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ERASING BOUNDARIES: MASCULINITIES, SEXUAL MINORITIES, AND EMPLOYMENT DISCRIMINATION†

Ann C. McGinley*

This Article analyzes the application of employment discrimination law to sexual minorities—lesbians, gays, bisexuals, transgender and intersex individuals. It evaluates Title VII and state anti-discrimination laws' treatment of these individuals, and is the first article to use masculinities research, theoretical and empirical, to explain employment discrimination against sexual minorities.

While the Article concludes that new legislation would further the interests of sexual minorities, it posits that it is neither necessary nor sufficient to solving the employment discrimination problems of sexual minorities. A major problem lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites, and that sees gender as naturally flowing from biological sex. Without courts' understanding that our current binary concept of gender may be socially constructed and artificially rigid rather than a natural result of biology, even new legislation may fail to protect the workers it seeks to protect.

The Article demonstrates that research on masculinities can help courts better understand sexual minorities and the motivations of those who discriminate against them in the workplace. It concludes that even in the absence of new legislation, a proper interpretation of Title VII's sex discrimination provision would protect sexual minorities from discrimination and would provide reasonable accommodation to allow sexual minorities to live and work with dignity and security. With an understanding of sexual minorities and the reasons why discrimination occurs, Title VII's prohibition of discrimination "because of sex" should be sufficient to grant sexual minorities workplace rights.

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I. INTRODUCTION

Title VII of the 1964 Civil Rights Act¹ protects against employment discrimination based on sex. The law is unsettled, however, as it relates to sexual minorities. The statute does not explicitly protect individuals based on sexual orientation, gender identity or expression.² In fact, federal courts have uniformly held that discrimination based on sexual orientation is not discrimination based on sex and, therefore, is not prohibited by the federal act.³ Moreover, all but one federal court to hear the issue have concluded that discrimination because a person is transgender⁴ is not prohibited by the statute.⁵

But sexual minorities have made some progress toward protection against employment discrimination by using the *Price Waterhouse* stereotyping doctrine to advance their cause. *Price Waterhouse v. Hopkins*⁶ held that it is illegal sex discrimination to deny a masculine woman a promotion at the employer's firm because of her failure to adhere to stereotypes of appropriate feminine behavior and dress. A number of courts have interpreted *Price Waterhouse* to protect gay, lesbian or transgender workers

1. 42 U.S.C. § 2000e-2 (2006).

2. See *id.* "Gender identity" is the personal concept of whether a person is a man or a woman. CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 69–70 (1998). "Gender role" or "expression" is the public manifestation of a person's gender identity such as behavior and dress. Shubo Ghosh & Leslie Walker, *Sexuality: Gender Identity*, EMEDICINE, May 19, 2009, <http://www.emedicine.com/ped/TOPICT2789.htm> (on file with the University of Michigan Journal of Law Reform). As used here, the term "sexual orientation" refers to the orientation that a person has with respect to sexual pleasure, which is defined by the object of the individual's sexual attention: homosexual, heterosexual, bisexual or other.

3. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979).

4. "Transgender" or "transgendered" is the umbrella term used to describe persons whose gender identity and/or expression differ from those expected of persons of their biological sex. See American Psychological Ass'n, Answers to Your Questions About Transgender Individuals and Gender Identity, <http://apa.org/topics/transgender.html> (on file with the University of Michigan Journal of Law Reform). Transsexuals are transgender persons who live and/or work in a gender other than that assigned to them at birth. They often accomplish this endeavor by taking hormones and having sex reassignment surgery and/or other surgeries such as facial feminizing surgery for men transitioning to women, and chest reconstruction for women transitioning to men. *Id.*; see also Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. ECON. ANALYSIS & POL'Y, Jan. 2008, at 6.

5. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that discrimination based on transgender status is not illegal sex discrimination under Title VII); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (same). But see *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that Title VII prohibits discrimination against an individual because he or she is transgender).

6. 490 U.S. 228 (1989).

where the discrimination occurs because of the individual's failure to conform to prescribed gender norms and stereotypes.⁷ Courts have not uniformly accepted this interpretation, however, and even courts that accept the doctrine often hold that it does not protect individual litigants before them.⁸ Courts have drawn boundaries in various ways, often avoiding protection for sexual minorities. These boundaries include barriers between discrimination based on sexual stereotyping (which is sex discrimination) and discrimination based on sexual orientation or gender identity (which is not). Even in response to motions for summary judgment, courts distinguish between harassing behaviors that are motivated by sex stereotyping and those that are motivated by sexual orientation or gender identity. Determining motivation in such a complex area as gender is artificial and unconvincing, especially without a full record and expert testimony.

Because of the uneven protection of sexual minorities from employment discrimination, advocates for sexual minorities have lobbied Congress for years either to amend Title VII or to pass a new law to protect against employment discrimination based on sexual orientation and gender identity. While a number of bills have been introduced in the House and the Senate, to date, none of these bills has passed both houses of Congress. Currently, there are bills before both the House of Representatives and the Senate.⁹ These bills create the Employment Non-Discrimination Act of 2009 (ENDA). Even if Congress enacts one of these bills, there remains a question as to whether courts will interpret it to give broad protection to sexual minorities in the workplace.

The problem of adequately protecting sexual minorities under Title VII lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex. Without understanding that our current binary concept of gender may be socially constructed and artificially rigid rather than a natural result of biology, the law, even if it explicitly protects persons based on sexual orientation and gender identity, may fail to shelter from discrimination those workers it seeks to protect. Gender scholars and, in particular, masculinities scholars can help courts understand why the boundary-drawing is based on a misunderstanding of sexual minorities.

7. See *infra* Part III.C.

8. See *infra* notes 150, 152, 273–296 and accompanying text.

9. See *infra* notes 12, 94–103 and accompanying text.

This Article discusses how workplace discrimination law applies to the different groups of individuals who do not fit within binary conceptions of gender or sex—lesbians, gays, bisexuals, transgender and intersex¹⁰ individuals. It analyzes Title VII and state anti-discrimination laws' treatment of these individuals at work, and uses masculinities and other gender research to provide a theoretical account that explains, at least in part, discrimination against members of these groups. Finally, the Article proposes that the best solution is to pass a federal statute or amendment to Title VII that would protect individuals from discrimination based on sexual orientation, intersex condition, gender identity and expression, and that would provide reasonable accommodations to transgender and intersex individuals for access to appropriate restroom and locker facilities at work. Even without passage of a federal act, however, this Article concludes that courts should interpret the sex discrimination provisions of Title VII and its state counterparts, with the aid of masculinities and other social science research, to protect persons from discrimination at work based on sexual orientation, intersex condition, gender identity or expression.

Masculinities research demonstrates that much harassing behavior directed at gays and transsexuals occurs because of sex or gender, and is therefore prohibited by Title VII. It occurs because of the sex or gender of the harasser and of the victim. The harasser is motivated to harass in order to negotiate his masculinity in the workplace and to prove that the job in question is masculine. The victim is harassed because he or she (in the case of a Male-to-Female transsexual) is perceived to be insufficiently masculine to continue in the job.

Part II of the Article analyzes the gender and masculinities research that challenges our binary concept of gender. Part III examines the federal and state case law dealing with employment

10. Intersex individuals are persons born with indeterminate sex because their chromosomes do not match their genitalia, or their genitalia is ambiguous, or they carry an extra chromosome or a mosaic chromosomal pattern. CATHERINE HARPER, INTERSEX 9–12 (2007); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, at 20, 22. The American Academy of Pediatrics has recommended that the terms “intersex,” “hermaphrodite” and “pseudohermaphrodite” be replaced because they are considered pejorative. The Academy recommends the term “disorders of sex development” (DSD). See Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e488 (2006) (on file with the University of Michigan Journal of Law Reform), available at <http://www.pediatrics.org/cgi/content/full/118/2/e488>. Because “intersex” continues to be used commonly in non-derogatory ways and the term “DSD” has not acquired much of a following, I use both terms in this Article.

discrimination against sexual minorities (LGBT individuals)¹¹ and reveals the underlying assumptions supporting much of the analysis. Part IV demonstrates how theoretical understandings of masculinities theory would inform courts and Congress about the nature of gender. This better understanding should lead to the passage of federal legislative protections, and even in the absence of federal legislation, better judicial interpretations. Finally, the Article concludes that courts should look to masculinities research in applying Title VII and state discrimination laws (and ENDA 2009,¹² if it passes) to sexual minorities. Only with an understanding of this research will courts recognize that discrimination against sexual minorities is always “because of sex” and sexual minorities should be protected by current law, with or without passage of ENDA 2009, in a manner that gives them full rights in the workplace.

II. BACKGROUND: GENDER AS A BINARY: FEMINISM, QUEER THEORY AND MASCULINITIES THEORY

A. Feminist Accounts of Gender

Popular culture perceives gender as a fixed phenomenon that derives naturally from an individual’s biological sex. It assumes that persons categorized as female biologically should be, and naturally are, feminine and attracted to men, and that persons categorized as male biologically should be, and naturally are, masculine and attracted to women. According to popular culture, gender is a means of promoting reproduction; gender relates to biological sex as “feminine” relates to female and “masculine” relates to male. Many of these perceptions are unconscious or hidden because they seem natural.

Sociologists and feminist scholars argue that gender is socially constructed,¹³ that gender role or expression is not natural but

11. “LGBT” stands for “lesbians, gays, bisexuals and transsexuals.” At times it is written as “LGBTI” to include intersex individuals or “LGBTQ” to include queer individuals. While I use “LGBT” throughout the Article because it is more common, I do not intend to exclude intersex or queer individuals.

12. Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

13. See, e.g., Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender*, 66 Soc. INQUIRY 143, 146–47 (1996) (stating that gender is “a social institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself.”).

learned behavior. It is a performance that is contestable or changeable. The popular binary view exaggerates differences between men and women and disregards similarities.¹⁴ It does not take into account biological variety, individual difference, diverse sexual orientation and the role that society plays in constructing biology,¹⁵ gender and sexual orientation. It converts persons who do not fit into the binary into unnatural outcasts. These outcasts include, among others, feminine men, masculine women, gays, lesbians, bisexuals,¹⁶ transgender, transsexual, intersex and gender queer individuals.¹⁷ While biology clearly plays an important role in behavior, the history of the American medical profession in constructing gender by attempting to force individuals to conform to gender norms and roles demonstrates the importance of social construction of gender.¹⁸

B. Sexual Orientation and Heteronormativity: Queer Theory

A binary conception of gender also leads to the inevitable conclusion that heterosexuality is normal and that homosexuality is abnormal. Queer theorists argue that heterosexuality as “the norm” is socially constructed.

14. See, e.g., R.W. CONNELL, MASCULINITIES 231–34 (2d ed. 2005); JUDITH LORBER, PARADOXES OF GENDER 294–302 (1994); Lorber, *supra* note 13, at 144–45 (arguing that adopting binary concepts reinforces the view of normal and deviant); Judith Lorber, *Using Gender to Undo Gender: A Feminist Degendering Movement*, 1 FEMINIST THEORY 79, 83 (2000).

15. Society constructs biology by deciding which sex a child who is born with ambiguous sexuality will be raised and by subjecting the child to surgery to attempt to make the child’s body align with the chosen sex. See Alice Domurat Dreger, “Ambiguous Sex”—or *Ambivalent Medicine?: Ethical Issues in the Treatment of Intersexuality*, HASTINGS CENTER REP., May–June 1998, at 24, 27; see also Meghan Daum, *The Case of Caster Semenya*, L.A. TIMES, Sept. 17, 2009, at A27 (describing the controversy over the South African runner who won an international race in Berlin as a woman, but who was later found to be intersex).

16. Defining “bisexual” may be more complicated than originally one would think. See *infra* Part III.C.2.

17. “Gender queer” individuals are persons who feel needlessly constrained by the sex/gender binary. This term can include gays, lesbians, bisexuals and transgender individuals and even heterosexuals who find sex/gender constricting. Queer individuals can be part of a queer social movement if they are willing to accept the term and to identify as queer and to recognize their own privilege vis-à-vis others. See Coralee Drechsler, *We Are All Others: An Argument for Queer*, in BISEXUALITY AND TRANSGENDERISM: INTERSECTIONS OF THE OTHERS 265, 273–74 (Jonathan Alexander & Karen Yescavage eds., 2003). “Queer,” then, is more of a political movement than a sexual or gender identity.

18. See, e.g., JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES 125–26 (2002) (describing leading doctors in the 1960s who established gender identity programs that taught parents how to establish and reinforce gender roles for their children, including attempts to get “sissy” boys to act more masculine and “tomboy” girls to act more feminine).

Queer theory, which derives from cultural studies, comprises four different concepts: (1) that sexuality is central to the struggle for political power whether it is obvious or not; (2) that identity is performative, not natural; (3) that political struggle is an ironic parody rather than a true struggle for liberation; and (4) that popular culture may offer a window into the struggle for political power that may actually prove to be transformative.¹⁹

Queer theorists argue that power and political meaning are created through binaries that “are inflected with sex.”²⁰ These binaries include heterosexual/homosexual, reason/desire, man/woman.²¹ The binary terms, however, are not equal. While one depends on the other for its meaning, the first is cast as acceptable and good and the second is of questionable legitimacy. Queer theory distinguishes itself from other postmodern theories by asserting that every binary is inflected with sex, even those that appear to have nothing to do with sexuality.²² Persons who are associated with the questionable term tend to closet themselves while those associated with the acceptable term may “out” them. An example of this dynamic is the insecure heterosexual who engages in “gay bashing” in order to secure his or her superior position as heterosexual.²³ Thus, according to queer theory, heterosexuality needs homosexuality in order to establish heterosexual identity as “non-homosexual” and to maintain a superior position. While LGBT groups have encouraged coming out of the closet as a means of communicating one’s true identity, many queer theorists are skeptical, arguing that sexuality is not fixed, but elusive and changing, and that coming out permits heterosexuality to use homosexuality as a foil so that heterosexuals may maintain a dominant position.²⁴

Queer theorists claim that identity is fluid and is therefore performative. They differ from the gay identity approach that sees some people as homosexual and others as heterosexual. Gay identity is receptive to the idea that sexuality has biological roots.²⁵ Queer theorists argue instead that identity is not fixed or natural, but relational and learned—it depends on the interaction with others.²⁶ They conclude that lesbian and gay identities, even though they are constructed on the ideal of equality, actually

19. See Susan Burgess, *Queer (Theory) Eye for the Straight (Legal) Guy*: Lawrence v. Texas’ Makeover of Bowers v. Hardwick, 59 POL. RES. Q. 401, 402–05 (2006).

20. *Id.* at 403.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. JANET HALLEY, SPLIT DECISIONS 113 (2006).

26. See Burgess, *supra* note 19, at 403.

exclude others, such as transgender persons, as outsiders.²⁷ Queer theorists use parody and irony as strategies to comment on gender and sex. For example, they see drag queens as offering an exaggerated and humorous parody on sex and gender. Such drag performances may “destabilize well-worn, yet firmly entrenched discourses, such as identity discussions that are a product of the heterosexual/homosexual binary.”²⁸

C. Masculinities Theory and Gender

Developed primarily by sociologists to understand men and masculinity, masculinities studies also draw from psychology, criminology, feminist theory, queer theory, anthropology and geography.²⁹ Most masculinities theorists accept that gender is socially constructed, but there are variations among masculinities experts in their view of the importance of the body, and in whether biology plays any role in establishing norms of behavior. R.W. Connell, a leading theorist in masculinities, for example, sees gender as an ordering of social practice based on reproductive capacity rather than on biology.³⁰ Connell believes that gender exists to fill in the gaps left by biology.³¹ But she disagrees with those social constructionists who see the body as merely a “landscape” on which to draw or a perspective from which one speaks.³² Instead, she argues that while gender is socially constructed and not biologically predetermined, our bodies play a role in this material construction.³³

Masculinities researchers consider how societal norms shape behavior of individual men and women, how masculinities are imbedded in the structure of institutions, and how individuals and groups perform masculinities within those institutions. The term “masculinities” has multiple meanings. For purposes of this Article, it refers to the construction of masculine identities at work through performance, and a set of practices and the active engagement in these practices by men or women at work. These practices, consciously or unconsciously, reinforce the gender hierarchy in workplaces by conflating “doing masculinity” with work itself.

27. See Drechsler, *supra* note 17, at 273.

28. Burgess, *supra* note 19, at 404.

29. See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 211–21 (2008).

30. See, e.g., CONNELL, *supra* note 14, at 71–72.

31. *Id.*

32. *Id.* at 50–52.

33. *Id.*

1. The Construction of Masculine Identities Through Performance

Masculinities are plural. There are multiple forms of masculinity that are affected by time, place, social class, race, gender, sexual orientation, age, disability and national origin. Thus, masculinities theorists prefer the term “masculinities” to “masculinity.” Moreover, masculinities are not static, but active and changeable.³⁴

The normative masculinity in the American workplace includes aggression, competition, and anxiety.³⁵ Although numerous masculinities exist in tension with one another, the powerful hegemonic masculinity is white, middle class, and heterosexual.³⁶ Masculinities researchers posit that our culture rewards white middle-class men who compete to prove their masculinity, exclude women from power because they lack masculinity, and exclude men from power who do not live up to the normative definition of masculinity.³⁷ Masculinity as anti-femininity “lies at the heart of contemporary and historical conceptions of manhood, so that masculinity is defined more by what one is not rather than who one is.”³⁸ Masculinity involves a flight from the feminine, and a fear of homosexuality. Men engage in “homosocial events” to gain acceptance by testing themselves in order to prove to other men that they are masculine.³⁹ This is a dangerous experience for the men, full of risk and relentless competition.⁴⁰ The pressure to prove one’s masculinity is constant and the competition is keen.

Masculinity is fragile. Men compete to prove that they are masculine because without masculinity, they are empty vessels. But the vast majority of men can not achieve the ideal hegemonic form of masculinity. As they fall short, they suffer and often cause others who are subordinated to them to suffer as well in order to capture whatever masculinity they can.⁴¹

34. See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM AND MASCULINITIES 182, 183–84 (Peter F. Murphy ed., 2004).

35. *Id.*

36. *Id.* at 184.

37. *Id.* at 184–85.

38. *Id.* at 185. As Kenneth Karst states, “[t]he main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy’s need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don’t be a girl.” Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).

39. Kimmel, *supra* note 34, at 186–87.

40. *Id.*

41. See *id.* at 184–87.

Many who perform masculinities see homosexuality as feminine behavior; homophobia "is a central organizing principle of our cultural definition of manhood. Homophobia is more than the irrational fear of gay men, more than the fear that we might be perceived as gay."⁴² It is a fear that other men will recognize that men are not as masculine as they pretend to be.⁴³ This fear creates shame and leads to an unwillingness to stand up for others who are harassed.⁴⁴ Moreover, it compels men to enact exaggerated masculine behaviors and to project attitudes that women and gays are "the other" with whom men compare themselves in order to establish their own "manhood."⁴⁵

Hegemonic masculinity is the powerful masculinity in a particular place at a particular time. It is the "configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees . . . the dominant position of men and the subordination of women."⁴⁶ Subordinated masculinities are forms of masculinity performed by those who do not have the power to perform hegemonic masculinities because of their position in society. Often the response of the subordinated masculinities is subversive in that it resists the hegemonic form of masculinity and presents a different, often more forceful or violent form of masculinity. Social scientists have studied the performance of masculinities in workplace environments that are all male or predominantly male.⁴⁷ They observe that even in the absence of women workers, men enact masculinities in relationship to one another. That is, they engage in competitive ritual behaviors such as sexual humor, aggressive derogatory comments and physical touching and grabbing of other men's genitals.⁴⁸ The men compete aggressively by engaging in these behaviors in order to prove their masculinity to one another.

Men use humor to build a sense of solidarity, to break the monotony of their jobs, and to resist the tight control exercised over them by the managers.⁴⁹ In a study of the relationship between humor and masculinity in blue collar shops in England, the men working on the shop floor developed a "shared sense of masculinity" by adopting exaggerated nicknames for each other and by

42. *Id.* at 188.

43. *Id.* at 189.

44. *Id.*

45. *Id.* at 191.

46. CONNELL, *supra* note 14, at 77.

47. See, e.g., David L. Collinson, 'Engineering Humor': Masculinity, Joking and Conflict in Shop-floor Relations, 9 ORG. STUD. 181 (1988).

48. *Id.* at 185-86, 189.

49. *Id.*

using hyper-masculine banter on the shop floor, “permeated by uninhibited swearing, mutual ridicule, [and] displays of sexuality and ‘pranks.’”⁵⁰ By contrasting their own hyper-masculinity with what they characterized as effeminate behavior of management, the men actively resisted their subordination by management.⁵¹ Their resistance was couched in explicit gender terms. They characterized management as effeminate: “twats” and “nancy boys.”⁵² This humor gave them a sense of power and authority at work, permitting them to “negate and distance”⁵³ their managers, even though the shop jobs required monotonous, repetitious tasks. Their use of humor also allowed the men to exercise pressure on the group to conform to working-class masculinity.

Collinson observes, however, that many of the men admitted to him that they did not act this way at home.⁵⁴ Indeed, their behavior at work was a performance that established their identities as masculine men, a performance that was necessary to survive the work environment. The gendered behavior did not exist outside of the workplace; rather, the men’s gender identities were socially enacted at work through their performances and their interactions with one another. Devon Carbado and Mitu Gulati explain that the performance of identities helps outsiders become more acceptable in the workplace, but may become a denial of oneself.⁵⁵ While men perform masculinities in the shop context to resist supervisors’ authority, these behaviors also appear to be identity performances to gain acceptance.

Women, effeminate men and transgender individuals may be harassed to undermine their competence, to force them out of the job, and to preserve the job as a masculine enclave.⁵⁶ Men also direct this behavior at newcomers and even at those who have been in the workplace for a period in order to assure that they conform to the group’s masculine norms and that they perform the behaviors that reinforce the norms.⁵⁷ These behaviors assure the job’s masculine identity, and the masculine identity of those holding the jobs. These performances often involve harassment directed at the

50. *Id.* at 185–86.

51. *See id.*

52. *See id.* at 186.

53. *See id.* at 186.

54. *See id.* at 192.

55. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (describing how outsider employees perform their identities in the workplace).

56. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1762–69 (1998).

57. *Id.*; *cf.* PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* 166–79 (2d ed. 2007) (describing hazing in college fraternities).

outsider who can not or will not perform masculinity in an acceptable manner. Common targets are effeminate men, gay men, and transgender individuals. The harassment of these individuals occurs because of sex or gender because the harasser uses the victim, who displays a less fulsome masculinity, as a means of proving his own masculinity.

2. Masculinities: Practices at Work

Besides constructing identity through performance, the term “masculinities” as used here refers to practices. These practices become so conflated with work and success at work that they are often invisible to those who practice them. Moreover, because of their association with the norm at work, both women and men can engage in these behaviors. These practices vary depending on the type of workplace, but their dominant characteristic is that they often affect men and women differently in the workplace.

a. White Collar Masculinities

Collinson and Hearn identified five types of masculinities practiced in white collar workplaces. They include authoritarianism, paternalism, entrepreneurialism, informalism and careerism.⁵⁸ Managers who practice authoritarianism broach no dissent or difference, are unwilling to engage in dialogue, and prefer coercive power and control over subordinates.⁵⁹ Paternalism is enacted by managers who model themselves on the father in a family.⁶⁰ They emphasize personal trust and loyalty. The effect is to ensure the subordinate’s cooperation and to enhance the manager’s power. Entrepreneurialism is a highly competitive style that elevates efficiency and managerial control over other values.⁶¹ It requires subordinates to work long hours, to be mobile geographically, and to meet tight deadlines. Informalism is a method of building relationships based on shared interests.⁶² Talk about women, sex, and baseball builds relationships between men while screening out female colleagues. Careerism is a masculinity enacted by middle-class

58. David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER WORK & ORG. 2, 13–16 (1994).

59. *Id.* at 13.

60. *Id.* at 13–14.

61. *Id.* at 14.

62. *Id.* at 14–15.

white managers whose masculine identity is linked to hard work and upward movement in their careers.⁶³

b. Blatant Masculinities

In more blatant forms, masculinities may include physical and verbal abuse of females in predominately male workplaces, of male victims who are homosexual or otherwise do not conform to masculine stereotypes, and of transgender individuals. The victims are harmed because of their gender. Women suffer severe hostility and sexual harassment when they are the objects of the behavior. The harm to gender non-conforming men is obvious: they are pushed, prodded, threatened, ridiculed and even raped at work. Male to female transsexuals are particularly vulnerable to these behaviors because they threaten the masculinity of the group and of the work itself. Men trying to prove their masculinity degrade victims through taunts and practices that compare the male victims to women or that ascribe traits to the victims that are considered “feminine.” By openly abusing men who do not conform to gender stereotypes, men police the social and gender order at work, reinforcing the definition of certain jobs as “masculine” and closed to non-conforming men and most women. Finally, the abusive behavior toward gender non-conforming men reinforces the gendered institution of work, an institution that privileges heterosexual white men over women, homosexual men, and transsexuals.

3. Applications of Masculinities Studies to Title VII

While masculinities theory shares many premises with feminist theory and draws much of its analysis from feminism, masculinities theory attempts to demonstrate why a reverence for the hegemonic forms of masculinity harms men as well as women.⁶⁴ It acknowledges that men as a group are powerful, but also claims that individual men often feel powerless.⁶⁵ These feelings of powerlessness derive from pressure on men to act as breadwinners, to

63. *Id.* at 15–16.

64. See Peter F. Murphy, *Introduction to FEMINISM AND MASCULINITIES* 1, 9–10 (Peter F. Murphy ed., 2004); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in *FEMINISM AND MASCULINITIES*, *supra* this note, at 57, 57–60, 67.

65. See Kimmel, *supra* note 34, at 194–95.

compete with other men to demonstrate their masculinity, and to deny their emotions.⁶⁶

Masculinities studies combine with other social science research to uncover hidden gendered expectations and biases, to interpret cultural meanings, and to provide new interpretations of the law. Combined with other research on gender, masculinities studies offers a better understanding of the way men and women behave and of the culture's interpretations of that behavior.

While masculinities studies is not a comprehensive theory for understanding human behavior, it offers explanations that other theories do not. First, by focusing on men's behaviors and motivations as well as the structures that benefit men, masculinities studies help us understand men and power, and the importance of recognizing that although individual men might benefit from the patriarchal dividend,⁶⁷ they may not be entirely powerful in their daily lives. This is because men are not all situated in similarly powerful positions vis-à-vis one another. A focus on men helps us understand that men are unequally positioned because of race, national origin, class, and even appearance and height. Inequalities result from these other identity factors as they intersect with gender. Perhaps even more crucial, masculinities studies help explain that workplace structures are themselves masculine and that masculine structures and behaviors are conflated with work. Women, transgender individuals, gay men and men of color who attempt to assimilate into the masculine workplace will have to work harder because their lived experiences are different from those of straight white men. Despite these efforts, often these individuals fail because they do not conform to gender expectations and are therefore subject to discrimination and harassment at work.

III. THE LAW OF SEXUAL MINORITIES AND EMPLOYMENT DISCRIMINATION

A. Background: Political and Identity Issues in the LGBT Community

Generally, Title VII law has not protected lesbian, gay, bisexual, transgender, intersex, and queer individuals from discrimination based on their failure to fit neatly into the binary concepts of male and female. The binary concept of male and female, masculine

66. See *id.*; Pleck, *supra* note 64, at 59–60.

67. The “patriarchal dividend” is the “advantage men in general gain from the overall subordination of women.” CONNELL, *supra* note 14, at 79.

and feminine, gives rise to heteronormativity, the conclusion that heterosexual relations between women and men are natural and that homosexual behavior is unnatural. While heteronormativity prevails, society's opinion of homosexuality has changed significantly over the past twenty-five years. Homosexuality was listed as a mental disorder until 1973 in the *Diagnostic and Statistical Manual of Mental Disorders*; in 1973, the American Psychiatric Association reversed course and concluded that homosexuality is not a mental disorder.⁶⁸ Today, although still controversial, many consider homosexuality to be an identity, rather than an illness or deviant behavior, and a number of state laws protect civil unions between gays or gay marriage.⁶⁹ Nonetheless, lesbians and gays continue to suffer discrimination in workplaces, and recognition of gay relationships may exclude other sexual minorities by reinforcing a new binary concept of heterosexuality versus homosexuality.

Even with the increasing acceptance of homosexual identity and relationships, this newly expanded binary presumes that persons are either male or female and that they fit into one of two categories of sexual orientation: heterosexual or homosexual. This presumption does not track reality. Other groups experiencing discrimination because their gender identities or expressions do not comport with binary definitions include bisexual, transgender and transsexual, intersex and queer individuals. While there has been considerable scholarship on gay and lesbian rights, legal scholars have just recently begun to grapple with the treatment of transgender and intersex individuals.⁷⁰ There is to date no published legal scholarship on bisexuals in the workplace.

68. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302 (2d ed. 1974); see also Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at 1.

69. See Nat'l Conference of State Legislatures, Same Sex Marriage, Civil Unions, and Domestic Partnerships, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (on file with the University of Michigan Journal of Law Reform).

70. See, e.g., Nancy Ehrenreich, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices"*, 40 HARV. C.R.-C.L. L. REV. 71, 77-79 (2005) (comparing surgery on intersex infants in the United States with female circumcisions performed in African nations); Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99, 103-07 (2005) (describing the debates between the intersex community and other members of the LGBT community); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (arguing that the law should permit self-identification of sexual minorities); L. Camille Hebert, *Transforming Transsexual and Transgender Rights*, 15 WM & MARY J. WOMEN & L. 535 (2009) (concluding that courts should treat discrimination against transgender persons as discrimination because of sex under Title VII); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243 (2008) (same); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. REV. 205, 239-42

*B. Congressional Attempts to Ban Sexual Orientation
and Gender Identity Discrimination*

Title VII prohibits discrimination against employees and applicants based on sex, but does not expressly protect employees and applicants from discrimination based on sexual orientation, gender identity or gender expression.⁷¹ Twenty-four states and the District of Columbia protect against discrimination in employment based on sexual orientation,⁷² and a number of municipalities and counties have enacted similar laws.⁷³ Of the twenty-four states and the District of Columbia, sixteen jurisdictions prohibit discrimination based on gender identity as well.⁷⁴ A few of the states that prohibit discrimination based on sexual orientation or gender identity limit the prohibition to state employment or to a particular

(2009); Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersections*, 7 GEO. J. GENDER & L. 31 (2006) (discussing the courts' distortion of issues confronting sexual minorities though categorization).

71. 42 U.S.C. § 2000e-2 (2006).

72. Alaska, Admin. Order No. 195 (2002); California, CAL. GOV. CODE §§ 12920-12922, 12926(q) (West 2005); Colorado, COLO. REV. STAT. §§ 24-34-401 to -402 (2008); Connecticut, CONN. GEN. STAT. ANN. § 46a-81c (West 2008); Delaware, Del. Exec. Order No. 10, 4 Del. Reg. Regs. 1562 (March 1, 2001); District of Columbia, D.C. CODE § 2-1402.11 (2009); Hawaii, HAW. REV. STAT. ANN. § 378-2(1) (LexisNexis Supp. 2003); Illinois, 775 ILL. COMP. STAT. 5/1-102, 5/2-102 (2008); Indiana, Dept. Child Servs., Policy No. HR-2-5 (2005); Iowa, IOWA CODE § 216.6(1) (2009); Maine, ME. REV. STAT. ANN. tit. 5 § 4572 (2009); Maryland, MD. CODE ANN. art. 49B, § 16 (LexisNexis 2003); Massachusetts, MASS. GEN. LAWS ch. 151B, § 4 (2009); Minnesota, MINN. STAT. § 363A.08 (2009); Nevada, NEV. REV. STAT. § 613.330 (2006); New Hampshire, N.H. REV. STAT. ANN. § 354-A:7 (2009); New Jersey, N.J. STAT. ANN. § 10:5-4 to -12 (West Supp. 2009); New Mexico, N.M. STAT. § 28-1-7 (Supp. 2007); New York, N.Y. EXEC. LAW § 296(1) (McKinney Supp. 2009); Oregon, OR. REV. STAT. § 659A.006 (2008); Pennsylvania, Exec. Order No. 2003-10 (2003); Rhode Island, R.I. GEN. LAWS § 28-5-3 to 28-5-7 (2003); Vermont, VT. STAT. ANN. tit. 21, § 495 (2003); Washington, WASH. REV. CODE ANN. § 49.60.030 (West 2008); Wisconsin, WISC. STAT. ANN. § 111.321.36 (2008).

73. *E.g.*, COLUMBUS, OHIO, ORDINANCE tit. 23, § 2331.03 (1959); COOK COUNTY, ILL., ORDINANCE §§ 42-31, 42-35 (2006); MINNEAPOLIS, MINN., ORDINANCE tit. 7, § 139.40 (1976); PITTSBURGH, PA., ORDINANCE § 659.02 (2006); SAN DIEGO, CAL., ORDINANCE ch. 5, art. 2, div. 96, § 52.9603 (2003); SEATTLE, WASH., ORDINANCE § 14.04.020-04.040 (1980).

74. California, CAL. GOV. CODE § 12926 (West 2005); Colorado, COLO. REV. STAT. §§ 24-34-401 to -402 (2008); Connecticut, CONN. GEN. STAT. ANN. § 46a-81c (West 2008); District of Columbia, D.C. CODE § 2-1402.11 (2009); Illinois, 775 ILL. COMP. STAT. 5/1-102, 5/2-102 (2008); Indiana, Dept. Child Servs. Policy No. HR-2-5 (2005); Iowa, IOWA CODE § 216.6 (1)(2009); Maine, ME. REV. STAT. ANN. tit. 5, § 4572 (2009); Minnesota, MINN. STAT. § 363A.08 (2009); New Jersey, N.J. STAT. ANN. § 10:5-4 to -12 (West Supp. 2009); New Mexico, N.M. STAT. § 28-1-7 (Supp. 2007); Oregon, OR. REV. STAT. § 659A.006 (2008); Pennsylvania, Exec. Order No. 2003-10 (2003); Rhode Island, R.I. GEN. LAWS § 28-5-3 to 28-5-7 (2003); Vermont, VT. STAT. ANN. tit. 21, § 495 (2003); Washington, WASH. REV. CODE ANN. § 49.60.030 (West 2008).

agency in state employment.⁷⁵ Without federal protection, these local and state laws create an uneven patchwork of protection against discrimination.⁷⁶

The federal Americans with Disabilities Act expressly excludes persons based on their sexual orientation and transgender status from the definition of disability.⁷⁷ A few state disability statutes, however, have been interpreted to protect transgender individuals as persons with disabilities.⁷⁸ This protection, however, is sparse and uneven.

Over the past thirty-four years, the United States Congress has considered many bills that would prohibit discrimination based on sexual orientation.⁷⁹ In 1975, Bella Abzug introduced in the United States House of Representatives the first bill to amend Title VII to expressly protect employees and applicants from discrimination based on their sexual orientation.⁸⁰ Since that date, numerous bills have been introduced in the House of Representatives and the United States Senate to protect persons from sexual orientation discrimination. While at least one of these bills came close to passing in the United States Senate, none of them has passed. Representative Barney Frank introduced the Employment Non-Discrimination Act of 2007 (ENDA)⁸¹ in the House of Representatives.⁸² In its original form, ENDA protected against discrimination based on sexual orientation, actual or perceived, and gender identity, actual or perceived.⁸³ The gender identity provision also required that the employer provide reasonable shower and locker room accommodations to transgender persons.⁸⁴ The hearing on H.R. 2015 elicited significant opposition from religious and employer's groups.⁸⁵ These

75. See, e.g., Alaska, Admin. Order No. 195 (2002) (sexual orientation only); Indiana, Dept. Child Servs. Policy No. HR-2-5 (2005) (sexual orientation and gender identity); Pennsylvania, Exec. Order No. 2003-10 (2003) (sexual orientation and gender identity).

76. H.R. REP. NO. 110-406, at 20–21, 23 (2007); see also Hebert, *supra* note 70, at 541–43.

77. 42 U.S.C. §§ 12208, 12211 (2006).

78. See, e.g., *Doe v. Electro-Craft Corp.*, No. 87-E-132, 1988 WL 1091932 (N.H. Super. Ct. April 8, 1988); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001). *But see Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (holding that plaintiff's gender dysphoria was not a handicap under state law because there was no proof that the employer discriminated because of her gender dysphoria, but implying that if proof of causation existed, gender dysphoria would be protected by the disability statute).

79. See generally H.R. REP. NO. 110-406 (2007).

80. *Id.* at 2.

81. H.R. 2015, 110th Cong. (2007).

82. H.R. REP. NO. 110-406, at 2–8 (2007).

83. H.R. 2015 § 4.

84. *Id.* § 8(a)(3).

85. *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Comm. on Education & Labor*, 110th Cong. 42–47 (2007) (statement of Mark Fahleson, Adjunct Professor of Employment Law, University of

groups were most concerned with the narrow exemption for religious organizations and what they considered to be the vagueness of the definition and protection based on gender identity.⁸⁶ Opponents also objected because they believed that a provision in the statute that permitted an employer to require reasonable dress codes could not co-exist with the protections of gender identity.⁸⁷ In order to pass the bill, its proponents agreed to a compromise that protects individuals based on sexual orientation, actual or perceived, and that gives broad exemptions to religious organizations, but does not expressly protect individuals based on gender identity.⁸⁸ Consequently, the compromise also eliminated the employer's duty to provide reasonable accommodations to an individual's gender identity. The amended bill, H.R. 3685, which defined the term "sexual orientation" to mean "homosexuality, heterosexuality, or bisexuality,"⁸⁹ passed the House of Representatives on November 7, 2007 and was placed on the Senate calendar.⁹⁰ There was no Senate action on the bill.

The bill tracked much of the language of Title VII, but it would have created a separate law making it illegal to discriminate against employees and applicants based on their sexual orientation or perceived sexual orientation. Moreover, while it permitted employees to bring disparate treatment claims for damages if there is proof that the employer intentionally violated the Act, it did not provide for a cause of action if an employer's neutral policies and practices created a disparate impact on gay men, lesbians and bisexuals.⁹¹ Finally, it explicitly stated that it did not "invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State."⁹² This section confirmed that Congress did not intend to overrule

Nebraska College of Law); *id.* at 56 (letter from the General Conference of Seventh Day Adventists, the Union of Orthodox Jewish Congregations, and the U.S. Conference of Catholic Bishops).

86. *See id.*

87. *See id.* at 36–39 (2007) (statement of Lawrence Lorber, Partner, Proskauer Rose LLP).

88. *See* H.R. 2015, 110th Cong. (2007) (protecting gender identity); H.R. 3685, 110th Cong. (2007) (protecting against discrimination based on sexual orientation, actual or perceived, but not referring to gender identity).

89. H.R. 3685, 110th Cong. § 3(a) (8) (2007).

90. 153 Cong. Rec. H13227 (daily ed. Nov. 7, 2009) (vote on H.R. 3685, 110th Cong. (2007)).

91. H.R. REP. NO. 110-406, at 10 (2007). This contrasts with at least one state statute that has been interpreted to grant a disparate impact cause of action based on sexual orientation. *See Taylor v. N.Y. Univ. Med. Ctr.*, 21 Misc.3d 23 (N.Y. Sup. Ct. 2008) (noting that New York law grants a disparate impact cause of action).

92. H.R. 3685 § 15.

the portion of the opinion in *Price Waterhouse v. Hopkins* that has been interpreted by lower courts to protect individuals, including lesbians and gays and transgender persons, from discrimination for their failure to conform to sex or gender stereotypes.⁹³

In June and August 2009, members of the House of Representatives and the Senate introduced identical bills entitled the "Employment Non-Discrimination Act of 2009."⁹⁴ These bills prohibit discrimination against individuals in employment based on perceived or actual sexual orientation and gender identity, and retaliation against them based on their opposition to employment practices made unlawful by the act.⁹⁵ They also make it unlawful to discriminate against an applicant or employee based on the actual or perceived sexual orientation or gender identity of a person with whom he or she associates.⁹⁶

"Sexual orientation" is defined as including homosexuality, heterosexuality or bisexuality.⁹⁷ "Gender identity" is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."⁹⁸

The new bills, like Title VII, grant a cause of action for disparate treatment, but unlike Title VII, do not provide a cause of action for disparate impact.⁹⁹ The bills specify that it is not a violation based on actual or perceived gender identity to deny access to shared shower or dressing facilities in which being seen unclothed is unavoidable.¹⁰⁰ However, to take advantage of this provision, the employer must provide reasonable access to facilities that are not inconsistent with the individual's gender identity at the time of employment or upon notice to the employer that the person is undergoing or has undergone gender transition.¹⁰¹ The bill also states that employers may impose reasonable dress codes during work hours provided that the employer permits the employee undergoing or who has undergone a gender transition to comply with the dress code pertinent to the gender to which the person has transitioned or is transitioning.¹⁰²

93. H.R. REP. NO. 110-406, at 21. For a discussion of the *Price Waterhouse* sex stereotyping theory and the courts' application of it to lesbians, gays and transsexuals, see *infra* Parts III.C.1, III.C.3.

94. H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

95. H.R. 3017 §§ 4-5; S. 1584 §§ 4-5.

96. H.R. 3017 § 4(e); S. 1584 § 4(e).

97. H.R. 3017 § 3(a)(9); S. 1584 § 3(a)(9).

98. H.R. 3017 § 3(a)(6); S. 1584 § 3(a)(6).

99. H.R. 3017 § 4(g); S. 1584 § 4(g).

100. H.R. 3017 § 8(a)(3); S. 1584 § 8(a)(3).

101. H.R. 3017 § 8(a)(3); S. 1584 § 8(a)(3).

102. H.R. 3017 § 8(a)(5); S. 1584 § 8(a)(5).

These latter provisions require a type of reasonable accommodation to the individual's gender transition.

Like the ENDA of 2007, the new ENDA bills also preserve the prior rights and remedies the person has under federal and state law.¹⁰³ This means that even if ENDA passes under its current form, a person may still have a cause of action under Title VII using the sex stereotyping doctrine, or conceivably could have a cause of action for disparate impact under Title VII if the impact results because of the individual's sex or gender.

The political future of ENDA 2009 is uncertain. As recently as November 2009, the Justice Department testified that passage of this law was its top political agenda and that the Obama Administration intended to move on it as soon as the health care reform bill is resolved.¹⁰⁴ It is unclear whether the election of Scott Brown, a Republican, to the former Senate position of Edward Kennedy will affect the politics surrounding the possible passage of ENDA.

C. The Case Law: Sexual Orientation, Gender Identity and Expression: Gays, Lesbians, Bisexuals, Intersex, and Transgender Individuals' Protection by Title VII and State Statutes

Courts have uniformly concluded that Title VII does not prohibit discrimination based on an individual's sexual orientation or transgender status. For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*,¹⁰⁵ the Ninth Circuit considered three consolidated cases brought by gays and lesbians who alleged discriminatory treatment in the workplace or failure to hire because of their sexual orientation. The court rejected the plaintiffs' argument that Title VII protects individuals from discrimination based on their sexual orientation and concluded that when it passed Title VII, Congress did not intend that the term "sex" be interpreted to include sexual orientation. After *DeSantis*, other circuits followed suit.¹⁰⁶

The early cases brought by transgender individuals, *Holloway v. Arthur Andersen & Co.*,¹⁰⁷ *Sommers v. Budget Marketing, Inc.*¹⁰⁸ and *Ulane v. Eastern Airlines, Inc.*,¹⁰⁹ held that Title VII's prohibition

103. H.R. 3017 § 15; S. 1584 § 15.

104. See Posting of David Ingram to LegalTimes, <http://legaltimes.typepad.com/blt/2009/11/employment-discrimination-bill-a-top-priority-doj-says.html> (Nov. 5, 2009, 12:25 EST).

105. 608 F.2d 327 (9th Cir. 1979).

106. See *supra* note 3.

107. 566 F.2d 659 (9th Cir. 1977).

108. 667 F.2d 748 (8th Cir. 1982).

109. 742 F.2d 1081 (7th Cir. 1984); see also *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983) (holding that transsexuals were not protected by prohibition of sex

against discrimination because of sex did not protect transsexuals from discrimination based on their identities as transsexuals, even though there may be a Title VII action if a transsexual is discriminated against because she is female or he is male.¹¹⁰ The courts analogized discrimination based on gender identity, role or expression to discrimination based on sexual orientation, which the courts had concluded was not prohibited by Title VII. They concluded that prohibition of discrimination based on transsexuality, like sexual orientation discrimination, would require Congress to amend the statute. The courts noted that Congress had bills before it to amend the statute to protect against sexual orientation discrimination, but that the amendments did not pass both the House and the Senate. Thus, the courts concluded, without an amendment that covers transsexuals as a protected category, the law does not prohibit employment discrimination against transsexuals.¹¹¹

Since 1989, however, the United States Supreme Court has decided two cases that blur the bright lines between sex and sexual orientation and between sex and transgender status. In *Price Waterhouse v. Hopkins*,¹¹² the Supreme Court expanded the definition of “because of sex” to include a prohibition to discriminate because of a person’s gender. In this context, “gender” means gender role or expression, congruity or incongruity with the cultural norms describing and prescribing the behavior of a person of a particular biological sex. After *Price Waterhouse*, a number of courts have concluded that it is illegal to engage in gender discrimination or harassment because of a person’s failure to conform to gendered expectations in dress and behavior.¹¹³

discrimination in state employment statute). Subsequently, an Iowa statute prohibited discrimination based on gender identity. IOWA CODE § 216.6(1)(2009).

110. A New York court has interpreted the New York gender discrimination provision to ban discrimination against transsexuals because of their transsexuality. See *Maffei v. Kolatton Indus., Inc.*, 626 N.Y.S.2d 391, 395 (Sup. Ct. 1995).

111. See, e.g., *Ulane*, 742 F.2d at 1085–86; see also *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981) (holding that transsexuals were not members of a protected class in a lawsuit brought under 42 U.S.C. § 1985(c)). Recently, at least one court disagreed. The federal district court in the District of Columbia held that discrimination against a transsexual because she is changing her sex is discrimination because of sex based on the clear language of the statute. This case, *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), is discussed *infra*.

112. 490 U.S. 228 (1989).

113. See, e.g., *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000). Exceptions to this doctrine are the appearance and dress code cases that permit an employer to impose “reasonable” differential appearance standards on men and women so long as they do not impose an unequal burden and do not unreasonably stereotype a particular group. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

In *Price Waterhouse*, Ann Hopkins, a successful accountant at the defendant firm, was denied partnership because the partners perceived her as too masculine and aggressive.¹¹⁴ Her mentor explained that she could improve her chances of election to partnership if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”¹¹⁵ The Court concluded that evidence of sex stereotyping tainting the decision making process in *Price Waterhouse* was sufficient to prove that sex was a motivating factor in the refusal to promote Hopkins. Under *Price Waterhouse*, adverse decision making resulting from an employee’s failure to adhere to sex stereotypes is discrimination because of sex.¹¹⁶ In essence, discrimination because of sex also includes discrimination based on gender role or expression.¹¹⁷

Perhaps more than any other recent case, *Price Waterhouse* has the potential to change the gender landscape of the workplace. After *Price Waterhouse*, women are protected from discrimination caused by their failure to act or dress according to feminine gender stereotypes. *Price Waterhouse*, therefore, could not legally refuse to make Ann Hopkins a partner in the firm based on her masculine appearance or behavior. Moreover, although some courts do not agree,¹¹⁸ others conclude that it is illegal to discriminate against men because of their effeminate dress or behavior.¹¹⁹ The case, however, can also be read narrowly and limited to its facts. For example, Judge Posner has argued that *Price Waterhouse* does not protect effeminate men in all-male workplaces because these workplaces do not generally discriminate against men in employment.¹²⁰

Even with a liberal reading of *Price Waterhouse*, cases will fall through the gaps if their facts do not establish that sex stereotyping

114. *Price Waterhouse*, 490 U.S. at 235, 250.

115. *Id.* at 272 (O’Connor, J., concurring) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

116. *Id.* at 250–52.

117. See also *Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000) (reversing district court’s grant of summary judgment because a reasonable jury could conclude that the defendant discharged the plaintiff because of sex stereotyping where there was evidence that she was aggressive but that men who were aggressive were not discharged).

118. See, e.g., *Willborn v. Formosa Plastics Corp. of Tex.*, No. 13-04-007-CV, 2005 WL 1797022 (Tex. App. July 28, 2005) (refusing to recognize a sex stereotyping cause of action under federal law for a male plaintiff who alleged he was harassed by his coworkers because the plaintiff had not demonstrated any United States Supreme Court cases that recognize sex stereotyping can be cognizable, and declaring no cause of action exists under Texas law); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 18, 33, 47 (1995) (discussing how courts treat effeminate men differently from masculine women).

119. See *infra* Parts III.C.1 and III.C.3.

120. See *Hamm*, 332 F.3d at 1066–68 (Posner, J., concurring).

was a motivating factor in the employment decision. For example, while there might be a cause of action for feminine men and masculine women, the plaintiff will prevail only if there is evidence that feminine behavior or dress for men or masculine behavior or dress for women caused the discrimination. In some cases, this evidence may be difficult to establish. Homosexual and bisexual plaintiffs who exhibit gender expressions that comport with societal expectations for their biological sex may have difficulty proving their cases. Moreover, in harassment cases, courts have found it difficult to distinguish between harassment that is motivated by sexual orientation (which is not forbidden by Title VII) and harassment motivated by an individual's failure to conform to gender norms (which is forbidden).¹²¹

In transgender cases, often the problem arises concerning which restroom the transgender individual will use. Without a reasonable accommodation requirement in the case of pre-operative MTF transsexuals, the individual may not be protected by the *Price Waterhouse* stereotyping doctrine. Finally, jurisprudence concerning reasonable dress and appearance regulation may create some exceptions to the *Price Waterhouse* stereotyping doctrine.¹²² All of these potential limitations on *Price Waterhouse* will be discussed in full below.

The second United States Supreme Court case that may open the way to broad protections of sexual minorities is *Oncale v. Sundowner Offshore Services, Inc.*¹²³ *Oncale* involved egregious male-on-male sexual harassment. Joseph Oncale, a roustabout on a Texas oil rig, alleged that coworkers and supervisors restrained him while one placed his penis on Oncale's neck and arm, threatened to rape him and used force to "push a bar of soap into Oncale's anus" while he was in the shower.¹²⁴ Oncale testified at his deposition that he quit his job because he was afraid that he would be raped.¹²⁵ Lower courts had split as to whether a cause of action existed under Title VII for same-sex harassment, and, if so, under what conditions a plaintiff would prevail.¹²⁶ The Supreme Court held

121. See *infra* Part III.C.1.

122. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

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

124. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996), *rev'd and remanded*, 523 U.S. 75 (1998).

125. *Oncale*, 523 U.S. at 77.

126. See, e.g., *Doe v. Belleville*, 119 F.3d 563, 568, 570–74 (7th Cir. 1997) (holding that if the behavior is sexual in nature there may be a cause of action for same-sex harassment); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that there is no cause of action for same-sex harassment where both the alleged victim and the alleged perpetrator are heterosexuals of the same sex); *Garcia v. Elf Atochem N.*

that Title VII creates a cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment created is hostile because of the victim's sex.¹²⁷ The mere fact that the perpetrator and the victim are of the same sex is not a bar to a Title VII sexual harassment cause of action.¹²⁸

The Court noted that in male-on-female sexual harassment cases, it is relatively easy to draw the inference that the behavior occurred because of sex.¹²⁹ Because the behavior is often explicitly sexual in nature, a reasonable fact finder may conclude that the behavior would likely not have occurred had the victim been of the same sex as the perpetrator.¹³⁰ The Court also stated that a same-sex harassment plaintiff may take advantage of the same chain of inference with proof of the homosexuality of the perpetrator.¹³¹ However, the Court recognized that harassment can occur because of one's sex for reasons unrelated to the perpetrator's romantic or sexual interest in the victim.¹³² It suggested three means of proving that the behavior occurred because of sex in same-sex environments. First, the plaintiff may prove that the defendant's employee was homosexual and harbored sexual desire for the plaintiff.¹³³ Second, the plaintiff may prove that the harasser or harassers objected to persons of his or her sex in the workplace.¹³⁴ Third, the plaintiff may demonstrate that there was differential treatment at work of men and women.¹³⁵ While there is debate concerning whether these are the exclusive means of proving that the behavior occurs because of sex,¹³⁶ the *Oncale* Court offered these means of proof as illustrative, rather than exclusive.¹³⁷ Therefore, it should be clear that plaintiffs may prove that same-sex harassment occurs because of sex by other means. Nonetheless, the Court emphasized

Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that there is no cause of action under Title VII for same-sex harassment).

127. *Oncale*, 523 U.S. at 79-80. State courts generally followed this reasoning in applying their own state statutes. See, e.g., *Barbour v. Dep't of Social Servs.*, 198 Mich. App. 183 (App. Ct. 1993) (holding that although the state anti-discrimination act does not proscribe discrimination based on sexual harassment, there is a cause of action for same-sex discrimination occurring because of sex).

128. *Oncale*, 523 U.S. at 79-80.

129. *Id.* at 80.

130. *Id.*

131. *Id.*

132. *Id.* at 80-81.

133. *Id.* at 80.

134. *Id.*

135. *Id.* at 80-81.

136. Some courts have held or assumed that these are the exclusive means of proving that the harassment occurs because of sex.

137. 523 U.S. at 80-81.

that its decision did not turn Title VII into a general civility code.¹³⁸ It noted that Title VII does not prohibit all verbal or physical harassment in the workplace.¹³⁹ Even between men and women behavior is not automatically discrimination because of sex “merely because the words used have sexual content or connotations.”¹⁴⁰ Moreover, the Court noted that Title VII requires that the behavior be sufficiently severe or pervasive from an objective perspective to alter the terms and conditions of employment.¹⁴¹ Simple and innocuous intersex flirtation or male-on-male horseplay would not meet this standard.¹⁴² In determining whether the behavior meets the “severe or pervasive” test, the Court stated that the fact finder should consider “a constellation of surrounding circumstances, expectations, and relationships,”¹⁴³ and a common sense sensibility to social context to determine whether the behavior is merely simple teasing or roughhousing, or severely hostile or abusive.

Proving that gender or sexual harassment occurs because of sex¹⁴⁴ has become increasingly complex since *Oncale*. Where the harassing behavior is sexual in nature, courts have little difficulty finding in a case of male on female harassment that the harassment occurred “because of sex,” automatically drawing the inference that the man’s sexual advances, touches, or jokes are related to the sex of the victim.¹⁴⁵ Courts draw this inference because they generally assume that the purpose for the sexual behavior is to forward the romantic interests of the perpetrator.¹⁴⁶ The courts reason that the perpetrator, presumably a heterosexual in a male-on-female harassment case, would not have behaved the same way with a person of his own sex.¹⁴⁷ Courts have had greater problems concluding that same-sex harassment occurs “because of sex,”

138. *Id.*

139. *Id.* at 80.

140. *Id.*

141. *Id.* at 81.

142. *Id.*

143. *Id.* at 82.

144. See generally Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment ‘Because of Sex’*, 79 U. COLO. L. REV. 1151 (2008).

145. See *Oncale*, 523 U.S. at 80 (“Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.”); see also *Doe v. City of Belleville*, 119 F.3d 563, 574 (7th Cir. 1997) (noting “it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against ‘because of her sex.’”), *vacated*, 523 U.S. 998 (1998).

146. See *Oncale*, 523 U.S. at 80.

147. See *id.*

especially where there is no evidence that the harasser is gay or lesbian.¹⁴⁸

Since *Oncale*, plaintiffs in same-sex hostile environment cases, with varying degree of success, have used the sex stereotyping doctrine of *Price Waterhouse* to prove that their harassment occurred “because of sex.” Male plaintiffs alleging harassment by other men compare their situation to that of Ann Hopkins, who was denied partner status because she did not live up to the ideals of femininity held by the partners. Male coworkers and supervisors harassed male plaintiffs, they argue, because they do not live up to the traditional ideal of masculinity. Transgender individuals, especially transwomen,¹⁴⁹ have also adopted the *Price Waterhouse* doctrine to argue that they have suffered discrimination because they do not live up to the masculine stereotypes that accompany their birth sex, or because, despite having transitioned to women, they do not conform to prescribed norms of female beauty.

1. Protecting Gays and Lesbians Through *Price Waterhouse*

Many post-*Oncale* courts accept that *Price Waterhouse*'s stereotyping doctrine applies to hostile work environment harassment cases,¹⁵⁰ but they struggle with the question of whether the hostile work environment is due to sex stereotyping, which would create a cause of action under Title VII,¹⁵¹ or to the alleged victim's sexual

148. See *Doe*, 119 F.3d at 575.

149. Transsexuals who are born male but transition to female.

150. See, e.g., *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1064 (7th Cir. 2003) (accepting the use of the *Price Waterhouse* sex stereotyping theory where applicable but concluding that the plaintiff's case was not a sex stereotyping case as a matter of law); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (affirming lower court's grant of summary judgment because evidence shows that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 262 n.4 (1st Cir. 1999) (concluding that *Price Waterhouse* creates a cause of action for men who suffer discrimination because of their lack of masculinity); *Equal Empl. Opportunity Comm'n v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004) (denying defendant's motion for summary judgment and stating that it was a question of fact whether the defendant harassed him because he was not sufficiently masculine where the plaintiff did not tell the coworkers he was gay and there was no evidence that they thought he was gay even though the comments they directed at him were “homo” and “faggot”). But see David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1743 (2002) (concluding that *Oncale* does not stand for the proposition that harassment based on non-conformity to gender norms is sex discrimination).

151. See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (where three judges concluded that Rene, a homosexual who had endured attacks and taunts in a same-sex environment, had a cause of action under the sex-stereotyping theory of *Price Waterhouse*); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding

orientation (or perceived sexual orientation), which courts hold is not covered by Title VII.¹⁵²

The cases demonstrate that drawing this line is virtually impossible.¹⁵³ Since *Oncale*, the courts of appeals have dealt with the issue in a number of cases; a number concluded that the plaintiff made out a cause of action¹⁵⁴ for sex stereotyping; with nearly identical

that the plaintiff, an “effeminate man,” had a cause of action under Title VII, using the *Price Waterhouse* sex-stereotyping theory, for same-sex hostile work environment harassment where his coworkers subjected him to taunts).

152. See, e.g., *Hamm*, 332 F.3d at 1062 (affirming the district court’s grant of summary judgment in a Title VII case alleging same-sex hostile work environment because the evidence supported only work performance conflicts or harassment based on perceived sexual orientation, not sexual stereotyping); *Spearman*, 231 F.3d at 1085 (affirming lower court’s grant of summary judgment because evidence showed that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping).

153. One court states that such a claim “requires us to navigate the tricky legal waters of male-on-male sex harassment.” *Hamm*, 332 F.3d at 1062.

154. See *Miller v. City of New York*, No. 04-5536-CV, 2006 WL 1116094 (2d Cir. Apr. 26, 2006) (overturning district court’s grant of summary judgment to the defendant where the plaintiff, a small man with a disability, produced evidence that he was given more difficult work and treated worse because he was not manly enough); *Rene*, 305 F.3d at 1068–69 (plurality decision reversing the district court’s grant of summary judgment to the defendant, and three judges concluding that Rene had preserved his case of sex stereotyping for appeal where the plaintiff was openly gay and his coworkers had teased him about the way he walked, whistled at him, caressed his buttocks, blew kisses at him, touched his body and his face, called him “muneca” or doll); *Nichols*, 256 F.3d at 870, 874 (holding that the district court improperly granted judgment in a bench trial to the defendant where throughout plaintiff’s employment his male coworkers and a supervisor subjected him to name-calling such as “her” and “she,” mocked him for carrying a tray “like a woman” and for not having sex with a waitress who was his friend, called him “faggot” and “fucking female whore,” and directed “the most vulgar name-calling . . . cast in female terms.”); *Schmedding v. Tnemecc Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (holding that the lower court improperly granted a motion to dismiss a heterosexual male’s claim alleging that his coworkers harassed him, calling him a “homo” and “jerk off,” unbuttoned his clothing, patted him on the buttocks, asked him to perform sexual acts, scratched his crotch and humped his door frame, concluding that “simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation.”); *McMullen v. S. Cal. Edison*, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664 (C.D. Cal. Nov. 17, 2008) (denying defendant’s motion to dismiss where the plaintiff alleged he was a gay man and that the defendant discriminated against him for his failure to adhere to sex stereotypes); *Rhea v. Collar Tree Stores, Inc.*, No. 04-2254 ML/V, 2005 WL 2600213 (W.D. Tenn. Oct. 12, 2005) (denying defendant’s motion for summary judgment even though the plaintiff stated that he believed he was discriminated against because of his sexual orientation because the issue is whether the defendant viewed him as too effeminate, not whether he believed they did); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (denying summary judgment to defendant where there was sufficient evidence that lesbian was harassed because she failed to adhere to feminine stereotypes); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (denying summary judgment where the plaintiff, a gay man, presented evidence that the employer harassed and retaliated against him because of his failure to adhere to masculine stereotypes; even though the evidence can also show that he was discriminated against because of his sexual orientation, this evidence is not a bar to his recovery); see also *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) (holding before *Oncale* that the plaintiffs had made out a cause of

facts, others held that the plaintiff did not. In the latter, the courts held that, as a matter of law, the plaintiff was harassed because of his sexual orientation or “perceived homosexuality” rather than for his failure to conform to sex stereotypes.¹⁵⁵

Although decided differently by the courts, the cases are indistinguishable. Typically the cases arise in an all male or virtually all male environment. Coworkers and/or supervisors use vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim, to harass him. Moreover, the taunts invariably include comments questioning the victim’s masculinity and his sexual orientation. Terms such as “bitch,” “fag,” “queer,” “homo,” and “sissy,” actions such as the grabbing of testicles, questions asking whether a person is male or female or “takes it up the ass,” and threats of rape are common. It would be impossible for the courts, the juries,

action for sex stereotyping where coworkers subjected two 16-year-old boys to relentless harassment, called them “fat boy,” “fag,” “queer,” “bitch,” asked them “[a]re you a boy or a girl,” threatened to take them “out to the woods” and grabbed their testicles), *vacated*, 523 U.S. 998 (1998). While *Doe* was vacated by the Supreme Court in light of *Oncale*, *Doe*’s alternative holding based on sex stereotyping is probably still good law. See *Hamm*, 332 F.3d at 1063 (citing to *Doe* for sex stereotyping holding and distinguishing it on its facts); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001) (concluding that the *Doe* holding concerning sex stereotyping is still good law).

155. See *Kiley v. Am. Soc’y for Prevention of Cruelty to Animals*, No. 07-0793-cv, 2008 WL 4442468 (2d Cir. Oct. 2, 2008) (dismissing complaint of pro se litigant stating that she may not use sex stereotyping to “bootstrap” a sexual orientation discrimination case into a violation of Title VII); *Hamm*, 332 F.3d at 1058 (affirming grant of summary judgment to the defendant because no reasonable jury could conclude that the harassment plaintiff suffered was sex stereotyping rather than caused by his work performance or his perceived homosexuality where coworkers regularly threatened plaintiff in vulgar terms, called him “faggot,” “bisexual,” and “girl scout,” and spread rumors that he was gay, warning others not to bend over in front of him); *Kay v. Independence Blue Cross*, 142 F. App’x 48 (3d Cir. 2005) (upholding summary judgment grant to the defendant because court concluded that facts show discrimination based on sexual orientation and not based on gender stereotypes); *Bibby*, 260 F.3d at 257 (affirming district court’s grant of summary judgment because the plaintiff did not present sufficient evidence that the harassment was because of sex where the plaintiff, a gay man, was assaulted at work, told by his assaulter, “everybody knows you’re a faggot,” and “everybody knows you take it up the ass,” called “sissy,” mistreated by his supervisors, and alleged he was discriminated against because of his sexual orientation); *Spearman*, 231 F.3d at 1082–83 (affirming lower court’s grant of summary judgment and concluding that the harassment was because of plaintiff’s perceived sexual orientation where coworkers called plaintiff “little bitch,” “cheap ass bitch,” “[y]ou f—ing jack-off, pussy-ass,” threatened to “f— [his] gay faggot ass up,” wrote graffiti on the bulletin board stating, “Aids kills faggots dead . . . RuPaul, RuSpearman.” (after RuPaul, a black male drag queen)); *Equal Empl. Opportunity Comm’n v. Family Dollar Stores, Inc.*, No. 1:06-CV-2569-TWT, 2008 WL 4098723 (N.D. Ga. Aug. 28, 2008) (granting summary judgment to the defendant because evidence points to discrimination based on perceived sexual orientation rather than stereotyping); *Prowel v. Wise Bus. Forms, Inc.*, No. 2:06-cv-259, 2007 WL 2702664 (W.D. Pa. Sept. 13, 2007) (granting summary judgment to the defendant where the evidence points to sexual orientation discrimination); *Martin v. N.Y. State Dep’t of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (granting summary judgment to defendant on sex stereotyping claim, concluding that all evidence showed discrimination based on sexual orientation).

the victims, or even the perpetrators to distinguish between behavior that is motivated by the victim's failure to conform to gender stereotypes and behavior motivated by the victim's sexual orientation.¹⁵⁶

For example, in *Nichols v. Azteca Restaurant Enterprises*,¹⁵⁷ the Ninth Circuit held that the plaintiff had a cause of action because his coworkers harassed him because of his effeminate behavior—behavior that did not comport with the masculine expectations of a man. Mr. Nichols' male coworkers and supervisor subjected him to name-calling such as “her” and “she,” mocked him for carrying a tray “like a woman” and for not having sex with a waitress who was his friend, called him “faggot” and “fucking female whore,” and directed at him “the most vulgar name-calling . . . cast in female terms.”¹⁵⁸

The court's treatment of *Nichols* contrasts to that of *Prowel v. Wise Business Forms*.¹⁵⁹ In *Prowel*, the plaintiff suffered repeated comments and mocking of his effeminate mannerisms and appearance, name calling such as “Rosebud,” “Princess,” and “faggot,” offensive phone calls, and graffiti in the men's room about AIDS. The court held that as a matter of law the facts alleged demonstrated discrimination motivated by sexual orientation rather than sex stereotyping, and refused to permit the plaintiff to “bootstrap” a sexual orientation claim under Title VII in the name of a sex stereotyping claim.¹⁶⁰

In *Rene v. MGM Grand Hotel, Inc.*,¹⁶¹ the plaintiff, a butler on the top floor of the hotel, worked with other male butlers and a male supervisor. He alleged that, over the course of two years, his coworkers subjected him to name-calling such as “muneca” (“doll” in Spanish) and poking and prodding, including putting their fingers in his anus through his clothing.¹⁶² The defense conceded that the environment was severe or pervasive, but challenged whether the behavior occurred because of sex.¹⁶³ A majority of the en banc court concluded, in two opinions with different rationales, that Rene had presented sufficient evidence of a Title VII violation to

156. For an interesting discussion of male feminism, male and heterosexual privilege and the fear heterosexual men have of being portrayed as not heterosexual, see Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 97–104, 108–11 (2000).

157. 256 F.3d 864 (9th Cir. 2001).

158. *Id.* at 870, 874.

159. *Prowel*, 2007 WL 2702664.

160. *Id.* at *4.

161. 305 F.3d 1061 (9th Cir. 2002) (en banc).

162. *Id.* at 1064.

163. *Id.* at 1066.

go to a jury.¹⁶⁴ The plurality concluded that the plaintiff's sexual orientation was not relevant in the inquiry and a reasonable jury could conclude, based on the sexual nature of the behavior, that the harassment occurred because of sex.¹⁶⁵ This opinion contravenes most other appellate opinions that hold that sexual behavior alone is insufficient to satisfy the "because of sex" requirement. The concurrence concluded that there was sufficient evidence that the coworkers harassed the plaintiff because he did not live up to the sexual stereotype of how a man should act and appear.¹⁶⁶

Judge Proctor Hug dissented, joined by three other members of the court, and concluded that the mere fact that the harassment is sexual in nature does not prove that it occurred because of sex.¹⁶⁷ Moreover, the dissent concluded, there was no cause of action for sex stereotyping in this case because the plaintiff admitted unequivocally and repeatedly in his deposition that the reason his coworkers abused him was because of his sexual orientation.¹⁶⁸ Judge Hug distinguished *Nichols* because Nichols was discriminated against based on his effeminate behavior at work, whereas Rene was discriminated against based on his sexual orientation—behavior that occurred outside of work.¹⁶⁹

Judge Hug's dissent seems to make a distinction between sexual orientation and gender identity or expression. He sees expression of gender identity at work as protected behavior, but characterizes sexual orientation as unprotected behavior occurring outside of the workplace.¹⁷⁰ The court in *Vickers v. Fairfield Medical Center*¹⁷¹ reaches a similar conclusion. It upholds the lower court's grant of the defendant's motion to dismiss because the gender non-conforming behavior alleged to support the sex stereotyping claim was not behavior observed at work or affecting job performance. Rather than sex discrimination for failure to conform to gender expectations, the alleged harassment, such as teasing for sexual practices, more likely occurred because of the plaintiff's perceived homosexuality.¹⁷²

164. *Id.* at 1068.

165. *Id.* at 1067.

166. *Id.* at 1069.

167. *Id.* at 1074 (Hug, J., dissenting).

168. *Id.* at 1077.

169. *Id.*

170. *Id.*

171. 453 F.3d 757 (6th Cir. 2006).

172. *Id.* at 763; *see also* *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (holding that male cross-dresser who cross-dresses outside of work did not have a sex stereotyping discrimination claim when he was fired because he was discriminated against not because he was effeminate but because he assumed the role of a woman outside of work). *But see* *Depiano v. Atl. County*, No. 02-5441, 2005 U.S. Dist. LEXIS

While theoretically it is possible to draw a line between sexual orientation and gender expression at work, as demonstrated above, it is very difficult to separate motivations of the perpetrators who harass a homosexual co-worker whose dress or behavior do not conform to gender stereotypes. In the case of the homosexual co-worker, the question becomes whether the discrimination occurs because of his homosexuality or because of his gender expression that does not conform to sex stereotypes. Because of these practical difficulties, Judge Hug's distinction may amount to a conclusion that heterosexuals may bring sex stereotyping claims, but homosexuals may not. This distinction would deny rights to a whole class of persons, and would lead to intrusions into the privacy of individuals. Moreover, some courts have already concluded that Title VII does not forbid the creation of a hostile work environment based on an individual's "perceived homosexuality." In these cases, even heterosexuals (who are perceived as homosexuals) would suffer harassment without recourse.

A concurrence by Judge Richard Posner in *Hamm v. Weyauwega Milk Products, Inc.*¹⁷³ raises similar questions about the stereotyping doctrine. He concludes that harassing a man because he is effeminate in an all male workplace is not discrimination because of sex because such harassment would discriminate only against a particular sub-class of men—those who are effeminate.¹⁷⁴ Judge Posner reaches this odd conclusion despite the Supreme Court's decision in *Phillips v. Martin Marietta* that it is illegal sex discrimination to discriminate against a subclass of women who are mothers.¹⁷⁵ He argues that in a traditionally male workplace such as Price Waterhouse, sex stereotyping of a woman is evidence of sex discrimination, and evidence that an employer refused to hire or promote a woman because she is masculine likely shows discrimination against women as a class.¹⁷⁶ This is particularly true, he argues, in traditionally masculine jobs such as firefighting because those jobs require masculine characteristics and women with masculine traits are those who would qualify for the position.¹⁷⁷ Eliminating women with masculine characteristics may eliminate most women who are interested in or capable of acting as firefighters.¹⁷⁸ But in an all-male workplace,

20250 (D.N.J. Sept. 2, 2005) (concluding that there is a cause of action under the New Jersey Law Against Discrimination, applying *Price Waterhouse* where the plaintiff was ridiculed and harassed for cross-dressing outside of work).

173. 332 F.3d 1058, 1066–68 (7th Cir. 2003) (Posner, J., concurring).

174. *Id.* at 1067.

175. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

176. 332 F.3d at 1067 (Posner, J., concurring).

177. *Id.* at 1068.

178. *Id.*

Posner argues, discrimination against a man because he is effeminate is not sex discrimination against men; it is merely discrimination against effeminate men.¹⁷⁹ This argument misses the point, however, that permitting discrimination against effeminate men is a means of enforcing the masculinity of the job which, in turn, creates barriers not only to effeminate men, but also to women who would be interested in the job.

Moreover, in his discussion of how courts apply the *Price Waterhouse* stereotyping doctrine, Judge Posner assumes that if courts distinguish between discrimination based on failure to meet sex stereotypes and discrimination based on homosexuality, effeminate heterosexual men would be protected, but effeminate homosexual men would not. Other courts reaching this question are in clear disagreement with Posner. According to these courts, the sexual orientation of the plaintiff is irrelevant in deciding whether the discrimination occurs because of sex.¹⁸⁰ In other words, it is necessary to consider whether the discrimination occurred because of the plaintiff's failure to conform to sex stereotypes, whether the plaintiff is heterosexual or homosexual. If it does, then the plaintiff has a cause of action.

Theoretically these courts are correct. It is possible, as a theoretical matter, to distinguish between discrimination based on sexual orientation and discrimination based on gender identity and expression. But practically speaking, Judge Posner has a point.

The cases demonstrate that it is nearly impossible to distinguish between sexual stereotyping discrimination and sexual orientation discrimination because the means used to discriminate or harass are virtually identical, and even the harassers are likely unaware of their exact motivations.

2. Protecting Bisexuals¹⁸¹

The 2009 version of ENDA protects an employee or applicant from discrimination based on sexual orientation.¹⁸² Sexual orientation is defined to include heterosexuality, homosexuality and

179. *Id.* at 1067.

180. *Rene v MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc); *Bibby v. Phila. Coca Cola Bottling Co., Inc.*, 260 F.3d 257, 264 (3d Cir. 2001).

181. While I have located "bisexuals" under the category "sexual orientation," and ENDA categorizes bisexuality as a sexual orientation that is protected by the law, bisexuality is not exactly a sexual orientation. Rather it is a view of gender and sexuality that rejects barriers and strict limitations imposed by heterosexuality or homosexuality. It sees sexuality as an identity, but more fluid, changeable and expressive than any fixed identity would be.

182. H.R. 3017, 111th Cong. § 4 (2009); S. 1584, 111th Cong. § 4 (2009).

bisexuality.¹⁸³ Like homosexuals, bisexuals suffer discrimination because of their sexual affiliation with same-sex partners, but they also suffer discrimination that does not affect lesbians and gays. This is discrimination based on their bisexuality “because [bisexuals] upset the dichotomies in a polarized world.”¹⁸⁴ There are only a few reported cases, federal or state, that deal with discrimination in employment based on an individual’s bisexuality, and none of them finds such discrimination actionable.¹⁸⁵ But if 2009 ENDA is enacted into law, there will likely be cases alleging discrimination based on bisexuality.

Bisexuality may present the courts with difficulties similar to the line-drawing between sexual orientation and sex stereotyping in which the courts engage today. To the extent that the bisexual individual suffers discrimination or harassment because of the sex of her partners, courts will likely consider the discrimination illegal under ENDA if the law passes. But, given that some bisexuals see their identities as working against sexual barriers, and some engage in a more fluid sexuality including pansexuality and polyamory,¹⁸⁶ it may be that courts will be unwilling to interpret the law to protect bisexual persons who engage in these practices. Courts will likely conclude that this is behavior rather than identity and is not protected by ENDA or, in the event that gender identity does not survive as a protected characteristic, that this behavior is part of gender identity that is not covered by the statute. This analysis would be reminiscent of Judge Hug’s dissent in *Rene* and of the court’s analysis in *Vickers*.¹⁸⁷ If, however, we are to protect sexual minorities, the courts should not distinguish between behavior occurring at the worksite and gender identity or status.

183. H.R. 3017 § 3(a)(9); S. 1584 § 3(a)(9).

184. Jillian Todd Weiss, *GL vs. BT: The Archeology of Biphobia and Transphobia within the U.S. Gay and Lesbian Community*, in *BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS*, *supra* note 17, at 25, 34.

185. *See, e.g.*, *Blaylock v. Transp. Sec. Admin.*, No. 07-464 (KSH), 2009 WL 2606245 (D.N.J. Aug. 24, 2009) (holding that discrimination based on bisexuality is not sex discrimination under Title VII); *Parrella v. Lawrence & Mem’l Hosp.*, No. 3:08-CV-1445(PCD), 2009 WL 1279290 (D. Conn. May 5, 2009) (same).

186. Pansexuality is the “openness to all forms of sexuality” and polyamory is engagement in sexual relations with multiple partners. *See* Weiss, *supra* note 184, at 34.

187. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1070 (9th Cir. 2002).

3. Recognizing Transgender Individuals and Transsexuals

a. Background on Transgender Status

Approximately two to five percent of persons are transgender, defined as a person who experiences some gender dysphoria.¹⁸⁸ Recently, the term “transgender” in political discourse has nearly completely replaced the term “transsexual.”¹⁸⁹ I use the term “transsexual” to refer to persons who live permanently in a gender into which they were not born. “Transgender” is a broader term. It includes transsexuals and other individuals. Male-to-female (MTF) transsexuals or “transwomen” are individuals born male who transition to women. Female-to-male (FTM) transsexuals or “transmen” are individuals born female who transition to men.¹⁹⁰ Transgender individuals who are not transsexuals include cross-dressers who wear the clothing of the “opposite” biological sex for emotional purposes, and transvestites who dress in the “opposite” sex’s clothing for sexual reasons,¹⁹¹ androgynous, bigendered, and gendered queer people.¹⁹² These last three groups generally include a mixed or alternating identity, but exact definitions vary from person to person. Moreover, many of these people find the gender categories themselves restrictive.¹⁹³ Finally, while the medical definition of persons with gender identity disorder excludes intersex individuals, some intersex persons may be considered transgender by the transgender community.

While it is difficult to estimate the incidence of transsexualism, some estimate that approximately 1 in 30,000 biological males are transsexuals and 1 in 100,000 biological females are transsexuals.¹⁹⁴ Others estimate that the number of transsexuals is about 1 in 50,000

188. Transgender Law & Policy Inst., Transgender Issues: A Fact Sheet, <http://www.transgenderlaw.org/resources/transfactsheet.pdf> (on file with the University of Michigan Journal of Law Reform).

189. Kristen Rose Schilt, Just One of the Guys?: How Female-to-Male Transmen Make Gender Inequality at Work Visible (2006) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with the University of Michigan Journal of Law Reform).

190. *See id.* at 9 (explaining the terms “transmen” and “transwomen”).

191. *See id.* at 18.

192. There are other groups of persons whose gender identity and expression are more ambiguous or fluid. *See* Candace Moore & Kristen Schilt, *Is She Man Enough?: Female Masculinities on The L Word*, in *READING THE L WORD: OUTING CONTEMPORARY TELEVISION* 159 (Kim Akass & Janet McCabe eds., 2006) (discussing the different types of female masculinity missing from the television show).

193. *See* American Psychological Ass’n, *supra* note 4.

194. *See* AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 535 (4th ed. 1994); *see also* Transgender Law & Policy Inst., *supra* note 188 (stating that statistics from the Netherlands demonstrated that 1 in 12,000 men undergo sex reassignment surgery and 1 in 34,000 women undergo sex reassignment surgery).

for both male and female populations.¹⁹⁵ These estimates have been challenged, however, by the community of transsexuals who claim that the numbers are much higher. The estimates, according to the community, undercount because they refer only to those who seek genital surgery, but many transsexuals do not choose surgery. Moreover, community estimates place the numbers of MTF and FTM transsexuals as approximately equal.¹⁹⁶ In large part because the sex reassignment surgery for FTM transmen is less successful than for MTF transwomen, far fewer transmen have such surgery.¹⁹⁷

Statistics demonstrate that transgender individuals suffer discrimination in the workplace. A written statement of testimony presented to Congress by the Transgender Law Center in San Francisco noted that a 2006 survey conducted of 194 transgender persons in San Francisco demonstrated that 60 percent of those surveyed earned less than \$15,300 per year and only 8 percent earned more than \$45,900.¹⁹⁸ Moreover, only 25 percent worked full time with 9 percent having no income.¹⁹⁹ Finally, 57 percent stated that they had experienced employment discrimination, but only 12 percent took any action about the discrimination.²⁰⁰ Testimony before the House Labor and Education Committee presented by Bradley Sears of the Williams Institute at UCLA School of Law stated that transgender individuals suffer significantly in the labor market with high rates of poverty and unemployment attributable to discrimination.²⁰¹ The 2008 Survey of the Transgender Law Center reported that 25 percent of transgender persons in California earn wages below the poverty line, and that the average income of those with Bachelor's degrees is 40 percent lower than that of the overall average income of college graduates in California.²⁰² Less than one-half of transgender individuals are employed full time, and those who are employed report high levels of discrimination and harassment in the workplace.²⁰³

195. See Schilt, *supra* note 189, at 3.

196. Schilt & Wiswall, *supra* note 4, at 1 n.2.

197. See *infra* notes 307–309 and accompanying text.

198. See *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Comm. on Education & Labor*, 110th Cong. (2008) (statement of The Transgender Law Center).

199. *Id.*

200. *Id.*

201. See *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Education & Labor*, 111th Cong. (2009) (testimony of Bradley Sears, Executive Director, Williams Institute at UCLA School of Law).

202. ELEANOR HARTZELL ET AL., TRANSGENER LAW CENTER, THE STATE OF TRANSGENER CALIFORNIA REPORT: RESULTS FROM THE 2008 CALIFORNIA TRANSGENER ECONOMIC HEALTH SURVEY 7 (2009).

203. *Id.* at 8–12.

Furthermore, a recent study by sociologists Kristen Schilt and Matthew Wiswall examined the pay of transsexuals who were employed before and after transitioning from one sex to another. The study found that there is a large transgender penalty in pay for both MTF and FTM transsexuals.²⁰⁴ MTF transsexuals (“transwomen”), however, suffered substantially more in both pay reductions and in terms and conditions of employment than their FTM (“transmen”) counterparts.²⁰⁵ Transwomen lost approximately one-third of their income by becoming female while transmen actually gained slightly when they transitioned to men (but still made less than their male colleagues at work).²⁰⁶ Moreover, an earlier study showed that transwomen experienced harassment and termination once they began transition, with some of the most virulent harassment occurring in blue collar workplaces.²⁰⁷ This harassment occurred even though the transwomen reported that as men they fit into the masculine workplace culture before transitioning to women. Transmen, in contrast, experienced fewer obstacles than their MTF counterparts, often gaining increased authority, pay, and respect at work when they began to work as men, even when they occupied the same jobs that they did as women.²⁰⁸

Anecdotal evidence produced in Schilt’s study also supported these conclusions. Five transmen praised their workplaces for their tolerance and acceptance while two transwomen emphasized workplace problems. One transwoman received notes on her desk telling her to quit, and found the women’s restroom “booby trapped”; another was laid off as soon as she began to present as a female.²⁰⁹ Ben Barres, a transman neurobiology professor at Stanford University, explains that when he was a woman others constantly questioned him and undermined his work. Now that he has transitioned to a man, audiences who are unaware of his gender transition tell him that his research is much better than that of his “sister.”²¹⁰

From the empirical data, the interviews, and the anecdotes, Schilt and Wiswall conclude that the “male gender carries a workplace benefit that cannot be carried over in a gender transition.”²¹¹

204. See Schilt & Wiswall, *supra* note 4, at 14.

205. *Id.* at 13, 16–17, 19.

206. *Id.* at 12.

207. *Id.* at 16–17 (citing Schilt, *supra* note 189).

208. *Id.* at 17 (citing Kristen Schilt, *Just One of the Guys?: How Transmen Make Gender Visible at Work*, 20 GENDER & SOC’Y 465, 475–82 (2006)).

209. *Id.* at 16.

210. *Id.* at 19.

211. *Id.*

Schilt found in an earlier study that transmen experience an easier transition in the workplace than transwomen.²¹² This transition can be attributed to a number of factors. First, transmen pass much more quickly because male hormones have a swift masculinizing effect on women's bodies.²¹³ Second, transmen face much less scrutiny than transwomen. As soon as transmen begin to grow beards, people who do not know they are transgender do not question their male credentials. Even when transmen are open about the transition, their colleagues seem to understand and approve (or at least, not disapprove) of the transition. When transwomen transition into women, in contrast, their colleagues question why a man would want to become a woman.²¹⁴ These reactions demonstrate how gender stereotypes "privilege masculinity and discredit femininity."²¹⁵ Dr. Schilt discusses the differences in workplace acceptance between transwomen and transmen:

Transwomen report a wide array of workplace barriers in open transition, including charges that they are mentally unstable, they lack command presence, they are disruptive to productivity, and, if they work with children, that they are threats to children's gender identities. While transmen face some gender harassment, particularly in blue-collar occupations—occupational contexts that often foster sexism and homophobia—they more often are welcomed into being one of the guys at work.²¹⁶

Moreover, by studying both stealth transmen (those whom their coworkers did not know were transmen) and open transmen who transition while at the same workplace, Schilt was able to describe the dynamics of how gender was enacted at the workplace. As outsiders who have crossed the gender divide, stealth transmen can recognize the benefits they receive and how men discredit women at work and promote homosociality.²¹⁷ Transmen who openly transition at work describe how coworkers demonstrate support by "doing gender" with open transmen and by treating them like one of the guys at work.²¹⁸

212. Schilt, *supra* note 189.

213. *Id.* at 5.

214. *Id.* at 5–6.

215. *Id.* at 6.

216. *Id.* at 13.

217. *Id.* at 7.

218. *Id.*

But perhaps even more notable is the interaction of race, sexual orientation, class, and height with gender to create barriers or open doors to employees in the workplace. The study of transsexuals has illuminated this variation because only transgender individuals have lived on both sides of the gender divide. Schilt found that stealth and open transmen were treated better than they were as women by coworkers, bosses, and customers. All attributed more authority, respect and privilege to the transmen after the transition than the women received before the transition. And transmen who were white, tall and heterosexual received many more benefits in workplaces than those who were short, racial minorities or did not pass as men.²¹⁹

These facts demonstrate a clear but unequal discrimination against persons based on their transgender status in combination with race, sexuality, and height, and raise the question of whether the law protects persons who are transgender from employment discrimination. The answer is that the results are mixed.

b. Title VII and Transgender Individuals

There is a split in the courts as to whether Title VII protects persons who are transsexual or transgendered. The early cases concluded that discrimination occurred, not because of the person's sex, but because the person was transgender or transsexual. Therefore, according to the early cases, there was no cause of action under Title VII. Many cases still reach the same conclusion. Under *Price Waterhouse*, however, a growing number of courts conclude that although transgender persons are not a protected class, an employer violates Title VII if it discriminates against a transgender person because of his or her failure to comply with sexual or gender stereotypes. Thus, like homosexuals and bisexuals, transgender persons may enjoy partial coverage by the statute, but their method of proof is difficult and their efforts are often unsuccessful. More remarkable, a recent federal district court case broke with the early cases and concluded that discrimination because of an individual's status as transsexual is discrimination because of sex.²²⁰

Title VII forbids discrimination because of an individual's sex. The legislative history of the statute demonstrates that Congress

219. *Id.* at 14–15.

220. For a discussion of this case, *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), see *infra* text accompanying notes 249–272.

thought little about the definition of “sex.” In fact, legislators supporting Title VII focused primarily on eliminating race discrimination in employment. “Sex” was added as a forbidden category by opponents of Title VII in an attempt to defeat the bill. Ironically, the bill passed. There is no legislative history that explains what “sex” means, but there is little doubt that in 1963 Congress had no interest in reaching discrimination based on gender identity or expression. Those who voted for the bill with the “sex” amendment most likely considered “sex” to mean biological male and biological female.

Courts deciding early cases brought by transsexuals relied on this legislative history to conclude that the statute does not protect transsexuals against employment discrimination.²²¹ There has been, however, a recent increase in court cases alleging employment discrimination against transsexuals and a significant change in Title VII law as applied to employment discrimination against transsexuals.

i. Using Price Waterhouse to Protect Rights of Transgender Workers

Soon after *Price Waterhouse* was decided, transsexual plaintiffs brought Title VII cases alleging that their employers discriminated against them because of their failure to meet stereotyped gender expectations. While a few courts dismissed the complaints as not adequately pleading sex stereotyping, other courts were receptive to the argument, at least in response to motions to dismiss and motions for summary judgment.²²²

In *Smith v. City of Salem*,²²³ the Sixth Circuit held that a transsexual plaintiff who alleged that she was discriminated and retaliated against because of her failure to conform to sex stereotypes had a cause of action under Title VII. The plaintiff alleged that she was a MTF transsexual firefighter who had worked for the department for seven years before she was diagnosed with Gender Identity Disorder (GID).²²⁴ As a man, the plaintiff had no negative incidents with the department. When she was diagnosed, she began to express a more feminine appearance in accordance with the medical

221. See *supra* note 5.

222. Cf. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding in a case brought under the Equal Credit Opportunity Act that the lower court erroneously dismissed a complaint of sex discrimination against the defendant bank which refused to give a loan to a biological man who presented at the bank in female clothing, and told the plaintiff that if he wanted a loan he would have to return in men’s clothing).

223. 378 F.3d 566 (6th Cir. 2004).

224. *Id.* at 568.

protocols for treating GID, and told her boss about her treatment.²²⁵ Soon thereafter, the plaintiff's superiors decided that they would require the plaintiff to undergo three psychological evaluations with physicians of the City's choice in order to encourage the plaintiff to resign.²²⁶ If she refused to comply, the defendants planned to terminate her on the grounds of insubordination.²²⁷ Two days later, Smith's counsel advised the defendants of Smith's legal representation and the potential ramifications if the City continued to follow its plan.²²⁸ The plaintiff filed a charge with the EEOC and received a right to sue letter.²²⁹ Within four days, Smith was suspended based on an alleged infraction of a little-known policy.²³⁰

The federal district court granted the defendant's Motion for Judgment on the Pleadings, concluding that the complaint amounted to a claim for discrimination because the plaintiff was a transsexual.²³¹ The Sixth Circuit overturned the federal district court, holding that *Price Waterhouse* enabled the plaintiff to prove that she was discriminated against because her appearance and behavior did not conform to the sex stereotypes that the defendants had of a man.²³² The court noted that the plaintiff alleged that she was fired soon after she began to assume a feminine appearance and dress, and noted that her coworkers began commenting on the plaintiff's appearance and mannerisms as not sufficiently masculine.²³³

In *Barnes v. City of Cincinnati*,²³⁴ the Sixth Circuit upheld a jury verdict in favor of the plaintiff, a pre-operative MTF transsexual police officer. The plaintiff was living as a pre-operative MTF transsexual when she failed the probationary period required for a promotion to sergeant.²³⁵ Barnes worked as a police officer for 17 years as a man, but at the time that she took the test for the promotion to sergeant, she was living as a woman outside of work and working as a man while on duty.²³⁶ Barnes had a reputation as a homosexual, bisexual or a cross-dresser in the police department.

225. *Id.*

226. *Id.* at 569.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 567, 569.

232. *Id.* at 572.

233. *Id.*

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

235. *Id.* at 733.

236. *Id.* at 733-34.

Barnes did well on the sergeant's test, but the defendant concluded that she had failed the probationary period, even though no other officer had ever failed probation. During the probationary period for her promotion to sergeant, the plaintiff began to express herself at work in a more feminine manner, at times appearing at work with lipstick or make-up.²³⁷ She was placed in a training program that required daily evaluation. No other sergeants were evaluated in this manner. Moreover, the colonel who submitted the report recommending that the plaintiff failed probation had told the plaintiff that she did not appear to be "masculine" and that she should stop wearing makeup and act more masculine.²³⁸ Others rated the plaintiff as lacking "command presence," a category that they defined in various ways, some seeming to judge masculinity.²³⁹ The court upheld the jury verdict in Barnes' favor, and concluded that there was sufficient evidence from which a reasonable jury could conclude that the defendant failed the plaintiff in her probationary period because she did not live up to the masculine stereotype.²⁴⁰ Thus, there was sufficient evidence of a violation of Title VII under *Price Waterhouse*.

In *Schwenk v. Hartford*,²⁴¹ a case brought by a transgender prisoner under 42 U.S.C. section 1983, the complaint alleged that a prison guard violated the Eighth Amendment prohibition of "cruel and unusual punishment" and the Gender Motivated Violence Act.²⁴² The plaintiff alleged that the defendant demanded that the plaintiff perform oral sex upon him and when the plaintiff refused, shoved him against the wall and forced his penis against the plaintiff's buttocks.²⁴³ The Ninth Circuit noted the reasoning in *Holloway* and *Ulane*, which concluded that transsexuals were not protected by Title VII, but concluded that *Price Waterhouse* had overruled those earlier cases by holding that Title VII barred discrimination against a person because of his or her failure to adhere to gender stereotypes.²⁴⁴ *Schwenk* held that the plaintiff had made out a cause of action for gender discrimination based on the *Price Waterhouse* doctrine because the prison guard may have acted based on his belief that the plaintiff was effeminate and did not conform to the gender expectations of a man. In a particularly insightful opinion

237. *Id.* at 734.

238. *Id.* at 735.

239. *Id.*

240. *Id.* at 737-38.

241. 204 F.3d 1187 (9th Cir. 2000).

242. *Id.* at 1192.

243. *Id.* at 1194.

244. *Id.* at 1201-02.

that apparently understood masculinity theory and the psychological literature supporting it, the court characterized all prison rape as occurring because of sex and explained the role of masculinity and femininity in prison rapes:

[Y]oung, slight, physically weak male inmates, particularly those with “feminine” physical characteristics, are routinely raped, often by groups of men. . . . The victims of these attacks are frequently called female names and terms indicative of gender animus like “pussy” and “bitch” during the assaults and thereafter. . . . After they are raped, victims are consigned to “passive” female sexual and social roles within the prison. . . . In contrast, prison rapists commit assaults in part to establish and maintain a masculine gender. According to the psychological literature . . . prison rapists strongly resist the characterization of their activities as homosexual. Instead, they conceive their sexual partners as female members of the prison social order. Thus, as with rape in general, all prison rape occurs “because of” gender—both that of the rapist and that of his victim.²⁴⁵

The concept that rape and other severe harassment perpetrated by men on men occurs because of sex is not limited to prisons. In workplaces, too, men harass other men in order to prove their own masculinity and to police the masculinity of the job. This behavior necessarily occurs because of sex or gender, both of the harasser and of the victim.²⁴⁶

Federal district courts and some state courts have also used *Price Waterhouse* to find a cause of action for transgender individuals.²⁴⁷

245. *Id.* at 1203 n.14 (citations omitted).

246. McGinley, *supra* note 144, at 1229.

247. See *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (concluding that transsexuals may bring sex discrimination claims under *Price Waterhouse* for sex stereotyping); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 U.S. Dist. LEXIS 57680 (N.D. Ind. Aug. 3, 2007) (holding that a cause of action exists for sex stereotyping of an MTF transsexual who wore nail polish and her hair in a feminine way); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 21, 2006) (relying on *Price Waterhouse* in refusing to dismiss plaintiff’s complaint that alleged sexual harassment and discriminatory discharge because he was a transsexual); *Depiano v. Atlantic County*, No. 02-5441, 2005 U.S. Dist. LEXIS 20250 (D.N.J. Sept. 2, 2005) (concluding that under the New Jersey Law Against Discrimination a cause of action exists for a cross-dresser who is harassed and discriminated against for failure to conform to gender stereotypes); *Sturchio v. Ridge*, No. 03-0025-RHW, 2004 U.S. Dist. LEXIS 27345 (Dec. 20, 2004) (holding that plaintiff, an MTF transsexual who had undergone sex reassignment surgery, had stated a cause of action for sexual harassment in violation of Title VII in her complaint); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (holding that the plaintiff, an MTF transsexual, had a

In *Glenn v. Brumby*,²⁴⁸ the Northern District of Georgia denied a motion to dismiss a case brought by a transgender individual pursuant to 42 U.S.C. section 1983 and alleging that her firing was a violation of the equal protection doctrine. The court held that the allegation that the plaintiff began to dress as a woman during her gender transition was sufficient to create a cause of action, especially because the defendant told her that people would think her immoral if she dressed like a woman. In *Schroer v. Billington*,²⁴⁹ the United States District Court for the District of Columbia found illegal gender discrimination based on sex stereotyping, but also broke with the earlier cases and found that the plain language of the statute prohibits discrimination against transsexuals. In *Schroer*, the court found that the plaintiff, an MTF transsexual, before undergoing transition to a woman, had applied for a position of Specialist in Terrorism and International Crime with the Congressional Research Service.²⁵⁰ She was a highly-qualified candidate for the position. She had graduated from the National War College and the Army Command and General Staff College, had advanced degrees and twenty-five years of service in the United States Armed Forces, and a Special Operations Command, a job for which she analyzed many classified operations and regularly briefed senior military officials.²⁵¹ At the time of her application for the terrorism specialist position, she had begun to work with a clinical social worker to develop a plan for transitioning from male to female, a transition that was guided by treatment protocols.²⁵²

Schroer was interviewed for the job as a male and received the highest score of all the interviewees.²⁵³ After submitting additional written materials, Schroer was selected unanimously by the committee for the position. She was offered the job and she accepted.²⁵⁴ Before the paper work was completed, Schroer told Charlotte Preece, a member of the selection committee staff, that she was transgender and that she planned to transition from male to

cause of action for harassment because of sex under the stereotyping doctrine); *Lie v. Sky Publ'g Corp.*, No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002) (holding that Massachusetts law prohibiting sex discrimination forbids employer from firing a transwoman for refusing to wear men's clothes to work). *But see* *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (holding that the plaintiff had not made out a cause of action because the defendant merely required her to use the men's room in light of her male driver's license and did not react to her physical appearance).

248. 632 F. Supp. 2d 1308 (N.D. Ga. 2009).

249. 577 F. Supp. 2d 293 (D.D.C. 2008).

250. *Id.* at 295.

251. *Id.*

252. *Id.*

253. *Id.* at 296.

254. *Id.*

female.²⁵⁵ Preece, who seemed surprised and a bit alarmed, raised issues about Schroer's security clearance.²⁵⁶ Schroer tried to reassure her that there should be no security problem as Schroer had a number of friends who had retained their clearances while transitioning.²⁵⁷ Schroer showed Preece a number of photographs of herself in women's attire.²⁵⁸ After speaking to a number of persons in the office, but without calling Schroer to ask for more information, Preece told Schroer that she was withdrawing the offer. Schroer filed suit alleging sex discrimination under Title VII.²⁵⁹

In a bench trial, the court concluded that the defendant had discriminated against Schroer because of sex in violation of Title VII.²⁶⁰ The court based its decision on two alternative theories. First, it concluded that under the *Price Waterhouse* sex stereotyping theory, the plaintiff proved that the defendant had violated Title VII by refusing to hire her because of her failure to conform to the sex stereotype of a man.²⁶¹ The court noted that Preece testified that when she looked at the photographs of the plaintiff dressed as a woman, she looked like a man in women's clothing.²⁶² Moreover, Preece stated that she did not understand why the plaintiff would become a woman, especially in light of her special operations training.²⁶³ The court inferred from Preece's statement that men with special operations in their background are especially masculine and it made Preece uncomfortable that the plaintiff did not live up to the masculine image.²⁶⁴ Finally the court stated that it did not matter whether the defendant withdrew its offer of employment because it perceived Schroer as an "insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."²⁶⁵ The facts could be parsed to support any of these three conclusions.

255. *Id.*

256. *Id.* at 297.

257. *Id.*

258. *Id.*

259. *Id.* at 299.

260. *Id.* at 300.

261. *Id.* at 305–06.

262. *Id.* at 305.

263. *Id.*

264. *Id.*

265. *Id.* State courts have followed the reasoning of *Price Waterhouse* to create a cause of action under state statutes for transsexuals who do not conform to sex stereotypes. *See, e.g.,* Lie v. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002) (holding that transsexuals are covered by the sex stereotyping theory of *Price Waterhouse*); Enriquez v. W. Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001) (holding that transsexual individual not covered by sexual orientation provision of the statute, but was covered by prohibition of gender discrimination based on *Price Waterhouse*).

Second, and perhaps more notable than the first conclusion because it departs from the other cases, *Schroer* concluded that under the plain language of the statute the refusal to hire the plaintiff occurred illegally “because of sex.”²⁶⁶ The court disagreed with the courts that have decided that Title VII does not forbid discrimination because of a person’s transsexuality.²⁶⁷ Instead of looking at the plain language of the statute, these courts improperly considered the Congressional intent at the time that the statute was enacted.²⁶⁸ On its face, the statute simply forbids discrimination because of sex. This language clearly forbids discrimination against a transsexual because discrimination occurs because of the plaintiff’s sex.²⁶⁹ Furthermore, it did not trouble the court that Congress would not have anticipated at the time of its passage that Title VII would apply to discrimination against transsexuals because Title VII has been interpreted numerous times in ways that go beyond the intent of the enacting Congress.²⁷⁰ For example, in *Oncale*, Justice Scalia noted that while same-sex harassment was not the principal evil that Congress sought to condemn in Title VII, statutory prohibitions often go beyond the principal evil.²⁷¹ Finally, the court questioned whether the decisions holding that Title VII’s prohibition of discrimination “because of sex” is limited to biological or anatomical sex are still good law after *Price Waterhouse*. Even if they are still good law, the court held that the defendant’s refusal to hire Schroer because she is changing her anatomy is literally discrimination because of sex.²⁷²

ii. Problems and Limitations with Price Waterhouse

The cases of transsexuals alleging that their employers violated Title VII by discriminating against them often hang by a thread and, as in the sexual orientation cases, *Price Waterhouse* does not always guarantee a fair result. In *Etsitty v. Utah Transit Authority*,²⁷³ for example, the plaintiff, a pre-operative transwoman, began living as a woman in preparation for sex reassignment surgery.²⁷⁴

266. 577 F. Supp. 2d at 306–07.

267. *Id.* at 307.

268. *Id.*

269. *See id.* at 308.

270. *See id.* at 307.

271. *Id.* at 307 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 423 U.S. 75, 79 (1998)).

272. *Id.* at 308.

273. 502 F.3d 1215 (10th Cir. 2007).

274. *Id.* at 1218.

After successfully completing her training as a bus driver while dressed as a man, she informed her supervisor that she would begin to appear more female at work and that she would eventually change her sex.²⁷⁵ The defendant fired the plaintiff because it was concerned that while on the road Etsitty, who still had male genitalia, would use the women's restrooms, behavior that the employer feared may lead to liability.²⁷⁶ It stated on the record of her termination that the plaintiff would be eligible for rehire once she completed the sex reassignment surgery.²⁷⁷ The lower court granted the defendant's motion for summary judgment.²⁷⁸

On appeal, the Tenth Circuit Court of Appeals affirmed. It concluded, like other courts before it, that Title VII does not protect transsexuals from discrimination based on their transsexuality.²⁷⁹ While recognizing that other courts have concluded that *Price Waterhouse* creates a cause of action for transsexuals under Title VII if the reason for the discrimination is the failure of the plaintiff to conform to sexual stereotypes, the court refused to reach the question of whether it would apply *Price Waterhouse* in a transsexual's case.²⁸⁰ It concluded that an employer has a legitimate non-discriminatory reason for firing an employee who has male genitals and uses the women's bathroom.²⁸¹ The court rejected the plaintiff's argument that discriminating based on which bathroom she planned to use was based on the sex stereotype that her behavior should conform to the behavior of others who have male genitalia.²⁸² The court concluded that the plaintiff's argument was merely that the employer discriminated against her because of her status as a transsexual, a status that is not covered by the statute.²⁸³

The Tenth Circuit Court of Appeals held that *Price Waterhouse* does not reach so far as to protect from discrimination biological males with male genitalia who seek to use women's restrooms.²⁸⁴ Finally, the court held that as a matter of law the plaintiff had not proved that the reason proffered by the defendant was a pretext for discrimination based on the plaintiff's failure to conform to sex stereotypes.²⁸⁵ Even though there was testimony in the record that

275. *Id.* at 1218–19.

276. *Id.* at 1219.

277. *Id.*

278. *Id.* at 1220.

279. *Id.* at 1222.

280. *Id.* at 1223–24.

281. *Id.* at 1227.

282. *Id.* at 1226.

283. *Id.* at 1223–24.

284. *Id.*

285. *Id.* at 1226.

management fired Etsitty because it was concerned about its public image, the court concluded that this testimony was insufficient to send the case to the jury.

Even if we are to accept the court's reasoning about the reach of *Price Waterhouse*, the court's conclusion that there was no genuine issue of fact to go to the jury seems wrong. While a reasonable fact finder could find, based on this evidence, that the defendant fired Etsitty because she would have used the women's restroom, the evidence is also sufficient to conclude that the defendant fired the plaintiff at least in part because of its fear of a poor public image based on Etsitty's appearance. Even if one were to conclude that the employer had a legitimate concern about the restroom, there was sufficient evidence that Etsitty's appearance or possible future appearance, besides her restroom use, may have motivated her firing. Moreover, given the reality of the lives of transwomen, they will not enjoy equal protection under the employment discrimination laws until there is an accommodation to their restroom needs. I discuss this issue more fully below.

Another limitation on the *Price Waterhouse* doctrine is a conclusion that the defendant did not discriminate against the plaintiff because of a failure to conform to sex stereotypes at work, but legally discharged the plaintiff for behavior, such as cross-dressing, outside of work. In *Oiler v. Winn-Dixie Louisiana, Inc.*,²⁸⁶ for example, the court rejected the plaintiff's stereotyping claim because there was no evidence of harassment or discharge because of a lack of masculinity at work; rather the evidence demonstrated that the defendant fired the plaintiff because he assumed the role of a woman outside of work. *Oiler* and similar decisions stress "behavior" outside of work over an identity or presentation that fails to conform to gender stereotypes. This interpretation also appears, as mentioned above, in some of the cases in which the courts conclude that the discrimination occurred because of sexual orientation defined as behavior outside of work, rather than an effeminate presentation in the workplace.²⁸⁷ But masculinities research makes the motivation for the discriminatory behavior clear. Men at work are uncomfortable with other men who display feminine or non-masculine characteristics, dress or behavior, whether the display occurs at work or outside of work. This strong revulsion is linked to the men's need to prove that they themselves are not feminine and are therefore masculine. What better way to prove

286. No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).

287. See *supra* notes 170-172 and accompanying text.

one's masculinity than to eliminate from the workplace those who do not meet the society's masculine norms?

A third exception to using the *Price Waterhouse* doctrine to protect transgender individuals is the courts' willingness to allow employers to enforce sex-specific dress codes. In *Creed v. Family Express Corp.*,²⁸⁸ for example, the court granted the defendant's motion for summary judgment of a claim brought for gender discrimination by a transwoman. The employer averred that it fired the plaintiff because she did not conform to the expectations of the male worker, as specified by the employer's dress code. When asked why she was fired, the employer asked her "if it would kill [her] to appear masculine for eight hours a day," and "why she applied for the job if she knew she would be undergoing a gender transition."²⁸⁹ These statements appear to be direct evidence of discrimination based on the plaintiff's gender, but the court concluded that the employer had the right to dictate to the plaintiff that she dress like a man in conformity with its dress code.²⁹⁰ The new ENDA may solve this problem, because it permits an employer to impose a sex-specific dress code on transgender individuals, but it would require the employer to permit the employee to abide by the dress code of the gender to which the employee is transitioning.²⁹¹ Hopefully, courts will not define "transition" narrowly or require extraordinary notice of the transition to the employer. And, if ENDA passes without this provision, it will deny important protection to transgender individuals.

iii. Restrooms and Reasonable Accommodation

As *Etsitty* demonstrates, for the transsexual cases, there is another issue in play that goes beyond those in the sexual orientation cases. In a number of the cases, the defendants have successfully defended by arguing that they did not discriminate against MTF transsexuals when they refused to allow transwomen workers to use the women's restroom.²⁹² In *Etsitty*, for example, the employer defended by stating that it fired the employee or refused to rehire her because of the concern that other women using public rest-

288. No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009).

289. *Id.* at *9.

290. *Id.* at *10.

291. H.R. 3017, 111th Cong. § 8(a)(5) (2009); S. 1584, 111th Cong. § 8(a)(5) (2009).

292. A 2008 survey of transsexuals in California found that 12 percent were denied access to appropriate restrooms and 11 percent were denied access to restrooms that matched their gender identity. HARTZELL, *supra* note 202, at 10.

rooms along the employee's route would be uncomfortable with a pre-operative MTF transsexual with male genitalia using the women's restroom.²⁹³ In *Goins v. West Group*,²⁹⁴ the defendant threatened to discipline Goins because she insisted on using the women's restroom near her work station.²⁹⁵ Goins, a transwoman who had not had reconstructive surgery, was told to use a single restroom in another part of the facility.²⁹⁶ When the employer threatened discipline, she quit and sued for discrimination under the Minnesota Human Rights Law, which banned discrimination based on gender identity and gender self-image.²⁹⁷ Despite the explicit language protecting against discrimination based on gender identity, the Minnesota Supreme Court held that the defendant had the right to insist that employees use the restroom in accordance with their biological sex, and that such a requirement did not constitute illegal discrimination against the plaintiff.²⁹⁸

Etsitty and *Goins* present the problems encountered by many transsexuals, especially the MTF transsexuals, who suffer discrimination in the workplace. In *Etsitty*, it was difficult to prove that the discrimination occurred because of the individual's failure to live up to gender stereotypes. *Goins* demonstrates that even where there is specific protection in the statute, the restroom issue raises issues for the courts. In *Goins*, despite the statutory protection of gender identity and self-image, the court still refused to require the employer to permit the plaintiff, who still had male genitals, to use the women's restroom.

These cases demonstrate a surprising lack of interest in or understanding of the lived reality of transwomen. The hard fact is that the years of transition from male to female gender are

293. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007); see also *Kastl v. Maricopa County Cmty. Coll.*, 325 F. App'x 492 (9th Cir. 2009) (upholding grant of summary judgment to the defendant where it declined to rehire plaintiff, a MTF transgender individual, due to her use of the women's restroom). Some employers may argue that they will not offer the opportunity for a pre-operative MTF transsexual to use the women's restroom because they fear suit by another woman. See *Etsitty*, 502 F.3d at 1219. This fear is likely groundless. In fact, in *Cruzan v. Special Sch. Dist. #1*, 294 F.3d 981, 984 (8th Cir. 2002), the court ruled that the defendant did not create a hostile work environment for a woman employee when it permitted a MTF transsexual who still had male genitalia to use the women's restroom because the MTF transsexual merely used the restroom and did not engage in misconduct.

294. 635 N.W.2d 717 (Minn. 2001).

295. *Id.* at 721.

296. *Id.*

297. *Id.* at 721–22.

298. *Id.* at 723. An Ohio court came to the same conclusion in *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003), which held that the plaintiff had not made out a cause of action because the defendant merely required her to use the men's room in light of her male driver's license and did not react to her physical appearance.

extremely dangerous for transwomen. This is because the likelihood of violent attack from men who find them threatening or repulsive is highest at this time. A transsexual MTF needs to avoid using the men's restroom because it is dangerous to use the men's room.²⁹⁹ This is consistent with the masculinities literature. It posits that the transwoman, like the gay man, is an affront to the masculinity of the other men in the restroom. The transwoman openly displays feminine dress and traits that are threatening to men who need to differentiate themselves from women in order to prove their masculinity. Often this confrontation results in violence against the gender non-conforming male. Women who may be expected to share the women's restroom react negatively to the transwoman's use of the women's room because they are concerned that the transsexual who still has male genitalia will attack or rape them in the restroom. But the bathroom problem should not create needless difficulties for employers. Nor should it create an excuse for failure to hire or for discharging an employee.

Under Title VII law, an argument could be made that a policy requiring transsexuals who are in transition to use the restroom that accords with their biological sex and their genitals has a disparate effect on men because of the dangers of an MTF's use of the men's restroom far exceeds the dangers that an FTM encounters using the women's restroom. With proper documentation of the dangers encountered by MTF transsexuals, some courts might agree that a Title VII case exists if this proof is available because transwomen as a group would be disadvantaged in comparison with transmen as a group. But disparate impact litigation is difficult and the courts may be unwilling to accept evidence that MTF transsexuals in general encounter dangers in male restrooms. Courts may insist on statistical evidence of dangers in the particular workplace, evidence that would likely be unavailable or at least insufficient to prove a statistical disparate impact case. Furthermore, even if the new ENDA passes, there may be continuing difficulty for transgender individuals who seek to use the restrooms of their gender expressed identity because ENDA does not create a cause of action for disparate impact. And, although ENDA requires an employer to reasonably accommodate a person based on gender identity if the employer seeks an exemption where there are

299. See DEIRDRE McCLOSKEY, *CROSSING: A MEMOIR* 38–39 (1999).

shared locker facilities, it is unclear whether this requirement applies to restroom facilities.³⁰⁰

One practical solution to the restroom problem would be to require a reasonable accommodation to the transgender person. One accommodation for an employer who compels the transwoman worker to use the men's room would require the employer to guarantee her safety from physical harm and sexual harassment. But even this response is not satisfactory because the transwoman is living as a woman and views herself as a woman. Forcing a woman to use the men's restroom even in the absence of physical danger seems an inappropriate affront to personal dignity, and is perhaps psychologically harmful. The better solution would be employer education of its female employees that would dispel their discomfort with sharing the restroom with a female person with male genitals. If education is insufficient to make the women comfortable, the employer should be required to make a reasonable accommodation to the bathroom needs of the individual. The courts have interpreted Title VII to require reasonable accommodation in religious discrimination cases.³⁰¹ Such a requirement need not be onerous. *Goins* demonstrates that permitting the transsexual employee to use an individual bathroom if one exists in the workplace is one option that may not be welcome to the transsexual employee. Nonetheless some transsexual employees may be comfortable with this option.³⁰²

In evaluating the effectiveness of a reasonable accommodation, it is important to recognize that many transgendered individuals do not have sex reassignment surgery, either because they lack the resources to pay for the surgery or because they choose not to have the surgery for other reasons. It is more common for transwomen than transmen to have surgery for three reasons. First, transwomen have difficulty passing as women if the transition takes place after puberty because it is nearly impossible to reverse the effects of the male hormones. Even after taking female hormones, transwomen continue to grow beards.³⁰³ Moreover, taking female hormones does not reduce foot size or height, so often transwomen are larger

300. See *Employment Non-Discrimination Act of 2009: Hearing on S. 1584 Before the S. Comm. on Health, Education, Labor & Pensions*, 111th Cong. (2009) (statement of Camille A. Olson, Partner, Seyfarth Shaw, LLP).

301. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

302. Experts in the area recommend that one's use of restrooms should follow the person's full time gender presentation. One should never be required to use the restroom of one's birth once the person has begun transitioning from one sex to another. See HUMAN RIGHTS CAMPAIGN, *TRANSSEXUAL INCLUSION IN THE WORKPLACE* 33 (2d ed. 2008).

303. See GRIGGS, *supra* note 2, at 37 (explaining the need for MTF transsexuals for electrolysis to remove facial hair).

than women are typically. Many transwomen constantly fear that they will not pass as women.³⁰⁴ This situation contrasts with that of transmen who after only a few months have little trouble passing as men.³⁰⁵ Because of this differential, there is more incentive for transwomen than transmen to have gender reassignment surgery in order to accomplish a more authentic transition.³⁰⁶

Second, and perhaps even more important, sex reassignment surgery is more successful for transwomen than for transmen. While surgeons can create a vagina by means of vaginoplasty that would fool gynecologists into believing it is natural from birth, the results of phalloplasty—surgery creating a penis—are less authentic, especially because the functioning of the new penis is not ideal.³⁰⁷ Finally, phalloplasty is much more expensive than vaginoplasty, approximately three or four times more expensive.³⁰⁸ Many transmen, therefore, opt to have breast surgery and to take male hormones, but not to have phalloplasty. While the clitoris grows from the male hormones and becomes erect upon stimulation, it does not appear as a penis, but it does allow for orgasm. Many FTM transmen wear artificial penises so that they appear to be men through their clothes.³⁰⁹

These facts are important in considering the employer's reactions to a transgender employee's request to use the restroom consistent with gender identity and expression. An employer like Utah Transit Authority that conditions Etsitty's rehiring and use of the women's restroom on proof that the plaintiff has completed sex reassignment surgery will needlessly treat some transgender individuals who have had sex reassignment surgery better than those who have either not yet finished the transition or who have chosen to forego surgery altogether. While employers may argue that this distinction is legitimate because their policy is to attribute gender based on the individual's genitalia, these policies do not comport with the world of transgender persons whose doctors advise them to wait for surgery until after they have lived as the sex to which they are transitioning for at least a year. Nor do they respect the legitimate decisions of transgender individuals who change their attributed gender, but fail to undergo sex reassignment surgery. Distinguishing among these individuals, granting benefits to

304. *Id.* at 81.

305. *Id.*

306. *Id.* at 81–86.

307. *Id.* at 82, 89; Schilt, *supra* note 189, at 57.

308. GRIGGS, *supra* note 2, at 83.

309. *Id.* at 86–87.

some but not to others, clearly is discrimination based on sex and gender.

There is an interesting tension between the social construction of gender espoused by masculinities and feminist theory and the lived experience of many transsexuals. In some ways, transsexuals' experiences support the masculinities and feminist theorists' views that gender and sex are not fixed phenomena. Many transsexuals consciously perform gender in a way that evokes the other sex, dressing bodies with male anatomy with exaggerated feminine dress such as makeup and dresses, or binding one's female breasts so as to pass as males. Many transsexuals, however, view the solution to their problems as a permanent transition to the other sex. Some transsexuals tell compelling tales about their gender identity. They do not see their transitions as a choice, but as a coming out of the closet to reveal their true identities.³¹⁰ If the transsexual believes ardently, as many do, that she or he inhabits the wrong body, and ingests hormones and has surgery to effect a sex change, it appears that the transsexual believes that biology determines sex and gender. By concluding that they do not fit into the bodies into which they were born, transgender individuals who live as transsexuals reinforce the idea that there are only two genders.

The story is, however, more complicated. As noted above, there is considerable variation among transgender individuals concerning how they transition. Some take hormones and go through sex reassignment surgery as well as other surgeries to make less visible secondary sex characteristics. Others, as mentioned above, may have hormone therapy and live in a transitioned gender, but opt not to have sex reassignment surgery. Furthermore, even when transgender individuals opt for sex reassignment surgery, the physical transition is only part of the story. Besides the physical changes accomplished through electrolysis, hormones, and surgery, acquiring a true identity involves significant performative changes, and transsexuals are keenly aware of the need to perform their newly adopted gender. Transwomen are particularly conscious about gender performances because they have more difficulty passing as women than transmen have passing as men. Kristen Schilt notes that there is a differential in the amount of scrutiny women suffer.³¹¹ In addition to the physical differences in passing, it is likely that the additional scrutiny of women's appearances creates more problems for men who are transitioning to women.

310. See McCLOSKEY, *supra* note 299 (stating throughout that she was not making a decision to change but she was expressing her identity).

311. See SCHILT, *supra* note 189, at 225.

When transitioning, many transwomen consciously adopt female mannerisms, methods of speech, and ways of developing relationships. Deirdre McClosky, a transwoman economics professor at the University of Iowa, for example, explains in her memoir that she studied how women performed their gender—how they helped one another, their speech patterns, and their willingness not to be the center of attention in group discussions—and she worked to emulate women’s styles.³¹² She also observes that there were differences between the way women relate to one another in American and Dutch cultures.³¹³ She observes that many transwomen received coaching from a speech therapist. She believes that it is necessary not only because women’s voices are higher in tone but also because women speak differently from men. She opines that women use fewer and less expressive gestures with their hands and keep their hands closer to the body when they speak. She notes that women speak with more modulation, but also more softly and often end phrases or sentences with an upward lilt. Another transwoman posits that women use more facial expressions when they speak, smile more frequently and look more directly into another’s eyes when they speak.³¹⁴ Transmen must be aware of similar issues, but Schilt’s research demonstrates that transmen experience more acceptance from their male colleagues when openly transitioning than transwomen do. Because the transmen adopt male gender role or expression, they present as masculine and less threatening to the masculinity of their male coworkers. Because masculine women are less threatening than feminine men, transmen have often adopted masculine dress, appearance and behaviors even before making the transition.³¹⁵

Transwomen’s lives demonstrate that the feminine gender expressions do not automatically follow physical and hormonal changes because they are social, not biological, in origin. Thus, although transsexuals tend to reinforce the concept of the binary of two sexes, transsexuals’ lived reality is that the physical changes are only a minor part of their transition. Furthermore, the transgender community consists of a diversity of gender and sexual expressions that is not limited to the binary definitions of male and female, masculine and feminine. There is the post-modern con-

312. McCLOSKEY, *supra* note 299, at 33, 77, 82, 83, 155–56, 159–60, 209–10, 264.

313. *Id.* at 142–43, 171–73.

314. GRIGGS, *supra* note 2, at 9.

315. Schilt, *supra* note 189, at 121.

cept of transsexuals as living “outside the boundaries of gender” rather than conforming with a particular or “opposite” gender.³¹⁶

This idea points to the position of trans people as located somewhere outside the spaces customarily offered to men and women, as people who are beyond the laws of gender. So the assumption that there are only two (opposite) genders, with their corresponding “masculinities” and “femininities,” is opened up to scrutiny. Instead, it is suggested that there is a possibility of a “third” space outside the gender dichotomy. This idea refers not simply to the addition of another category; it is conceived as “a space for society to articulate and make sense of all its various gendered identities.”³¹⁷

4. Protecting Intersex Individuals

Intersex or development sex disorder (DSD) individuals constitute another category of persons whose status under Title VII is ambiguous. To date, there are no reported cases brought by intersex individuals, but if they suffer discrimination as a result of their sexual ambiguity, intersex individuals should have a cause of action under Title VII. Discrimination against intersex individuals because of their ambiguous genitalia or conflict between genitalia and chromosomes would appear to be prohibited by Title VII's clear language that bans discrimination because of the individual's sex. But as we have seen, courts have made distinctions between sex stereotyping and sexual orientation and between sex stereotyping and gender identity discrimination. It is not inconceivable that they would draw boundaries between sex discrimination and discrimination because a person is intersex. Such line drawing in the case of an intersex person would contradict the clear language of the statute that prohibits discrimination because of sex. Although intersex persons may not necessarily be categorized as male or female, they do have a sex. And even if courts conclude that they are not protected under the clear language of Title VII, it is possible that *Price Waterhouse* may be used to protect intersex individuals from discrimination. But it is also possible that intersex individuals would

316. Richard Ekins & Dave King, *Transgendering, Men, and Masculinities*, in HANDBOOK OF STUDIES ON MEN AND MASCULINITIES 379, 389 (Michael S. Kimmel et al. eds., 2005) (citing Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280 (Julia Epstein & Kristina Straub eds., 1991)).

317. *Id.* (citing ZACHARY I. NATAF, LESBIANS TALK TRANSGENDER 57 (1996)).

fall into the gap and not receive protection of the sex stereotyping doctrine. Another possibility open to intersex individuals but not to transgender persons is protection under the Americans with Disabilities Act against workplace discrimination. While the ADA expressly excludes transgender persons from the definition of disability, it makes no exclusion for intersex individuals.³¹⁸

IV. MASCULINITIES: IMPROVING THEORY AND RESULTS IN TITLE VII CASES

Masculinities theory teaches us that men as a group prove their masculinity and police the masculinity of the job by engaging in discriminatory behavior toward men who do not live up to masculine norms. It may be that femininity or perceived femininity of gay or transgendered individuals causes the abusive behavior they often suffer at work.

Masculinities studies demonstrate that the very methods used to harass non-conforming men are based on the superiority of men over women, the masculine over the feminine.³¹⁹ If permitted by law, the conflation of certain types of work with men, and men with hegemonic masculinities, privileges gender-conforming men over women and gender non-conforming men. It also privileges white middle-class men over men of color. It leads to environments that are abusive to women and gender non-conforming men because of their sex, and it creates a whole class of jobs that exclude all but the most daring women and gender non-conforming men. By not recognizing that this behavior discriminates because of a person's sex, in violation of Title VII, courts reinforce the hegemonic masculinities, the superiority of masculine men and the inferiority of women, and the gender differences in pay and experience. Discriminatory behaviors, if permitted to continue, confirm that women (and non-conforming men) do not belong in many workplaces that are predominately male. Without desegregating these workplaces and breaking down the gender identification of the jobs in question, it is virtually impossible to achieve equality for women, many men, and sexual minorities.

Masculinities research, along with identity performance theory, may help the courts see that discrimination based on homosexuality or bisexuality is discrimination because of gender and is

318. 42 U.S.C. §§ 12208, 12211(b)(1) (2006).

319. See Case, *supra* note 118, at 18, 33, 47 (noting that many cases interpret *Price Waterhouse* not to apply to the feminine male and arguing that this devaluation of the feminine harms not only the individual effeminate male, but also women as a group).

therefore prohibited by Title VII. Masculinities research eschews the binary of feminine and masculine/heterosexuality and homosexuality as harmful to those who do not fit into one or the other extremes. Identity performance theory explains that, in the workplace, outsiders, such as gays, lesbians and bisexuals, have to perform their identities in order to gain acceptance at work.³²⁰ These performances take a toll on the individual because they entail significant extra work, and include negotiations with the self about what performances are acceptable. These are precisely the type of workplace pressures Title VII was meant to dismantle.

Likewise, the transgender cases raise significant issues concerning masculinity. First, it is notable that all of the reported decisions on transsexuals deal with transwomen. Moreover, many of the decisions involve MTF transsexuals who work in jobs that have a male gender identity: bus driver, firefighter, police officer, terrorism specialist. All of these jobs, especially those of police officer, firefighter and terrorism specialist, are perceived as requiring masculine characteristics. In light of Schilt and Wiswall's research demonstrating that transwomen experience serious pay disadvantage as well as less acceptance in their transitions than their transmen counterparts, masculinities research is especially relevant to understanding discrimination against transsexuals. Masculinities scholars note that men in jobs that are predominately male experience a need to prove their masculinity to other men. They construct their masculine identities through interaction with other persons in the workplace. In the transsexual cases, the male workers' behavior toward the transsexual plaintiffs protects the job from devaluation due to an association with femininity, and helps the male employees to construct their masculinity at work. These behaviors, we have seen, also occur in sexual harassment cases where the plaintiff is either homosexual or a man who does not otherwise live up to the norms of masculinity.

Transwomen may be even more threatening to the masculinity of the male workers than women or gays in the workplace. Any man who would reject his masculinity to the extreme of taking hormones or having his male organs surgically removed may be perceived as a serious danger to masculinity. Because masculinity is defined as that which is not feminine, a decision to purposefully express oneself as feminine is anathema to male coworkers who need to prove their masculinity to one another. Female coworkers, too, may further the discrimination by insisting on complementary definitions of male and female, and refusing to accept transwomen

320. See Carbado & Gulati, *supra* note 55.

in the women's restrooms. In this way, masculinity research helps courts understand how discrimination against sexual minorities occurs not only because of sexual orientation or transgender status, but also "because of sex."

V. CONCLUSION

Sexual minorities deserve protection under Title VII. To date, that protection is elusive and fragmented. Although many courts recognize a cause of action under *Price Waterhouse* for discrimination based on a person's failure to conform to gender stereotypes, Title VII has been uniformly interpreted not to prohibit discrimination based on sexual orientation and, except for one case, not to prohibit discrimination based on transgender identity. The distinction between prohibited discrimination based on gender stereotypes and permissible discrimination based on sexual orientation has created judicial attempts at line-drawing to establish the motivations of perpetrators. Similar line-drawing occurs in transgender cases when courts attempt to decide whether the employer was motivated by the plaintiff's transgender status or her failure to conform to gender stereotypes.

Masculinities theory demonstrates that distinguishing between these two sets of motivations is inadvisable and impossible. When combined with Schilt's empirical work, masculinities theory can help explain why the vast majority of the sexual orientation cases are brought by men in traditionally male workplaces and all of the transgender cases are brought by transwomen. In both cases, the harassment or other discriminatory behavior occurs because the plaintiff, who is identified by the perpetrators as a man, threatens the definition and concept of masculinity. Homosexual orientation is associated with femininity, an inferior gender status. Male-to-female transgenderism may be even more threatening than homosexuality because it rejects the superiority of masculinity in the most graphic of terms. The transgender individual dresses and behaves like a woman, and may even have reconstructive surgery to remove his male sexual organs. In this way, masculinities theory explains how discrimination against sexual minorities is inherently "because of sex" and therefore prohibited by Title VII.

Passage of ENDA, especially if it includes protection for gender identity and accommodation to the needs of transgender individuals, would ameliorate some of the problems because courts should not engage in the boundary-drawing between the defendant's motivations for the discriminatory behavior. ENDA, however, may

create more line-drawing problems. For example, judges may be uncomfortable concluding that discrimination against an individual because of her engagement outside of work in varying sexual behaviors is discrimination based on bisexuality. Judges may also impose a narrow definition of those who are covered by the restroom accommodation in the statute by interpreting “transition” narrowly or by imposing unreasonable notice requirements on the employees. Even more problematic, judges could potentially conclude that there is no “transition” without sex reassignment surgery.

Intersex individuals face similar hurdles under Title VII. While it makes sense that discrimination against a person because she is intersex or has a development sex disorder (DSD) violates Title VII because the discrimination would occur because of the sex of the individual, it is unclear whether courts will conclude that the statute forbids discrimination based on DSD. While discrimination based on DSD may also be prohibited by the Americans with Disabilities Act (ADA), judges interpreting Title VII and the ADA may see DSD as the same as sexual orientation or gender identity discrimination, or may conclude that because the individual was born as “third sex,” the discrimination against the individual does not occur because of sex. While this conclusion makes little sense, we have already seen the courts attempting to draw fine lines between discrimination based on sexual orientation and gender non-conformity and concluding that discrimination based on transgender status is not protected by Title VII. It is not a far step to the conclusion that discrimination based on intersex status is not the type of discrimination that the authors of Title VII sought to condemn, and, therefore, discrimination based on intersex status is not prohibited by the statute.

An amendment to Title VII or passage of ENDA to protect against discrimination based on sexual orientation, gender identity and intersex conditions would further the interests of LGBTI individuals. Nonetheless, passage of an amendment or a new act may not resolve the problems raised by the line-drawing debate over sex stereotyping and sexual orientation discrimination. Courts may continue to draw lines, this time between discrimination based on bisexuality and discrimination based on behavior outside of the workplace, and between discrimination based on transgender identity and based on an employee’s failure to use the proper restroom.

Even in the absence of statutory amendment or a new statute, Title VII should protect against discrimination based on sexual

orientation, intersex conditions and gender identity and should provide reasonable accommodation, where necessary, to allow sexual minorities to live and work with dignity and security. Masculinities research such as the theoretical work of R.C. Connell and Michael Kimmel and the qualitative empirical work of Kristen Schilt will advance the understanding of the victims of discrimination and of the causes of discriminatory behaviors, which are often rooted in a need to prove masculinity. With an understanding of sexual minorities and the reasons why discrimination occurs, Title VII's prohibition of discrimination "because of sex" should be sufficient, if interpreted broadly, to grant sexual minorities workplace rights.