

The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964

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In the first half of 1963—one hundred years after the signing of the Emancipation Proclamation, and amidst the ongoing protests in Birmingham, Alabama—President John F. Kennedy twice went to Congress with urgent appeals regarding civil rights. Reminding the senators and representatives of America’s founding principle that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” President Kennedy urged them to advance President Abraham Lincoln’s belief “in the equal worth and opportunity of every human being.”²

To counteract the “growing crisis in American race relations,” in his June message President Kennedy proposed a package of legislation he called the Civil Rights Act, which would cover, among other areas, voting rights, public accommodations, discrimination in employment, and education. The proposed legal remedies, the President claimed, “are the embodiment of this Nation’s basic posture of common sense and common justice,” and protect rights most Americans take for granted.³ Regarding employment discrimination, President Kennedy appealed to the “democratic principle that no man should be denied employment commensurate with his abilities because of his race or creed or ancestry.”⁴

In his conclusion, the President asked the senators and representatives to “look into your hearts . . . for the one plain, proud and priceless quality that unites us all as Americans: a sense of justice.” It is justice, he said, that requires them to “insure the blessings of liberty for all Americans”—not merely for economic efficiency, international respect, or public safety—“but, above all, because it is right.”⁵

In both of President Kennedy’s appeals to Congress, discrimination because of sex was never mentioned.

² President John F. Kennedy, Special Message to the Congress on Civil Rights (Feb. 28, 1963), *available at* www.presidency.ucsb.edu/ws/?pid=9581.

³ President Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), *available at* www.presidency.ucsb.edu/ws/?pid=9283.

⁴ President Kennedy (Feb. 28, 1963).

⁵ President Kennedy (June 19, 1963).

“Because of . . . Sex” and the Civil Rights Act

Title VII of the Civil Rights Act of 1964—enacted a year after President Kennedy’s second message to Congress, and seven months after his assassination—prohibits discrimination in employment “because of . . . race, color, religion, sex, or national origin.”⁶ “Sex” was added only two days before the bill’s passage in the House, without prior hearing or debate, by an amendment offered by Representative Howard Smith, who opposed the civil rights bill but believed his amendment “[would] do some good for the minority sex.”⁷ The amendment had been suggested to Smith by the National Women’s Party,⁸ and during the debate Smith and several other representatives spoke about their concern that, if the underlying bill were to pass, the “sex” provision would be needed to protect white women competing with black women in employment. Departing from his initial jocular tone, in Smith’s final comments before the vote on his amendment he imagined a hypothetical employer facing the decision whether to hire an equally-qualified black or white woman—

If [the employer] does not employ th[e] colored woman . . . that employer will say “Well now, if I hire the colored woman I will not be in any trouble, but if I . . . hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit.”

That will happen as surely as we are here this afternoon. You all know it.⁹

Despite the opposition of the sponsor of the bill—“[i]magine the upheaval that would result from adoption of blanket language requiring total equality”!¹⁰—and the Department of Labor,¹¹ the

⁶ 42 U.S.C. § 2000e-2.

⁷ 110 CONG. REC. 2,577 (1964) (introductory statement of Rep. Smith). Rep. Smith voted against final passage of the bill. See House Vote #182 (1964), available at www.govtrack.us/congress/votes/88-1964/h182.

⁸ The National Women’s Party was a women’s organization that had fought for passage of the Equal Rights Amendment (ERA) ever since its leader Alice Paul drafted it in 1923. Rep. Smith had supported the ERA since as early as 1943, and some scholars have asserted that the Smith amendment was a surrogate for the ERA. See Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 182-83 (1991); Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 147-49 (1997).

⁹ 110 CONG. REC. 2,583 (remarks of Rep. Smith); see also *id.* (remarks of Reps. Tuten, Pool, Andrews, and Rivers expressing same concern, for example Rep. Andrews—“Unless this amendment is adopted, the white women of this country would be drastically discriminated against in favor of a Negro woman”); *id.* at 2,580 (remarks of Rep. Martha Griffiths) (“a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister”). For more background on the legislative history of the Smith amendment, see generally Bird, *supra* note 8, at 150-58 (relating that Rep. Smith, a Virginia Democrat and chairman of the powerful House Rules Committee, fought against the Civil Rights Act, the Fair Employment Practices Commission, and other pieces of legislation offering protection to minorities prior to 1964, but believed that, if the Act were to pass, the “sex” provision should be included to protect white women competing against newly-empowered blacks in the job market).

¹⁰ 110 CONG. REC. 2,577 (1964) (statement of Rep. Emanuel Celler, chairman of House Judiciary Committee).

¹¹ See *id.* (Rep. Celler reading into the record letter from Department of Labor dated February 7, 1964).

amendment passed by a vote of 168 to 133.¹² When President Lyndon Johnson signed the Civil Rights Act into law on July 2, 1964, for the first time in American history private and public sector employers were prohibited from discriminating in employment on the basis of sex.

The initial treatment of Smith's amendment by the Equal Employment Opportunity Commission (EEOC) was less than laudatory, and the only woman then on the Commission would later recall that the subject of sex discrimination invoked little more than "boredom" or "virulent hostility" from her colleagues.¹³ EEOC Executive Director M. Thompson Powers made clear that "the commission is very much aware of the importance of not becoming the 'sex commission.'"¹⁴ His successor, Herman Edelsberg, also informed the press that "no man should be required to have a male secretary."¹⁵

The first courts to interpret the "because of sex" provision followed the plain language of the statute to determine the scope and meaning of "sex." The little legislative history that existed clearly indicated that Congress intended the provision to protect women, and courts had no difficulty interpreting the statute as protecting biological women from discrimination in employment due to the fact they were female.¹⁶ Even discrimination on the basis of pregnancy was initially held to be permissible under Title VII.¹⁷

In 1974, Representatives Bella Abzug and Ed Koch of New York City introduced the Equality Act, the first bill that would have added sexual orientation to the anti-discrimination protections of the Civil Rights Act, but their bill did not see any action.¹⁸ In 1979, continuing the plain language interpretation of the law, the Ninth Circuit rejected an argument that

¹² *See id.* at 2,584.

¹³ CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 187 (1988), available at <http://ark.cdlib.org/ark:/13030/ft367nb2ts> (stating that EEOC commissioners and staff expressed a general belief that the addition of sex to the law had been illegitimate).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g., Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (using both the plain meaning of the statute and legislative activity subsequent to Title VII's passage to determine that Congress intended the word "sex" to be understood traditionally in order to "place women on an equal footing with men" in case where "transsexual" alleged she was terminated on the basis of her sex).

¹⁷ *See Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding that an employer's disability benefits plan does not violate Title VII just because it fails to cover pregnancy-related disabilities).

¹⁸ *See* Equality Act of 1974, H.R. 14752, 93rd Congress (1974), available at <http://www.scribd.com/doc/180318509/H-R-14752-93rd-Congress-Civil-Rights-Act-of-1974-pdf>. The Equality Act would have expanded employment, housing, and public accommodations protections to include marital status and sexual orientation, and would also have expanded public accommodations protections to include sex.

Also, at the start of the next Congress Abzug and Koch introduced the Civil Rights Amendments Act. This bill would have prohibited discrimination on the basis of "affectional or sexual preference," which the bill defined as having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment. *See* H.R. 166, 94th Congress (1975), available at www.govtrack.us/congress/bills/94/hr166.

discrimination against a homosexual was sex discrimination under Title VII.¹⁹ The plaintiff in the case argued that he would have been treated differently had he been a woman attracted to other men, and that the discrimination therefore turned on his sex. However, the Ninth Circuit held that the plaintiff was merely attempting to “bootstrap Title VII protection for homosexuals,” and that discrimination based on sexual orientation was not a valid claim under Title VII because it affects biological males and females equally.²⁰ That same year, the Fifth Circuit held without comment that “[d]ischarge for homosexuality is not prohibited by Title VII.”²¹

Over the 1970s and 1980s, however, courts began interpreting “sex” in Title VII more broadly. In 1971, the Supreme Court held that Title VII’s anti-discrimination provisions applied to an employer’s refusal to accept applications from women, but not men, with preschool children,²² and the Fifth Circuit held that Title VII protections applied to men as well as women.²³ In 1986 the Supreme Court ruled that sexual harassment was always discrimination “because of sex,”²⁴ and during this period of time plaintiffs began to bring a greater diversity of cases alleging more and more theories as to why they had suffered discrimination “because of sex” under Title VII.

Ulane v. Eastern Airlines

An example of such a case is 1984’s *Ulane v. Eastern Airlines*, one of the first courts to examine whether the sex discrimination provisions of Title VII extend to transgender individuals.²⁵ Karen Ulane, then Kenneth Ulane, was hired in 1968 as a pilot for Eastern Air

¹⁹ See *De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (“Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind” when enacting Title VII) (quoting *Holloway*, 566 F.2d at 662-63).

²⁰ *Id.* at 331 (“we note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex”).

²¹ *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (affirming dismissal of employee’s Title VII claim alleging he was fired because of his religion and sexual preferences).

²² See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 547 (1971) (Marshall, J., concurring) (per curiam) (“When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.”).

²³ See *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (refusal to hire men to be flight attendants is sex discrimination under Title VII); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (health benefits plan covering employees and spouses that provided greater pregnancy-related coverage to female employees than spouses of male employees constitutes discrimination against male employees on basis of sex under Title VII).

²⁴ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (sexual harassment, even when it does not lead to economic injury, is impermissible sex discrimination under Title VII when it creates hostile work environment).

²⁵ 742 F.2d 1081 (7th Cir. 1984) *cert. denied*, 471 U.S. 1017 (1985). For other early cases involving transgender plaintiffs, see *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975) (in case where was plaintiff discharged because she intended to undergo sex conversion surgery, holding Title VII does not reach situations involving transsexuals, homosexuals or bisexuals, and noting various Congressional efforts to introduce legislation to add protections as evidence such individuals not covered by law); *Powell v. Read’s, Inc.*, 436

Lines after flying combat missions in Vietnam for the Army. After returning to work from gender reassignment surgery, Ulane was fired. The court affirmed the plain meaning of the statute:

The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.²⁶

The court therefore found that Ulane was “not discriminated against as a female” and rejected her Title VII claim, holding that Title VII “is not so expansive in scope as to prohibit discrimination against transsexuals.”²⁷

At the same time, courts continued to hold that homosexuals were outside the scope of Title VII as well. For example, the Sixth Circuit dismissed a sex discrimination claim by a male employee of the postal service who had been taunted, ostracized, and physically beaten because his co-workers believed he was a homosexual. The court held that the actions against plaintiff, “although cruel, are not made illegal by Title VII.”²⁸

Price Waterhouse v. Hopkins and Sex Stereotyping

Five years later, however, the Supreme Court utilized an expanded definition of “sex” in the landmark case *Price Waterhouse v. Hopkins*.²⁹ Hopkins was a senior manager in an accounting firm who was denied partnership because she exhibited traditionally masculine traits. The firm had advised her she could improve her chances for partnership if she were “to take a course at charm school,” “walk more femininely, talk more femininely, wear makeup, have her hair styled and wear jewelry.”³⁰ The Court held that the firm discriminated against Hopkins

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F. Supp. 369, 370-71 (D. Md. 1977) (where transgender plaintiff fired on first day of new job as waitress, reading Title VII to cover claim “would be impermissibly contrived and inconsistent with the plain meaning of the words”).

²⁶ 742 F.2d at 1085.

²⁷ *Id.* at 1087.

²⁸ *Dillon v. Frank*, 1992 U.S. App. LEXIS 766, 22 (6th Cir. Mich. Jan. 15, 1992) (“homosexuality is not an impermissible criteria on which to discriminate with regard to terms and conditions of employment”); *see also Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990) (dismissing Title VII claim by black homosexual employee); *Hopkins v. Balt. Gas & Elec. Co.*, 871 F. Supp. 822, 832 n.17 (D. Md. 1994) (dismissing claim of same-sex harassment against allegedly bisexual male supervisor, noting that “courts have consistently held that Title VII does not prohibit discrimination on the basis of sexual orientation or preference”).

²⁹ *See* 490 U.S. 228 (1989).

³⁰ *Id.* at 235.

“because of sex” on a theory of “sex stereotyping,”³¹ explicitly affirming that such stereotyping is legally relevant under Title VII—

[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 in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.³²

Revising prior courts’ interpretations of “because . . . of sex,” the Court noted that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,” and these words “mean that gender must be irrelevant to employment decisions.”³³ In this case, “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.”³⁴

Under *Price Waterhouse*, therefore, the term “sex” in Title VII encompassed both biological sex and gender—i.e. the socially-constructed roles, behaviors, and attributes that society considers appropriate for men and women. If gender plays a role in an employers’ decision to take an adverse employment action, they have committed sex discrimination. Very simply, “an employer may not take gender into account.”³⁵

After *Price Waterhouse*, some courts began recognizing Title VII protections in cases of gender stereotyping. In 1997, the Seventh Circuit applied *Price Waterhouse* to hold that same-sex harassment claims of male employees who had been the targets of repeated, sexually-charged and gender-based remarks from male co-workers were actionable under Title VII.³⁶ The court held that *Price Waterhouse* “makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.”³⁷ Therefore, a man who is harassed because “his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave is harassed ‘because of’ his sex.”³⁸

³¹ *Id.* at 257-58.

³² *Id.* at 251 (internal quotations omitted).

³³ *Id.* at 239-40. *See also id.* at 264 (O’Connor, J., concurring in the judgment) (“There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . The bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.”) (internal quotations omitted).

³⁴ *Id.* at 250.

³⁵ *Id.* at 244.

³⁶ *See Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

³⁷ *Id.* at 580.

³⁸ *Id.* at 581. *See also Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001) (finding “unrelenting barrage of [same-sex] verbal abuse” by male co-workers constituted sex discrimination under Title VII). “*Price*

A year later the Supreme Court reached the same conclusion in *Oncale v. Sundowner Offshore Services, Inc.*³⁹ In *Oncale*, an employee on an eight-man oil platform crew who had been forcibly subjected to sex-related, humiliating actions by colleagues in the presence of the rest of the crew, including physical assaults in a sexual manner and threats of rape, filed a claim of sex discrimination against his employer. Although it did not reference *Price Waterhouse*, the Court held that Title VII's prohibition of discrimination "because of sex" protects men as well as women and extended the statute's coverage to same-sex harassment between heterosexual men.

Delivering the opinion of a unanimous court, Justice Scalia wrote that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,"⁴⁰ and explicitly defended the Court's moving beyond legislative intent in its interpretation of the statute—

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.⁴¹

Also in 1998, Executive Order 13087 made it the policy of the federal government to prohibit discrimination based on sexual orientation in federal employment. The Order did not create any enforceable rights, such as the ability to seek relief before the EEOC—President Clinton pointed out at its signing that such rights can only be granted by Congress⁴²—but nonetheless set the stage for action by all agencies of the federal government against sexual orientation-related harassment and discrimination.

Smith v. City of Salem

In 2004, the Sixth Circuit extended the sex-stereotyping theory of *Price Waterhouse* to transgender plaintiffs, the first federal court to do so.⁴³ Jimmie Smith was a lieutenant in the Salem, Ohio Fire Department. After Smith began "expressing a more feminine appearance on a

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Waterhouse sets a rule that bars discrimination on the basis of sex stereotypes. . . . To the extent [prior case law] conflicts with *Price Waterhouse* . . . [it] is no longer good law." *Id.* at 874-75.

³⁹ See 523 U.S. 75 (1998).

⁴⁰ *Id.* at 80 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

⁴¹ *Id.* at 79.

⁴² Presidential Statement on Signing Executive Order 13087 (May 28, 1998), available at <http://clinton6.nara.gov/1998/05/1998-05-28-statement-on-amendment-to-eeo-executive-order.html>.

⁴³ See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); James G. O'Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1101-02 (2007).

full-time basis,” he⁴⁴ received comments and questions from co-workers, prompting him to talk with his direct supervisor about his gender identity disorder. Although Smith’s supervisor had agreed to keep the conversation confidential, the supervisor told the head of the fire department, and the city soon devised a plan to use Smith’s disorder as a basis for terminating his employment.⁴⁵ The Sixth Circuit held that Smith stated a valid claim under Title VII for discrimination “because of sex” as a result of his gender non-conformity. *Price Waterhouse*, the court said, does not

provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. . . . [D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.⁴⁶

The next year, in *Barnes v. City of Cincinnati*, the Sixth Circuit decided a similar case regarding a police officer who presented as male while on-duty but often lived as a woman off-duty.⁴⁷ The officer was promoted to sergeant upon passing a promotional exam, but demoted after failing to pass his probationary period. The officer contended the demotion was due to gender conformity discrimination, while the city argued it was based on poor performance. Following *Smith*, the court held the officer was a member of a protected class by virtue of his non-conforming gender behavior, and found that the evidence sufficiently established that his demotion was motivated by a failure to conform to sex stereotypes. “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination [under Title VII], irrespective of the cause of that behavior.”⁴⁸

Smith was not held to encompass discrimination against homosexuals, however. In *Vickers v. Fairfield Medical Center*, the Sixth Circuit dismissed a claim by an employee perceived as homosexual (his orientation was never disclosed), determining that Title VII does

⁴⁴ According to the complaint in the case, Smith identified as male. *See id.* at 570.

⁴⁵ *Id.* at 568.

⁴⁶ *Id.* at 574-75.

⁴⁷ 401 F.3d 729, 733 (6th Cir. 2005) (noting that Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser, that no other male sergeant was known to be gay or have a feminine appearance, and that the Cincinnati vice squad had photographed Barnes at night).

⁴⁸ *Id.* at 737 (quoting *Smith*, 378 F.3d at 575).

For other recent cases extending Title VII protection to transgender individuals, *see, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293, 307-08 (D.D.C. 2008) (finding that Library of Congress’s refusal to hire transgender applicant after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was “literally discrimination ‘because of . . . sex,’” and that “decisions holding Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of judge-supposed legislative intent over clear statutory text) (emphasis in original, internal quotations omitted); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“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”).

not protect sexual orientation.⁴⁹ In a long discussion of *Smith*, the court acknowledged that “gender stereotyping claims can easily present problems for an adjudicator . . . for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”⁵⁰ But “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII,” and the court thus held that the employee’s theory of sex stereotyping did not support the employee’s discrimination and sexual harassment claims.⁵¹ The court distinguished its case from *Smith* because the employee’s gender non-conforming behavior was not behavior observed at work or affecting his job performance and because the employee did not argue his appearance or mannerisms on the job were perceived as gender non-conforming and provided the basis for his harassment. Instead, the employee’s harassment was more properly viewed as based on the employee’s perceived homosexuality, rather than gender non-conformity.⁵²

Macy v. Holder

In 2012, the EEOC—in a decision binding on all federal agencies—ruled for the first time that “discrimination based on gender identity, change of sex, and/or transgender status” is discrimination “because of sex” under Title VII, concluding in *Macy v. Holder* that the sex stereotyping theory of *Price Waterhouse* protects transgender individuals discriminated against on the basis of their status.⁵³ But the Commission also utilized a new theory in the case, developed out of the principle on which the Supreme Court’s stereotyping analysis had been based in *Price Waterhouse*—that Title VII prohibits employers from taking gender into account in making employment decisions.⁵⁴

⁴⁹ See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764-65 (6th Cir. 2006) (employee’s harassment “reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility” but does not fit within the prohibitions of Title VII) (citing *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001)).

⁵⁰ *Vickers*, 453 F.3d at 763-64 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (finding individual may have viable Title VII discrimination claim where employer acted out of animus toward his or her “exhibition of behavior considered to be stereotypically inappropriate for their gender”)).

⁵¹ *Vickers* at 764 (quoting *Dawson* at 218).

⁵² *Vickers* at 764-65. “Ultimately, recognition of *Vickers*’ claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” *Id.* at 764.

For a recent district court case from the Sixth Circuit, see *Revely v. Cincinnati State Tech. & Cmty. College*, 2014 U.S. Dist. LEXIS 155999, 7 (S.D. Ohio Nov. 4, 2014) (“in reality, Plaintiff is claiming that she was terminated because of her sexual orientation, a personal characteristic that Title VII does not protect against employment discrimination”) (citing *Vickers*).

⁵³ See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

⁵⁴ See *id.* at *7 (quoting *Price Waterhouse*, 490 U.S. at 244).

When an employer discriminates against someone because the person is transgender, the Commission argued, the employer has engaged in disparate treatment related to sex

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 transgender person.⁵⁵

Evidence of gender stereotyping “is simply one means of proving sex discrimination,”⁵⁶ and the Commission thus concluded that intentional discrimination against a transgender individual because that person is transgender “is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”⁵⁷ Under *Macy*, therefore, the EEOC’s official position is that anti-transgender discrimination is per se sex discrimination.⁵⁸

Shortly after *Macy*, the EEOC published its 2013-2016 Strategic Enforcement Plan (SEP), which lists as the third of six national enforcement priorities “addressing emerging and developing issues,” including “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, *as they may apply*.”⁵⁹ The SEP makes clear the EEOC intends to make sexual orientation and gender identity discrimination a priority in its enforcement efforts, yet acknowledges that even after *Macy* the reach of Title VII remains uncertain, especially regarding sexual orientation.

Since the SEP’s release, the EEOC has instructed its investigators and attorneys that discrimination against individuals because they are transgender violates Title VII’s prohibition of sex discrimination in employment. Despite the absence of a clear precedent like *Macy*, the EEOC has also instructed investigators and attorneys that lesbian, gay, and bisexual individuals may bring valid Title VII sex discrimination claims, and that the EEOC should accept such charges.⁶⁰

⁵⁵ *Id.*

⁵⁶ *Id.* at *10. “Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.” *Id.*

⁵⁷ *Id.* at *11.

⁵⁸ For examples of more recent EEOC rulings involving transgender individuals, see *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (intentional misuse of employee’s new name and pronoun may cause harm to employee, constitute sex-based discrimination and/or harassment); *Complainant v. Dep’t of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) (failure to revise agency records pursuant to changes in gender identity stated valid Title VII claim).

⁵⁹ U.S. Equal Emp’t Opportunity Comm’n, *Strategic Enforcement Plan (SEP)*, at 10 (Dec. 17, 2012), available at www.eeoc.gov/eeoc/plan/upload/sep.pdf (emphasis added).

⁶⁰ See U.S. Equal Emp’t Opportunity Comm’n, *What You Should Know about EEOC and the Enforcement Protections for LGBT Workers*, www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited April 6, 2015); but see EEOC Federal Training & Outreach Division, *What Does the Macy Decision Mean for Title VII?* (June 15, 2012) (video at 47:20), www.eeoc.gov/federal/training/brown_bag_macy.cfm (stating that federal agencies should accept charges from employees as if *Macy* prohibited discrimination under Title VII on the basis of sexual orientation).

In September 2013, the EEOC settled a sex discrimination case involving a transgender employee of a South Dakota grocery store. The owner of the supermarket terminated the employee, who had recently been promoted, after she indicated her intent to present as a woman. In a conciliation agreement with the agency, the owner agreed to pay \$50,000 to the former employee.⁶¹ One year later the EEOC filed the first two lawsuits in the agency's history alleging sex discrimination against transgender individuals under Title VII.⁶² And in December 2014, Attorney General Eric Holder announced that the Justice Department will take the litigation position that the protections of Title VII of the Civil Rights Act extend to claims of discrimination based on an individual's gender identity, including transgender status.⁶³

Finally, just two weeks ago the EEOC found that the Army violated Title VII by subjecting a transgender employee to disparate treatment and harassment based on sex.⁶⁴ In a case of first impression, the EEOC reversed a lower agency decision and held that the Army discriminated against Tamara Lusardi, a veteran and civilian software specialist who had transitioned from male to female in 2010, when it denied her equal access to the common female restroom and allowed a team leader to intentionally and repeatedly refer to her by male names and pronouns. The EEOC ordered the Army to provide Lusardi with compensatory damages and attorneys' fees, and to conduct diversity and sensitivity training for all employees and supervisors in the facility where she works.⁶⁵

The Employment Non-Discrimination Act

The Employment Non-Discrimination Act (ENDA) was first introduced in 1994 by Representative Gerry Studds of Massachusetts, attracting 137 cosponsors, and has been introduced in nearly every Congress since then.⁶⁶ A narrower version of the original Equality Act introduced by Representative Abzug, it does not directly amend Title VII, but would

⁶¹ See Press Release, Rapid City Market to Pay \$50,000 to Settle EEOC Finding of Discrimination Against Transgender Employee (Sept. 16, 2013), www.eeoc.gov/eeoc/newsroom/release/9-16-13.cfm.

⁶² See *EEOC v. Lakeland Eye Clinic, P.A.*, Docket No. 8:14-cv-2421 (M.D. Fla. Civ. Sept. 25, 2014) (alleging discrimination based on sex in violation of Title VII for firing employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes); *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, Docket No. 2:14-cv-13710 (E.D. Mich. Sept. 25, 2014) (same for funeral director/embalmer).

⁶³ See Memorandum from Att'y Gen. to U.S. Attorneys regarding Treatment of Transgender Emp't Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), *available at* www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; *see also* Press Release, Announcement of Att'y Gen. Holder (Dec. 18, 2014), www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.

⁶⁴ See *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (Apr. 1, 2015), *available at* www.lieffcabraser.com/Documents/Lusardi.pdf.

⁶⁵ See *id.*, slip op. at 18-19.

⁶⁶ See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Congress (1994), *available at* www.govtrack.us/congress/bills/103/hr4636.

otherwise prohibit discrimination on the basis of sexual orientation in employment by incorporating language similar to Title VII. Gender identity protections were added to the legislation in 2007. A version of ENDA limited to sexual orientation passed the House in 2007 by a 235-184 margin, and a trans-inclusive ENDA passed the Senate in November 2013 by 64 to 32.⁶⁷ Although it likely has majority support in the House, Speaker John Boehner said in early 2014 he would not bring the bill to the floor.⁶⁸

After waiting unsuccessfully for the House to pass ENDA, President Obama signed Executive Order 13672 in July 2014, which amended two earlier executive orders to prohibit discrimination in the civilian federal workforce on the basis of gender identity, and discrimination in hiring by federal contractors on the basis of both sexual orientation and gender identity.⁶⁹

ENDA's longstanding religious exemption has become especially controversial in recent years. Shortly after the Supreme Court released its *Hobby Lobby* decision in June 2014, several gay rights groups withdrew their support from ENDA due to its religious exemption, which they believe is too broad.⁷⁰ In part due to this loss of support, ENDA will likely not be reintroduced in the current Congress. Instead, the former Senate sponsor of ENDA plans to introduce a comprehensive nondiscrimination bill that includes protections against sexual orientation and transgender discrimination in employment, housing, education, credit, and public accommodations but with a narrower religious exemption.⁷¹

Title VII Protections for Sexual Orientation?

Recently, some courts and EEOC decisions have begun to recognize Title VII claims regarding sexual orientation as valid. In *Terveer v. Billington*, the Library of Congress moved to dismiss a gay employee's sex discrimination claim on the basis that Title VII does not cover sexual orientation. The court denied the motion, however, finding that the employee's allegation that discrimination occurred because he was gay plausibly suggested the discrimination was

⁶⁷ See H.R. 3685, 110th Congress (2007), www.congress.gov/bill/110th-congress/house-bill/3685/actions; S. 815, 113th Congress (2013), www.congress.gov/bill/113th-congress/senate-bill/815/actions.

⁶⁸ See Daniel Reynolds, *John Boehner: 'No Way' ENDA Will Pass This Year*, ADVOCATE.COM (Jan. 30, 2014), www.advocate.com/politics/politicians/2014/01/30/john-boehner-no-way-enda-will-pass-year.

⁶⁹ See Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014), *available at* www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf; *see also* Remarks by the President at Signing of Exec. Order on LGBT Workplace Discrimination (July 21, 2014), www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination.

⁷⁰ See Michelle Garcia, *ACLU, NCLR, and More Groups Drop Support of ENDA*, ADVOCATE.COM (July 8, 2014), www.advocate.com/enda/2014/07/08/breaking-aclu-nclr-and-more-groups-drop-support-enda; *see also* Molly Ball, *How Hobby Lobby Split the Left and Set Back Gay Rights*, THE ATLANTIC (July 20, 2014), www.theatlantic.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721.

⁷¹ See Chris Johnson, *Merkley to introduce comprehensive LGBT non-discrimination bill*, WASHINGTON BLADE (Dec. 10, 2014), www.washingtonblade.com/2014/12/10/merkley-lays-vision-comprehensive-lgbt-non-discrimination-bill.

based on gender stereotypes, and thus validly stated a Title VII sex-discrimination claim.⁷² Last August, a decision by the EEOC denying an appeal of a sexual orientation claim nonetheless recognized that allegations of sexual orientation discrimination can be construed as claims of sex discrimination cognizable under Title VII.⁷³

In September 2014, a district court denied a motion to dismiss filed against a same-sex couple who claimed that the employer's failure to provide health insurance coverage for an employee's same-sex spouse constituted sex discrimination under Title VII.⁷⁴ Finding the plaintiff to have satisfied the initial burden of stating a claim plausible on its face, the court held that a "careful reading" of the complaint "demonstrates that [the employee] alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."⁷⁵

In October 2014, the EEOC filed an amicus brief seeking rehearing in a Seventh Circuit case after the court dismissed the plaintiff's Title VII sex discrimination claim based on sexual orientation.⁷⁶ In its dismissal, the Seventh Circuit panel held that the conduct complained of was not covered under Title VII because the statute's "prohibition on discrimination based on sex extended only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation."⁷⁷ In its amicus brief, the EEOC wrote that

[p]ortions of the panel's ruling rest on the sweeping proposition that Title VII's prohibition on discrimination "because of sex" does not prohibit discrimination based on sexual orientation. Yet an increasing number of courts, as well as the EEOC (the primary Agency charged with enforcing the statute), have recognized that intentional discrimination based on an individual's sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes.⁷⁸

⁷² See *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding plaintiff to have sufficiently pled he was victim of sex stereotyping, cognizable sex discrimination under Title VII, by alleging that defendant denied promotions and created a hostile work environment because of his nonconformity with male sex stereotypes).

⁷³ See *Complainant v. DHS*, EEOC Appeal No. 0120110576, 2014 WL 4407422, at *7 (Aug. 20, 2014) (citing EEOC cases where agency has held that sex discrimination claims may intersect with claims of sexual orientation discrimination).

⁷⁴ See *Hall v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 132878, 1 (W.D. Wash. Sept. 22, 2014).

⁷⁵ *Id.* at 9.

⁷⁶ See *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014).

⁷⁷ *Id.* at 697.

⁷⁸ Brief of the U.S. Equal Emp't Opportunity Comm'n as Amicus Curiae in Support of Rehearing at 3, *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014) (No. 12-1723) (citing *Terveer v. Billington* and arguing the panel should modify its statements to the contrary in its opinion, overruling Circuit precedent if necessary).

The panel denied the petition for rehearing, but in a rare move issued an amended opinion removing its original holding that Title VII does not cover sexual-orientation discrimination and affirming the district court's dismissal on other grounds.⁷⁹

A New World for the EEOC

As part of the implementation of its 2013-2016 Strategic Enforcement Plan's objective to address "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply,"⁸⁰ the EEOC began tracking information on charges filed alleging discrimination related to gender identity and/or sexual orientation in January 2013. In the final three quarters of fiscal year 2013 (beginning January 1, 2013), the EEOC received 667 charges raising allegations of sex discrimination related to sexual orientation and 161 charges alleging sex discrimination based on gender identity, for 801 total (some charges raised both kinds of allegations). In the first three quarters of fiscal year 2014 (through June 30, 2014), the EEOC received 663 charges raising allegations of sex discrimination related to sexual orientation and 140 charges alleging sex discrimination based on gender identity, for 784 total.⁸¹ Prorating the total number of sex discrimination charges filed with the agency in 2013 and 2014 to obtain estimates for three quarters, the sexual orientation- and gender identity-related filings represent approximately four percent of the total sex discrimination charges filed for each year.⁸²

In the 50 years since passage of the Civil Rights Act, the meaning of "because . . . of sex" has changed considerably, and no doubt the case law will continue to evolve, with perhaps profound impacts on gay, lesbian, and transgender Americans.

⁷⁹ See Order Denying Petition for Rehearing, *Muhammad*, 767 F.3d 694 (No. 12-1723).

⁸⁰ *Strategic Enforcement Plan*, *supra* note 62, at 10.

⁸¹ U.S. Equal Emp't Opportunity Comm'n, *What You Should Know about EEOC and the Enforcement Protections for LGBT Workers*, www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁸² See U.S. Equal Emp't Opportunity Comm'n, *Charge Statistics: FY 1997 Through FY 2014*, www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.