthermore, these cases demurred "sex" does not include gender identity because Congress did not intend such when it enacted the Civil Rights Act, and did it include gender identity within its amendment prohibiting sex discrimination.[64] This assumption was largely based on absence of congressional legislative history defining "sex" or describing what it should entail.[65] Courts concluded the limited evidence on the definition of "sex" meant it could only encompass the "traditional" idea of sex, a binary of male or female based on sexual anatomy.[66] Some also relied on the idea that "sex" was included in order to afford women

63. Transgender identity as a class or sub-set of sex is not a protect category of people, like race, religion or national origin, the argument being made by *Macy v. Holder*, and in this paper, is that transgender identity is already part of the definition and understanding of "sex." *See* Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) ("[W]hen the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII."); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) ("[W]e conclude discrimination against a transsexual because she is a transsexual is not 'discrimination because of sex.' Therefore, transsexuals are not a protected class under Title VII . . . ."); *see also* Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & SEXUALITY 61, 75 (2011) ("Federal courts have conclusively held that transgender individuals are not afforded protection under Title VII when the discrimination is based on transsexuality itself."); William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 515–17 (2011) (stating that "gender identity is not 'sex'" by explaining the legal landscape of Title VII sex discrimination jurisprudence).

64. *See Ulane*, 742 F.2d at 1085 ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . . "); *Sommers*, 667 F.2d at 750 ("[F]or the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."); *Holloway*, 566 F.2d at 663 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

65. *See Ulane*, 742 F.2d at 1085 (noting the "total lack of legislative history supporting the sex amendment . . . ."); *Sommers*, 667 F.2d at 750 (pointing out that the sex amendment was passed "without prior legislative hearings and little debate"); *Holloway*, 566 F.2d at 662 ("There is a dearth of legislative history on Section 2000e-2(a)(1) . . . ."). *But see* Franklin, *supra* note 54, at 1320 (asserting there was significant debate at the time as to what "sex" meant and encompassed).

66. *See e.g.*, *Ulane*, 742 F.2d at 1086 ("[W]e decline in behalf of the Congress to judicially expand the definition of 'sex' as used in Title VII beyond its common and traditional interpretation."); *Sommers*, 667 F.2d at 750 ("[T]he word 'sex' in Title VII is to be given its traditional definition . . . ."); *Holloway*, 566 F.2d at 662 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind.").

equality and protection from discrimination in the workplace.[67] Ultimately, courts found Congress' failure to expand the definition of sex was the best evidence against courts taking steps to expand the definition themselves.[68]

C. Oncale *and Same-Sex Harassment*

In 1988, the Supreme Court held in *Oncale v. Sundower Offshore Services, Inc.* that same-sex sexual harassment is a cognizable claim under Title VII.[69] The significant analysis of the Supreme Court illustrates same-sex sexual harassment may not have been within the original scope of Congress when it enacted Title VII, but "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[70]

Oncale is important for transgender sex discrimination claims because the Supreme Court established Title VII as an evolving statute, capable

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67. *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("It is, however, generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women."); *Holloway*, 566 F.2d at 663 ("The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.").

68. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085–86 (7th Cir. 1984) (surmising that the failure of Congress to pass Title VII amendment proposals to cover sexual orientation "strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals"); Sommers, 667 F.2d at 750 (citing that, collectively, ten bills were introduced to the 94th and 95th Congresses which would have prohibited discrimination based on '"sexual preference'" were defeated "indicat[ing] that the word 'sex' in Title VII is to be given its traditional definition"); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977) ("Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference.' None have been enacted into law. Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

69. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

70. *Id.* at 79; *see* Sung, *supra* note 63, at 522–23 (summarizing *Oncale*). One author notes:

> In addition to recognizing that the statutory language of Title VII is sufficiently broad to be read as covering same-sex harassment, the Court observed that the harassing conduct need not be motivated by sexual desire in order to give rise to an inference of sex discrimination. Thus, while *Oncale* did not specifically rule on the issue of whether same-sex harassment motivated by gender stereotypes is actionable, the Court laid down the doctrinal foundation for later courts to extend the sex-stereotyping doctrine to sexual harassment claims. These courts' reasoning is clear: if discrimination on the basis of gender nonconformity is discrimination because of sex, and same-sex harassment not motivated by sexual desire is actionable, then it must follow that same-sex harassment motivated by the harassee's nonconforming gender traits is also actionable under Title VII.

Sung, *supra* note 63, at 522–23.

of expansion in covering similar problems not originally envisioned by Congress. This decision implies that, in the area of employment discrimination, the Supreme Court may likely extend definitions incorporating discrimination not originally envisioned by the men and women who created Title VII.

D. *Price Waterhouse and Sex Stereotyping*

In 1989, the Supreme Court's decision in *Price Waterhouse v. Hopkins* provided an evaluative framework for determining sex and gender discrimination under Title VII. The case involved a woman who was denied a promotion by her employer because of "sex stereotyping."[71] Hopkins was described by her fellow employees as "macho" and "masculine," and also "overcompensat[ed] for being a woman."[72] She was criticized for using profanity, which one partner found particularly offensive because it came from a woman, and she was indirectly advised to go to charm school and walk, talk, and dress more femininely, wear makeup, style her hair, and wear jewelry.[73]

The first major Supreme Court decision was interpreting the meaning of "sex" to include gender.[74] This decision considered the varying sexual definitions and understandings, contemplating sex as encompassing not only anatomical representation, but also including the sociological meaning of sex.[75] The Supreme Court ultimately held discrimination on the basis of gender includes discrimination based upon sex stereotyping.[76] The Court stated the following concerning the legal validity of sex stereotyping:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire

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71. Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36, 250 (1989).

72. *Id.* at 235 (quoting the record).

73. *Id.* (quoting the record).

74. *Id.* at 239–40 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. . . . We take these words [Title VII statutory language regarding sex discrimination] to mean that gender must be irrelevant to employment decisions.").

75. *Id.* at 250–52 (discussing the role of sex stereotyping in the case).

76. *Id.* at 250 ("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.")

spectrum of disparate treatment of men and women resulting from sex stereotypes."[77]

Finally, the Court noted its decision in no way limited "the possible ways of proving that stereotyping played a motivating role in an employment decision."[78] Today, *Price Waterhouse* is the principal case to which courts look for guidance in evaluating Title VII employment discrimination claims brought by transgender plaintiffs.[79]

E. *Protections Provided by Federal Circuit Courts and States*

Unlike the Supreme Court, Federal Circuit Courts of Appeal do not categorically extend sex stereotyping to include gender nonconformity. Few Federal Circuit Courts of Appeal have addressed the issue of transgender protection under Title VII. Thus far, the Sixth and Tenth Circuits are the only circuits to address a Title VII claim brought by a transgender plaintiff.[80] The First, Ninth, and Eleventh Circuits have addressed claims based on other laws brought by transgender plaintiffs. In these cases, the courts either analogized them to Title VII claims or applied the *Price Waterhouse* sex stereotyping framework.[81] The Second, Third, and Seventh Circuits have extended the sex stereotyping framework to discrimination based on sexual orientation.[82] Presumably, these courts would

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77. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (internal quotation marks omitted).

78. *Id.* at 251–52. This is largely due to the Court's focus on the burden of proof in proving sex stereotyping allegations and rebuttals to that evidence. *See id.* at 258. ("We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.").

79. *See* Lee, *supra* note 55, at 436–37 ("[T]he Gender Nonconformity Approach has been the dominant way in which transgender plaintiffs have contested employment discrimination under Title VII. The approach focuses exclusively on the gender nonconformity of the plaintiff, and thus relies heavily on the rationale underlying the *Price Waterhouse* decision.").

80. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218 (10th Cir. 2007) (suing under Title VII); Smith v. City of Salem, 378 F.3d 566, 569 (6th Cir. 2004) ("assert[ing] Title VII claims of sex discrimination and retaliation").

81. *See* Glenn v. Brumby, 663 F.3d 1312, 1313, 1316–20 (11th Cir. 2011) (suing under 42 U.S.C. § 1983 and the court employing the sex stereotyping evaluation); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 213–15 (1st Cir. 2000) (suing under the Equal Credit Opportunities Act while the court interpreted the claim under Title VII case law); Schwenk v. Hartford, 204 F.3d 1187, 1192, 1200–01 (9th Cir. 2000) (pursuing a Eighth Amendment claim under 42 U.S.C. § 1983 and the Gender Motivated Violence Act, with the court analogizing the GMVA to Title VII).

82. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) (recognizing that the gender stereotyping claims should be

extend the sex stereotyping framework to gender identity claims or transgender claims.[83]

The Fourth, Fifth, Eighth, and District of Columbia Circuits remain completely silent on the issue, signaling transgender Americans living within these circuits' jurisdiction will continue to receive no solid legal protection from workplace discrimination under Title VII. Implicated states include Arkansas, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and the District of Columbia.[84]

Overall, sixteen states—California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington—and the District of Columbia have enacted their own transgender-inclusive discrimination laws.[85] Illinois, Iowa, and Minnesota all have state legislation affording workplace discrimination protection for gender identity,[86] but a transgender employee would still not have a viable federal claim. There are also scattered counties, cities, and townships that have enacted gender identity protection despite the fact that their states have no trans-

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available to those alleging same-sex sexual harassment, but concluding that the homosexual plaintiff did not allege the appropriate evidence of sex stereotyping to sustain his claim); Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000) (discussing the possible application of the sex stereotyping framework to homosexual plaintiffs, but holding that the plaintiff did not sufficiently allege facts for the court to evaluate such a claim); Doe v. City of Belleville, Ill., 119 F.3d 563, 595–96 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (approving Title VII sex stereotyping claims for two perceived homosexual males when the harassment came in the form of gender norming and sexual harassment). The *Simonton* court also points out that applying sex stereotyping to homosexuals claiming such discrimination "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes." Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

83. *See Doe*, 119 F.3d at 592 (7th Cir. 1997) (discussing its circuit decision in *Ulane* and seeming to purport the court would have allowed a sex stereotyping claim for plaintiff Ulane had she made that argument instead of focusing on her transgender status).

84. *See Court Locator*, U.S. COURTS, http://www.uscourts.gov/court_locator.aspx (last visited Nov. 10, 2013).

85. *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER LAW & POLICY INST., http://www.transgenderlaw.org/ndlaws/index.htm (last edited Feb. 1, 2012).

86. 775 ILL. COMP. STAT. ANN. 5/1-102(A), 5/1-103(O-1) (LexisNexis 2010 & Supp. 2012); IOWA CODE §§ 216.2(10), 216.6(1)(a)-(c) (2013); MINN. STAT. ANN. §§ 363A.02.01(a)(1), 363A.03.44, 363A.08 (West 2012).

gender discrimination laws, but these practices are far from being consistent or widespread.[87]

It may be assumed that all of these jurisdictions would apply the *Price Waterhouse* sex stereotyping framework to a transgender claim if it meets the necessary requirements, but that does not mean these jurisdictions would be sympathetic to including transgender people under sex discrimination categorically. Analysis of the cases in which courts have afforded transgender plaintiffs coverage under Title VII's sex discrimination prohibition illustrates the importance of extending Title VII coverage for transgender people beyond merely sex stereotyping.

IV. EEOC Background and Impact

A. *EEOC Creation, Purpose, and History*

The Equal Employment Opportunity Commission (EEOC) was established in 1964 under Title VII, and is entrusted with enforcing the provisions of Title VII.[88] In addition to enforcing Title VII and its amendments—including the Pregnancy Discrimination Act—the EEOC has authority to enforce the Equal Pay Act of 1963 (EPA), the Age Discrimination in Employment Act of 1967 (ADEA), Title I of the Americans with Disabilities Act of 1990 (ADA), Sections 102 and 103 of the Civil Rights Act of 1991, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008 (GINA).[89]

At its inception the EEOC had limited methods with which it could enforce Title VII laws. Originally, the methods primarily utilized were "conciliation, education, outreach[,] and technical assistance,"[90] which were fairly limited in effect. In 1972, Congress gave the EEOC litigation enforcement authority[91] which has since become its primary focus for en-

87. *See* Transgender Law & Policy Institute, *supra* note 85 (enumerating jurisdictions that currently have gender identity and sexual orientation anti-discrimination laws). According to the Transgender Law and Policy Institute, since 1975, one-hundred and sixty jurisdictions have enacted some form of law that affords protection based on gender identity or gender expression. *Id.*

88. *See* 42 U.S.C. § 2000e-4 (2006) (creating the EEOC).

89. *Laws Enforced by EEOC*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/laws/statutes/index.cfm (last visited Nov. 10, 2013).

90. *35 Years of Ensuring the Promise of Opportunity*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/history/35th/history/index.html (last visited Nov. 10, 2013).

91. 42 U.S.C. § 2000e-5(a)-(b) (2006) (giving the EEOC authority to issue a charge on its own authority following an investigation); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 1–3, 86 Stat. 103 (1972); *see also id.* § 2000e-4(g)(6) (2006) ("The Commission shall have power . . . to intervene in a civil action brought under section

forcement and an increasingly effective tool for resolving disputes.[92] Consequently, the influence of the EEOC has expanded.

As a requirement of all laws enforced by the EEOC, except for the EPA, an individual must file a Charge of Discrimination with the EEOC before he or she files a discrimination lawsuit in either federal or state court; this applies to both private and federal sector employees and job applicants.[93] In this process, the claimant completes a standard form, usually with EEOC assistance, but without an attorney's assistance.[94] The Charge of Discrimination affects any subsequent litigation; litigants may not proceed with a lawsuit until they file a Charge of Discrimination and proceed with the required administrative process.[95]

Also noteworthy to the history and direction of the EEOC are the roles of commissioners themselves.[96] Each commissioner has their own goals and ideas for where the EEOC should expend its resources and

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2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.").

92. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 90.

93. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/charge.cfm (last visited Nov. 10, 2013) [hereinafter *Filing a Charge*]; *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Nov. 10, 2013) [hereinafter *Overview*]. The federal employee or job applicant process is considerably more complicated than the private sector process, and has a much shorter statute of limitations (forty-five days). *Id.* But again, this process must be completed before filing a suit in federal court. *Id.* An individual may have another individual, agency, or organization file the necessary charge on his or her behalf in order to protect his or her identity as well. *Filing a Charge*, *supra*.

94. *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/howtofile.cfm (last visited Nov. 24, 2013).

95. *Filing a Charge*, *supra* note 93; *see also* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 6–7 (1996) (indicating the original charge document has generated "a substantial amount of litigation over [its] relevance and proper interpretation"). However, the EEOC addressed this issue in its decision in *Macy v. Holder* making it less likely to become a problem for a transgender complainant. *See* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *5 (E.E.O.C. Apr. 20, 2012) (noting the Agency's mistake in separating Macy's claims into two different procedures based on the language she used in her complaint and stating that all of her claims were stating sex discrimination).

96. 42 U.S.C. § 2000e-4(a) (2006).

> There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.

Id.

time.[97] However, the overall mission of the EEOC may be simply defined as "the elimination of illegal discrimination from the workplace."[98] Given its mission and the mandates discussed, it is no surprise the EEOC has been involved in the overwhelming majority of employment discrimination claims.[99]

B. *Impact of the EEOC in the Judiciary*

In the area of transgender employment discrimination, the EEOC has significant impact on the process by which a transgender individual seeks redress for employment-related discrimination. All victims of transgender discrimination must go through the EEOC before filing their case in a state or federal court.[100] This is due to the decision in *Macy v. Holder*, which states, "[A]ll EEOC offices will now be required to accept and investigate gender identity and transgender discrimination claims."[101] This requirement will certainly aid in validating and standardizing the way these claims are addressed and handled by the EEOC. Additionally, recognition of transgender claims at the process's outset will help legitimize such claims in federal and state courts as well, depending on the level of deference given to the EEOC's decision in *Macy*.

Beyond the manner in which Title VII claims are processed, evaluating impact of the EEOC requires examining the level of deference the Supreme Court, and therefore lower courts, have historically afforded the EEOC. Generally, there are two kinds of deference provided to EEOC decisions—*Chevron* deference and *Skidmore* deference.[102] However, in evaluating the actions of the EEOC, the Supreme Court does not always apply these deference frameworks.[103]

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97. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 90.

98. *Id.*

99. Selmi, *supra* note 95, at 1 (recognizing the EEOC's long involvement in employment discrimination law and that "the vast majority of employment discrimination claims have been initially processed by that agency"). This author acknowledges this while advocating that the EEOC should either be eliminated or overhauled to focus on less lucrative cases—those less likely to be pursued by a private attorney. *Id.* at 4.

100. *See Filing a Charge*, *supra* note 93 (providing that a complaint for a discrimination lawsuit can be initiated by filing a Charge of Discrimination with the EEOC); *see also Overview*, *supra* note 93 (explaining the process for filing a complaint).

101. WENKE, *supra* note 18.

102. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944); *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1939–41 (2006) (discussing the two deference tests applied by the Supreme Court to federal agency action).

103. *See* Hart, *supra* note 102, at 1937 ("In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to 'chart its own course' rather than to defer to [EEOC] . . . regulations and guidance interpreting these laws.").

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[104] the Supreme Court established a two-part test for deciding the deference that should be given by the Supreme Court to an executive agency.[105] Initially, a court must determine whether Congress has spoken directly to the issue and if their intent was clear.[106] If so, both the agency and the Supreme Court must follow Congress' meaning and intent.[107] If not, a court must determine whether the agency's interpretation is a permissible construction of the statute.[108] The agency's construction must not be "arbitrary, capricious, or manifestly contrary to the statute."[109] Deference will only be given when it is fairly clear that Congress intended to delegate legislative interpretation to the agency; this can be done explicitly or implicitly.[110] Regarding congressional delegation, the Supreme Court stated:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[111]

Delegation of legislative interpretation simply requires that the agency interpretation of the statute be reasonable. The Supreme Court concluded that it has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."[112] This is exactly what Congress has entrusted the EEOC to do—administer and enforce Title VII.[113]

"The majority of cases in which the Supreme Court has applied [the] *Chevron* [deference test] have involved notice-and-comment rulemaking

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104. *Chevron*, 467 U.S. at 837.
105. *Id.* at 842.
106. *Id.* at 842–43.
107. *Id.*
108. *Id.* at 843.
109. *Id.* at 844.
110. *Id.* at 843–44.
111. *Id.*
112. *Id.* at 844.
113. *See* 42 U.S.C. § 2000e-5(a) (2006) ("The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.").

or formal adjudication."[114] The EEOC's decision in *Macy v. Holder* came from a formal adjudication,[115] and as such should be afforded *Chevron* deference. However, even if the Supreme Court will not apply *Chevron* deference there is another deference test that may be used—the *Skidmore* deference test.[116]

In *Skidmore v. Swift & Co.*,[117] the Supreme Court delineated a test for deciding where deference should be given to an agency's statutory interpretation where there is not express or implied congressional delegation.[118] The Supreme Court stated:

> We consider that the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[119]

Thus, whenever agency interpretation lacks congressional delegation, the court should look to many factors in determining if the agency's construction should be considered legitimate or not. This is not a straightforward reasonableness standard like the *Chevron* test and allows the court to look at more surrounding evidence in determining the appropriateness of agency interpretation.

"The Court applies this *Skidmore* standard in reviewing a wide variety of agency interpretations, ranging from opinion letters addressed to specific disputes to more generally applicable policy statements, agency manuals, and enforcement guidelines."[120] Because these types of agency actions tend to be more common than notice-and-comment rulemaking and formal adjudication, this is the level of deference most often employed by courts.[121]

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114. Hart, *supra* note 102, at 1940.

115. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012).

116. *See generally* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (enunciating a test for agency action deference to be followed by courts).

117. *Skidmore*, 323 U.S. at 134.

118. Hart, *supra* note 102 (explaining the *Skidmore* test is a less deferential standard that the *Chevron* test).

119. *Skidmore*, 323 U.S. at 140.

120. Hart, *supra* note 102, at 1941.

121. *Id.*

However, as noted above, "[m]uch of the time, whether it agrees with the agency or not, the Court has simply declined to decide what standard of deference it should apply to an EEOC interpretation, even when the interpretation at issue is made pursuant to the agency's explicitly delegated authority."[122] "[I]n the specific context of federal antidiscrimination law, the Court tends either to avoid the question of what deference is due, or to refuse deference to the EEOC under any standard."[123] This peculiarity will require examining the Supreme Court's application of both tests to glean an impression of its possible evaluation of the *Macy v. Holder* decision.

V. MACY V. HOLDER: THE EEOC'S DECISION

> "With so many barriers to gainful employment in our society, we can't let discrimination be one of them. The EEOC's decision ensures that every transgender person in the United States will have legal recourse when faced with employment discrimination. Having the protection of federal sex-discrimination law is especially critical for transgender people who live in the [thirty-four] states that lack transgender-inclusive nondiscrimination laws. This is a game changer for transgender America."
>
> — Masen Davis[124]

A. *Macy v. Holder Facts*

Mia Macy was a police detective in Phoenix, Arizona who decided to move to San Francisco, California for family reasons.[125] Her supervisor in Phoenix told her about an opening with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at a crime laboratory for which Macy was qualified.[126]

From late 2010 to early 2011, Macy spoke with the lab director regarding the position and claims she was offered the job if her background check revealed no issues.[127] The hiring process began in January 2011 when the contractor responsible for filling the position contacted Macy; she was asked to complete the required paperwork and an investigator was assigned to perform her required background check.[128]

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122. *Id.* at 1942.
123. Hart, *supra* note 102, at 1939.
124. TRANSGENDER L. CTR., *supra* note 1.
125. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012) ("[Macy] was still known as a male at that time . . . .").
126. *Id.*
127. *Id.*
128. *Id.*

On March 29, 2011, Macy informed the contractor she was in the process of transitioning from male to female and asked that this information be given to the director of the lab as well.[129] Five days after the contractor informed the ATF of Macy's name and gender changes, Macy was told the position was no longer available due to federal budget cuts.[130]

Distressed over the rapid change in events, Macy contacted a counselor with the EEOC to discuss her concerns.[131] The counselor informed her the position was not, in fact, cut due to budget concerns, but that another applicant was hired because that person was further along in the background investigation.[132] Macy took the differing stories of why she was denied the position as evidence that the ATF did not want to hire her because she was a transgender individual.[133]

Macy filed her formal EEOC complaint with the ATF on June 13, 2011, alleging discrimination based on sex, gender identity, and sex stereotyping.[134] On October 26, 2011, the ATF accepted and referred her claims for investigation, but stated only her sex discrimination claim could be taken up through the EEOC process, and that her "gender identity stereotyping" claims would have to be processed according to the applicable Department of Justice (DOJ) policy.[135] Macy and her attorney disagreed with this finding and, after withdrawing the part of her complaint previ-

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129. *Id.*

130. *Id.*

131. *Macy*, 2012 WL 1435995, at *2.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The Department of Justice has one system for processing sex discrimination complaints and another process for processing sexual orientation and gender identity complaints. *Id.* Claims based on "race, color, religion, national origin, sex, age, disability (physical or mental), genetic information, and reprisal" will be adjudicated according to EEOC regulations. Equal Employment Opportunity Program, 1200.1, Ch. 4-1, § B.7.a (Dep't of Justice Sept. 12, 2003), *available at* http://www.justice.gov/jmd/hr/hrorder/chpt4-1.htm. Those based on "gender identity, sexual orientation or status as a parent" will be adjudicated as outlined in Section B.7.j, which states:

> Complaints of discrimination on the bases of sexual orientation, gender identity, or status as a parent will be processed by utilizing the informal EEO counseling process and, as necessary, the EEO Alternative Dispute Resolution (ADR) Program. If the dispute is not resolved, the complainant is entitled to an investigation and a final Department decision. Back pay and non-monetary remedies are available when there is a finding of discrimination on either basis. Individual entitlement in this regard is derived from Department of Justice policy and practice and not from EEOC regulations which govern other types of discrimination complaints in the Federal Sector. Although complaints based on sexual orientation and parental status are processed under the same administrative time frames, they cannot be the subject of a hearing before an EEOC administrative judge or an appeal to the EEOC.

Id.

ously accepted by the DOJ, requesting an appeal from the EEOC on the remainder of her claim.[136]

This procedural jockeying was important to the EEOC because it ultimately decided all of Macy's claims were "different ways of stating the same claim of discrimination 'based on . . . sex.'"[137] Therefore, the EEOC saw no distinction between claims based on "sex," "transgender status," "gender identity" or a change in sex or gender; they were all valid under Title VII.[138]

B. *Macy v. Holder Analysis*

The *Macy* decision began by pointing out under Title VII, the term "sex" includes both gender and the biological distinctions that distinguish men from women.[139] This language was borrowed from the Supreme Court's decision in *Price Waterhouse*, which emphasized sex discrimination could also include discrimination based on gender roles and norms.[140] Therefore, the terms sex and gender are often used interchangeably when discussing Title VII discrimination prohibitions.[141] While the terms do not share the exact same meaning, for the purposes of Title VII, "sex" incorporates both elements of sex and gender to the point where the statute may as well include the term gender in its language.

The EEOC found the inclusion of gender discrimination in Title VII important to the transgender discrimination issue "because the term 'gender' encompasses not only a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity."[142] Ac-

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136. *Macy*, 2012 WL 1435995, at *3–4.

137. *Id.* at *5.

138. *Id.* at *4–5.

139. *Id.* at *5.

140. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989). "Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute." *Id.* at 229 (emphasis added); *see also, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("Title VII bar[s] not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender."); Smith v. City of Salem 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination . . . ."); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[U]nder *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender.").

141. *Macy*, 2012 WL 1435995, at *5.

142. *Id.* at *6. *Compare Gender–Dictionary*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/gender (last visited Sept. 16, 2013) (defining "gender" as "the behavioral, cultural, or psychological traits typically associated with one sex"), *with* BLACK'S LAW DICTIONARY 1498 (9th ed. 2009) (defining "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.").

cording to the EEOC, if this were not the case, the only basis for sex discrimination would be if "an employer preferred a man over a woman, or vice versa."[143] If this limited scope applied, many instances of sex-based discrimination would go unaddressed.

For the EEOC, gender discrimination, and therefore sex discrimination, "occurs any time an employer treats an employee differently for failing to conform to any gender based expectations or norms."[144] The linchpin to sex discrimination is whether the discrimination was "*related* to the sex of the victim."[145] This finding was based on the Supreme Court's conclusion in *Price Waterhouse* that gender should not be "a *motivating part* in an employment decision . . . ."[146]

However, both the Supreme Court and the EEOC recognized and discussed the one statutory exception sex discrimination prohibition[147]—the bona fide occupational qualification (BFOQ).[148] Generally, an employer may consider sex where it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."[149] Where a sex-based trait is reasonably necessary to perform the position's duties, sex may be considered in hiring or firing an employee. But, the Supreme Court concluded, and the EEOC agreed, that "[t]he only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her."[150]

The EEOC held discriminating against someone because that person is transgender is discrimination *related* to the sex of the victim.[151] The EEOC went on to say:

> This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a trans-

143. *Macy*, 2012 WL 1435995, at *6 (E.E.O.C. Apr. 20, 2012).

144. *Id.*

145. *Id.* (emphasis added) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

146. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (emphasis added).

147. *See id.* at 242 (discussing the BFOQ exception); *Macy*, 2012 WL 1435995, at *6 (noting the BFOQ exception).

148. 42 U.S.C. § 2000e-2(e) (2006).

149. *Id.*

150. *Price Waterhouse*, 490 U.S. at 242; *Macy*, 2012 WL 1435995, at *6 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989)).

151. *Macy*, 2012 WL 1435995, at *7.

> gender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[152]

Therefore, the EEOC affords Title VII coverage to transgender individuals when they are discriminated against because they are gender nonconforming and simply because they are transgender—a trait/status and identity which encompasses aspects of sex and gender.[153] This is critical because sex stereotyping claims should presumably be available to anyone, as every person has a biological sex. However, some courts prohibit transgender claims under sex stereotyping because they follow the traditional binary construction of sex established in the pre-*Price Waterhouse* cases.[154] Under the EEOC's construction of Title VII "sex," transgender

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152. *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)).

153. *Macy*, 2012 WL 1435995, at *10. This is not the first time the EEOC argued for such a construction of Title VII sex discrimination. *Id.* at *10, n.16. *See generally* Brief of U.S. EEOC as Amicus Curiae in Opposition to Summary Judgment, Pacheco v. Freedom Buick GMC, Inc., No. 7:10-CV-116-RAJ, 2011 WL 5410751, at *4–6 (W.D. Tex. Oct 17, 2011) (arguing in favor of the plaintiff's Title VII claim of sex discrimination). This brief states that discrimination because a person is transgender is discrimination because of sex under Title VII. *Id.* at *6. The two major rationales proposed are transsexual discrimination is covered by sex stereotyping as expressed in *Price Waterhouse* and transsexual discrimination is discriminating because a change in a protected characteristic, sex, is analogous to a change in religion, which was protected by the Supreme Court in *Schroer*. *Id.* at *4–6. Finally, the EEOC argues that the cases relied on by the defendant, regarding excluding transgender people from Title VII protection, are pre-*Price Waterhouse* and not controlling. *Id.* at *5–6. However, the trial judge ultimately denied the EEOC's motion as moot after he denied the defendant's motion for summary judgment and the parties settled out of court. *Id.* at *6; *see* TransAction, *"Sea Change" in transgender employment rights*, DAILY KOS (Apr. 24, 2012, 6:46 AM), http://www.dailykos.com/story/2012/04/24/ 1085954/—Sea-Change-in-transgender-employment-rights (stating *Macy* was the EEOC's opportunity to speak out after their request in their amicus curiae brief in *Pacheco* was denied).

154. *See* Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002) (distinguishing the case from *Price Waterhouse* by contending that at no time did the employer discriminate against the plaintiff for not meeting sex norms; i.e. she was never told she was too effeminate or given work associated with females). Therefore, the court distinguished between an employee who exhibits characteristics of the opposite sex and an employee who assumes the role of the opposite sex. *See id.* (distinguishing the case from *Price Waterhouse* by contending that at no time did the employer discriminate against the plaintiff for not meeting sex norms; i.e. she was never told she was too effeminate or given work associated with females).

> [T]he Court agrees with *Ulane* and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders.

Id. at *6. There are grey areas in both biological sex and gender. *See generally* Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination*

individuals do not have to rely solely on the possibly tenuous argument that they are gender nonconforming (because they transgressed their sex based gender identity and identified with the opposite gender from their biological sex), but could directly claim the discrimination is based on their transgender status. This is not to say that the EEOC decided transgender individuals are a suspect group afforded the highest protection under the law,[155] but that discrimination based on transgender status is certainly discrimination based on sex under Title VII.

The EEOC evaluated the decisions of the Sixth, Ninth, and Eleventh Circuit Courts and the District of Columbia district court, which have ruled in favor of transgender sex discrimination claims under Title VII. The following is a discussion of the reasoning of each circuit, directly from their opinions, with emphasis on the portions highlighted by the EEOC.

C. *Federal Cases Relied on by the EEOC in Macy v. Holder*

In *Macy*, the EEOC cited the Ninth Circuit's decision in *Schwenk v. Hartford*.[156] *Schwenk* dealt with a claim brought by a prisoner who was a biological man who presented and identified as a woman.[157] In her claim, Schwenk alleged escalating sexual harassment by a prison guard that eventually progressed to an attempted rape.[158] Although Schwenk brought her claim under 42 U.S.C. § 1983, citing a violation of her Eighth Amendment rights, and under the Gender Motivated Violence Act (GMVA),[159] the Ninth Circuit drew parallels between the GMVA and

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"Because of . . . [Perceived] Sex," 34 N.Y.U. REV. L. & SOC. CHANGE 55, 92–94 (2010) (discussing implications of intersex individuals on Title VII sex discrimination). The existence of intersex (hermaphrodite) individuals begs the question whether this binary construction of sex is even appropriate today. *Id.* at 55. Given that there are people who naturally have the biological anatomy of both a man and a woman, it significantly undermines adherence to a binary construction of sex. *See generally id.* at 93–94 (proposing "Congress adopt a law defining 'sex' in Title VII to mean 'perceived sex, which includes discrimination against any perceived sex category or against the failure to conform to the discriminating party's expectations of appearance, body, or behavior for any perceived sex category . . . [and stating] the creation and maintenance of sex stereotypes that affects any victim of sex discrimination, regardless of whether that victim falls within or between the binary").

155. Equal Protection issues are beyond the scope of this Comment except where courts have analogized Title VII claims.

156. Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

157. *Id.* at 1192.

158. *Id.* at 1193.

159. *Id.* at 1192. The GMVA was enacted as subtitle C of the Violence Against Women Act of 1994. Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103–322, § 40302, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (1994)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000)).

Title VII and used the same analysis.[160] The defendant argued neither men nor transgender individuals have protections under the GMVA.[161] However, the court quickly dispelled the notion men were not intended to have coverage under the GMVA by pointing to the legislative history of the Act[162] and that "sex" discrimination applies equally to both men and women under Title VII.[163]

In evaluating whether transgender individuals are afforded protection, the Ninth Circuit first tried to "define what is meant by gender."[164] They examined the evolution of the term "sex" in the context of Title VII. The court pointed out that in the past, sex was defined narrowly and excluded gender,[165] but that this "initial judicial approach . . . has been overruled by the logic and language of *Price Waterhouse*."[166] The court noted because of the parallels between Title VII and the GMVA, each is to be construed as covering sex discrimination and gender discrimination.[167] The Ninth Circuit concluded that because the defendant "knew that Schwenk considered herself a transsexual," and, according to Schwenk's testimony, only began harassing her after learning that she considered herself a woman and "included commentary about her transsexuality," there was sufficient evidence the defendant's "actions were motivated, at least in part, by Schwenk's gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor."[168]

The EEOC focused on this conclusion in *Macy v. Holder*. The victim's gender identity motivated the defendant in his actions.[169] The adverse

160. *See Schwenk*, 204 F.3d at 1200–01 ("Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII.").

161. *Id.* at 1199.

162. *Id.* at 1200 (citing the Senate Report accompanying the bill, Senate hearing testimony, and the public statement of the bill's author, all of which included language that would include men in the bill's coverage).

163. *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

164. *Id.* at 1201 (explaining that defining gender is necessary for determining whether "gender was a motivating factor" in the attack against Schwenk).

165. *Id.* at 1201 (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir.1977), Dobre v. Amtrak, 850 F. Supp. 284, 286 (E.D.Pa.1993), and Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir.1984), all stating that sex discrimination but not gender discrimination was covered by Title VII)).

166. Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

167. *Id.* at 1202.

168. *Id.*

169. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *7 (E.E.O.C. Apr. 20, 2012) ("When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim . . . [t]his is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a nonstereotypical [sic]

actions could be linked to the victim's gender, which the Ninth Circuit defined in terms of her gender transition. Thus, both the Ninth Circuit and the EEOC view transgender status as inseparable from gender.

Next, the EEOC turned to *Smith v. City of Salem, Ohio*[170] from the Sixth Circuit Court of Appeals.[171] Smith, "biologically and by birth [a] male" who was diagnosed with Gender Identity Disorder (GID),[172] was an employee of the Salem Fire Department and claimed she was discriminated against after starting to present at work in a more feminine way.[173] Smith also asserted she was discriminated against after she shared with co-workers that she would be transitioning from a man to a woman.[174] She alleged that city officials conspired in creating a work environment that would force her to resign and illegitimately punished her for seeking redress with the EEOC and in court.[175] She brought her claims under both Title VII and 42 U.S.C. § 1983 pursuant to the Equal Protection

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fashion . . . .'"). The EEOC compares *Schwenk* to *Rosa v. Park W. Bank & Trust Co.*, in which a bank customer was refused a loan application because he was a biological man dressed in "traditionally feminine attire." Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000). The plaintiff brought suit under the Equal Credit Opportunity Act (ECOA), which the court interpreted using Title VII case law. *Id.* at 214–15. The court found the plaintiff may have a viable claim for sex discrimination if the bank attendant did not give the loan application because the plaintiff's "attire did not accord with his male gender." *Id.* at 215–16. This could provide some evidence that gender played a role in the discrimination, however the court remanded for further fact finding. *Id.* at 216. The EEOC seems to have included this case to provide further comparison with cases that employ Title VII jurisprudence to the construction of the statute at issue with regard to transgender discrimination.

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

171. *Macy*, 2012 WL 1435995, at *8 (citing *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004)).

172. *Id.*; AM. PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576–82 (4th ed.2000) (identifying Gender Identity Disorder (GID) as a medically recognized mental disorder where one experiences a sexual identity in dysfunction with his or her biological sex organs); *see also* Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria,'* ADVOCATE.COM (July 23, 2012, 8:00 PM), http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria (indicating "[t]he newest edition of the [DSM manual] will replace the diagnostic term 'Gender Identity Disorder' with the term 'Gender Dysphoria,'" as a result of years of advocacy and lobbying from the medical community to remove GID from the mental disorders list).

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

174. *Id.* at 568–69.

175. *Id.* While claims brought under 42 U.S.C. § 1983 are beyond the scope of this Comment, it is interesting to note that the Sixth Circuit has noted several times that Title VII and 42 U.S.C. § 1983 equal protection claims for disparate treatment are essentially the same. *Id.* at 577.

Clause and the Due Process Clause under the Fourteenth Amendment of the U.S. Constitution.[176]

The district court dismissed Smith's Title VII claims, ruling she failed to state a claim in accordance with *Price Waterhouse* sex stereotyping.[177] In so holding, the district court believed Smith's sex stereotyping claim was disingenuous and merely used the term of art ("sex stereotyping") as an end run around her real claim based on her "transsexuality," which it held was not protected under Title VII.[178]

In the Sixth Circuit's reversal and response to the district court ruling, the court reviewed *Price Waterhouse* and its implication, and concluded that:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[179]

The Sixth Circuit then made a very valuable point. It acknowledged some courts have held that discrimination against transgender individuals should be excluded from sex stereotyping discrimination coverage precisely because they can be identified as transgender or transsexual and therefore fall into a class of persons unprotected by sex discrimination.[180] The Sixth Circuit found this analysis incompatible with *Price Waterhouse* because it:

> [D]oes not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. . . . 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 dis-

176. Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004).

177. *Id.*

178. *Id.*

179. *Id.* at 574 (emphasis added).

180. *See id.* at 574 ("In other words, 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.").

> crimination claim where the victim has suffered discrimination because of his or her gender non-conformity.[181]

The EEOC highlighted this assertion, which addresses a main argument against transgender inclusion in Title VII sex discrimination. A plaintiff may be identified as transgender or transsexual, but despite this possibly fatal classification, an individual would nevertheless state a claim under gender discrimination exactly because he or she is transgender and therefore does not conform to gender norms.[182] For the purposes of Title VII, the problematic non-protected classification of transgender is blurred with the definitions and understanding of the term "sex" and discrimination based on that trait. Transgender discrimination fits the paradigm for sex discrimination, so it should be afforded the same Title VII protection.

The final Federal Circuit Court case cited by the EEOC was *Glenn v. Brumby*,[183] decided by the Eleventh Circuit.[184] An employee of the Georgia General Assembly's Office of Legislative Counsel was terminated because of her transition from a male to female in accordance with her GID diagnosis and treatment.[185] The claim was again based on 42 U.S.C.§ 1983 for violations of her rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[186]

Although this was not a Title VII claim, the Eleventh Circuit posed the issue as "whether discriminating against someone on the basis of his or her gender nonconformity constitutes sex-based discrimination under the Equal Protection Clause," and then delved into an analysis of *Price Waterhouse* and the sex stereotyping construct.[187] The Eleventh Circuit's reasoning relied on how transgender is defined. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. '[T]he very acts that define transgender

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181. *Id.* at 574–75.

182. *See* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *9 (E.E.O.C. Apr. 20, 2012) (discussing the definition of transgender in terms of gender nonconformity and holding "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender").

183. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

184. *Macy*, 2012 WL 1435995, at *8.

185. *Glenn*, 663 F.3d at 1313–14 (firing Glenn because his "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable").

186. *Id.* at 1313.

187. *Id.* at 1316.

people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'"[188]

Therefore, the Eleventh Circuit also subscribed to the idea that transgender individuals, claiming discrimination because of the transgender status, precisely fit the sex stereotyping claim because they are transgender and break gender norms.[189] It would seem this was the EEOC's reason for including a discussion of *Glenn* in its analysis. In this line of reasoning it is the definition of transgender as gender nonconforming that firmly plants such a claim of discrimination within sex discrimination. "Transgender" is defined in terms of gender nonconformity, and because gender nonconformity is certainly covered under Title VII sex discrimination, so must transgender-based complaints.

Finally, the EEOC noted many district court cases found transgender discrimination claims cognizable under Title VII based on sex stereotyping,[190] and found *Schroer v. Billington*[191] a notable example.[192] Schoer, a

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188. *Id.* (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007)); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001) (asserting that the term transgender "applies to persons whose appearance, behavior, or other personal characteristics differ from traditional gender norms").

189. *See Glenn*, 663 F.3d at 1316 ("There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.").

190. *See, e.g.*, Michaels v. Akal Sec., Inc., Civil Action No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, at *3–4 (D. Colo. June 24, 2010) (supporting *Etsitty v. Utah Transit Authority* to the extent that the plaintiff had no claim under Title VII based on her transgender status, but, unlike *Etsitty*, assumes without deciding that the *Price Waterhouse* gender stereotyping claim was available to the plaintiff); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2009 WL 35237, at *6, 11 (N.D. Ind. Jan. 5, 2009) (stating that claims for direct transgender coverage under Title VII are not allowed, but recognizing claims of sex stereotyping for transgender individuals where the plaintiff shows the employer acted on the basis of his or her gender in making its adverse employment decision which the court did not find in this case); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding transgender identity is not a bar to a sex stereotyping claim). The *Lopez* court could not:

> [I]gnore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an "effeminate" male or "macho" female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes. There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII and *Price Waterhouse*.

Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (emphasis added); *see* Mitchell v. Axcan Scandipharm, Inc., No. CIV.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (authorizing a claim under Title VII based on sex stereotyping as expressed in *Price Waterhouse* for a transgender plaintiff); Tronetti v.

candidate for employment with the Library of Congress' Congressional Research Center, alleged discrimination for her transition from male to female after being tentatively offered a position with the Library.[193] Despite her qualifications for the position,[194] the Library claimed a number of non-discriminatory reasons for not hiring her, including concerns over her security clearance, trustworthiness, and potential job distraction due to her transition.[195] Additionally, the Library "argue[d] that a hiring decision based on transsexuality is not unlawful discrimination under Title VII."[196] The District Court of the District of Columbia found the non-discriminatory explanations merely pretextual and further held that Schroer stated a viable claim under Title VII either as sex stereotyping or purely as sex discrimination.[197]

Here, in applying the *Price Waterhouse* sex stereotyping construct to the facts, the district court found "the Library's hiring decision was infected by sex stereotyping."[198] However, the district court also saw a major difficulty with the claim: "When the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII."[199]

TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (acknowledging an actionable claim for a transgender plaintiff pursuant to sex stereotyping, rejecting *Ulane*, and stating "[t]ranssexuals are not genderless, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 9, 2001) (approving a cause of action under *Price Waterhouse* Title VII sex stereotyping theory for transgender plaintiffs, while failing to address the continued viability of ostensibly prohibiting a direct claim of transgender discrimination provided by *Ulane* and its progeny).

191. 577 F. Supp. 2d 293 (D.D.C. 2008).

192. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *9 (E.E.O.C. Apr. 20, 2012).

193. *Schroer*, 577 F. Supp. 2d at 295–300.

194. *Id.* at 295.

195. *Id.* at 299.

196. *Id.* at 300.

197. *Id.*

198. *Id.* at 305.

199. *Id.*; *see e.g.*, Doe v. U.S. Postal Service, 1985 WL 9446, at *2, 4–5 (D.D.C. 1985) (agreeing with the seminal case that Title VII does not afford protection to "transsexuals"); Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir.1984) (denying transsexuals protection under Title VII); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir.1982) (excluding transsexuals from protection under Title VII); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir.1977) (refusing to grant transsexuals protection under Title VII).

Accordingly, this court would have difficulty affording transgender plaintiffs protection under Title VII based on their transgender status as an independent characteristic. However, the D.C. District Court ultimately held that it would not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[200] This court distinguished discrimination on the basis of transgender status and discrimination for the "inherently gender-nonconforming" traits of a transgender individual.[201] It is the gender-nonconforming nature of being transgender that is the real issue. This echoes the Sixth Circuit's reasoning in *Smith* regarding the problematic classification issue.[202]

However, the district court ultimately stated that Schroer qualified for coverage based on the plain language of the statute and that the discrimination she encountered was "because of . . . sex".[203] More specifically, Schroer changed a protected characteristic[204] and the court analogized this kind of situation to a change in religious adherence:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected

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200. *Schroer*, 577 F. Supp. 2d at 305.

201. *Id.*

202. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 574–75 (6th Cir. 2004) (concluding the ability to classify discrimination of transgender individuals as "transgender discrimination" does not strip it of its gender nonconformity character). For example, when a man acts in ways typically associated with women, that activity is not described "as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual." *Id.* at 574. Because of this description, discrimination against the transsexual is not discrimination based on sex, but rather discrimination based on the individual's status or mode of self-identification. *Id.* at 574–75. This classification of transsexual "then legitimize[s] discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Id.*

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

204. *Id.*

> by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.[205]

Here, analysis by analogy takes a fairly concrete concept—discrimination due to a change in religion—and applies it to transgender discrimination jurisprudence. The court found that while transgender individuals may not currently receive class protection, their gender-nonconforming character and change in their protected characteristic must fit the discrimination prohibited by Title VII.

In *Macy v. Holder*, the EEOC found the *Schorer* religion comparison compelling and saw no distinction between discriminating against a change in religious adherence and a change in sex:

> Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account.[206]

Furthermore, the D.C. Circuit Court's analysis of Congress's failure to enact legislation specifically prohibiting workplace discrimination based on sexual orientation or gender identity stands out within the *Schroer* opinion.[207] One school of thought interpreting Title VII does not read the statute to protect transgender individuals and finds that "Congress is content with the status quo."[208] Here, the district court found it reasonable that legislative inaction shows congressional intent to interpret Title VII as extending coverage to transgender people.[209]

It is this conclusion that Title VII, as written and interpreted, does in fact afford transgender individuals protection against workplace discrimination, which is the cornerstone of the EEOC's decision in *Macy v.*

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205. *Id.* at 306–07.

206. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

207. *See* Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (discussing the non-passage of congressional bills to "ban[ ] employment discrimination on the basis of sexual orientation and gender identity" and claiming that "[c]ongressional inaction lacks persuasive significance"); *see* Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007) (banning employment discrimination based on sexual orientation and gender identity). *See also* Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (banning discrimination based on sexual orientation only); Employment Non-Discrimination Act of 2007, H.R. 3686, 110th Cong. (2007) (banning only gender identity discrimination).

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

209. *Id.*

Holder and its apparent recommendation to employers and other courts considering the issue.

VI. IMPLICATIONS OF *Macy v. Holder*

> "I think that as a society we are becoming more and more open to the LGBT community. I feel we are possibly in the most amazing time for LGBTQ rights in the modern age."
>
> — Paula Buls[210]

A. *Generally*

First, the EEOC decision, and the DOJ's acceptance, denotes inclusion of transgender protection under Title VII is binding on all EEOC offices and federal agencies.[211] This also means all federal agencies, as employers, must recognize transgender inclusion in anti-discrimination laws and in their policies.[212] Hopefully, courts across the country endorse a similar view regarding the viability of transgender discrimination claims under Title VII, as illustrated by the EEOC. Given the trend of federal courts recognizing the validity of transgender claims under Title VII, there is a worthy and valuable outlook for transgender victims of employment discrimination.

Moreover, given that participating in an EEOC investigation is the first step in the process to file an employment discrimination claim in any court,[213] there is a strong likelihood that more transgender discrimination claims will make their way into the state and federal courts. It is even possible that this decision will change the way in which employers react to allegations of transgender discrimination:

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210. E-mail Interview with Paula Buls, Licensed Master Soc. Worker, Katy Koonce & Associates (Dec. 17, 2012) (on file with *The Scholar: St. Mary's Law Review on Race & Social Justice*).

211. Chris Geidner, *DOJ Accepts EEOC Ruling That Trans Bias Is Covered By Title VII, ATF Begins Investigation*, METRO WEEKLY (May 21, 2012, 11:55 PM), http://www.metroweekly.com/poliglot/2012/05/the-department-of-justice-has.html (explaining the EEOC holding is not the same as a ruling from the Supreme Court but that the decision is still substantial because it is binding on all EEOC field offices and federal departments and agencies); *see also* TRANSGENDER L. CTR., *supra* note 1 ("The EEOC's decision will impact every employer, public and private, throughout the nation. The decision is entitled to significant deference by the courts, and will be binding on all federal agencies.").

212. WENKE, *supra* note 18.

213. *See Filing a Charge*, *supra* note 93 (stating filing a Charge of Discrimination with the EEOC is mandatory before filing a discrimination lawsuit against an employer under Title VII); *Overview*, *supra* note 93 (explaining the process for a claim of discrimination against a federal employer).

> Employers faced with an EEOC investigation that is taken seriously, and by an agency that unequivocally views discrimination against transgender people as illegal, are significantly more likely to mediate, give people their jobs back, stop the harassment that is occurring on the job, settle the case for a monetary amount, and generally work to make the situation better. The power of the EEOC to help change a workplace environment when a charge has been filed should not be understated.[214]

Those who contact the EEOC regarding an instance of transgender or gender identity discrimination can now assume that their claims will be "taken seriously and investigated in the same professional manner that all others are investigated."[215] In fact, according to the Director of the Transgender Civil Rights Project of the National Gay and Lesbian Task Force, following its decision, the EEOC made available LGBT cultural competency training for its investigation employees.[216] This should only increase the EEOC's field office workers' sensitivity and understanding of gender identity discrimination complaints.

B. *Deference and the U.S. Supreme Court*

As previously discussed, there are two types of deference tests typically applied to an agency action. If the Supreme Court were to afford the EEOC *Chevron* deference in evaluating its decision in *Macy v. Holder*—as it was adjudication unanimously agreed upon by the five bi-partisan agency commissioners[217]—then the remaining prong to satisfy would be determining whether Congress directly spoke to the issue.[218]

To this end, the primary question will be what was intended by the word "sex" in Title VII. However, at worst, there is legislative ambiguity in defining "sex" under Title VII, either because of a lack of congressional history or a lack of consensus.[219] At best, the EEOC dispelled any

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214. LISA MOTTET, NAT'L GAY & LESBIAN TASK FORCE, MOVEMENT ANALYSIS: THE FULL IMPACT OF THE EEOC RULING ON THE LGBT MOVEMENT'S AGENDA 5 (2012), *available at* http://www.thetaskforce.org/downloads/reports/reports/eeoc_movement_analysis.pdf.

215. *Id.* at 4.

216. *Id.* at 4 n.10.

217. *See id.* at 3 ("The ruling was precedent-setting because it was decided by the full Commission; all five bi-partisan Commissioners agreed to its issuance.").

218. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .").

219. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (noting the "total lack of legislative history supporting the sex amendment"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982) (pointing out that the sex amendment was

issues with incorporating gender identity discrimination under sex discrimination, because gender identity is a part of gender, and gender is decidedly part of sex.[220] If congressional intent was found to be ambiguous, then the decision need only be a reasonable interpretation of the statutory requirement.[221] The reasonableness of the EEOC's interpretation of the term "sex" in Title VII is well documented and established in this Comment. "Despite the fact that Title VII . . . explicitly grant[s] some rulemaking authority to the EEOC, the Court has applied *Chevron* deference in only two antidiscrimination cases . . . ."[222] An evaluation of the application of *Skidmore* deference will, therefore, be useful.

If the Supreme Court were to apply *Skidmore* deference to the EEOC's decision, a favorable outcome could still be assumed. The evaluative factors pronounced by the Supreme Court in *Skidmore* were thoroughness of consideration, the reasoning's validity, the "consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[223]

Thoroughness and validity of reasoning have likewise been taken into account in analyzing the *Macy* decision. Regarding judicial decisions in other jurisdictions, the EEOC thoroughly dispelled the major criticisms of transgender inclusion within sex discrimination by addressing the definitional issues and protected classification issue to which other courts have adhered. Validity of the reasoning is evident in its straightforward and logical incorporation of gender identity within gender, and therefore, within sex.

Consistency with an earlier pronouncement was problematic for the Supreme Court when interpreting the EEOC definition of "sex" within the meaning of Title VII in a prior case.[224] However, the EEOC took an extra step in its *Macy* decision, explicitly overturning any of its earlier

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passed "without prior legislative hearings and little debate"); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("There is a dearth of legislative history on Section 2000e-2(a)(1) . . . ."); Franklin, *supra* note 54, at 1320 (asserting there was significant debate at the time as to what "sex" meant and included, resulting in a "deep uncertainty at the time Title VII was enacted about which employment practices the statute barred").

220. *See* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *6 (E.E.O.C. Apr. 20, 2012) (holding that discriminating against someone because that person is transgender is discrimination related to the sex of the victim).

221. *Id.*

222. Hart, *supra* note 102, at 1945.

223. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

224. *See* Gen. Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976) (applying *Skidmore* deference and finding because of the contradiction between the EEOC pronouncement at issue and earlier positions taken by the EEOC, no deference should be given).

contrary decisions.[225] This could help the Supreme Court, and other courts, overcome any difficulty with the EEOC's earlier decision.

While examining the panoply of factors that the Supreme Court could use in evaluating whether the EEOC's decision is persuasive is beyond the scope of this Comment, the general thoroughness and soundness of the EEOC's decision supports a finding that the ruling is persuasive. It is challenging to undermine the logic of one of the EEOC's key arguments—that if a change in religion is protected from discrimination, a change in sex should also be protected.[226] Either way, there is a change in a protected characteristic under Title VII.

If no established standard of deference is used by the Supreme Court in evaluating the EEOC's decision, hopefully, the Court would side with the EEOC's line of reasoning regardless. The EEOC's statutory interpretation of Title VII "sex" as incorporating gender identity discrimination is based on the Supreme Court's construction of sex as inclusive of gender.[227] Moreover, the definition of transgender identity in terms of gender[228] could make it difficult for the Court to argue that transgender individuals should not be covered in sex discrimination protections.

C. *Regarding the Employment Non-Discrimination Act*

If the current understanding of Title VII includes protections for transgender individuals under sex discrimination, the federal legislature may be more effective in passing the Employment Non-Discrimination Act (ENDA)[229] to protect against sexual orientation discrimination, or amend

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225. *Macy*, 2012 WL 1435995, at *11 n.16; *see, e.g.*, Kowalczyk v. Brown, Appeal No. 01942053, 1996 WL 124832, at *3 n.1 (E.E.O.C. Mar. 14, 1996) (agreeing with the previous decision that a plaintiff may not bring a sex discrimination claim based on her transgender status); Campbell v. Espy, Appeal No. 01931730, 1994 WL 652840, at *1, 4 n.3 (E.E.O.C. July 21, 1994) (refusing appellant's request for reconsideration of her discrimination complaint and noting the "courts and the Commission have previously held that gender dysphoria or transsexualism is not protected under Title VII under the aegis of sex discrimination"); Jennifer Casoni v. U.S. Postal Serv., Appeal No. 01840104, 1984 WL 485399, at *3 (E.E.O.C. Sept. 28, 1984) (holding that a transgender plaintiff's Title VII sex discrimination was not cognizable).

226. Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

227. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (equating gender with the term "sex" under Title VII).

228. *GLAAD Media Reference Guide – Transgender Glossary of Terms*, GLAAD, http://www.glaad.org/reference/transgender (last visited Nov. 26, 2013) (defining "Transgender" as "[a]n umbrella term . . . for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gender-variant people").

229. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013) (representing

Title VII to reflect the same.[230] Some version of such an act has been proposed in Congress over ten times since 1994.[231] No version of the act has ever passed both houses, and either the Senate or the House has passed only two versions of the act since 1994.[232]

Congress could potentially decide to drop the transgender inclusion language that has presented a major hurdle for passage of the ENDA, and instead focus solely on sexual orientation discrimination.[233] This would be piece-meal protection, and certainly controversial, but an important step forward from where we are today. It would provide statutory protections for all LGBT individuals, while not in a consolidated statute; it would be concrete employment discrimination protection for a large group of Americans.

VII. CONCLUSION

> "No one should have to choose between their gender and their job. Every employee has a right to expect the opportunity to work hard, to provide for themselves and their families, and to do this in a workplace free of harassment and discrimination."
>
> — Masen Davis[234]

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the most recent versions of the proposed legislation to provide gender identity and sexual orientation employment discrimination).

230. *See generally* Sung, *supra* note 63, at 538–39 (advocating for an amendment to Title VII over passage of the ENDA). Claiming the ENDA has been watered down, and that if enacted "would perpetuate the idea that the discrimination endured by LGBT people is somehow different from—and less objectionable than—discrimination endured by people of color and women[,]" Sung argues the Title VII Amendment represents a clean start and offers a more effective way of remedying transgender discrimination claims because it seeks to "redefine Title VII's prohibition on discrimination because of sex to affirm that gender, sexual orientation, and gender identity are not conceptually distinct." *Id.*

231. *See Employment Non-Discrimination Act: Legislative Timeline, Resources*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline (last visited Nov. 26, 2011) (listing the proposed U.S. House and Senate bills regarding an ENDA); *see also* Sung, *supra* note 63, at 501 n.69 (providing a summary of the legislative history of EDNA).

232. Sung, *supra* note 63, at 501 n.72–73 ("[O]nly two versions of ENDA made it out of the House or Senate committees to which they were assigned—ENDA 1995 was defeated in the Senate by a vote of 49–50, and ENDA 2007 passed the House but subsequently died in the Senate.").

233. *See id.* at 504 ("Apparently, 2007 was the first year that ENDA had a real chance of passing the House, but only if it were transexclusive.").

234. *In The News: Transgender Sensitivity Trainings Mandated For TSA Managers At LAX In a Settlement Agreement*, TRANSGENDER L. CTR., http://transgenderlawcenter.org/archives/375 (last visited Nov. 26, 2013) (quoting Davis, the Transgender Law Center's Executive Director).

Title VII addressed a vast array of workplace discrimination—including race, color, religion, national origin, and sex-based discrimination.[235] As the Supreme Court surmised, the sex discrimination prohibition requires that in situations other than the "bona fide occupational qualification," sex cannot be taken into consideration in hiring or firing.[236] Furthermore, the Supreme Court used the terms "sex" and "gender" interchangeably, making it clear that gender is synonymous with sex in terms of Title VII.[237] Recent federal jurisprudence shows the term gender, and therefore sex, *should* and does include transgender individuals.[238]

Hence the logic followed by the courts in the 1970s and 1980s regarding transgender inclusion in Title VII coverage has been obliterated.[239] Transgender employees and job candidates are afforded protection under the *Price Waterhouse* construct of sex stereotyping or gender norming, as no one should be fired or denied employment for failing to meet perceived standards of the male or female gender.[240] Taking the argument for transgender inclusion in Title VII sex discrimination prohibitions one step further reveals transgender individuals should have and do have protection under Title VII per se—based on the term sex and the definitions used to describe transgender.[241]

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235. 42 U.S.C. § 2000e-2 (2006).

236. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (recognizing the BFOQ exception to Title VII and concluding "[t]he only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her").

237. *See id.* at 239–40 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids [unlawful employment practices] *because of* such individual's . . . sex. We take these words to mean that gender must be irrelevant to employment decisions.").

238. *See e.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 572–73 (6th Cir. 2004) (finding the narrow definition of sex in the pre-*Price Waterhouse* decisions, which excluded transgender individuals from Title VII coverage, was overruled by *Price Waterhouse* and was no longer good law).

239. *See* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.").

240. *See e.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004) (recognizing Title VII coverage for transgender people under a sex stereotyping claim); *Schwenk*, 204 F.3d at 1201–02 (ruling sex or gender motivated harassment violated the GMVA by applying Price Waterhouse sex stereotyping); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (holding the transgender plaintiff sufficiently stated a claim under sex stereotyping).

241. *See e.g.*, *Schroer*, 577 F. Supp. 2d at 306 (providing the plaintiff coverage under the language of Title VII in and of itself); Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012) ("[D]iscrimination against a transgender

The EEOC believes in the validity of this line of reasoning—that transgender people have protection under sex stereotyping and simply for identifying as transgender or gender nonconforming.[242] The EEOC eloquently stated their position in *Macy v. Holder*, a decision to which all courts should afford great deference.[243] The EEOC is entrusted with ensuring that all employers follow the statutory prohibitions under Title VII.[244] With *Macy*, the EEOC has clearly taken a strong stance that the protections they provide will be extended to transgender individuals. Including transgender-based discrimination within the meaning of Title VII is a sound and logical extension of our nation's pioneering steps toward eradicating workplace discrimination.

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individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII.").

242. *See id.*

243. *See Macy*, 2012 WL 1435995, at *11 (endorsing the *Price Waterhouse* classification of sex stereotyping and a "by definition" application of Title VII to transgender plaintiffs); *see also* TRANSGENDER L. CTR., *supra* note 1 ("The decision is entitled to significant deference by the courts, and will be binding on all federal agencies.").

244. *See* 42 U.S.C. § 2000e-5 (2006) (authorizing the EEOC to prevent unlawful employment practices).