WHEN STEVE IS FIRED FOR BECOMING SUSAN: WHY COURTS AND LEGISLATORS NEED TO PROTECT TRANSGENDER EMPLOYEES FROM DISCRIMINATION

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I. INTRODUCTION

Steven B. Stanton was Largo, Florida's longest tenured city manager.[1] For fourteen years, he oversaw the city's 1,200 employees and $130.6 million budget.[2] City commissioners gave him good performance evaluations and had recently increased his pay.[3] But Stanton was fired from his $140,000-a-year job when the news media revealed that he would be undergoing sex-reassignment surgery[4] and returning to work as Susan Ashley Stanton.[5] Several city commissioners said he had violated their

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1. Memo. from Karen M. Doering, Atty. for Steven Stanton, to City of Largo, Fla., *Reply to City of Largo Preliminary Res. No. 1924,* 3 (Mar. 19, 2007) (available at http://www.nclrights.org/site/DocServer/stanton_reply_city_largo.pdf?docID=1501) (listing Stanton's accomplishments as city manager).

2. Lorri Helfand, *Largo Official Plans Sex Change*, St. Pete. Times 1A (Feb. 22, 2007). The City of Largo has 76,000 residents. *Id.*

3. Lorri Helfand, *Largo Officials Vote to Dismiss Stanton*, St. Pete. Times 1A (Feb. 28, 2007) (noting that Stanton received a 9% raise in 2006); Lorri Helfand, *Stanton's Pay Rises, Despite Mayor*, St. Pete. Times (Largo Times) 1 (Dec. 15, 2004) (describing Stanton's yearly salary increases since 2001); Shannon Tan, *City Narrowly Approves Manager's Raise*, St. Pete. Times (Largo Times) 1 (Aug. 17, 2005) (stating that Stanton received a 4% raise in 2005 and a 3% raise in 2004).

4. Lorri Helfand, *Despite Outcry, Stanton Is Fired*, St. Pete. Times 1A (March 24, 2007). City commissioners voted five to two to terminate him. *Id.* Stanton made this disclosure after the *St. Petersburg Times* told him that the newspaper received a tip revealing his plans to become a woman. *See* Ltr. from Steven B. Stanton to City of Largo Employees (Feb. 21, 2007) (available at http://www.baynews9.com/content/36/2007/2/21/225501.html?title=Letter+from+Largo+city+manager+to+employees) (indicating that he had taken "extraordinary steps" to prevent his secret from affecting his career or family).

5. *See* Lorri Helfand, *It's Official: Steve Is Susan*, St. Pete. Times B3 (June 8, 2007) (describing Stanton's legal name change to Susan Ashley Stanton).

trust by keeping his transition a secret.[6] They insisted Stanton was not fired because he was transgender but because they had lost faith in his honesty, integrity, judgment, and ability to lead.[7]

In contrast, when Mike Penner, a veteran sportswriter at the *Los Angeles Times*, revealed he was transgender, his employer supported his decision and allowed him to come out to readers.[8] Penner was reluctant to go public and had considered resigning after seeing what happened to Stanton.[9] Penner's editor, however, insisted, "we don't want what happened to Susan Stanton to happen here."[10] Not only did Penner (now known as Christine Daniels) receive a promotion, the *Times* gave her a blog, "Woman in Progress," to write about her transition.[11]

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6. Helfand, *supra* n. 4; Jim Stratton, *Largo Reaffirms Firing of Transgender Official*, Orlando Sentinel 1A (March 24, 2007). Stanton had previously disclosed his secret to a select group of city employees and elected officials. Lorri Helfand, Robert Farley & Will Van Sant, *Stanton Carefully Built 'Circle of Trust,'* St. Pete. Times 1A (Feb. 25, 2007). By waiting to inform all the city commissioners of his transgender status, Stanton's attorney, Karen Doering, says he was following established guidelines for transitioning in the workplace. Doering, *supra* n. 1, at 1; *see* Transgender at Work, *TAW Checklist for Transitioning in the Workplace*, http://www.tgender.net/taw/tggl/checklist.html (accessed Dec. 6, 2007) (suggesting that employees reveal their intent to transition to a small group before making a general announcement); *see also* Lorri Helfand, *With No Transition Plan, Stanton Wrote One*, St. Pete. Times 1A (March 16, 2007) (describing his planned schedule to reveal his transgender status to city commissioners and the media).

7. Stratton, *supra* n. 6. Members of the public, however, said that Stanton should be fired because his gender reassignment would be immoral. Helfand, *Largo Officials Vote to Dismiss Stanton*, *supra* n. 3. "If Jesus was here tonight, I can guarantee you he'd want him terminated. Make no mistake about it," said Ron Sanders, pastor of Lighthouse Baptist Church of Largo. *Id.* Transgender opponents claim that *Deuteronomy* 22:5 in the Bible supports their position as follows: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord thy God." Debra Rosenberg, *(Rethinking) Gender*, Newsweek 50 (May 21, 2007) (available at http://www.newsweek.com/id/34772).

8. Mike Penner, *Old Mike, New Christine*, L.A. Times D2 (Apr. 26, 2007) (available at http://www.latimes.com/sports/la-sp-oldmike26apr26,0,2709943.story).

9. Demorris A. Lee, *Commission Grapples with Stanton Fallout*, St. Pete. Times 1 (May 17, 2007) (available at http://www.sptimes/com/2007/05/17news_pf/Northpinellas/Commission_grapples_w.shtml). Daniels stated that "[a] lot of people have lost their jobs. For me, it was just the opposite. The Times has probably set the template for how to let an employee transition in dignity." *Id.*

10. *Id.*

11. *See* Regine LaBossiere, *The Fact and Fiction of Being Transgender*, Hartford Courant (Conn.) D1 (June 15, 2007) (comparing Stanton's and Daniels' situations). Daniels' blog is available at http://latimesblogs.latimes.com/womaninprogress/ (accessed Oct. 8, 2007). To her surprise, Daniels' transition strengthened her bonds with most of her friends. Lee, *supra* n. 9. Some readers criticized her transition as "unnatural" and blasted the newspaper for publicizing her situation. James Rainey, *A Writer's Transformation Makes the Personal Public*, L.A. Times A28 (Apr. 27, 2007).

The overwhelming disparity between the two cases can in large part be attributed to the difference between Florida and California laws.[12] In thirty-eight states (including Florida) businesses can legally fire their employees solely because they are transgender.[13] These states prohibit discrimination based on sex, but do not expressly protect gender identity or expression.[14] Only twelve states and the District of Columbia have legislation protecting transgender workers from employment discrimination.[15]

Moreover, while Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of . . . sex,"[16] the circuits are split over whether Title VII protects transgender plaintiffs.[17] This is legally significant because the United States Supreme Court has yet to address this issue. This Article argues that in light of the conflicting caselaw that has developed around the interpretation of "sex" in Title VII, courts should adopt the Sixth Circuit's holding that Title VII prohibits discrimination against employees who fail to conform to gender stereotypes regardless of their transgender status.[18] Congress should also enact federal legislation, particularly a transgender-inclusive Employment Non-Discrimination Act (ENDA),[19] to settle the issue. A

12. *See* Christine Daniels, *Civil Rights for LGB . . . and T*, L.A. Times 21 (Oct. 10, 2007) (stating that a human resources department employee told Daniels that "[t]he Times cannot discriminate against you because California has a law in place.")

13. *See* Natl. Gay & Lesbian Task Force, *Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws*, http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_4_08.pdf (updated Apr. 2008). California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia have legislation prohibiting discrimination based on gender identity or expression in employment. *Id.*

14. *E.g.* Fla. Stat. § 760.01(2) (2007).

15. *See* Natl. Gay & Lesbian Task Force, *supra* n. 13.

16. 42 U.S.C. § 2000e-2(a) (2006).

17. For a discussion on the circuit split, see *infra* Part II(D).

18. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 571 (6th Cir. 2004).

19. *E.g.* H.R. 2015, 110th Cong. (April 24, 2007) (as introduced by Representative Barney Frank) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2015ih.txt.pdf). In September 2007, Representative Barney Frank decided to split ENDA into two bills after a poll of House members showed that the transgender-inclusive ENDA lacked the votes to pass. Barney Frank, *Statement of Barney Frank on ENDA, the Employment Non-Discrimination Act*, http://www.house.gov/frank/ENDASeptember2007.html (last updated Sept. 28, 2007). Frank introduced House Resolution 3685, a bill protecting sexual orientation, and House Resolution 3686, a bill protecting gender identity. H.R. 3685, 110th Cong. (Sept. 27, 2007); H.R. 3686, 110th Cong. (Sept. 27, 2007). Outraged, nearly 300 gay and transgender organizations launched a campaign to

transgender-inclusive ENDA would provide the most effective means of protecting transgender workers from employment discrimination because the current patchwork of federal, state, and local laws fails to adequately safeguard transgender employees.[20]

This Article will start out in Part II with an overview of the legislative history of Title VII and the Supreme Court's interpretation of the term "sex" in Title VII as well as a discussion of the cases leading to the circuit split.[21] Next, Part III will critically analyze various solutions to protect transgender employees.[22] Part IV will propose that courts adopt the Sixth Circuit's interpretation of Title VII and that Congress enact a transgender-inclusive ENDA.[23] This Article will conclude in Part V.[24]

II. HISTORICAL BACKGROUND

A. Transgender People

An estimated 750,000 to 3 million Americans are transgender according to the National Center for Transgender Equality.[25] Transgender is an umbrella term used to describe a range of "gender" identities, including cross-dressers, those who do not conform to societal stereotypes of what it means to be "male" or "female," and transsexuals.[26] While "sex" is generally understood to mean

pass a transgender-inclusive ENDA. Natl. Gay & Lesbian Task Force, *Task Force, Inc., Update on ENDA*, http://thetaskforce.org/press/releases/prENDA_101107 (Oct. 11, 2007). The House of Representatives passed H.R. 3685. H.R. 3685, 110th Cong. (Nov. 7, 2007) (as passed by House Nov. 7).

20. For a discussion on how current laws fail to adequately protect transgender workers, see *infra* Part III.

21. *Infra* pt. II.

22. *Infra* pt. III.

23. *Infra* pt. IV.

24. *Infra* pt. V.

25. Rosenberg, *supra* n. 7.

26. Natl. Ctr. Transgender Equal., *Coming Out as a Transgender* 2, 5, http://www.nctequality.org/Resources/Coming_Out_as_Transgender.pdf (accessed Feb. 2, 2008). Transsexuals identify and live their lives as the gender opposite from which they were assigned at birth. *Id.* at 5. Some are diagnosed with gender-identity disorder, a condition involving incongruity between an individual's anatomical sex and personal gender identity. Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR* 576, 577 (4th ed., Am. Psychiatric Assn. 2000). In the 1900s, electric-shock therapy was used in an attempt to "cure" people with gender dysphoria. Human Rights Campaign Found., *Transgender Issues in the Workplace: A Tool for Managers* 7 (2004) (available at http://nmmstream.net/hrc/downloads/publications/tgtool.pdf) (accessed Jan. 8, 2008). Currently, the typical course of treatment involves psychological or psychiatric counseling,

whether a person is anatomically male or female at birth, "gender" is whether a person possesses qualities that society considers masculine or feminine.[27] Transgender people face discrimination in many areas other than employment, including housing, public accommodations, credit, parenting, immigration, and prisons.[28] Even after undergoing gender-reassignment surgery, some courts will refuse to change the sex designated on a transgendered person's birth certificate,[29] while other courts have invalidated their marriages.[30] Transgender people are often the victims of brutal hate crimes.[31]

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hormone therapy, a one-year trial period where the person lives as his or her new gender, and gender-reassignment surgery. World Prof. Assn. Transgender Health, Inc., *The Harry Benjamin International Gender Dysphoria Association's Standard of Care for Gender Identity Disorders, Sixth Version* 2–3 (Feb. 2001) (available at http://wpath.org/Documents2/socv6.pdf). A new treatment for transgender children delays puberty for a few years so the children will not develop into their biological sex. Lauren Smiley, *Girl/Boy Interrupted*, SF Weekly Vol. 26, Issue 24 (Cal.) (July 11, 2007); *see also Transgendered 7-year-old* (CNN June 28, 2007) (TV broadcast) (available at http://www.cnn.com/video/#/video/us/2007/06/28/zahn.living.life.as.girl.cnn) (describing a family's decision to allow their son to live as a girl).

27. Taylor Flynn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 394 (2001). While most laws use the term "sex," courts, administrative agencies, and legislators often use "gender" synonymously with "sex." Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 Ariz. L. Rev. 265, 274 (1999). United States Supreme Court Justice Ruth Bader Ginsburg was largely responsible for using the words interchangeably in the 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, 10 (1995). She stated that the word "sex" might "conjure up improper images" for judges reading briefs about sex discrimination.

28. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 Wm. & Mary J. Women & L. 37, 37–38 (2000); John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. Gender, Race & Just. 237, 258–266 (2004).

29. Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"*, 4 Mich. J. Gender & L. 275, 325 (1997).

30. *E.g. Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. 2d Dist. App. 2004) (holding that marriage of woman to post-operative female-to-male transsexual was void); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that post-operative male-to-female transsexual lacked standing as husband's surviving spouse to sue under wrongful death and survival statutes even though the couple was married for seven years).

31. *See* Ohle, *supra* n. 28, at 268–269. The United States House of Representatives passed a hate-crimes prevention bill on May 3 that included gender identity. H.R. 1592, 110th Cong. (March 20, 2007) (as introduced). The Senate adopted an amendment attaching the hate-crime provision to a defense-authorization bill. S.A. Miller, *Senate Approves Defense Bill; Bush Veto Likely on Gay Protection*, Wash. Times A1 (Oct. 2, 2007). The President is likely to veto the bill. *See* Exec. Off. Pres., *Statement of Administration Policy*, http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf (May 3, 2007) (indi-

This Article, however, focuses on employment discrimination against transgender workers.

B. Title VII Background

In 1964, Congress enacted Title VII of the Civil Rights Act, prohibiting employment discrimination based on race, color, religion, sex, and national origin.[32] "Sex" was added as an amendment a day before the House approved Title VII, apparently as a tactic designed to defeat the entire bill.[33] The sparse legislative history indicates that Congress was attempting to give women equality in the workplace.[34] Although both the House and Senate passed the amendment, neither held debates or hearings on what constituted "sex" for the purposes of interpreting Title VII.[35] As a result, courts have had to come up with their own interpretations, often creating conflicting caselaw on whether Title VII extends to sexual orientation and gender identity or expression.[36]

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cating that the President's senior advisors will recommend that he veto the hate-crimes bill).

32. 42 U.S.C. § 2000e-2(a). Title VII provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

33. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that the amendment was "the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination"); *Legislative History of Titles VII and XI of Civil Rights Act of 1964* vol. 1, 3228 (U.S. Equal Empl. Opportunity Commn.) [hereinafter *Legislative History*] (noting that some of the supporters of the amendment to add "sex" as a prohibited basis of discrimination were "openly and honestly seeking to kill the entire bill").

34. *See DeSantis v. P. Tel. & Telegraph Co. Inc.*, 608 F.2d 327, 329 (9th Cir. 1979) (noting that the purpose of Title VII's "sex" discrimination provision was to "place women on an equal footing with men").

35. *Legislative History*, *supra* n. 33, at 3231 (quoting Rep. Green that "there were no hearings by any committee of the House; not a single word of testimony was taken; and the full implications could not have been understood"); *see Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (noting that "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives"). "[T]he bill quickly passed as amended and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Id.*

36. *Compare Etsitty v. Utah Transit Auth.*, 2005 WL 1505610 at *4 (D. Utah June 24, 2005) (holding that Title VII does not protect transsexual employee alleging wrongful termination because of gender nonconforming behavior), *aff'd*, 502 F.3d 1215 (10th Cir.

Early decisions rejected Title VII claims by transgender plaintiffs.[37] The Seventh Circuit held in *Ulane v. Eastern Airlines*[38] that Title VII does not protect transsexuals.[39] Kenneth Ulane, a pilot for Eastern Airlines, was fired after undergoing gender-reassignment surgery and returning to work as Karen Frances Ulane.[40] The lower court found that the term "sex" was not just "a cut-and-dried matter of chromosomes" but also included "sexual identity."[41] The Seventh Circuit rejected this interpretation of Title VII for three reasons. First, the plain meaning of the term "sex" indicated that Title VII only prohibits discrimination "against women because they are women and against men because they are men."[42] Second, the legislative history of Title VII showed that Congress never intended Title VII to apply to non-traditional notions of "sex."[43] Lastly, Congress had repeatedly rejected bills to amend Title VII to include sexual orientation.[44] In light of these reasons, the Seventh Circuit concluded that a new definition of "sex" had to come from Congress.[45] Although the United States Supreme Court eventually decided two cases that went beyond the narrow definition of "sex" in *Ulane*, a

2007); *with Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (determining that a male plaintiff wearing a dress may have a claim for discrimination under the Equal Credit Opportunity Act).

37. *See e.g. Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (rejecting male-to-female transsexual's claim that Title VII protected transsexuals); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977) (holding that Title VII did not protect a male-to-female transsexual who was fired); *Grossman v. Bernards Township Bd. of Educ.*, 1975 WL 302 at *4 (D. N.J. Sept. 10, 1975) (acknowledging no actionable Title VII claim because the plaintiff was fired not because she was female but because of her sex change).

38. 742 F.2d 1081 (7th Cir. 1984).

39. *Id.* at 1085–1086.

40. *Id.* at 1082–1083.

41. *Id.* at 1084. The district court found that "sex" in Title VII did not include "sexual preference" so that gays and transvestites were not protected under Title VII. *Id.*

42. *Id.* at 1085.

43. *Id.*

44. *Id.* at 1085–1086; *e.g.* Employment Nondiscrimination Act of 1996, Sen. 2056, 104th Cong. (1996); Employment Non Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

45. *Ulane*, 742 F.2d 1081 at 1086. "For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating." *Id.*

number of lower courts continue to use the biological sex approach for purposes of interpreting Title VII.[46]

C. Supreme Court's Interpretation of "Sex"

The Supreme Court adopted a broad interpretation of "sex" in Title VII when it decided the seminal case of *Price Waterhouse v. Hopkins*.[47] *Price Waterhouse* involved a senior manager at the accounting firm, Ann Hopkins, who claimed the firm's partners discriminated against her when they refused to reconsider her for partnership.[48] Although the partners had praised her accomplishments, they also criticized her for being "overly aggressive" and "macho," suggesting that she "overcompensated for being a woman."[49] One partner advised her to enroll in "a course at charm school."[50] Another partner told Hopkins she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances at partnership.[51] The Supreme Court recognized that Hopkins was discriminated against not because she was a woman per se but because she was a woman who failed to meet the stereotypical characteristics expected of women.[52] The Court held that Title VII covers harassment directed at a person because the person fails to conform to traditional sex stereotypes.[53]

Although the Court in *Price Waterhouse*, however, failed to define sex stereotyping,[54] the Court seemed to conclude that the

46. *E.g. Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058 at *2 (S.D. Ind. June 17, 2003) (explaining that the plaintiff, who had intended to change his sex from male to female, was held outside the protected class under Title VII because the word "sex" in Title VII means "biological sex" and not "sexual preference" or "sexual identity"); *Oiler v. Winn-Dixie La., Inc.*, 2002 WL 31098541 at *6 (E.D. La. Sept. 16, 2002) (explaining that the language of Title VII does not prohibit discrimination against people with sexual identity disorders because the term "sex" does not include sexual identity or gender identity disorders).

47. 490 U.S. 228 (1989) (plurality opinion). The Court uses the terms "sex" and "gender" interchangeably throughout the opinion.

48. *Id.* at 231–232. Seven of the 662 partners at the firm were women. *Id.* at 233.

49. *Id.* at 234–235.

50. *Id.* at 235.

51. *Id.*

52. *Id.* at 256. "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'" *Id.*

53. *Id.* at 250.

54. *See* Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 Ark. L. Rev. 27, 39–40 (1990) (finding that courts fail to define "sexual stereotyping" itself because they

term "sex" in Title VII was no longer limited to one's anatomical sex at birth, but also included physical appearance, behavior, and other characteristics that might be considered "masculine" or "feminine."[55] However, not all of the lower courts have adopted this interpretation, with several courts continuing to hold that discrimination based on "sex" is restricted to one's biological sex.[56] Other courts have simply concluded that *Price Waterhouse* does not apply to cases involving transgender plaintiffs because Ann Hopkins was not transgender.[57]

In 1998, the Supreme Court further expanded the scope of sex discrimination beyond what Congress intended in Title VII. The male plaintiff in *Oncale v. Sundowner Offshore Services, Inc.*[58] was part of an all-male crew working on an oil platform in the Gulf of Mexico.[59] He alleged that his supervisors and co-workers threatened him with rape and physically assaulted him in a sexual manner, even forcibly pushing a bar of soap into his anus as he was showering.[60] The Fifth Circuit affirmed the district court's decision that Title VII did not prohibit same-sex harassment by male co-workers.[61] The Supreme Court reversed and unanimously held that Title VII prohibited same-sex sexual harassment.[62] Justice Scalia reasoned that even though Congress did not intend to prevent male-on-male sexual harassment when it

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tend to assume that sex-stereotyping cases are self-evident).

55. Justice Brennan wrote the following:

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

490 U.S. at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

56. *Supra* n. 45.

57. *See e.g. Oiler*, 2002 WL 31098541 at *6 (noting that the plaintiff in *Price Waterhouse* never pretended to be a man or adopted a male persona); *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257 at *4 (W.D. Mo. Oct. 11, 2000) (distinguishing *Price Waterhouse* on the basis that Ann Hopkins was not a transsexual).

58. 523 U.S. 75 (1998).

59. *Id.* at 77.

60. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–119 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998). The plaintiff stated at his deposition that "I felt that if I didn't leave my job, that I would be raped or forced to have sex." *Oncale*, 523 U.S. at 77.

61. *Id.*

62. *Id.* at 82.

enacted Title VII in 1964, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[63]

The Court listed three scenarios by which a plaintiff could prove a claim of same-sex sexual harassment: (1) if the harasser was homosexual and presumably motivated by sexual desire; (2) the harasser used sex-specific terms indicating hostility to women in the workplace; and (3) the harasser treated men and women differently in the workplace.[64] The Court emphasized that all harassment between men and women in the workplace did not automatically constitute sex discrimination[65] and cautioned against turning Title VII into a "general civility code."[66] The critical test, the Court held, was whether, "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[67] The language used by the Court indicates that there are only two categories of sex: male and female.[68] Moreover, the Court did not mention sex stereotyping or harassment based on sexual orientation[69] as one of the ways a plaintiff could show sex discrimination. As a result, lower courts have had to determine whether same-sex sexual harassment also encompasses harassment based on a person's sexual orientation or gender identity.[70]

63. *Id.* at 79.

64. *Id.* at 80–81.

65. *Id.* at 80 (indicating that words uttered with sexual content or connotation does not necessarily amount to sexual discrimination between men and women).

66. *Id.* at 81.

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

68. Masako Kanazawa, Student Author, Schwenk *and the Ambiguity in Federal "Sex" Discrimination Jurisprudence: Defining Sex Discrimination Dynamically under Title VII*, 25 Seattle U. L. Rev. 255, 262 (2001) (citing *Oncale*, 523 U.S. at 78). Medical experts, however, believe that male and female are not mutually exclusive categories and that "sex exists along a continuum." Storrow, *supra* n. 29, at 281–282.

69. *Oncale*, 523 U.S. at 80. Although the opinion does not mention the plaintiff's sexual orientation, the plaintiff, a married father of two, said he is not a homosexual. *High Court Backs La. Man; Ruling Allows Lawsuit over Same-Sex Harassment*, The Advocate (Baton Rouge, La.) 1A (March 5, 1998).

70. *See e.g. Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (regarding "as settled law that . . . Title VII does not proscribe harassment simply because of sexual orientation."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 259 (3d Cir. 2001) (holding that plaintiff failed to state a cause of action under Title VII when he alleged he was sexually harassed because of his sexual orientation).

D. Circuit Split: Federal Courts' Interpretation of "Sex"

After the Supreme Court's decision in *Price Waterhouse*, transgender plaintiffs argued that they were discriminated against based on sex stereotypes for not behaving or dressing according to their anatomical sex. Although lower courts mostly acknowledge that gender-nonconformity claims are actionable under Title VII,[71] they tend to reject such claims when the plaintiffs' behavior also implicates their gender identity or sexual orientation.[72] These courts, for example, recognize that an employer who fires an unfeminine woman violates Title VII, but does not violate Title VII for firing a woman who looks like a man or who lives as a man.[73] In such situations, courts have found that the motivation for the discriminatory behavior was bias against gays or transgender persons, not gender stereotyping.[74] The courts then assert that Title VII only forbids sex-based discrimination, not sexual-orientation or transgender discrimination. Other courts distinguish discrimination based on sex per se from discrimination based on the individual's change of sex, finding that the latter is not protected by Title VII.[75]

The circuits remain split on these issues. The Ninth Circuit has departed from the "anatomical sex" approach,[76] while the Sixth Circuit has held that Title VII prohibits discrimination on the basis of gender nonconformity regardless of transgender

71. Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 Duke J. Gender L. & Policy 205, 218 (2007).

72. *Id.*

73. Chai R. Feldblum, *Gay People, Trans People, Women: Is It All about Gender?* 17 N.Y.L. Sch. J. Human Rights 623, 643 (2000).

74. Friedman, *supra* n. 71, at 205; *see* Jeremy S. Barber, Student Author, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 Am. U. L. Rev. 493, 506 (2002) (finding that gay plaintiffs bringing claims under Title VII are generally successful if they can prove they were discriminated against because of a failure to conform to gender stereotypes under *Price Waterhouse* and not because of sexual orientation).

75. *See e.g. Sweet*, 2003 WL 21525058 at *3 (asserting that *Price Waterhouse* does not require an abandonment of *Ulane* and that Title VII does not prohibit discrimination based on plaintiff's intent to change his sex).

76. *E.g. Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–875 (9th Cir. 2001); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

status.[77] The Seventh Circuit, however, continues to regard *Ulane* as binding precedent.[78]

1. Schwenk v. Hartford

The Ninth Circuit was the first circuit to adopt a broad interpretation of "sex" when it decided *Schwenk v. Hartford*[79] in 2000. Although the case did not involve Title VII, the decision created a split from the circuits that continued to adhere to the narrow "anatomical sex" definition in rejecting claims by transgender plaintiffs.

The transgender plaintiff in *Schwenk* alleged she was sexually assaulted by a guard while housed in an all-male prison.[80] She sued the guard and other prison officials under the Gender-Motivated Violence Act,[81] which paralleled Title VII.[82] The Ninth Circuit noted that federal courts had distinguished sex from gender, thus denying transgender plaintiffs the protections of Title VII because they were the victims of gender, not sex, discrimination.[83] The court declared that "the logic and language" of the Supreme Court's decision in *Price Waterhouse* had overruled this approach and held that Title VII encompasses both sex *and* gender.[84]

A year later, the Ninth Circuit melded the holdings of *Price Waterhouse* and *Oncale* and concluded that a plaintiff could prove same-sex harassment was discrimination by presenting evidence that the harasser's conduct was motivated by a belief that the plaintiff failed to conform to gender stereotypes. The plaintiff's co-

77. *Smith*, 378 F.3d at 574–575.

78. *E.g. Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (following *Ulane* by asserting that harassment based solely on a person's sexual orientation is not an unlawful employment practice under Title VII).

79. 204 F.3d 1187 (9th Cir. 2000).

80. *Id.* at 1193.

81. *Id.* at 1192 (citing 42 U.S.C. § 13981 (1994)). The Supreme Court later held that the Act was unconstitutional. *U.S. v. Morrison*, 529 U.S. 598, 627 (2000).

82. 204 F.3d at 1200–1201.

83. *Id.* at 1201.

84. *Id.* at 1201–1202 (relying on the logic set forth in *Price Waterhouse*, 490 U.S. at 249, "the correct test for determining whether a crime of violence is motivated by gender is whether gender was *a* 'motivating factor'—it need not be the *only* motivating factor") (emphasis in original).

workers in *Nichols v. Azteca Restaurant Enterprises, Inc.*[85] mocked him for walking and carrying his tray "like a woman" and referred to him as "she" and "her."[86] The court held that the same-sex harassment was discrimination based on gender stereotypes in violation of Title VII.[87] Similarly, in *Rene v. MGM Grand Hotel, Inc.*,[88] the Ninth Circuit concluded that a gay plaintiff stated a cause of action under Title VII even though he alleged he was discriminated against because of his sexual orientation.[89]

2. Smith v. City of Salem, Ohio

The Sixth Circuit was the first circuit to explicitly hold that Title VII protected transgender employees. The plaintiff in *Smith v. City of Salem, Ohio*[90] was a fire department lieutenant who had been diagnosed with gender-identity disorder (GID).[91] After informing his supervisor of his diagnosis, city officials tried to force him to resign by requiring him to undergo psychological evaluations and suspending him.[92] The Sixth Circuit noted that courts had previously rejected Title VII claims in cases such as *Ulane* because the plaintiffs were victims of "gender" and not "sex" discrimination.[93] The court found that the approach in those cases had been "eviscerated" by the Supreme Court's decision in *Price Waterhouse*.[94] Thus, discrimination against a transgender person who fails to act in accordance with his or her anatomical sex was no different from the discrimination Ann Hopkins faced in *Price*

85. 256 F.3d 864 (9th Cir. 2001).

86. *Id.* at 874.

87. *Id.* at 874–875.

88. 305 F.3d 1061 (9th Cir. 2002) (plurality). The plaintiff did not claim he was discriminated against because he failed to conform to gender stereotypes. *Id.* at 1077 (Hug, Schroeder, Fernandez & Nelson, JJ., dissenting).

89. *Id.* at 1063–1064 (plurality) (holding that a plaintiff's sexual orientation is irrelevant for purposes of Title VII). The dissent emphasized that discrimination based on sexual orientation was not actionable under Title VII. *Id.* at 1074–1076 (Hug, Schroeder, Fernandez & Nelson, JJ., dissenting).

90. 378 F.3d 566 (6th Cir. 2004).

91. *Id.* at 568 (according to the American Psychiatric Association, gender-identity disorder is defined as "a disjunction between an individual's sexual organs and sexual identity").

92. *Id.* at 569.

93. *Id.* at 573.

94. *Id.*

Waterhouse.[95] The court held that the use of labels such as "transsexual" or "homosexual" would not affect claims by plaintiffs alleging discrimination because of their gender nonconformity.[96] Writing for the three-judge panel, Judge Cole stated that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."[97]

Similarly, in *Barnes v. City of Cincinnati*,[98] the Sixth Circuit affirmed a jury verdict in favor of a preoperative male-to-female transsexual police officer who was demoted by the police department.[99] The officer occasionally came to work wearing makeup or lipstick, and the vice squad had photographed him at night while he was dressed as a woman.[100] Although the officer had passed a promotional test to become a sergeant, he failed the probationary period after his supervisors put him through an especially demanding training program.[101] The Sixth Circuit found that the officer properly stated a claim under Title VII by alleging discrimination against the City for his failure to conform to gender stereotypes.[102]

Under *Smith* and *Barnes*, transgender plaintiffs in the Sixth Circuit are protected by Title VII irrespective of whether they identify as transsexuals—a label that many lower courts have deemed fatal to Title VII claims.[103]

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95. *Id.* at 575. As the court noted, "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex." *Id.* at 574 (emphasis in original).

96. *Id.* at 575.

97. *Id.*

98. 401 F.3d 729 (6th Cir. 2005).

99. *Id.* at 733.

100. *Id.* at 733–734.

101. *Id.* at 733 (creating a special evaluation program strictly for Officer Barnes, he was not permitted to go out in the field alone and was video and tape recorded during this probationary period).

102. *Id.* at 737. The court found that the plaintiff, by alleging discrimination based on his failure to conform to gender stereotypes, was a member of a protected class. *Id.* at 736–737. In order to establish a prima facie case of sex discrimination, the court requires a plaintiff to demonstrate that (1) he is a member of a protected class; (2) he applied and was qualified for a promotion; (3) he was denied the promotion; and (4) his co-workers with similar qualifications but who were not members of the protected class received promotions. *Id.*

103. Thomas Ling, Smith v. City of Salem*: Title VII Protects Contra-Gender Behavior*, 40 Harv. Civ. Rights-Civ. Libs. L. Rev. 277, 284–285 (2005).

E. State Laws

In states prohibiting employment discrimination on the basis of sexual orientation, but not gender identity, transgender plaintiffs may have a cause of action if they are mistaken for being gay, lesbian, or bisexual.[104] On the other hand, courts often reject sexual-orientation claims by transgender plaintiffs after finding that transgenderism is a distinct category from sexual orientation.[105] In states with antidiscrimination laws that do not expressly protect sexual orientation or gender identity, such as Florida, the outcome of cases turns on how the courts define "sex" discrimination. Some courts continue to rely on caselaw such as *Ulane*, while others have broadly interpreted the sex and disability provisions of state laws to protect transgender plaintiffs.[106]

The Florida Commission on Human Relations, the state agency charged with enforcing Florida's civil rights laws, previously found that transsexualism constituted a handicap under the Florida Civil Rights Act in *Smith v. City of Jacksonville Correctional Institution*.[107] Belinda Joelle Smith, formerly William H. Smith, was a corrections officer at the Jacksonville Correctional Institution.[108] Smith occasionally dressed as a woman to reflect her gender identity.[109] On one such occasion, Smith had a flat tire and a police officer stopped to help her.[110] The police officer filed a report of the encounter after Smith identified herself as female even though her tag was registered to a male.[111] The city dismissed her after learning of the incident for conduct unbecoming of a public employee.[112]

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104. Erin Ekeberg & Ramona Tumber, *Sexuality & Transgender Identity Issues in Employmen*t, 5 Geo. J. Gender & L. 387, 403 (2004).

105. Abigail W. Lloyd, Student Author, *Defining the Human: Are Transgendered People Strangers to the Law?* 20 Berkeley J. Gender L. & Just. 150, 191 (2005).

106. *See e.g. Sommers v. Iowa Civil Rights Commn.*, 337 N.W.2d 470 (Iowa 1983) (holding that sex discrimination does not protect transsexuals and transsexualism is not a disability under the Iowa Civil Rights Act); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. App. Div. 2001) (holding that sex discrimination includes gender stereotyping and that gender dysphoria qualifies as a handicap under the New Jersey Law Against Discrimination).

107. 1991 WL 833882 (Fla. Div. Admin. Hrgs. Oct. 2, 1991).

108. *Id.* at *4.

109. *Id.* at *5.

110. *Id.* (wearing a woman's wig, makeup, a French-cut bikini, and female accessories).

111. *Id.*

112. *Id.* at *7.

The Commission found that Smith was handicapped because the struggle with her gender identity led to suicidal thoughts, alcohol abuse, and bleeding ulcers, which affected her health and life.[113] In the alternative, even if Smith was not actually handicapped, the Commission found that Smith had a perceived handicap because of the city's perception that Smith's transsexuality impaired her ability to continue working.[114]

However, in *Fishbaugh v. Brevard County Sheriff's Department*,[115] the Commission found that transsexualism was no longer considered a covered disability under the Florida Civil Rights Act.[116] The Commission distinguished *Smith*, finding that the plaintiff there was fired in 1986, before the Americans with Disabilities Act (ADA)[117] became law and the Rehabilitation Act[118] was amended to exclude transsexualism as a disability.[119] The Commission found that the plaintiff could prove she was handicapped by showing she had an actual or perceived physical impairment that substantially limited a life activity.[120] However, because the plaintiff had completed sex reassignment, she no longer suffered from the impairments in *Smith* and thus was not considered handicapped.[121]

In *Shepley v. Lazy Days RV Center*,[122] the Commission found that the male-to-female transsexual plaintiff established a prima facie case of discrimination for the following reasons: (1) he was terminated; (2) was a member of a protected class (male); (3) was qualified for the job; and (4) his employer retained other employees with comparable or lesser qualifications not in the protected group.[123] The Commission found that the employer, who fired the plaintiff five days after the plaintiff returned to work as a female

113. *Id.* at *11.
114. *Id.* at *12.
115. http://fchr.state.fl.us/fchr/complaints_1/final_orders/final_orders_2004/fchr_order_no_04_103 (Fla. Commn. Human Rel. Aug. 20, 2006).
116. *Id.*
117. 42 U.S.C. § 12211(b)(1) (2006).
118. 29 U.S.C. § 705(20)(F)(i) (2006).
119. *Id.*
120. *Id.*
121. *Id.*
122. http://fchr.state.fl.us/fchr/complaints_1/final_orders/finalorders_2006/fchr_order-no_06_016 (Fla. Commn. Human Rel. Feb. 6, 2006).
123. *Id.*

because of "disruption to [the employer's] business," failed to provide a "legitimate, non-discriminatory business reason" for termination.[124] The Commission concluded that the employer's reason was a pretext for discrimination, and ordered the employer to reinstate the plaintiff and pay back wages, lost benefits, and attorney fees.[125]

III. POSSIBLE SOLUTIONS

A. Judicial Solution

Transgender plaintiffs, relying on Justice Scalia's broad language in *Oncale*,[126] have attempted to persuade courts to extend the scope of Title VII's prohibition on sex discrimination beyond what Congress apparently intended in 1964. Yet, while courts have interpreted the term "sex" to include men,[127] victims of "hostile environment" sexual harassment,[128] married women,[129] and unwed mothers,[130] many courts have been reluctant to extend Title VII's protections to gay and transgender employees.[131] This can be ascribed to the tension between *Price Waterhouse* and cases such as *Ulane*.

While transgender plaintiffs contend that *Price Waterhouse* has practically overruled *Ulane*, a number of courts continue to adhere to the "anatomical approach" of *Ulane* in interpreting Title VII and refuse to extend the holding in *Price Waterhouse* to transgender employees.[132] Courts that have taken this approach reason that transsexuals are "categorically different" from effeminate men or masculine women who fail to conform to certain

124. *Id.*
125. *Id.*
126. *Supra* n. 63 and accompanying text.
127. *E.g. Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983).
128. *E.g. Meritor Sav. Bank*, 477 U.S. at 73.
129. *E.g. Sprogis v. United Air Lines, Inc.*, 444 F.2d at 1197–1198.
130. *E.g. Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364, 371 (6th Cir. 1977).
131. David M. Neff, Student Author, *Denial of Title VII Protection to Transsexuals:* Ulane v. Eastern Airlines, Inc., 34 DePaul L. Rev. 553, 553–554 (1985).
132. *Compare e.g. Doe v. United Consumer Fin. Servs.*, 2001 WL 34350174 at *4 (N.D. Ohio Nov. 9, 2001) (finding that even if *Ulane* remains viable, the issue was whether the plaintiff could state a claim under *Price Waterhouse*).

gender stereotypes.[133] The Second Circuit, for example, cautioned that the gender-stereotyping theory would not "bootstrap protection for sexual orientation into Title VII" because not all gay men were stereotypically feminine.[134] Similarly, a district court found that the gender-stereotyping theory failed to protect a male cross-dresser because he was not fired for acting insufficiently masculine but because he dressed publicly as a woman.[135]

The results of many Title VII claims thus have turned on whether an employee was discriminated against because of sexual orientation or transgender status (no claim under Title VII) or failure to conform to gender stereotypes (actionable claim under Title VII).[136] As a result, an effeminate heterosexual worker could bring a valid Title VII claim for harassment, but a gay worker faced with the same harassment would be unable to bring a claim because his co-workers are homophobic.[137] The problem with such an analysis is that courts must determine whether an employer's discriminatory motives were based on a belief that the employee was heterosexual, homosexual, or transgender.[138] In *EEOC v. Grief Bros. Corp.*,[139] for example, the employer argued that the plaintiff was harassed not because he was male but because of his

133. *See* Tracy Hoskinson, Student Author, Etsitty v. Utah Transit Authority: *Transposing Transsexual Rights under Title VII*, 15 L. & Sexuality 175, 182–183 (2006) (arguing that transsexuals, by definition, fail to conform to gender stereotypes and should be protected under Title VII).

134. *Simonton v. Runyon*, 232 F.3d 33, 38 (2nd Cir. 2000). One author has concluded that the Second Circuit's analysis would result in the protection of visibly gender nonconforming gays and the exclusion of nonvisibly gender nonconforming gays under Title VII. Nicole Anzuoni, Student Author, *Gender Non-Conformists under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 Geo. J. Gender & L. 871, 879 (2002). Anzuoni found that this was an irrational standard because all gays fail to conform to the stereotype of being sexually attracted to a member of the opposite sex. *Id.*

135. *Oiler*, 2002 WL 31098541 at *5.

136. *See e.g. Doe*, 2001 WL 34350174 at *4 (finding that the plaintiff lacked a claim if she was fired for being transsexual unless her termination was also based on her failure to conform to gender stereotypes of appearance and behavior).

137. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1064–1065 (7th Cir. 2003) (finding that harassment of male plaintiff implicated his sexual orientation and not sex). The court acknowledged the difficulty in differentiating between failure to conform to gender stereotypes and discrimination based on sexual orientation. *Id.* at 1065 n. 5.

138. *Id.* at 1067. Judge Richard Posner wrote the following in a concurring opinion: "To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy." *Id.*

139. 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004).

sexual orientation (which is not protected under Title VII).[140] The plaintiff's harassers, however, testified they did not know or think he was gay.[141] Even though the harassers had called the plaintiff "queer" and a "faggot," the court found that the claim survived summary judgment because a jury could conclude that the plaintiff was harassed not because he is gay but because he is male.[142]

Courts should explicitly affirm the Sixth Circuit's holding in *Smith* that any discrimination against a transgender person is per se sex discrimination. Several courts, however, insist that the notion that Title VII imposes a per se prohibition of sex stereotyping contravenes acceptable judicial interpretation of statutes.[143] The Second Circuit emphasized in *Simonton* that the role of a court in statutory interpretation is restricted to discerning and following legislative meaning.[144] And even though the First Circuit acknowledged that harassment based on sexual orientation was reprehensible, the court nonetheless concluded that its role was to "construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[145]

These arguments fail to consider that there is only one logical way to decide these cases based on the binding precedent of *Oncale*. Although Title VII fails to address sexual harassment, the Supreme Court ruled in *Meritor Savings Bank, FSB v. Vinson*[146] that such claims were actionable under Title VII.[147] Several courts, however, denied same-sex sexual harassment claims by reasoning that Congress did not intend to include such claims when it enacted Title VII.[148] The Supreme Court rejected this reasoning in *Oncale*, finding that statutory prohibitions often extend

140. *Id.* at *10.
141. *Id.* at **10–11.
142. *Id.* at *11.
143. Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?* 21 Lab. Law. 213, 215–216 (2006).
144. *Simonton*, 232 F.3d at 35.
145. *Higgins*, 194 F.3d at 259.
146. 477 U.S. 57 (1986).
147. *Id.* at 64–66.
148. *E.g. Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–452 (5th Cir. 1994); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

beyond the principal evil to cover "comparable evils."[149] According to the Supreme Court in *Oncale*, courts have discretion in determining the scope of Title VII.[150] Title VII is a remedial statute and must be construed liberally.[151] Thus, courts should find that discriminating against gay and transgender employees is a "comparable evil" to the principal evil that Title VII originally sought to prohibit.

Additionally, it is practically impossible to know exactly what Congress intended when it passed the amendment adding "sex" to Title VII.[152] The legislative history of the amendment is virtually non-existent.[153] Issues of sexual orientation and gender identity were typically not discussed in 1964;[154] so even if Congress had intended a broad interpretation of "sex," legislators would have been reluctant to broach the issue.

Moreover, the Supreme Court's decision in *Price Waterhouse* shows that the focus of Title VII is not on one's biological or anatomical sex.[155] Instead, the aim of Title VII is to prevent employers from discriminating by making "irrelevant distinctions based on gender."[156] Thus, courts can no longer rely on the claim that Congress did not intend to protect transgender employees in order to exclude these employees from Title VII's protections.

Courts also contend that the failed attempts to amend Title VII to include sexual orientation show that Congress intended to exclude gender identity, an argument that the Seventh Circuit relied on in *Ulane*.[157] This flawed reasoning fails to consider the distinction between sexual orientation and gender identity. The concept of gender identity applies not only to gays, but also to transgender and heterosexual employees like Ann Hopkins in

149. *Oncale*, 523 U.S. at 79.

150. *Id.* at 78.

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

152. *See* E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment under Title VII and the "Reasonable Heterosexist" Standard*, 18 Berkeley J. Emp. & Lab. L. 56, 80 (1997) (arguing that a reliance on determining congressional intent permits courts to project their own homophobia onto Congress and the laws enacted by Congress).

153. *Supra* nn. 33–35 and accompanying text.

154. *Oiler*, 2002 WL 31098541 at *4.

155. *Price Waterhouse*, 490 U.S. at 243 (finding that the purpose of Title VII was to promote hiring based on job qualifications).

156. Storrow, *supra* n. 29, at 318–319.

157. 742 F.2d at 1085–1086.

Price Waterhouse.[158] The terms "transsexuality" and "homosexuality" should not be used interchangeably. Moreover, Congress has never considered a bill to include or exclude gender identity in Title VII, so courts should not extend the argument to the concept of gender identity.[159] One district court stated the following about the Seventh Circuit's arguments in *Ulane*:

> Those arguments, perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history. . . . Without good reasons to oppose it, and with numerous courts now joining its conclusion—albeit under the *Price Waterhouse* framework—it may be time to revisit . . . [the] conclusion in *Ulane I* that discrimination against transsexuals *because they are transsexuals* is "literally" discrimination "because of . . . sex."[160]

After all, an employer who discriminates against a woman with male genitals or a man with breasts is discriminating on the basis of that person's nonconforming trait.[161] As the Sixth Circuit correctly concluded, the Supreme Court's decision in *Price Waterhouse* "eviscerated" the reasoning in cases such as *Ulane*.[162] The district and appellate courts that have yet to extend *Price Waterhouse* to transgender employees should follow the Sixth Circuit in abandoning *Ulane* and hold that labels such as "transgender" are irrelevant to whether a person states a claim for failure to conform to gender stereotypes. This would ensure consistency[163] and avoid the arcane distinctions that lower courts have created in denying transgender plaintiffs protection under Title VII.[164]

158. *See Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) (finding that male-to-female transsexual who alleged that an employer refused to hire her because of her sexual identity properly stated a claim under Title VII).

159. *Id.*

160. *Id.* (emphasis in original).

161. *See Kastl v. Maricopa Co. Community College Dist.*, 2004 WL 2008954 at *2 (D. Ariz. June 3, 2004) (finding that the "presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision").

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

163. *See* Hoskinson, *supra* n. 133, at 183–184 (concluding that "until Congress amends the law or the Court holds to the contrary, rights of transsexuals in the workplace will continue to vary drastically, depending on whether one happens to live near Sacramento or Salt Lake City.").

164. Seventh Circuit Judge Richard Posner summed up his view on the confusing case-

B. Disability Laws

GID is considered an illness in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).[165] The ADA[166] and the federal Rehabilitation Act,[167] however, specifically exclude the following from the definition of disability: "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."

As many state laws do not contain such an exclusion, transgender plaintiffs have argued that GID should be considered a handicap under state disability laws. In *Jette v. Honey Farms Mini Market*,[168] for example, the Massachusetts Commission Against Discrimination inferred that because the state legislature was aware of the exemption for transsexualism but chose not to include it in the state statute, the legislature must have intended to provide protection for transsexuals.[169]

The success of disability claims can depend on a state's definition of disability or handicap. State laws generally define handicap as a physical or mental condition that substantially limits or impairs one or more major life activities,[170] such as caring for one's self,[171] reproduction,[172] engaging in sexual relations, and interacting with others.[173] Transgender plaintiffs argue that the

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law that has developed around this issue in *Hamm* as follows:

> I think it worth recording my conviction that the case law has gone off the tracks in the matter of "sex stereotyping" . . . the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction.

Hamm, 332 F.3d at 1066–1067.

165. Ohle, *supra* n. 28, at 271. The American Psychiatric Association removed homosexuality from the DSM-IV in 1973. *Id.*

166. 42 U.S.C. § 12211(b)(1).

167. 29 U.S.C. § 705(20)(F)(i).

168. 2001 WL 1602799 (Mass. Commn. Against Discrimination Oct. 10, 2001).

169. *Id.* at *3.

170. *E.g.* Fla. Admin. Code Ann. r. 60Y–6.001(36) (2007). To be classified as handicapped, one must meet at least one of the four following statutory definitions: (1) have a physical or mental impairment that substantially limits a major life activity; (2) have a record of such an impairment; (3) be regarded as having such a physical or mental impairment; or (4) have a developmental disability. *Id.*

171. Fla. Admin. Code Ann. r. at 60Y–6.001(42).

172. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

173. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999).

stress caused by living with GID can result in depression, anxiety, alcohol addiction, and suicidal thoughts.[174] Many transsexuals also need ongoing medical care such as hormone therapy.[175] Gender-reassignment surgery may substantially limit a person's ability to procreate or engage in sexual activity.[176]

Transgender-rights advocate Jennifer Levi argues that transgender plaintiffs should bring disability claims because such claims emphasize the "inelasticity" of gender identity and help courts understand that the plaintiffs fail to conform to gender stereotypes because of genuine, medical, and scientific reasons.[177] Levi contends that the introduction of medical evidence helped persuade state courts in New Jersey and Massachusetts to rule in favor of transgender plaintiffs who were discriminated against for failing to dress according to their biological sex.[178] The evidence introduced in those cases showed that it was medically necessary for the plaintiffs to dress according to their gender identity and that they were not merely doing so for frivolous reasons.[179]

While a diagnosis of GID permits many individuals to receive hormone therapy and medical treatment,[180] many transsexuals do not want to associate their gender identity with a mental illness.[181] Furthermore, the claim of mental impairment can put plaintiffs in a bind. In *Dobre v. National Railroad Passenger Corp.*,[182] an Amtrak employee claimed she was discriminated against after revealing she was transsexual.[183] But the plaintiff

174. *Jacksonville Correctional Instn.*, 1991 WL 833882 at *5.

175. World Prof. Assn. Transgender Health, *supra* n. 26.

176. Br. of Petr., *Fishbaugh v. Brevard County*, Oct. 6, 2003 (copy on file with Author).

177. Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 Colum. J. Gender & L. 90, 90–91 (2006).

178. *Id.* at 99.

179. *Id.* at 101–103; *see Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000) (holding that school could not prohibit fifteen-year-old transgender student from dressing in girls' clothes or accessories).

180. Ohle, *supra* n. 28, at 271; *see M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. App. Div. 1976) (relying on medical evidence to find that a male who successfully underwent gender-reassignment surgery was a female for marriage purposes).

181. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 Berkeley Women's L.J. 15, 32–33 (2003) (finding that disability-discrimination claims are an important alternative because of the difficulty in pursuing successful sex-discrimination claims).

182. 850 F. Supp. 284 (E.D. Pa. 1993).

183. *Id.* at 286 (claiming among other things, that (1) she was told she needed a doctor's note to dress as a woman; (2) she was required to wear male clothing; (3) she was forbid-

had also stated in her complaint that her transsexualism did not interfere with her ability to perform at work.[184] The court was thus able to find that transsexualism was not inherently prone to limit major life activities and was not a protected disability under Pennsylvania law.[185]

Finally, including GID as a real or perceived handicap under disability laws would exclude transgender plaintiffs who, for personal or financial reasons, choose not to seek a medical diagnosis.[186] This would significantly impact low-income transgender people who cannot afford to obtain a GID diagnosis.[187]

C. Local Antidiscrimination Ordinances and State Laws

The first statute prohibiting discrimination against transgender people was passed in Minneapolis, Minnesota in 1975.[188] Currently, 104 local jurisdictions have adopted employment protections for transgender persons.[189] As of April 2008, over 109 million Americans, or 39% of the population, now live in jurisdictions with transgender-inclusive nondiscrimination laws.[190] Many state and local governments also have internal nondiscrimination policies prohibiting discrimination based on gender identity.[191]

Some courts have struck down local ordinances, finding that such ordinances were preempted by state law or went beyond the scope of a municipality's power.[192] One author conducted a survey

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den from using the woman's bathroom; (4) she was called by a male name, rather than her requested female name; and (5) she was removed from public view).

184. *Id.* at 289.

185. *Id.*

186. *See* Ilona M. Turner, *Comment: Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 593–594 (2007) (arguing that a disability model favors transsexual plaintiffs who seek medical intervention over individuals such as occasional cross-dressers).

187. Spade, *supra* n. 181, at 35; *see* Lloyd, *supra* n. 105, at 185 (arguing that the disability model privileges individuals who can afford to seek medical intervention).

188. Minn. Dept. Human Rights, *When Gender and Gender Identity Are Not the Same*, http://www.humanrights.state.mn.us/rsonline12/genderidentity.html (accessed Dec. 15, 2007).

189. Natl. Gay & Lesbian Task Force, *supra* n. 13.

190. *Id.*

191. *Id.*

192. *E.g. Hutchcraft Van Serv., Inc. v. City of Urbana Human Rel. Commn.*, 433 N.E. 2d 329 (Ill. App. 4th Dist. 1982). In response to this case, the Illinois Legislature amended its Human Rights Act to allow home rule units to legislate broader categories of discrimination than under the Human Rights Act. *Page v. City of Chi.*, 701 N.E. 2d 218, 226 (Ill.

of local antidiscrimination ordinances in Philadelphia, Baltimore, Tampa, New Orleans, Chicago, Detroit, Ann Arbor, Columbus, West Hollywood, and Seattle.[193] The survey found that complaints were rarely filed, possibly because of the lack of public awareness of the local ordinances.[194] When complaints were filed, local government human rights commissions often lacked the resources necessary to adequately enforce the ordinances because they only employed three or fewer investigators.[195] The author concluded that such ordinances had little impact on employment discrimination because they are "largely ceremonial."[196] A similar pilot study of sexual orientation-discrimination complaints filed under the Massachusetts Fair Labor Act found that the lack of resources needed to implement the state's antidiscrimination law resulted in a significant backlog of cases.[197] Yet another study found that there was no evidence that local and state antidiscrimination policies had a direct effect on the average earnings or income of members of same-sex couples.[198] In contrast, Title VII promoted major economic gains among African-Americans in the South.[199]

These studies show that local ordinances and state laws are not as effective because states and municipalities lack the resources necessary to effectively enforce these laws. Moreover, when a jurisdiction adds sexual orientation to its antidiscrimination law without including protections for transgender people, it takes an average of fourteen and a half years before

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App. 1st Dist. 1998).

193. Chad A. Readler, Student Author, *Local Government Anti-Discrimination Laws: Do They Make a Difference?* 31 U. Mich. J. L. Reform 777, 797 (1998).

194. *Id.* at 799–802.

195. *Id.* at 805.

196. *Id.*

197. Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?* 73 U. Mo. Kansas City L. Rev. 643, 671–672 (2005).

198. Marieka M. Klawitter & Victor Flatt, *The Effects of State and Local Anti-Discrimination Policies on Incomes of Same-Sex Coup*les, 17 J. Policy Analysis & Mgmt., No. 4, 658 (1998); *see* John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 Indus. & Lab. Rel. Rev. 622, 640–641 (2003) (finding that openly gay and bisexual men earn up to thirty-two percent less than married heterosexual men but openly lesbian and bisexual women earn up to twenty-six percent more than married heterosexual women).

199. *See generally* John J. Donohue III & James Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. Econ. Literature 1603 (1991) (discussing the effect of Title VII).

that jurisdiction updates its laws.[200] Passing federal legislation that includes protections based on gender identity or expression will be far more efficient. Federal legislation will also promote uniformity and undo the current patchwork of local ordinances and state antidiscrimination laws.

IV. PROPOSED FEDERAL LEGISLATION

A. History of Employment Non-Discrimination Act

Since 1975, Congress has considered a number of federal bills that would amend Title VII to include sexual orientation.[201] None of these bills garnered much support, so gay advocates switched tactics by introducing the stand-alone Employment Non-Discrimination Act (ENDA) in 1994.[202] The Act, which prohibited employment discrimination based on sexual orientation, was introduced again in 1995, 1997, 1999, 2001, and 2003.[203] In 1996, the Senate rejected ENDA by a fifty-to-forty-nine vote, while the Defense of Marriage Act, which limits the definition of marriage to the union between a male and a female, passed.[204] Opponents claimed ENDA would give gays special rights. During one of the debates on ENDA, Senator Orrin Hatch stated that sexual orientation was unlike other protected classes because it involved "conduct" and not immutable characteristics.[205] Contrary to this argument, the issue of whether sexual orientation is a matter of choice has been debated by gay advocates, healthcare profession-

200. Natl. Gay & Lesbian Task Force, *Years Passed between Sexual Orientation and Gender Identity/Expression*, http://www.thetaskforce.org/downloads/reports/fact_sheets/years_passed_gie_so_7_07.pdf (updated July 2007).

201. *E.g.* H.R. 166, 94th Cong. (Jan. 14, 1975).

202. *See* S. 2238, 103d Cong. (June 23, 1994) (text of ENDA).

203. Human Rights Campaign, *Timeline: The Employment Non-Discrimination Act*, http://www.hrc.org/issues/5636.htm (accessed Dec. 15, 2007). Because ENDA has languished for so long, at least one commentator has proposed that employers adopt ENDA with a "Fair Employment" mark instead. Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 Mich L. Rev. 1639, 1640–1641 (2006).

204. *See* Jill Lawrence, *Anti-Gay Marriage Bill OK'd Senate Then Rejects Bid to Ban Job Bias*, USA Today 1A (Sept. 11, 1996) (noting that ENDA opponents contended the bill would give gays special status and cause excessive litigation).

205. *Id.*

als, and scientists, with many studies concluding that sexual orientation is mostly immutable.[206]

Congress' repeated failure to act implies that the federal government is endorsing discrimination against gay and transgender employees.[207] In contrast, 230 major corporations have amended their internal nondiscrimination policies to include protections for gender identity and expression.[208] The first transgender career exposition, held in Atlanta in September 2007, drew recruiters from major employers including American Airlines, Ernst & Young, Hewlett-Packard, and Microsoft.[209]

In 1999, the National Gay and Lesbian Task Force and other leading lesbian, gay, bisexual, and transgender rights organizations stopped supporting ENDA because it was not transgender-inclusive.[210] After a decade-long effort to make ENDA fully inclusive, Representative Barney Frank introduced a new version of ENDA that would protect gender identity in April 2007.[211] The proposed bill required employers to provide adequate shower or dressing facilities to employees who are transitioning.[212] The Act did not prohibit employers from imposing reasonable dress or grooming standards and provided that employers allowed transi-

206. Marie Elena Peluso, Student Author, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 Vand. L. Rev. 1533, 1555–1557 (1993).

207. Sen. Rpt. 107-341 at 9 (Nov. 15, 2002); *see* Sen. Subcomm. on Lab. & Human Resources, *The Employment Discrimination Act of 1994*, *Hearing on S. 2238*, 107th Cong. 2 (July 29, 1994) (statement by Justin Dart, Jr., former Chairman of the President's Committee on Employment of People with Disabilities) (stating that it is wrong for Americans to acquiesce in "vicious discrimination" because they disagree with their views or activities).

208. Gender Pub. Advoc. Coalition, *230 Major Corporations Adopt Gender Protections*, http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0683 (Sept. 13, 2007).

209. Jenny Jarvie, *Changing Your Job while You're Changing Your Gender*, L.A. Times 18 (Sept. 16, 2007).

210. Natl. Gay & Lesbian Task Force, *Nondiscrimination Legislation Historical Timeline*, http://www.thetaskforce.org/issues/nondiscrimination/timeline (accessed Dec. 15, 2007). The inclusion of gender identity may endanger ENDA's chances of enactment by making the bill more controversial. Regina L. Stone-Harris, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 St. Mary's L.J. 269, 323–324 (1996).

211. H.R. 2015, *supra* n. 19. "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."

212. *Id.*

tioning employees to adhere to their new gender's dress or grooming standards.[213]

A survey of House members, however, revealed that the bill would fail to garner enough support, but that a bill banning discrimination based on sexual orientation was likely to pass.[214] As a result, Frank introduced a new bill protecting sexual orientation but not gender identity.[215] Over 350 civil rights groups vehemently opposed the change and insisted that gender identity be included in the proposed bill.[216] The House of Representatives passed House Resolution 3685 on November 7, 2007, by a vote of 235–184.[217]

If signed into law, House Resolution 3685 could give courts ammunition to find that employees who fail to conform to gender stereotypes are no longer protected by Title VII.[218] Several courts might reason that *Price Waterhouse*-type claims could no longer be brought after House Resolution 3685 became law since legislators had intentionally and explicitly eliminated the provision for gender nonconformity.[219] Employers could then argue that a gay or lesbian employee was fired not because of antigay bias but because the person was too feminine or masculine.[220]

However, even if the Senate passes House Resolution 3685, President Bush is likely to veto the bill.[221] ENDA could then become an issue in the 2008 presidential election. Presidential can-

213. *Id.*

214. 153 Cong. Rec. H11383 (daily ed. Oct. 9, 2007) (statement of Rep. Barney Frank) (available at 2007 WL 2935301).

215. *Id.*

216. United ENDA Coalition, *Coalition Members*, http://www.unitedenda.org/ (accessed Dec. 7, 2007).

217. H.R. 3685, 110th Cong. (Nov. 7, 2007).

218. Lambda Legal, *Weakened ENDA Means Less Protection for Everyone*, http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html (updated Oct. 4, 2007); *but see* Barney Frank, *Statement of Congressman Barney Frank in Response to a Recent Press Release by Lambda Legal Raising Questions about ENDA*, http://www.house.gov/frank/enda100307.html (Oct. 3, 2007) (asserting that H.R. 3685 does not "make it easier to fire a gay man because of some effort to transform homophobia into dislike of effeminacy").

219. Lambda Legal, *Re: Your Press Release Dated October 3, 2007 Responding to Our Statement of October 1, 2007*, http://data.lambdalegal.org/pdf/ltr_enda_frank.pdf (Oct. 4, 2007).

220. *Id.*

221. *See* Exec. Off. Pres., *Statement of Administration Policy*, http://www.whitehouse.gov/omb/legislative/sap/110-1/hr3685sap-r.pdf (Oct. 23, 2007) (indicating that the President's senior advisors would recommend that he veto H.R. 3685).

didates have already stated their support or opposition to the proposed legislation.[222]

The repeated failure to pass ENDA, according to law professor Chai Feldblum, shows that the government has determined that a segment of the public consider homosexuality or bisexuality "morally problematic."[223] This is wrong for a couple of reasons. First, the government should never use moral and religious considerations as a political tool to permit ongoing discrimination. Second, Congress has intervened in similar situations in the past. Congress enacted Title VII when only a handful of states had laws prohibiting racial discrimination.[224] Congress also passed the ADA even though a few states already protected individuals with disabilities.[225] In both cases, Congress acknowledged the need for uniform legislation to prevent discrimination. Only twelve states and the District of Columbia have laws protecting transgender employees.[226] Unfortunately, recent local surveys of transgender employees found that at least 20 percent, and as many as 57 percent, experienced employment discrimination.[227] As in the past, Congress should fill in the gaps created by the lack of legislation and enact a transgender-inclusive ENDA.[228]

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222. Senator John McCain opposes expanding antidiscrimination laws to protect gay workers. James A. Barnes, *Hitting the Mute Button*, The National Journal (May 12, 2007). All the Democratic candidates support a transgender-inclusive ENDA. Human Rights Campaign, *Where the Democratic Candidates Stand*, http://a4.g.akamai.net/f/4/19675/0/newmill.download.akamai.com/19677/anon.newmediamill/pdfs/Questionnaire_ReportCard.pdf (last accessed Apr. 22, 2008).

223. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brook. L. Rev. 61, 86 (2006). A 2007 poll found that 58 percent of voters supported a federal law to prohibit workplace discrimination based on gender identity and sexual orientation. Peter D. Hart Research Associates, Inc., *Results of Survey on Employment Non-Discrimination*, http://www.civilrights.org/assets/pdfs/enda-polling-memo.pdf (Feb. 26, 2007).

224. Sen. Rpt. 107-341, *supra* n. 207, at 10.

225. *Id.*

226. Natl. Gay & Lesbian Task Force, *supra* n. 13.

227. H.R. Subcomm. on Health, Empl., Lab. & Pensions of the Comm. on H. Educ. & Lab., *The Employment Non-Discrimination Act of 2007*: *Hearing on H.R. 2015*, 110th Cong. 2 (Sept. 5, 2007) (statement of Lee Badgett, research director, Williams Institute at UCLA School of Law).

228. 149 Cong. Rec. S12377 (daily ed. Oct. 2, 2003) (Statement of Sen. Edward Kennedy) (available at 2003 WL 22271802) (arguing that because only a few states have laws similar to ENDA, "[a] Federal law is clearly needed to ensure that all Americans receive equal treatment in the workplace"). Critics claim that ENDA will provoke more litigation. 142 Cong. Rec. S10129-02 (daily ed. Sept. 10, 1996) (available at 1996 WL 511112). Members of a panel, however, said during a Senate committee hearing that ENDA should not result in a significant increase in litigation. Sen. Comm. on Health, Educ., Lab. & Pen-

B. Differences between ENDA and Title VII

The proposed ENDA is generally similar to Title VII, but it contains a number of exemptions designed to make the bill more palatable to its opponents.

ENDA only permits employees to bring disparate-treatment claims.[229] In contrast, Title VII also allows disparate-impact claims, which require employers to justify a facially neutral practice or policy that has a disproportionate impact on a protected group.[230] ENDA also explicitly prohibits preferential treatment and quotas.[231] By forbidding preferential treatment based on sexual orientation or gender identity, supporters of ENDA hope to diffuse the argument that the bill will grant "special rights" to gays and transgender people.[232] Omitting affirmative action and disparate impact was necessary, according to Representative Barney Frank, because an affirmative-action or disparate-impact case under ENDA would require employees to disclose their sexual orientation, violating privacy rights in the workplace.[233]

House Resolution 2015 exempted religious organizations that have religious worship or the teaching of religious doctrine as their primary purpose, and the Armed Forces.[234] House Resolution 3685, however, exempts the Armed Forces and all religious corporations, associations, educational institutions, and societies that fall under Title VII's religious exemptions.[235] Without such an exemption, groups such as Concerned Women for America contended that ENDA would force religious business owners to hire gay and transgender people in spite of their religious belief that homosexuality and transgenderism are "sinful" in violation of the First Amendment.[236] This argument parallels that of Title VII

sions, *Employment Non-Discrimination Act*, 107 Cong. 9, 2D (Feb. 27, 2002).

229. H.R. 2015, *supra* n. 19; H.R. 3685, *supra* n. 217.

230. 141 Cong. Rec. S8493-04 (June 15, 1995) (Statement of Sen. Jeffords) (available at 1995 WL 363478).

231. H.R. 2015, *supra* n. 19; H.R. 3685, *supra* n. 217.

232. 145 Cong. Rec. S7591-01 (June 24, 1999) (Statement of Sen. Jeffords) (available at 1999 WL 419839).

233. H.R. Subcomm. on Health, Empl., Lab. & Pensions of the Comm. on H. Educ. & Lab., *The Employment Non-Discrimination Act of 2007*: *Hearing on H.R. 2015*, 110th Cong. (Sept. 5, 2007) (Statement by Congressman Barney Frank).

234. H.R. 2015, *supra* n. 19.

235. H.R. 3685, *supra* n. 217.

236. Concerned Women for America, *CWA: ENDA Would Dismantle First Amendment*

critics, who once contended that employers should have the freedom to discriminate against African-Americans.[237] Just as these critics came to recognize the importance of laws prohibiting discrimination against African-Americans,[238] so should opponents of ENDA.

Commentator J. Banning Jasiunas contends that the exemptions render ENDA ineffective and the bill, if enacted, will fail to provide adequate protection to gays and transgender people.[239] This outcome is because courts are likely to interpret a stand-alone bill less expansively than Title VII.[240] A stand-alone bill also reinforces the idea that sexual-orientation or transgender discrimination should be treated differently from other forms of discrimination.[241] A better remedy would be for Congress to amend Title VII to include gender identity and sexual orientation, but given the unsuccessful history of proposed bills to include sexual orientation, such a remedy is implausible at this time.

Although ENDA has its weaknesses, gay and transgender employees say that the bill, if passed, would give them a sense of security because of the lack of remedies currently available.[242] The passage of ENDA would send a clear message that employers can no longer legally discriminate against transgender employees. ENDA would also resolve the current circuit split over whether transgender employees are protected from employment discrimination.

Liberties, Christian Newswire (May 11, 2007). The group says it is the nation's largest women's public-policy organization. *Id.*

237. John J. Donohue III, *Advocacy versus Analysis in Assessing Employment Discrimination Law*, 44 Stan. L. Rev. 1583, 1583 (1992).

238. *Id.*

239. J. Banning Jasiunas, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?* 61 Ohio St. L.J. 1529, 1529 (2000).

240. *Id.* at 1555–1556.

241. *Id.* at 1556.

242. H.R. Subcomm. on Health, Empl., Lab. & Pensions of the Comm. on House Educ. & Lab., *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015*, 110th Cong. (Sept. 5, 2007) (statement by Brooke Waits, who was fired because of her sexual orientation: "I do not believe that anyone should be exposed to a workplace where they have to worry that simply and honestly being who they are could cost them their livelihood.")

V. CONCLUSION

As the congressional debate over protections for transgender employees continues, former City Manager Steven Stanton, who was fired after disclosing his intention to undergo gender-reassignment surgery, is still searching for a new job. Stanton, who unsuccessfully applied for jobs in Sarasota[243] and Naples, Florida,[244] acknowledges that it might be "too soon for a transgendered city manager."[245] Now known as Susan Ashley Stanton, she has said she will not sue the city of Largo, Florida,[246] choosing instead to focus on speaking engagements and lobbying Congress to pass a transgender-inclusive ENDA.[247]

If Stanton had sued the city under Title VII, it is unclear whether she would have won because the Eleventh Circuit has not explicitly ruled on whether employers are prohibited from discriminating based on a person's gender identity.[248] Certainly, Stanton would allege she was fired because of her failure to conform to male-gender stereotypes under *Price Waterhouse*, as prior to coming out, Stanton occasionally dressed as a woman and went by the name "Susan."[249] Stanton would try to persuade the federal district court to follow the Sixth Circuit's interpretation of post-*Price Waterhouse* cases under Title VII with the following:

> It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act

243. Lorri Helfand, *Stanton Doesn't Get Job in Sarasota*, St. Pete. Times 1B (May 31, 2007).

244. *Former Largo City Manager Applies for Naples Job*, The News-Press (Fort Myers) (Sept. 28, 2007); *2 from Lee County Finalists for Naples Job*, The News-Press (Fort Myers) (Oct. 2, 2007) (excluding Stanton from the list of finalists).

245. Helfand, *supra* n. 243.

246. Television Interview by Larry King, CNN with Steve Stanton (April 13, 2007).

247. Lorri Helfand, *Stanton Uses Status to Lobby*, St. Pete. Times 1B (May 16, 2007).

248. *See Fredette v. BVP Mgt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (holding that a male employee sexually harassed by gay supervisor has a viable Title VII claim for gender discrimination but refusing to hold that discrimination based on sexual orientation is actionable under Title VII); *Cox v. Denny's Inc.*, 1999 WL 1317785 at *2 (M.D. Fla. Dec. 22, 1999) (indicating that transsexual could assert a sexual harassment claim based on his sex but not his transgender status); *Mowery v. Escambia Co. Utilities Auth.*, 2006 WL 327965 at *8 (N.D. Fla. Feb. 10, 2006) (finding "Title VII . . . permits no cause of action when the alleged harassment is based *solely* on one's sexual orientation or perceived sexual orientation").

249. Lane DeGregory, *His Second Self*, St. Pete. Times 1A (March 11, 2007); Lorri Helfand, *Stanton Went to Seminars as 'Susan'*, St. Pete. Times 10A (March 3, 2007).

> femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[250]

The argument is persuasive. District courts within the Eleventh Circuit are not bound by *Ulane*, a Seventh Circuit case.[251] At least one district court outside the Seventh Circuit has cited *Smith* and *Barnes* favorably to find that a male-to-female transsexual plaintiff had pled enough facts to show he was discriminated against for failing to conform to stereotypes of how a man should look and behave.[252] Even a district court within the Seventh Circuit, where *Ulane* is binding, held in *Creed v. Family Express Corp.*[253] that a transgender plaintiff can state a sex-stereotyping claim for failing to behave or appear masculine or feminine enough.[254] While the court did not overrule the holding in *Ulane* that transgender status in itself is not protected under Title VII,[255] the decision is probably the first in the Seventh Circuit to uphold a transgender plaintiff's sex-stereotyping claim under *Price Waterhouse*. Certainly, an increasing number of federal courts are allowing transgender employees such as Stanton to bring *Price Waterhouse*-type claims under Title VII.

The nebulous state of the law is shown by the Equal Employment Opportunity Commission's (EEOC) response to an inquiry about whether transgender employees are protected by Title VII.[256] In the informal discussion letter, EEOC Assistant Legal Counsel Dianna B. Johnston noted the split in recent court decisions and concluded that the issue could not be determined out-

250. *Smith*, 378 F.3d at 574.

251. *See e.g. Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935 at *4 (W.D.N.Y. Sept. 26, 2003) (rejecting *Ulane* and finding that transsexuals are not "genderless" and thus can pursue state-sex-stereotyping claims under Title VII).

252. *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 at *2 (W.D.Pa. Feb. 17, 2006).

253. 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007).

254. *Id.* at *3. The plaintiff must show that the employer acted with stereotypical motivations and the claim arose from the employee's appearance or conduct. *Id.*

255. *Id.*

256. *See* Dianna B. Johnston, *Title VII: Sex Discrimination/Coverage of Transgendered*, http://www.eeoc.gov/foia/letters/2007/titlevii_sex_coverage_trans.html (May 25, 2007) (modified on July 16, 2007) (discussing the split within the judicial system with respect to whether transgendered individuals are covered by Title VII).

side the context of specific allegations and a complete investigation.[257]

Stanton could have brought her case before the Florida Commission on Human Relations. While the city claimed Stanton was fired for reasons unrelated to transgenderism, Stanton's attorney contends that those reasons were a pretext for discrimination.[258] If the Commission found that the city's reasons were pretextual, as in *Shepley*, the Commission could order the city to reinstate Stanton as city manager and pay Stanton back wages.

Ironically, the City of Largo has an internal discrimination and harassment policy prohibiting discrimination based on gender identity or expression.[259] Commissioners approved the policy after rejecting a transgender-inclusive citywide ordinance in 2003.[260] Employees had to sign a form indicating they read the policy and had to undergo four hours of diversity training.[261] Those who violated the zero-tolerance policy would be fired.[262] The city commissioners likely violated this policy,[263] but the fact that Stanton had no recourse shows how local policies lack "teeth."[264]

Public policy and common sense dictate that employees should be judged on the basis of their job performance and not because of their gender identity. Discrimination should never be legal. Yet in thirty-eight states, businesses can legally fire (or refuse to hire) employees merely because they are transgender. While some gay or transgender employees have successfully brought employment-discrimination claims under Title VII, many lower courts continue to hold that Title VII does not prohibit discrimination based on sexual orientation or gender identity. The

257. *Id.*

258. *See* Telephone Interview with Karen Doering, Stanton's attorney (April 16, 2007) (copy on file with Author) (stating that "[t]here's no way had he not announced that he was transitioning that he would be fired today").

259. Shannon Tan, *Officials Revise City Policy on Conduct*, St. Pete. Times (Largo Times) 1 (Oct. 8, 2003).

260. Shannon Tan, *Largo Defeats Human Rights Ordinance*, St. Pete. Times 3B (Aug. 6, 2003).

261. Shannon Tan, *Diversity Training Stresses "Don'ts"*, St. Pete. Times (Largo Times) 1 (Nov. 23, 2003).

262. *Id.*

263. *See* Lorri Helfand and Robert Farley, *How Will Largo Handle Official's Sex Change?* St. Pete. Times B1 (Feb. 23, 2007) (quoting Largo human resources manager Susan Sinz who stated that the policy applies to Stanton).

264. See *supra* Part III(D) for a discussion on how local ordinances lack "teeth."

large variation between the protections offered by local ordinances and state laws highlight the need for a uniform, nationwide standard of protection from employment discrimination based on gender identity.

District and appellate courts should adopt the Sixth Circuit's holding in *Smith v. City of Salem* and find that discrimination against transgender employees because of their failure to conform to sex stereotypes violates Title VII. Congress should also enact a transgender-inclusive Employment Non-Discrimination Act. ENDA will cure the problems courts have faced in interpreting Title VII and ensure that transgender employees are adequately protected irrespective of the jurisdiction they live in.