

Title VII’s Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class under the Term “Sex” and Practical Implications of Inclusion

Shawn D. Twing* and Timothy C. Williams*

I. INTRODUCTION	174
II. ARE TRANSGENDERED PERSONS COVERED UNDER TITLE VII?	175
A. The Case of Exclusion—a “Restrictive” View	176
B. The Case for Inclusion – the “Expansionist” View	182
1. The Precursor -- Price Waterhouse v. Hopkins.....	182
2. Federal Court Inclusion of Transgender Individuals	184
III. STATE LAW PROTECTION.....	188
IV. PRACTICAL IMPLICATIONS OF INCLUSION	190
A. “Bathrooms as Battlegrounds”	190
1. Transgender Employee Rights.....	191
2. Rights of Co-Workers.....	193
3. Additional Challenges.....	195
4. Guidance for Employers	196
B. Employer Dress Codes	197
C. Overnight Travels	199
D. BFOQ or Business Necessity.....	200
E. Concerns from a Business Standpoint	201
F. Religious Employers.....	202
V. CONCLUSION	202

* Mr. Twing is a shareholder in the Sprouse Shrader Smith, P.C. law firm in Amarillo, Texas. Mr. Twing is board certified as a labor and employment law specialist by the Texas Board of Legal Specialization. He graduated *cum laude* in 1993 from the University of Arkansas and is licensed to practice in Oklahoma, Texas, and Arkansas.

* Mr. Williams is an associate at Sprouse Shrader Smith, P.C. law firm in Amarillo, Texas. Mr. Williams graduated *magna cum laude* as the highest ranking student in his graduating class in 2008 from Baylor Law School.

I. INTRODUCTION

In February of 1964, the Civil Rights Act was on the cusp of passing in the House of Representatives.¹ Representative Howard Smith, a staunch opponent of the bill, was losing ground, and it looked as though equal employment opportunity would become a reality.² “But Howard Smith had one last arrow in his quiver—perhaps ‘bombshell’ would be a better term.”³ In what is dubbed “Ladies Day,” Representative Smith, in “a mocking and jocular tone,” moved to add “sex” to Title VII.⁴ Representative Smith’s addition to Title VII was “to prevent discrimination against another minority group, the women.”⁵ As explained by commentators, “[c]ertainly Smith hoped that such a divisive issue would torpedo the civil rights bill, if not in the House, then in the Senate.”⁶ This last minute attempt to defeat the civil rights legislation by adding the term “sex” failed and the Civil Rights Act of 1964 passed both the House of Representatives and the Senate.⁷

As noted by Justice William Rehnquist, the “prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives.”⁸ Due to the last minute addition, “we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”⁹ When Congress enacted Title VII, it was well-accepted that the term “sex” as it is used in the Act referred to a female and a male. There also seems to be little doubt that the reference to sex was primarily meant to provide equal employment opportunity protection to women in the workforce. However, without a clear guideline within the statute regarding the term “sex” and what protections are covered by the term, the courts and employers have been forced to participate in a virtual guessing game as to just how far they should go in order to assure their compliance with the Act. For instance, it was not until the late seventies, some ten years after the passage of Title VII, that sexual harassment as a form of prohibited sex discrimination was recognized.¹⁰

¹ See Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 2 (1991), available at <http://www.jofreeman.com/lawandpolicy/titlevii.htm>.

² See *id.* (“The [Civil Rights] momentum thwarted the plans of Representative Smith (D. Va.) to use his power as chair of the House Rules Committee to stop or at least delay the Civil Rights bill.”).

³ Ted Gittenger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964, Part 2*, 36 PROLOGUE 2 (2004).

⁴ Freeman, *supra* note 1; see also 110 CONG. REC. 2577–84 (1964).

⁵ *Id.* at 2577.

⁶ Gittenger & Fisher, *supra* note 3.

⁷ See *id.*

⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986).

⁹ *Id.*

¹⁰ See *id.* at 65 (“[I]n 1980 the EEOC issued Guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII.”); see also *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976); DIANNE AVERY, LITIGATING THE SEXUAL HARASSMENT CASE

Sexual harassment claims are only one of the many expansions of Title VII coverage since the inception of the Act. The purpose of this article is to trace the trajectory of state and federal law regarding the possible expansion of equal employment protections for transgender employees and applicants and the issues that will arise with such an expansion.

The authors would like to note in the opening that for the purposes of this article we will interchange the usage of the terms transsexual and transgender. While we recognize that the terms have different meanings, it is difficult to imagine any scenario in which one would be covered by Title VII and not the other; therefore, the terms are used interchangeably. Further, the authors are not discussing “sexual orientation,” which is not correctly classified as a gender “disorder.”¹¹ “Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual orientation, but sexual identity. Transgenderism describe[s] people who experience a separation between their gender and their biological/anatomical sex.”¹²

Section II of this article addresses the case for exclusion and inclusion of transsexuals as a protected class under Title VII. The purpose of Section II is not to advocate for inclusion or exclusion, but rather to explore the current state of the law regarding transsexual rights. Section III of this article briefly addresses transsexual rights in the state court arena. Section IV addresses some practical implications for inclusion, whether it comes by legislative amendment or recognition by the courts. The scope of this article is to identify and elaborate on potential legal issues and lay the foundation for providing a workable solution.

II. ARE TRANSGENDERED PERSONS COVERED UNDER TITLE VII?

The first step for both proponents and opponents of inclusion begins by analyzing what falls within “sex” under Title VII. In 1964, when Title VII was adopted, there seemed little need for debate as to the meaning of the term “sex.” In the more traditional social climate of the early to mid 1960s, sexual identity and sexual orientation issues

(Matthew B. Schiff & Linda C. Kramer eds., 1999) (stating that “[t]he 1976 decision of Judge Richey in *Williams v. Saxbe* is generally acknowledged as the first to recognize that sexual harassment is actionable under Title VII”).

¹¹ “There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (Michael B. First ed., Am. Psychiatric Ass’n 2000) [hereinafter DSM]. First, “[t]here must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex.” Second, there must be “evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.” *Id.*

¹² Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage, 8 UCLA WOMEN’S L.J. 219, 237 (1998).

generally were not publicly accepted, and individuals faced with such issues were much more tight-lipped about those matters than today. Those openly discussing their gender identity or sexual orientation issues have grown exponentially since Title VII was originally passed; however, in the wake of this social change, the meaning of the term “sex” in the Act has never been clarified or officially defined by Congress.¹³

In other areas, Congress has been unwilling to extend protection to transgender individuals.¹⁴ For example, the Americans with Disabilities Act (“ADA”), which was originally passed in 1990, expressly excludes gender identity disorders as a covered disability.¹⁵ Specifically, the term “disability” does not include transvestism, transsexualism, and gender identity disorders not resulting from physical impairments.¹⁶ These exclusions were not modified by the recent passage of the Americans with Disabilities Amendment Act of 2008, signed by President George W. Bush on September 25, 2008.¹⁷ Certainly, although the ADA and Title VII are two separate statutes, the specific exclusion of gender identity disorders could be some indication of Congress’s unwillingness to recognize gender identity disorders as illnesses or issues that require special protections in the employment arena.

Since Title VII was passed, several courts have taken a proactive stance in broadening the types of workplace conduct that are prohibited by Title VII.¹⁸ Without a doubt, the term “sex” has spawned many of the expansions of Title VII and is the term from which many of the expansions will come as debates crop up throughout state and federal courts regarding the possibility of Title VII coverage as to sexual orientation or transgender individuals.

A. The Case of Exclusion—a “Restrictive” View

The case for exclusion centers on the meaning of “sex.” The Seventh, Eighth, and Tenth Circuits have all expressly rejected the proposition that transsexuals are a protected class under Title VII based

¹³ Courts have held that Title VII’s protection extends to men. *See, e.g., Medcalf v. Trs. of Univ. of Penn.*, 71 Fed. App’x. 924, 927 (3d Cir. 2003) (stating that a male applicant made out a prima facie case under Title VII by showing that (1) he was male, (2) was qualified to perform the job of Women’s Crew Coach at Penn, (3) he was rejected, and (4) Penn selected a woman for the position).

¹⁴ *See* Americans with Disabilities Act, 42 U.S.C. § 12211 (1997).

¹⁵ *See* Rehabilitation Act, 29 U.S.C. § 706(8)(F)(i) (1997); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1).

¹⁶ 42 U.S.C. § 12211(b)(1).

¹⁷ *See* 42 U.S.C. § 12101 *et. seq.*; S. Res. 3406, 110th Cong. (2008) (enacted).

¹⁸ *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989) (expanding Title VII to prohibit employment discrimination based on “sexual stereotypes”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (expanding Title VII to cover same-sex harassment and “all reasonably comparable evils”).

on the interpretation of the word “sex.”¹⁹ This is not to say that transsexuals are barred from bringing a Title VII claim. Rather, a transsexual must establish discrimination based upon status as a male or a female and not as transgender.

Posner explains this view as follows:

To constructionists, transsexualism is the most dramatic illustration of society's insistence that sex (organs) and gender (public classification of a person as belonging to one sex or the other) coincide . . . Most Americans do not consider, say, a male transsexual, even following conversion, to be a woman. The transsexual may fool them, as might a female impersonator or a transvestite. But if they were apprised of the facts, they would say, this is not really a woman; this is a man who has undergone surgical and hormonal therapy to make him look and feel like a woman.²⁰

This view, as well as American jurisprudence to date, encompasses a binary conception of sex. In other words, constructionists necessarily classify individuals into one of two “sexes,” male or female.²¹ As such, an individual's sexual organs coincide with that individual's gender at birth and thus fall within one of the two categories of “sexes.”²² This view of two (as opposed to three) sex classifications is further illustrated by surgical intervention in the case of hermaphroditic infants to correct, given “sex” classifications, an anomalous condition.²³ Although “[s]cientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female,” at this point in time, several circuits conclude that “discrimination against a transsexual because [he or she] is a transsexual . . . is not discrimination because of sex.”²⁴

In *Ulane*, the Seventh Circuit explained that the definition of sex should be given its “common and traditional interpretation” for Title VII purposes.²⁵ Based upon the traditional meaning of the word “sex,” the statutory prohibition on sex discrimination was meant as a person's “biological sex” at birth. Looking at the term as it is used in the Act under the rules of statutory construction, unless a term is otherwise defined, the word must be given its ordinary meaning.²⁶ The phrase in Title VII prohibiting discrimination on the basis of sex is undefined, and

¹⁹ See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007).

²⁰ RICHARD A. POSNER, *SEX AND REASON* 26–27 (Harvard Univ. Press 1994).

²¹ See *id.*

²² See *id.*

²³ *Id.* at 26 (“We do not have a social niche for hermaphrodites, and in addition we can intervene surgically to correct what, given our social organization, is indeed an anomalous condition.”).

²⁴ *Etsitty*, 502 F.3d at 1222.

²⁵ *Ulane*, 742 F.2d at 1086.

²⁶ See *id.*

by its plain meaning, implies that it is unlawful to discriminate against a woman because she is a woman or against a man because he is a man. The *Ulane* Court further reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."²⁷ Thus, Title VII provided no protection to an employee when she could only show that she was discriminated against as a transsexual, rather than as a woman or a man.²⁸

The Tenth Circuit reached a similar conclusion.²⁹ The Court was guided by the plain language of Title VII in interpreting the statute – not the primary intent of Congress.³⁰ The Court recognized that statutory prohibitions are often extended beyond the principal evil to cover reasonably comparable evils.³¹ The Court found "nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."³² Rather, in light of the traditional binary conception of sex, "transsexuals may not claim protection under Title VII based solely on their status as a transsexual."³³ Transsexual employees, like all other employees, are only afforded protection if they are discriminated against because they are male or because they are female.³⁴

The Tenth Circuit noted that few courts have been willing to extend the protections of Title VII to include transsexuals as a protected class.³⁵ The Court further noted that they have explicitly declined to extend Title VII protections to discrimination based on sexual orientation in *Medina v. Income Support Division*.³⁶ And, although there is a substantive distinction between sexual orientation and sexual identity, *Medina* illustrates the Tenth Circuit's reluctance to expand the traditional definition of sex in the Title VII context.³⁷

The Third Circuit has recently shed some light on the practical difficulties faced by courts when deciding whether an individual is being discriminated against because he or she is transgender or because he or

²⁷ *Id.* at 1085.

²⁸ *Id.*

²⁹ *Etsitty*, 502 F.3d at 1215.

³⁰ *Id.*

³¹ *Id.* Other courts have used this argument to afford transgendered employees protection under Title VII. Essentially, the argument goes that discrimination against transgendered persons is a reasonably comparable evil that, although Congress may not have initially anticipated, the courts should now act to remedy. See *Schroer v. Billington*, No. 05-1090, 2009 WL 1543686 (D.D.C. April 28, 2009) (finding employer discriminated against transgender employee and awarding compensation for back pay and lost employment-related benefits, nonpecuniary losses, and past pecuniary losses under Title VII).

³² *Etsitty*, 502 F.3d at 1222.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; see also *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005).

³⁷ *Etsitty*, 502 F.3d at 1222.

she fails to conform to gender stereotypes.³⁸ Although the case deals with a Title VII discrimination claim brought on the basis of the plaintiffs status as a homosexual, the Third Circuit's analysis extends to transgendered persons.³⁹

In *Prowel*, Brian Prowel sued under Title VII alleging that his employer harassed and retaliated against him because of sex based upon his failure to conform to gender stereotypes.⁴⁰ Prowel is a homosexual man who identified himself as an effeminate male with mannerisms starkly different from his male counterparts at his work.⁴¹ Prowel was eventually "outed" at his work.⁴² The various acts of discrimination that Prowel complained of included a co-worker leaving newspaper clippings of a "man-seeking-man" ad, being referred to as "Rosebud," "Princess" and "fag," and finding a feather tiara and package of lubricant jelly at his work station.⁴³ Prowel also complained that he was asked to perform more varied tasks than other employees, but was not compensated fairly for these extra tasks.⁴⁴ Prowel considered bringing a lawsuit and approached four non-management personnel, asking them to testify on his behalf.⁴⁵ The general manager confronted Prowel regarding the potential lawsuit, and Prowel was terminated later that year.⁴⁶ Prowel then exhausted his administrative remedies before the Equal Employment Opportunity Commission and sued in United States District Court alleging violations of Title VII.⁴⁷

The district court granted summary judgment for the employer on the basis that Title VII does not prohibit discrimination based on sexual orientation.⁴⁸ On appeal, the issue before the Third Circuit was whether this grant of summary judgment in favor of the employer was appropriate.⁴⁹ The court began its analysis by stating that "sex" under Title VII does not include sexual orientation.⁵⁰ The court also noted that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."⁵¹ The district court found that Prowel's claim fell clearly on one side of the line, holding that it was an artfully-pleaded claim of sexual orientation discrimination.⁵² The Third Circuit, however, found that based upon the facts and inferences in favor

³⁸ See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).

³⁹ See *id.*

⁴⁰ *Id.* at 286.

⁴¹ *Id.* at 287.

⁴² *Id.*

⁴³ *Prowel*, 579 F.3d at 288.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Prowel*, 579 F.3d at 289.

⁴⁹ *Id.* at 291.

⁵⁰ *Id.* at 286.

⁵¹ *Id.* at 291.

⁵² *Id.*

of *Prowel*, the record is ambiguous on the issue of whether *Prowel*'s claim was one based on sexual orientation discrimination, or discrimination because of sex, i.e. failure to conform to sexual stereotypes.⁵³ Despite the ambiguity, the court held that *Prowel*'s gender stereotyping claim should be submitted to a jury.⁵⁴

Prowel demonstrates the practical difficulties that courts face when determining whether a claim of sex discrimination is based upon an individual's sex or status as transgender. The Third Circuit acknowledged that not every case of sexual orientation discrimination (or transgender discrimination) can translate into a triable gender stereotyping claim without contradicting "Congress's decision not to make sexual orientation discrimination (or transgender discrimination) cognizable under Title VII."⁵⁵ By the same token, just because an individual is homosexual or transgender does not automatically preclude those individuals from pursuing a claim under Title VII.⁵⁶ A person's sexual orientation is not necessarily intertwined with their mannerisms such that discrimination based on a failure to conform to a gender stereotype ipso facto constitutes discrimination based on sexual orientation.⁵⁷ Striking a balance between those claims falling within the protection of Title VII and those outside Title VII will often be a difficult, fact-intensive inquiry better suited for a jury. Through development of evidence presented at trial, a court or jury could reasonably be expected to determine an employer's motive. Although Congress does not prohibit discrimination based on transgender status, a transgender person will not automatically be barred from bringing suit under Title VII if he or she can show that discrimination was based on sex and not transgender status.

Though case law has evolved in such a way that Title VII is now, once again, on the cusp of expansion, it is the job of the popularly-elected legislature to pass laws that include additional coverage beyond those that were clearly meant to be contained in Title VII. The United States Constitution vests the power to legislate in the legislative branch of government.⁵⁸ In passing Title VII, Congress acted under and within that power. Thereafter, it is the job of the courts to *interpret* the legislation *as it is written*.⁵⁹ Although there are times when poorly-drafted laws or unanticipated situations blur the line between interpreting and writing legislation, courts should be compelled to follow statutory construction under the guide of legislative intent in any situation in which the words of a statute are unclear as written. Title VII's inclusion

⁵³ *Prowel*, 579 F.3d at 285.

⁵⁴ *Id.*

⁵⁵ *Id.* at 292.

⁵⁶ *See id.*

⁵⁷ *See id.* ("[T]hey constitute sufficient evidence of gender stereotyping harassment . . . rather than harassment based solely on . . . sexual orientation.")

⁵⁸ U.S. CONST. art. I.

⁵⁹ U.S. CONST. art. III.

of the term “sex” in our changing world may not be entirely clear; however, the legislative intent behind the term is clear. Any court looking to the legislative intent could see that transsexuals were not meant to be covered under the Act. Therefore, it is impossible to reasonably infer that the text of Title VII provides coverage for “transsexuals” or “transgendered persons” through its inclusion of the term “sex.” Providing such coverage in the absence of a clear legislative amendment to the Act would be an act of legislating from the bench.

Further, the legislative process exists for the purposes of determining who should and who should not be provided legal protection. For example, not every ailment or injury is qualified for protection as a disability under the Americans with Disabilities Act.⁶⁰ The legislative process and legislative debate were designed as the fair and equitable gatekeepers to determining who and what should be provided legal protection. Thereafter, it is the responsibility of the courts to uphold the law as it is written by the popularly-elected legislature. Similarly, the term “sex” presumes that there are two “sexes”—male and female. As such, Title VII provides protection for those who fall within the binary concept of “sex.” It is the province of the legislature, not the courts, to expand the binary concept of “sex” to include transsexuals.

So far, the only federal law that speaks to protection of transsexuals in an employment context is the ADA, and the ADA specifically mentioned the group for purposes of excluding it from protection.⁶¹ Although transsexualism has been recognized as a medical condition for many years and is included as a psychiatric disorder in the Diagnostic and Statistical Manual of Mental Disorders under the broad heading of “gender identity disorder,”⁶² both the Rehabilitation Act of 1973 and ADA explicitly *exclude* both “transsexualism” and “gender identity disorders not resulting from physical impairments” from protection.⁶³ Significantly, not even a certification from a doctor confirming a person suffers from a gender identity disorder will bring transsexualism within the parameters of the ADA. Although some may not like the protections, or in this case the lack of protections, provided by federal law, the legislative process must be respected.⁶⁴

The case for exclusion centers around the fact that an expansion of Title VII must come through the legislative process. In light of this view, it is noteworthy that expansion of Title VII to include transgender persons as a protected class is gaining momentum in the legislature.⁶⁵

⁶⁰ Americans with Disabilities Act, 42 U.S.C. § 12211 (1997).

⁶¹ *Id.* § 12211(b)(1).

⁶² DSM, *supra* note 11, at 576.

⁶³ See Rehabilitation Act, 29 U.S.C. § 706(8)(F)(i) (1997); 42 U.S.C. § 12211(b)(1).

⁶⁴ Language in *Creed v. Family Express Corp.* suggests that the Court disagreed with the employer that a male-to-female transsexual must present herself according to her gender identity or be in violation of the dress code and grooming policy. No. 3:06-CV-465RM, 2009 WL 35237, at *10 (N.D. Ind. Jan. 5, 2009). However, “rightly or wrongly, Title VII’s prohibition on sex discrimination doesn’t extend so far.” *Id.*

⁶⁵ See David Cray, *Impetus Builds for Bill Banning Anti-Gay Bias in the Workplace*, DESERET

Representative Barney Frank introduced the Employment Non-Discrimination Act of 2009 in the 111th Congress.⁶⁶ Versions of this bill have been introduced in the past which excluded transgender persons, but supporters of this bill have indicated their support is contingent on the inclusion of transgender persons as a protected class.⁶⁷

B. The Case for Inclusion – the “Expansionist” View

1. *The Precursor -- Price Waterhouse v. Hopkins*

The case for inclusion truly begins at the doors of an office by the name of Price Waterhouse. Ironically, some of the strongest arguments behind the case for inclusion of transgender individuals in Title VII’s prohibited employment discriminations were born out of this Supreme Court case that did not even involve a transgender individual. In *Price Waterhouse v. Hopkins*, the plaintiff was a senior manager in a professional accounting office who was a candidate for partner at the firm.⁶⁸ During the candidacy process, all of the partners in the local office were invited to submit written comments or evaluations of each candidate.⁶⁹ Thereafter, the firm’s admissions committee reviewed the comments and interviews that partners submitted. Based on this information, the admissions committee made its recommendation to the Policy Board.⁷⁰ The recommendation options were as follows: (1) accept the candidate for partnership; (2) put the application on hold; or (3) deny the candidate the promotion.⁷¹ If the candidate was accepted, the candidate’s name was then submitted to the entire partnership for a vote.⁷²

Many of the statements about the plaintiff in her reviews praised her for her efforts in securing multi-million dollar accounts for the firm, her character, and called her an “outstanding professional,” among other noteworthy praises.⁷³ However, it appeared from her record that she may have been aggressive to the point of abrasiveness and had numerous problems in dealing with staff at the firm.⁷⁴ A great deal of the negative

MORNING NEWS, Aug. 28, 2009 at A07.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989) (Price Waterhouse has been reversed by an amendment to the Civil Rights Act changing the Supreme Court’s framework in mixed motive cases; however, the proposition that gender stereotyping can be proof of a Title VII claim has not been reversed.).

⁶⁹ See *id.*

⁷⁰ *Id.* at 233.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Price Waterhouse*, 490 U.S. at 234.

⁷⁴ *Id.* at 234-35.

remarks about the plaintiff, even from those partners who supported her, took issue with her “interpersonal skills” and commented that she was “overly aggressive, unduly harsh, difficult to work with and impatient with staff.”⁷⁵ This line of commenting ultimately doomed her candidacy.

It was the psychological reasoning behind the various comments that brought gender stereotyping into play. It is the age-old but never stale question of whether these characteristics are those that are seen as an asset in a man and a liability in a woman. It also brings up the question of whether or not conduct that is seen as abrasive in a female is considered assertive when the same conduct is demonstrated by a male professional. Certainly, any person, including a woman, in a top position at a competitive job must exhibit a take-charge attitude and be outspoken or aggressive to some degree. As the Court made clear in its opinion, if a woman is viewed in a negative light for exhibiting these characteristics, then she is put at odds with what is expected of her to be successful in the business world.⁷⁶

In response to what the Court viewed as a conundrum for women in the workplace, its opinion states that it was likely that the partners reacted negatively to the plaintiff's personality because she was a woman.⁷⁷ The partners' comments about her were that she was “macho,” that she “overcompensated for being a woman,” and that “she should take a course at charm school.”⁷⁸ Other comments admonished her use of foul language, not as a neutral professional principle, but because the male partners believed that she should be a lady.⁷⁹ At a meeting with the policy board, the male partner responsible for explaining the decision to put her application on hold told her that she should “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.”⁸⁰ Essentially, she should act and look like a prim and proper lady, even though her appearance had nothing to do with her *ability* to be an executive at Price Waterhouse.

Ultimately, the Court decided that the passing of Title VII showed Congress's intent to forbid employers from taking gender into account in making employment decisions.⁸¹ Significantly, the Court construed Title VII as a mandate that “gender must be irrelevant to employment decisions.”⁸² In the Court's opinion, Price Waterhouse had engaged in sex stereotyping. To that end, it specifically acknowledged the error in the company's ways by stating:

[W]e are beyond the day when an employer could evaluate

⁷⁵ *See id.*

⁷⁶ *See id.* at 235.

⁷⁷ *Id.*

⁷⁸ *Price Waterhouse*, 490 U.S. at 235.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.* at 239.

⁸² *Id.* at 240.

employees by assuming or insisting that they matched the stereotype associated with their group, for “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁸³

By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to “sex” encompasses both the biological differences between men and women and any discrimination based on a failure to conform to stereotypical gender norms as they are related to the particular sex.⁸⁴

2. *Federal Court Inclusion of Transgender Individuals*

It is with this background that the argument for inclusion takes shape. The concept created in *Price Waterhouse*—that discrimination against a person based upon his or her gender non-conformity is discrimination against that individual based upon his or her “sex” within the acceptable or intended meaning of Title VII—is perhaps the most compelling argument for inclusion. According to *Price Waterhouse*, “sex,” as it is used in Title VII jurisprudence, goes beyond an individual’s anatomical make-up and encompasses the totality of the individual’s sexual identity. This identity includes a consideration of the individual’s characteristics and behaviors, including labels such as “masculine,” “macho,” or “feminine.” In other words, to discriminate against John for becoming Jane is to target Jane or John on the basis of his or her gender and failure to conform to his or her anatomical make-up—which *Price Waterhouse* specifically forbids.

For instance, a non-transgender woman’s “sex” includes her attitude, behavior, and the manner in which she interacts with others. It even includes the clothing she chooses to wear and whether or not she chooses to put on make-up. If she is the target of discrimination based upon one or more of these stereotypes, the discrimination she encounters enjoys the label of sex discrimination, and there are protections in place for her because of that label. The similarities of the discriminations faced by transgendered employees are striking.

The case for inclusion is rapidly gaining momentum as the courts’ reluctance to read “sex” as providing protection to these individuals begins to fade and courts recognize that discrimination based on a failure to conform to stereotypical gender norms support a claim under Title

⁸³ *Price Waterhouse*, 490 U.S. at 251 (citation omitted).

⁸⁴ See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004) (describing the impact of *Price Waterhouse*).

VII.⁸⁵

The first case attributed to recognize transgender persons as a protected class is *Smith v. Salem Ohio*. In *Smith*, the plaintiff was a male-to-female transsexual employee of the Salem Fire Department.⁸⁶ After being diagnosed with Gender Identity Disorder, Smith began expressing a more feminine appearance at work, which resulted in discrimination.⁸⁷ The Sixth Circuit read *Price Waterhouse* to hold that “Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”⁸⁸ According to the *Smith* court, under *Price Waterhouse*, “an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination.”⁸⁹ Similarly, the court reasoned, “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.”⁹⁰ Thus, “discrimination against [an employee] who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*.”⁹¹ Thus, the Sixth Circuit held that “Smith has stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination.”⁹²

Recently, the District Court in the District of Columbia also held that a transgendered individual is entitled to protection under Title VII.⁹³ There, the United States government retracted an offer of employment after learning of the employee’s desire to transition from a male to a

⁸⁵ See, e.g., *Kastl v. Maricopa County Cmty. Coll. Dist.*, 325 Fed. App’x. 492, 493 (9th Cir. 2009) (stating that “it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women”); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“[s]ex stereotyping by an employer based on a person’s gender non-conforming behavior is impermissible discrimination.’ That is, individual employees who face adverse employment actions as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.”) (internal citations omitted); *Smith*, 378 F.3d 566 (holding that Title VII bars discrimination based on a failure to conform to stereotypical gender norms); *Zalewska v. County of Sullivan*, 316 F.3d 314, 323 (2d Cir. 2003) (noting that discrimination based on a failure to conform to stereotypical gender norms is prohibited by the Equal Protection Clause); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 660 (S.D. Tex. 2008) (stating that plain language of Title VII and *Price Waterhouse* “do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes”); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E, 2003 WL 22757935, at *4 (W.D. N.Y. 2003) (holding that transsexuals are “protected under Title VII to the extent that they are discriminated against on the basis of sex”).

⁸⁶ *Smith*, 378 F.3d at 568.

⁸⁷ *Id.*

⁸⁸ *Id.* at 573.

⁸⁹ *Id.* at 574.

⁹⁰ *Id.* (emphasis in original).

⁹¹ *Smith*, 378 F.3d at 575.

⁹² *Id.*

⁹³ *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008).

female.⁹⁴ After hearing the evidence, the District Court concluded that the employee was discriminated against because of sex in violation of Title VII and that the reasons given by the government for retracting the offer were a pretext for discrimination.⁹⁵ The Court likened the plight of the “converting” transgender to another area afforded Title VII protection:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII.⁹⁶

The Court ultimately found that the decision to retract the offer for employment was because the employee’s “appearance and background did not comport with the decisionmaker’s sex stereotypes about how men and women should act and appear.”⁹⁷

This argument is a continuation of the foundation laid down in *Price Waterhouse* that gender must be irrelevant to employment decisions.⁹⁸ With this foundation, it is argued that a transgender “situation” would fit squarely within the confines of the Supreme Court’s gender neutrality requirements for the workplace. If an employer terminates Jane for seeking to become John, then the employer is practicing a form of sex discrimination in the sense that it is making an employment decision on the basis of the employee’s sex. Moreover, the employer could also be said to be sex stereotyping by making an employment decision on the basis of Jane’s lack of characteristics that are traditionally associated with the female gender.

Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, regardless of the cause of that behavior. Therefore, a label such as “transsexual” should not alter a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Superimposing classifications such as transsexual or transgender does not then legitimize

⁹⁴ *Id.* at 299.

⁹⁵ *Id.* at 300.

⁹⁶ *Id.* at 306-07.

⁹⁷ *Id.* at 308.

⁹⁸ See *Price Waterhouse*, 490 U.S. at 231.

discrimination based on an employee's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.⁹⁹ After all, *Price Waterhouse* established the premise that it is illegal to take adverse employment action against a female employee because, in the decisionmaker's judgment, she acts like a man. This reasoning extends to include a female employee who seeks sexual reassignment surgery to become a man. There is, of course, a significant difference between acting in a particular role and actually changing characters. This difference weighs in favor of protection rather than signifying a distinction warranting exclusion.

In attempting to forecast the future of the possible inclusion of transgender individuals under Title VII, it is also important to keep in mind Supreme Court opinions showing that the Supreme Court is poised to take a proactive stance, even if that stance means that it must disregard or, more precisely, supplement Congress' original intent. The Supreme Court case of *Oncale v. Sundowner Offshore Services, Inc.* is a very good example of this proactive stance. In *Oncale*, the Supreme Court overturned case law in some states that denied that same-sex harassment was actionable conduct under Title VII.¹⁰⁰ The opinion states:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principle 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.¹⁰¹

To some, this language may be viewed as nothing more than an esoteric exercise in the jurisprudential method used by the Court to interpret statutes when it decides cases. However, this passage is a key element in forecasting the future of Title VII coverage and litigation. The Court essentially shakes loose the limitation of Congressional intent and expands the protection of Title VII in ways that Congress did not contemplate. The Court expands the scope of Title VII to virtually any conduct that is determined to be noxious in the workplace so long as the conduct in question is a "reasonably comparable evil." Under this framework, although it is clear that Congress did not intend to cover transgender individuals by placing the word "sex" in the statute, what is not clear is whether or not discrimination against transgendered

⁹⁹ *Smith*, 378 F.3d at 574; *Lopez*, 542 F.Supp.2d at 660.

¹⁰⁰ See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁰¹ *Id.* at 79–80.

individuals is a “reasonably comparable evil” that demands inclusion.

According to the expansionist view, courts should not shy away from expanding the scope of Title VII if doing so furthers the purpose and intent of the Act. Title VII, including subsequent amendments such as the Pregnancy Discrimination Act, was enacted to ensure that employment decisions are made on the basis of an applicant’s ability to do the job for which he or she has applied or the job in which he or she is currently working. The fact that an applicant or a current employee is of a certain race or gender, for instance, should not be used by employers as a criteria for hiring or retention of employees. Expanding the coverage of Title VII to protect transgender individuals would further enhance the honorable goal of Title VII by ensuring that employers are not allowed to make an employment decision about a transgendered individual for reasons other than his or her ability to do the job. If gender has nothing to do with a person’s job performance, he or she should not be denied work that he or she is qualified to perform. This is the goal of Title VII and expanding its coverage to protect another insular minority would only further that goal.

III. STATE LAW PROTECTION

Just as in the federal arena, state courts are increasingly recognizing transgender individuals as a protected class under state laws prohibiting discrimination based on sex.¹⁰² In addition to finding discrimination based on sex, some states have protected transgender individuals under state laws based upon disability.¹⁰³ Further, state legislatures have played an active role in recognizing transgender rights. According to the Transgender Law & Policy Institute, a total of 122 states, counties, and cities have passed legislation prohibiting discrimination on the basis of gender identity or expression.¹⁰⁴ Moreover, many local governments that

¹⁰² See, e.g., *Morales v. ATP Health & Beauty Care, Inc.*, No. 3:06-CV-01430, 2008 WL 3845294, at *8 (D. Conn. Aug. 18, 2008) (recognizing that a transgender employee’s perceived failure to conform to gender stereotypes can constitute membership in a protected class under Connecticut antidiscrimination law); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a transgendered individual stated a valid sex discrimination claim under state law); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001) (concluding that sex discrimination under state law includes gender discrimination “so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman”).

¹⁰³ See, e.g., *Lie v. Sky Publ’g Corp.*, No. 0131171, 2002 WL 31492397, at *7 (Mass. Super. Ct. Oct. 7, 2002) (holding that the transgender plaintiff established a prima facie case of discrimination based on the disability of gender identity disorder); *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that a transsexual youth was protected by state law prohibiting discrimination on the basis of disability).

¹⁰⁴ See Transgender Law & Policy Institute, Non-Discrimination Laws that Include Gender Identity and Expression, <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Apr. 29, 2010). According to the Transgender Law & Policy Institute, Colorado, Iowa, Oregon, Vermont, New Jersey, Washington, Hawaii, Illinois, Maine, California, New Mexico, Rhode Island, Minnesota and the District of Columbia have laws prohibiting discrimination on the basis of gender.

have enacted antidiscrimination statutes that include transgendered individuals are in areas of states, such as Texas, that do not have such protections at the state level.¹⁰⁵

Many of the state antidiscrimination statutes contain the same broad prohibition of discrimination based on sex that is contained under Title VII.¹⁰⁶ In those states where discrimination against transgender individuals is unlawful, the courts have been presented with many of the same arguments that are beginning to trickle through many of the circuit courts. The primary argument is that discrimination against a transsexual is based on stereotyped notions of “appropriate” male and female behavior or appearances.¹⁰⁷ In fact, the Ninth Circuit has held that the definition of “sex” under federal non-discrimination laws encompasses both biological differences between men and women¹⁰⁸ as well as actions based on failure to “conform to socially prescribed gender expectations.”¹⁰⁹ In a similar manner, the Superior Court for New Jersey quoted case law holding that “sex” is comprised of more than a person’s genitalia at birth and based its decision to protect transgendered individuals on the belief that gender stereotyping is unlawful.¹¹⁰

However, just as there is a split between circuit courts as to coverage of transsexuals under Title VII, there is also a split between states as to whether or not state law should protect transgendered individuals. Those states with holdings that deny coverage of transsexuals view the word “sex” in their laws in the same manner as the traditional meaning under Title VII when it was first passed.¹¹¹ The Iowa Supreme Court, for instance, took a position in line with the more

The cities and counties which have laws prohibiting discrimination on the basis of gender, listed based upon year of enactment from 2007 back to 1975, are Nashville, TN; Kalamazoo, MI; Broward, FL; Columbia, SC; Detroit, MI; Gainesville, FL; Hamtramck, MI; Kansas City, MO; Oxford, OH; Lake Worth, FL; Milwaukee, WI; Palm Beach County, FL; Saugatuck, MI; West Palm Beach, FL; Bloomington, IN; Cincinnati, OH; Easton, PA; Ferndale, MI; Hillsboro, OR; Johnson County, IA; King County, WA; Lansdowne, PA; Lansing, MI; Swarthmore, PA; West Chester, PA; Gulfport, FL; Indianapolis, IN; Lincoln City, OR; Northampton, MA; Albany, NY; Austin, TX; Beaverton, OR; Bend, OR; Buriem, WA; Oakland, CA; Miami Beach, FL; Tompkins County, NY; Carbondale, IL; Covington, KY; El Paso, TX; Ithaca, NY; Key West, FL; Lake Oswego, OR; Monroe Co., FL; Peoria, IL; San Diego, CA; Scranton, PA; Springfield, IL; University City, MO; Allentown, PA; Baltimore, MD; Boston, MA; Buffalo, NY; Chicago, IL; Cook County, IL; Dallas, TX; Decatur, IL; East Lansing, MI; Erie County, PA; New Hope, PA; New York City, NY; Philadelphia, PA; Salem, OR; Tacoma, WA; Denver, CO; Huntington Woods, MI; Multnomah Co., OR; Rochester, NY; Suffolk County, NY; Atlanta, GA; Boulder, CO; DeKalb, IL; Madison, WI; Portland, OR; Ann Arbor, MI; Jefferson County, KY; Lexington-Fayette Co., KY; Louisville, KY; Tucson, AZ; Benton County, OR; Santa Cruz County, CA; New Orleans, LA; Toledo, OH; West Hollywood, CA; York, PA; Cambridge, MA; Evanston, IL; Olympia, WA; Pittsburgh, PA; Ypsilanti, MI; Iowa City, IA; Grand Rapids, MI; San Francisco, CA; Santa Cruz, CA; St. Paul, MN; Seattle, WA; Harrisburg, PA; Los Angeles, CA; Urbana, IL; Champaign, IL; and Minneapolis, MN.

¹⁰⁵ See, e.g., *id.* (noting that Houston, Texas has adopted legislation prohibiting discrimination in public employment on the basis of gender identity and expression).

¹⁰⁶ See, e.g., *Lie*, 2002 WL 31492397, at *1.

¹⁰⁷ See *id.* at *5.

¹⁰⁸ See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

¹⁰⁹ *Id.*

¹¹⁰ See *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

¹¹¹ See *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 474 (Iowa 1983).

traditional view of “sex” when it determined that “the word ‘sex’ in Iowa’s Civil Rights Act did not include transsexuals and that sexual discrimination was intended to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred.”¹¹² Many of the courts believe that transsexuals may deserve coverage; however, if transsexuals are to enjoy such coverage, it must come from the legislature in the form of a separate law or an amendment to the current anti-discrimination law.

IV. PRACTICAL IMPLICATIONS OF INCLUSION

If transgender discrimination successfully completes its case for inclusion under Title VII, business owners and their management employees will certainly be faced with numerous changes that must be closely monitored in the workplace. Regardless of whether the inclusion comes by judicial interpretation of the term “sex,” as used in Title VII, or a legislative amendment that adds transgender persons as a protected class, legal issues for employers are certainly on the horizon. Employers have to be cognizant of the fact that depending on where they do business, they may have covered employees. Employers should also consider being proactive. It is the view of the authors that the trajectory is toward more inclusion.

A. “Bathrooms as Battlegrounds”

One practical implication of inclusion presenting a challenge to employers and managers is what to do with the once segregated male and female restrooms and how to set a clear policy determining which employees are allowed to use each restroom. For the transgender individual, an employer will want to assure a safe, dignified, and convenient restroom. By the same token, other employees may not be comfortable sharing a restroom with a transgender individual. For example, a male-to-female transgender may want to use the restroom that correlates to their outside appearance as opposed to their genital or anatomical make-up. Both male and female co-workers may oppose the transgender individual using their respective restroom facilities. The employer not only has to worry about potential liability arising from the transgender individual, but also from the co-workers who oppose whatever decision the employer makes.

¹¹² See *id.*

1. *Transgender Employee Rights*

One of the challenges in drafting a restroom policy is how to protect the privacy interests and rights of a transgender employee. For some employers, renovation to restroom facilities or the creation of a unisex bathroom may be cost prohibitive. Even if this is an available option, these renovations do not ensure that the employer is not discriminating against a transgender employee, especially during the transition period. There remains the issue of which restroom facility the transgender employee will be permitted to use.

This challenge surfaced in Arizona in the 2004 case, *Kastl v. Maricopa County Community College District*.¹¹³ The Rebecca E. Kastl had been diagnosed with a gender identity disorder, claiming that she was a female who was incorrectly assigned to the male sex at birth.¹¹⁴ Upon her original employment with the defendant, she was a male; however, sometime after being hired as an adjunct professor, she was diagnosed with a gender identity disorder, and her personal physician determined that she was a biological female.¹¹⁵ This prompted her to change her name from a male name to a female name, and she sought and obtained an Arizona driver's license indicating her sex to be female.¹¹⁶

Kastl and another transgender faculty member continued to work at the Maricopa County Community College during their gender transitions.¹¹⁷ During this period, Kastl began to use the women's restroom.¹¹⁸ Her bathroom use was met with numerous complaints from the school's students, many of whom were minors, which prompted the school to create a restroom policy.¹¹⁹ Essentially, the policy required the transgender employees to use the men's restroom until they provided proof that they had completed genital correction or sex reassignment surgery. In an attempt to compromise with the defendant, Kastl attempted to prove her transformation to her new gender by showing the defendant her state-issued driver's license.¹²⁰ The defendant rejected Kastl's attempt, calling it "inconclusive and irrelevant."¹²¹ Kastl expressed numerous objections to the defendant's policy, including her concern for serious bodily injury if she used the men's restroom, invasion of her privacy, and her concern for the selective enforcement of the proof requirement, as it was only required of the transgender

¹¹³ No. Civ. 02-1531 PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004).

¹¹⁴ *Id.* at *1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Kastl*, 2004 WL 2008954, at *1.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

employees.¹²² The defendant did not budge on the policy, so Kastl refused to abide by it and was terminated shortly thereafter.¹²³

As a result of her termination, Kastl filed suit alleging that the defendant's policy and its actions in enforcing the policy violated Title VII and Title IX's prohibition against sex discrimination, among many other claims.¹²⁴ Because the court and the parties accepted as true that Title VII and Title IX issues mirror one another, the remainder of the discussion of this case will revolve around a Title VII analysis.¹²⁵

The employer then filed a motion for summary judgment on the basis that Kastl could not prove her allegation that she is a biological female, which is the first element of a *prima facie* case.¹²⁶ The District Court granted summary judgment in favor of the employer stating that Kastl "has failed to meet her burden of establishing a *prima facie* case of discrimination because she has provided no evidence that she was a biological female."¹²⁷ The District Court's decision focused primarily on whether Kastl was protected under Title VII at all, and it did not address the employer's stated reasons for the restroom policy.

In 2009, the Ninth Circuit upheld the decision of the lower court, but on different grounds.¹²⁸ The Ninth Circuit turned to *Price Waterhouse* to guide its decision, stating that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."¹²⁹ The Ninth Circuit found that Kastl had established a *prima facie* case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were the motivating factor in the employer's actions against her.¹³⁰ At that point, the burden shifted to the employer under the *McDonnell Douglas* test to articulate a legitimate, nondiscriminatory reason. The employer satisfied the burden when it proffered evidence that it banned Kastl for safety reasons.¹³¹ Ultimately, the Court of Appeals found that Kastl's Title VII claim was doomed under the third stage of the *McDonnell Douglas* test, because establishing a *prima facie* case was not sufficient to defeat the

¹²² *Id.*

¹²³ See *Kastl*, 2004 WL 2008954, at *1.

¹²⁴ See *id.* at **2-10.

¹²⁵ See *id.* at *3.

¹²⁶ *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *2 (D. Ariz. Aug. 22, 2006).

¹²⁷ *Id.* at *6.

¹²⁸ See *Kastl v. Maricopa County Cmty. Coll. Dist.*, 325 F. App'x 492, 492 (9th Cir. 2009).

¹²⁹ *Id.* at 493.

¹³⁰ *Id.* at 493 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). *McDonnell Douglas* sets forth the basic allocation of burdens and order of presentation of proof in a Title VII case. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). First, the plaintiff has the burden to prove by a preponderance of the evidence a *prima facie* case of discrimination. *Id.* at 253. If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* If the defendant carries this burden, the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were just a pretext for discrimination. *Id.*

¹³¹ *Id.* at 494.

employer's motion for summary judgment.¹³²

This case, although addressing the issue of whether Kastl fell within Title VII, provides little guidance in the development of a workable company restroom policy. The employer's safety concern was found to be a sufficient reason for the implementation of the restroom policy.¹³³ On the surface, this opinion seems to indicate that safety concerns are a valid reason for a restroom policy requiring transgender employees to use the restroom which matches their genitals until they provide proof that they completed the genital recorection or sex reassignment surgery. The Ninth Circuit's recognition of the "safety concerns" argument means that it may be possible for an employer to have such a restroom policy if it is phrased in a manner that is genital specific—albeit difficult to draft without violating some privacy rights of almost every employee. However, it is also important to note that the Ninth Circuit only afforded the safety concerns argument one sentence in their opinion.¹³⁴ The opinion does not discuss whether such an argument could be held a pretext for discrimination against transgender persons. It seems likely that such a policy, if incorrectly drafted, could be found to truly reflect an employer's discomfort with transgender employees and violate Title VII.

2. *Rights of Co-Workers*

In addition to the rights of the transgender employee, the recognition of transgender rights creates another legal minefield for the employer—some employees may be uncomfortable sharing a restroom with a transgender employee. Of course, some of this discomfort could be eased with training to help provide an understanding of the transgender person and the desire for reassignment.¹³⁵ As with many fears, becoming informed about whatever it is that is causing concern helps to ease the person's mind. However, training is not a quick fix and must be provided in conjunction with other solutions for those who are still uncomfortable with using a restroom with transgender persons. An employer may help resolve some of the employee's discomfort by making some renovations to its current restrooms. For instance, the employer could remove urinals from men's restrooms or assure that there are sufficient stalls that are equipped with doors in all facilities.¹³⁶ Further, an employer should assure that all restrooms have proper latches or locks and doors that close adequately so that employees have

¹³² See *Kastl*, 325 Fed. App'x at 492.

¹³³ See *id.*

¹³⁴ *Id.* at 494.

¹³⁵ See JANIS WALWORTH, MANAGING TRANSSEXUAL TRANSITION IN THE WORKPLACE (2003) available at <http://www.gendersanity.com/shrm.html>.

¹³⁶ *Id.*

sufficient privacy while using the stalls.¹³⁷

Employers may also institute temporary accommodations that enable their employees to have time to adjust to the change. For example, employers may ask the transgender employee if he or she is willing to volunteer to use only certain restrooms appropriate for his or her new sex or only unisex restrooms for a temporary period of time. When planning for this temporary solution, the employer should assure that the transsexual employee is inconvenienced as little as possible.¹³⁸ Once the transition period has ended, other employees may have adjusted to the transgender employee in his or her new gender identity. Those employees who have not adjusted may have concerns, and while it is important to listen to and attempt to work out a compromise with employees, it may just be that some individuals cannot accept the changes. Those situations are difficult, and may be forced to end with losing an employee. If an employer handles himself or herself appropriately, the relationship should not be forced to end in a lawsuit.

The Eighth Circuit case *Cruzan v. Special School District, No. 1* provides an example and potentially some guidance into this situation.¹³⁹ There, Cruzan, a female teacher at a Minneapolis school district, brought a suit alleging that the school discriminated against her on the basis of her sex and religion by allowing a transgender co-worker to use the women's facility.¹⁴⁰ The transgender employee began working for the school district in 1969.¹⁴¹ Nearly thirty years later, the employee informed the school district that he was transgender and would transition from male to female.¹⁴² The transgender employee would be known as Debra Davis instead of David Nielsen.¹⁴³ After consulting legal counsel, the school district determined that Davis had the right to use the women's restroom.¹⁴⁴ After a few months, Cruzan entered the women's faculty restroom where she saw Davis exiting a private stall.¹⁴⁵ Cruzan filed suit alleging violations of Title VII and the Minnesota Human Rights Act.¹⁴⁶

The Eighth Circuit found that the school district's decision to allow Davis to use the women's faculty restroom did not rise to the level of an actionable adverse employment action.¹⁴⁷ Davis's use of the female

¹³⁷ *Id.*

¹³⁸ See Center for Gender Sanity, <http://www.gendersanity.com/shrm2.html> (last visited Apr. 29, 2010).

¹³⁹ 294 F.3d 981 (8th Cir. 2002).

¹⁴⁰ *Id.* at 982.

¹⁴¹ *Id.* at 983.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *Cruzan*, 294 F.3d at 982. Legal counsel for the school district informed the school that the Minnesota Human Rights Act prohibited discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness." *Id.* (quoting MINN. STAT. § 363.01 (1998)).

¹⁴⁵ *Id.* at 983.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 984.

faculty restroom had no effect on Cruzan's title, salary, or benefits.¹⁴⁸ Cruzan also had alternate restroom accommodations available including a single-stall unisex bathroom.¹⁴⁹ Further, the evidence showed that in order to avoid Davis, Cruzan began using the female students' restroom.¹⁵⁰ Thus, Cruzan was not actually required to share the same restroom facilities with Davis.

In order to recover, Cruzan had to establish a "tangible change in duties or working conditions that constitute a material employment disadvantage."¹⁵¹ "Mere inconvenience, without a decrease in title, salary, or benefits," was insufficient to show an adverse employment action.¹⁵² Thus, the employer was within its rights to allow a transgender employee to use the restroom that matched their physical presentation. To do so will amount only to an inconvenience to non-transgender co-workers who are uncomfortable with the idea, which is not actionable under Title VII. However, it is important to note that in *Cruzan*, there were alternative restroom facilities available, including a unisex restroom. Although the analysis would most likely remain unchanged, the inability of the employer to provide these alternate restroom facilities could potentially open the door to liability.

3. *Additional Challenges*

Another potential pitfall for an employer arises when the employer cannot practically accommodate the transgender employee during the transition period. For example, employees in the transportation industry are often left at the mercy of the available public facilities without the benefit of other patrons being informed about the transition period. An employer solution is impractical and a transgender employee's inability to have appropriate facilities implicates serious privacy concerns. In *Etsitty v. Utah Transit Authority*, Etsitty was a driver for the Utah Transit Authority (UTA) who was transitioning from a male to a female.¹⁵³ Since Etsitty was a driver and would frequently use public restroom facilities en route, UTA could not control the restroom facilities Etsitty had access to or used.¹⁵⁴ Fearing liability arising out of Etsitty's restroom usage while en route, UTA terminated Etsitty's employment citing a failure to accommodate her restroom needs.¹⁵⁵

Although the court ultimately decided that transgender employees

¹⁴⁸ *Id.*

¹⁴⁹ *Cruzan*, 294 F.3d at 984.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (quoting *Cossette v. Minn. Power & Light*, 188 F.3d 964, 972 (8th Cir. 1999)).

¹⁵² *Id.*

¹⁵³ 502 F.3d 1215, 1218–19 (10th Cir. 2007).

¹⁵⁴ *Id.* at 1219.

¹⁵⁵ *Id.*

are not a protected class and thus Etsitty could not satisfy her prima facie burden on the basis of her status as transgender,¹⁵⁶ this case illustrates yet another potential legal battle an employer could face. What happens when an employer cannot provide for a transgender person's restroom accommodations because the available facilities are not within the employer's control? Obviously, termination of the transgender employee is not the appropriate course of action. But the question remains: how does an employer develop an appropriate restroom policy to address such concerns? In situations like this, the restroom policy should most likely require the employee to use the restroom matching the gender that they are presenting at the time.

4. *Guidance for Employers*

The *Kastl* case is only one of what may presumably become many cases over bathroom use as the cause for transgender inclusion continues to gain speed in many district and circuit courts. Further, *Cruzan* illustrates the potential backfire that could result in transgender accommodations which leave nontransgender co-workers feeling uncomfortable. It leaves many questions to be answered for an employer who is attempting to comply with the Act and attempting to protect the transgender employee while also seeking to protect its nontransgender employees who may not be comfortable sharing a bathroom with someone who is transgender. Any court case, legislative amendment, or Equal Employment Opportunity Commission (EEOC) interpretive guideline which includes transgender protections must provide some guidance to employers on this topic. One practical solution to help employers comply would be to provide guidance similar to the technical compliance manual that exists for the ADA.¹⁵⁷ Ultimately, employers cannot be left to navigate the compliance minefield without some guidance.

Transgender workers are no different from other employees in that they should use the restroom appropriate for the gender in which they are currently presenting themselves. Once the employee has begun presenting himself or herself in a new gender role, requiring him or her to walk into a restroom that is designated for his or her former gender would be extremely awkward for the employee and any other employee or third party in or around the restroom at the time. If transgender individuals are forced to use the restroom that is designated for their former sex until their genitalia are transformed, despite their presentation as members of their new sex, it singles them out for embarrassment and

¹⁵⁶ *Id.* at 1221.

¹⁵⁷ DEP'T OF JUSTICE, ADA REGULATIONS & TECHNICAL ASSISTANCE MATERIALS, TITLE III TECHNICAL ASSISTANCE MANUAL (1993) available at <http://www.ada.gov/taman3.html>.

humiliation.

B. Employer Dress Codes

Another potential issue that arises is the ability of an employer to set a dress code. Despite the holding in *Price Waterhouse* that prohibits an employer from discriminating for a failure to live up to gender role expectations,¹⁵⁸ courts have long recognized an employer's ability to differentiate between men and women in appearance and grooming policies.¹⁵⁹ The main issue raised in those cases is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.¹⁶⁰ Thus, gender-specific dress codes are appropriate and do not violate Title VII as long as the dress codes do not disparately impact one's sex or impose an unequal burden.¹⁶¹ For instance, it is not unlawful discrimination to require a male employee to maintain a short and well-groomed haircut.¹⁶² However, dress or appearance requirements intending to be sexually provocative, and tending to stereotype employees as sex objects are not permitted.¹⁶³ Further, the Seventh Circuit has found that requiring female employees to wear a specified "career ensemble," while at the same time allowing male employees to wear customary business attire, violates Title VII.¹⁶⁴

In *Creed v. Family Express Co.*, the issue before the court was whether an employer had violated Title VII for discharging a gender-

¹⁵⁸ 490 U.S. at 231.

¹⁵⁹ See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc).

¹⁶⁰ See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854–55 (9th Cir. 2000).

¹⁶¹ See, e.g., *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076, 1081 (9th Cir. 2004) (holding that Harrah's Casino's grooming standard which required women to wear makeup and styled hair and men to dress conservatively was not discriminatory because it did not impose an unequal burden); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (upholding employer's grooming policy that prevented male employees from wearing long hair); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (same).

¹⁶² See, e.g., *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); *Kelley v. Johnson*, 425 U.S. 238, 249 (1976) (upholding the constitutionality of regulations describing the length and style of hair appropriate for police officers). See also *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that "hair length requirement[s] for male employees [are] part of a comprehensive personal grooming code applicable to all employees . . . [w]here . . . such policies are reasonable and are imposed in an evenhanded manner on all employees").

¹⁶³ *Eq. Empl. Opportunity Comm'n v. Sage Realty Corp.*, 507 F. Supp. 599, 609 (S.D.N.Y. 1981) (finding that requiring a female employee to wear a uniform where [h]er thighs and portions of her buttocks were exposed "when [the employer] knew that the wearing of this uniform on the job subjected her to sexual harassment, constituted sex discrimination").

¹⁶⁴ *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1034–35 (7th Cir. 1979).

transitioning employee (male-to-female) for letting her hair grow longer than the employer deemed appropriate for men and wearing makeup.¹⁶⁵ Presenting herself as Christopher Creed, the plaintiff was hired as a sales associate at Family Express, a retail store.¹⁶⁶ During the course of employment, Creed began wearing clear nail polish, trimming her eyebrows, wearing mascara, growing her hair out, and wearing her hair in a more feminine style.¹⁶⁷ During this time, Creed also increasingly used the name “Amber.”¹⁶⁸ Throughout the course of her employment, however, Creed continued to wear the required unisex uniform consisting of a polo shirt and slacks.¹⁶⁹

Family Express had a sex-specific dress code and grooming policy requiring all of its employees to “maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn.”¹⁷⁰ The policy also required males to maintain neat, conservative hair kept above the collar and prohibited earrings or other jewelry that accompanies body piercing.¹⁷¹ Females were required to maintain neat and conservative hair, which need not be above the collar, and were permitted to wear makeup and jewelry so long as it was conservative.¹⁷² Family Express placed great importance on their dress code and grooming policy and informed new sales associates that the policy was a non-negotiable part of employment.¹⁷³

Following a complaint about Creed’s appearance, Family Express informed her that she would no longer be permitted to present herself in a feminine manner at work and must either cut her hair and not wear nail polish and makeup or resign from her position as a sales associate.¹⁷⁴ Creed informed Family Express that she would not be able to conform to the policy, at which point Family Express considered her actions a “voluntary termination.”¹⁷⁵ Creed argued that she was terminated because she did not conform to the expectations of how a man should look.¹⁷⁶ Family Express claimed that they simply articulated the fact that Creed was in violation of the company dress code and grooming policy.¹⁷⁷

The court ruled that the company did not violate Title VII by

¹⁶⁵ Creed v. Family Exp. Corp., No. 3: 06-CV-465RM, 2009 WL 35237, at *1 (N.D. Ind. Jan. 5, 2009).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Creed, 2009 WL 35237, at *2.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *3.

¹⁷⁵ Creed, 2009 WL 35237, at *4.

¹⁷⁶ *Id.* at *9.

¹⁷⁷ *Id.*

requiring Creed to present as a male.¹⁷⁸ The court ruled that no reasonable jury could find that Family Express acted on the basis of a prohibited purpose—failure to embody sexual stereotypes—as opposed to a legitimate nondiscriminatory purpose—breach of dress code and grooming policy.¹⁷⁹ The court recognized that Creed may argue that “real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that [the] dress code and grooming policy discriminates on the basis of her transgender status.”¹⁸⁰ However, the court noted that “rightly or wrongly,” Title VII’s prohibition on sex discrimination does not extend that far.¹⁸¹

It is important to note that Indiana is in the Seventh Circuit, a circuit which has consistently held that transgender employees do not fall within the scope of “sex” in Title VII. Thus, the result reached in *Creed v. Family Express* does not expand the ability for an employer to terminate an employee for a failure to conform to the dress code and grooming policy of their anatomical sex. This case does, however, bring an important issue to light, i.e., how does an employer develop a dress code and grooming policy for a transgender employee that does not violate Title VII?

Terminating an employee for dressing like a person of the opposite sex is really about terminating them for their appearance. If the employee has gender identity disorder but continues to dress in the appropriate clothing for the gender in which he or she was born, most employers would not terminate the employee. Therefore, any adverse employment decision is truly based upon the employee’s appearance. Again, the most practical solution is to require a transgender employee to adhere to the dress code and grooming policy of the gender in which the employee is currently presenting. Requiring a transgender employee (male-to-female, for example) to present herself as male during her transition will unnecessarily complicate the issue and make what is a difficult transition period even more difficult.

C. Overnight Travels

Although there are no reported cases on the issue involving transgender individuals, another potential issue for employers is overnight travels. For example, if an employer typically bunks males with males and females with females during overnight company trips in order to be financially conservative, it takes little imagination to foresee the potential complications that arise when one of the traveling

¹⁷⁸ *Id.* at *10.

¹⁷⁹ *Id.* at *11.

¹⁸⁰ *Creed*, 2009 WL 35237, at *10.

¹⁸¹ *Id.*

employees is a transgender. Just as with the restroom, this issue implicates privacy concerns of both the transgendered and non-transgendered employees. A possible solution, and perhaps the one which best addresses the legal issues potentially presented, is to develop a policy which will allow a transitioning employee to maintain separate bunking accommodations. This would protect privacy concerns by nontransgender employees while at the same time would not force a transitioning employee to bunk with the sex that matches anatomically. However, it is important to recognize that isolating a transitioning employee raises potential legal concerns by itself. Accordingly, any policy which permits or requires separate bunking for a transitioning employee should eventually give way to a policy similar to that of nontransitioning employees.

D. BFOQ or Business Necessity

Employers have also been permitted to disallow a female or a male to work in certain positions through the bona fide occupational qualification exemption (“BFOQ”) or business necessity defense. For example, females are allowed to be excluded from positions as security guards in all-male, maximum-security prisons for security reasons.¹⁸² In some instances, the sex of the employee can directly undermine that employee’s capacity to fulfill the requirements of the job.¹⁸³ If a female employee was seeking reassignment as a male, the issue then becomes whether those jobs which typically exclude females based on BFOQ or business necessity would now become available to the newly transitioned male employee.

As pointed out by the Supreme Court, in some instances, more is at stake than an individual’s decision to weigh and accept the risks of employment.¹⁸⁴ In positions such as in a correctional facility, the overwhelming concern to maintain basic control and protect inmates and other security personnel will most likely exclude a transgender female-to-male employee from those positions.¹⁸⁵ Thus, the BFOQ would still apply to her as a male because her dressing as a male security guard does not alter the safety precautions that prompted the allowance of the BFOQ defense.

¹⁸² See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (stating that “[a] woman’s relative ability to maintain order in a male, maximum security, unclassified penitentiary . . . could be directly reduced by her womanhood”).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 335.

¹⁸⁵ See generally *id.*

E. Concerns from a Business Standpoint

Another potential issue for an employer is customer preference. Currently, there are no studies of which the authors are aware linking transsexual employees to a decrease in a company's business. An employer may argue that his or her customers prefer that a transsexual not be employed, and that the transsexual's employment will adversely affect the business's bottom line. If transsexuals are included under Title VII, the issue then becomes whether customer preference warrants discrimination. EEOC guidelines specifically state that customer preference does not warrant application of the bona fide occupational qualification exception.¹⁸⁶ In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit used these guidelines in arriving at the conclusion that Pan Am's passenger preferences for female stewardesses did not justify the policy of hiring only females for that position.¹⁸⁷ Specifically, the court said that "the fact the customers prefer [females] cannot justify sex discrimination."¹⁸⁸ This same reasoning would extend to transsexuals. In other words, the fact that customers may prefer the business to employ a nontranssexual employee cannot justify discrimination. As explained by the Fifth Circuit, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."¹⁸⁹

Most advocates of individual property interests support the idea that a business owner should have the ability to make a personal decision whether or not he or she wants to hire or retain certain individuals whose ideas may not fall in line with the company he or she built. For example, if an employer hires "Jane" to work as a sales clerk, should the employer be forced to retain that employee after "Jane" becomes "John"? Essentially, the employer hired "Jane" because she was "Jane." Thus, continued employment of "John" places the employer in the precarious position of employing someone that was not hired. Obviously, the scope of this article cannot address all the legal implications encompassed in this issue, other than to note that the extension of Title VII to include transsexual employees could implicate serious concerns in this arena. Although these concerns may eventually fall to the wayside as transsexuals and transgender persons become more visible and the social stigma surrounding them fades, currently, these concerns can and will

¹⁸⁶ See 29 C.F.R. § 1604.2(a)(1) (2010). The guidelines provide that the bona fide occupational qualification exception as to sex should be interpreted narrowly and that labeling certain positions "men's jobs" and "women's jobs" tends to deny employment opportunities unnecessarily to one sex or the other. *Id.*

¹⁸⁷ 442 F.2d 385, 386 (5th Cir. 1971).

¹⁸⁸ *Id.* at 389.

¹⁸⁹ *Id.*

affect the viability of a small business owner.

F. Religious Employers

It is unclear the extent to which a faith-based employer will be able to circumvent the recognition of transgender persons as a protected class. Of course, the impact of inclusion, if legislatively recognized, would be determined in large part based on any exceptions to the bill. For example, previous versions of the Employment Non-Discrimination Act contained exemptions for corporations, associations, educational institutions, or societies that are exempt from the religious discrimination provisions of Title VII of the Civil Rights Acts of 1964.¹⁹⁰ Thus, to the extent that religious employers were exempt from the provisions of Title VII in other aspects, the exemptions regarding transgender persons would be similar.

Although there are no cases which currently address both the expansion of Title VII to include transgender persons and a religious exemption, the result of any judicial expansion of Title VII would likely include a similar religious exemption.

V. CONCLUSION

Whether transgender employees are protected by Title VII under the term “sex” sparks debate that demands that its participants come off the fence and pick a side. Regardless of whether courts currently recognize transgender employees as a protected class, the issues raised by transgender employees cannot be put on the backburner forever. Through the foregoing pages, readers on both sides of the issue should be willing to admit (perhaps grudgingly) that there are no easy solutions, but that the changing face of the American worker will force the issue one way or the other.

One thing is clear, recognition of transsexual and transgender individuals as a protected class under discrimination laws—whether federal or state—is increasing. Regardless of whether the expansion of Title VII eventually comes from legislative recognition (as the case for exclusion suggests) or the natural expansion of the term “sex” to protect a reasonably comparable evil (as the case for inclusion suggests), this expansion creates practical concerns for employers. The changing face of the American worker necessitates changing the policies the American employer implements. There are a variety of issues which expansion of

¹⁹⁰ See, e.g., H.R. 3017, 111th Cong. § 6 (2009); H.R. 3685, 110th Cong. § 6 (2007); H.R. 3285, 108th Cong. § 9 (2003).

Title VII creates for employers, ranging from restroom access to dress codes.

The most practical solution to the majority of legal issues raised is to treat the transgender employee as the sex they are presenting. This will help ease the transition period for the employee as well as curb some privacy concerns. To the extent that this practical solution does not resolve the issue, such as in the context of a prison guard, analogous judicial interpretation of Title VII will play a crucial role. This, however, will not solve all legal issues raised by inclusion of transgender persons as a protected class. Inclusion will necessarily dictate that employers reassess their employment policies.