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## Including the Transgenderless at Work: A Comparison of Transgender Employees and Transgender Students as Plaintiffs

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## NOTES

# INCLUDING THE TRANSGENDERLESS AT WORK: A COMPARISON OF TRANSGENDER EMPLOYEES AND TRANSGENDER STUDENTS AS PLAINTIFFS

### INTRODUCTION

In 1983, Ann Hopkins sued her employer, the accounting firm Price Waterhouse, under Title VII of the Civil Rights Act of 1964.<sup>1</sup> She claimed she had been denied the position of partner primarily on the basis of her gender.<sup>2</sup> Hopkins went on to win her case in both the district and circuit courts.<sup>3</sup> After the Supreme Court heard the case in 1988, *Price Waterhouse v. Hopkins* became one of the most cited gender discrimination cases.<sup>4</sup> Not only did the Court establish a new burden of proof—namely that the employer had to show that the decision regarding employment would have been the same if sex discrimination had not occurred<sup>5</sup>—but it also introduced the legal relevance of sex stereotyping as a subset of sex discrimination in the workplace.<sup>6</sup> The Supreme Court held it impermissible to advise a female candidate for an

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1. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-32 (1989).

2. *Id.* at 232.

3. *Id.*

4. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 303 (D.D.C. 2008); 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, 4 (1995) [hereinafter *Disaggregating Gender from Sex*] (“[A] wide variety of cases and fact patterns not generally seen to have much to do with one another can all be better understood if organized for purposes of analysis under the rubric of gender; these include cases involving sex-specific clothing regulations, stereotypically feminine behavior by both men and women, sexual harassment of both women and men, jobs seen to require either predominantly masculine or predominantly feminine traits, single-sex education, sexual orientation, and transsexuality.”).

5. See *Price Waterhouse*, 490 U.S. at 242.

6. See *id.* at 250-51.

accounting partnership to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . wear jewelry,” and go to “charm school.”<sup>7</sup>

The double bind that women experience in workplace environments that favor typically male-gendered characteristics was astutely observed by the *Price Waterhouse* Court: “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”<sup>8</sup> Thirty years later, this “catch 22”<sup>9</sup> remains pervasive and particularly concerning for effeminate men.<sup>10</sup> It seems that men “who exhibit[] feminine qualities [are] doubly despised, for manifesting the disfavored qualities”<sup>11</sup> deemed feminine and for “descending from [their] masculine gender privilege to do so.”<sup>12</sup> This unfortunate reality illustrates the “continuing devaluation, in life and in law, of qualities deemed feminine.”<sup>13</sup>

In her article, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, Mary Anne Case argues that “unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.”<sup>14</sup> One example of gender favoritism she offers is that of voice pitch: in society high-pitched voices are generally considered to be “both feminine and out of favor, while deep voices are associated with a wide range of desirable qualities, from authority to sexiness.”<sup>15</sup> “[M]en with high-pitched voices [tend to be at a] disadvantage—in the employment market, in court, in politics, and elsewhere.”<sup>16</sup>

In dealing with gender stereotypes in the legal sphere, however, the courts seem to be making progress.<sup>17</sup> *Hopkins* marked a “third

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7. *Id.* at 235, 256, 258 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

8. *Id.* at 251.

9. *Id.*

10. See *Disaggregating Gender from Sex*, *supra* note 4, at 58.

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. *Id.* at 7.

15. *Id.* at 28.

16. *Id.* at 29.

17. See *id.* at 30-31 (explaining that with and since the *Price Waterhouse* decision, the Court gradually broadened the concept of impermissible sex stereotyping).

generation of sex-stereotyping cases in the courts.”<sup>18</sup> While “the first generation focused on the assumption that an entire sex conformed to gender stereotypes; the second [generation assumed] that individual members of the sex did; [and] the third . . . penalized [individuals] because their gender behavior did not conform to stereotypical expectations.”<sup>19</sup>

In the meantime, schools too have had to learn to adjust to gender nonconforming students especially because such students frequently find themselves among the chronically victimized.<sup>20</sup> Indeed, it has been recognized that “[t]hose young people whose gender expression challenges society’s sex role expectations are particularly targeted for violence.”<sup>21</sup> Because schools tend to be viewed as a “microcosm[] of the communities they serve[,]”<sup>22</sup> they often, in turn, “reflect the culture and values of the dominant group in the school.”<sup>23</sup> “[W]hen school officials fail to protect a gender-nonconforming student from bullying, the child is [essentially taught that] . . . ‘the school—and by extension society as [a] whole—condones such activity.’”<sup>24</sup> On the other hand, when teachers do intervene on behalf of bullied students, “studies show that . . . victimized students report less harassment and [increased] feelings of [safety at school].”<sup>25</sup> As such, schools, and consequently state courts, have looked to their state legislatures to determine the schools’ appropriate course of action in dealing with transgender students.<sup>26</sup>

In Part I of this Note, I outline the history of the fight for transgender equality in the workplace by discussing which federal circuit courts have been more or less receptive to a transgender plaintiff’s claim under Title VII. “Transgender individuals have been successful in securing rights by arguing that they have experienced discrimination on the basis of their gender nonconformity.”<sup>27</sup> There seems to be a new

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18. *Id.* at 37.

19. *Id.*

20. See Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 IND. L.J. 827, 876-77 (2011).

21. *Id.* at 836 (quoting Joyce Hunter, *Introduction: Safe Passage*, 19 J. GAY & LESBIAN SOC. SERVICES 1, 2 (2007)).

22. *Id.* (quoting ELIZABETH J. MEYER, *GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS* 23 (2009)).

23. *Id.* (quoting MEYER, *supra* note 22, at 23).

24. *Id.* at 846 (quoting MEYER, *supra* note 22, at 5).

25. *Id.* at 847.

26. *Id.* at 867.

27. Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARVARD J.L. & GENDER 399, 405 (2012) (footnote omitted); see generally Elizabeth M. Glazer & Zachary A. Kramer,

requirement, however, that “employers be neutral as to the gender category into which workers fall” despite a disconnection (or connection) with their actual biological sex.<sup>28</sup> “Although not unreasonable, the decision to require perfect gender-nonconformity as a condition for obtaining relief in the event of gender identity discrimination may have contributed to the disenfranchisement of the transgender rights movement’s youngest members . . . .”<sup>29</sup>

Much of the recent transsexual sex-discrimination case law, examined below, is consistent with a reading of the sex stereotyping prohibition as requiring a certain category of neutrality.<sup>30</sup> That is, the transgender individual may present traits of the gender of his or her choice, but these traits *must* be fixed.<sup>31</sup> This problematic discrepancy has been recognized before:

The problem of adequately protecting sexual minorities under Title VII lies in the courts’ binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex. Without understanding that our current binary concept of gender may be socially constructed and artificially rigid rather than a natural result of biology, the law, even if it explicitly protects persons based on sexual orientation and gender identity, may fail to shelter from discrimination those workers it seeks to protect.<sup>32</sup>

This rigid set of criteria is unworkable for the individual who comes into work in a “frilly pink dress”<sup>33</sup> one day and a suit the next. Individuals who seek fluidity in their gender identities—and who simultaneously do not want to put their jobs at risk—are unwelcome in

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*Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 654-60 (2009) (demonstrating, through the progression of transgender employment discrimination precedent from 1984 to 2008, that a claim of discrimination on the basis of gender-nonconformity was the only reasonably reliable basis upon which transgender employees could bring successful sex discrimination claims).

28. Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 781 (2013).

29. Tran & Glazer, *supra* note 27, at 406.

30. See Yuracko, *supra* note 28, at 780.

31. See Tran & Glazer, *supra* note 27, at 400-03 (emphasis added) (arguing that courts do not currently recognize the full range of choices that an individual may make regarding one’s gender but rather, that legal protection from discrimination on the basis of gender identity has been reserved for perfect gender-nonconformists).

32. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715 (2010).

33. See Yuracko, *supra* note 28, at 778.

the work environments of today.<sup>34</sup>

Courts, however, seem to be more lenient when evaluating a plaintiff's discrimination claim within the school context.<sup>35</sup> This is interesting in light of the well-recognized and undisputed notion that the workplace is reminiscent of high school.<sup>36</sup> I posit here that the goals of the school environment and those of the work setting are not inconsistent; what society generally thinks is reprehensible at school might also be reprehensible and harmful at work. Thus, in Part II of this Note I examine the recent victories transgender student plaintiffs have achieved, both through the actions of state legislatures as well as within the judicial system. The successes of these student plaintiffs may shed light on this issue for transgender employees who are seemingly stuck in uncomfortable and unwelcoming environments at work.

Part III of this Note then examines how these school cases might provide the courts with a more flexible, broad standard with which to assess a transgender employee's claims of discrimination against his or her employer.

## I. THE TRANSGENDER PLAINTIFF YESTERDAY AND TODAY

### A. *The Current Legal Standard for Plaintiffs under Title VII*

According to Title VII, it is unlawful for an employer "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."<sup>37</sup> Prior to *Price Waterhouse v. Hopkins*, the Supreme Court articulated a burden-shifting framework for discrimination cases under Title VII in *McDonnell Douglas Corp. v. Green*.<sup>38</sup> Under the *McDonnell Douglas* approach, the plaintiff must first establish a *prima facie* case of discrimination:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was

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34. See Tran & Glazer, *supra* note 27, at 405-06, 419-20.

35. See *infra* Part II.

36. See WILMA DAVIDSON & JOHN F. DOUGHERTY, MOST LIKELY TO SUCCEED AT WORK: HOW WORK IS JUST LIKE HIGH SCHOOL, at x (2003).

37. 42 U.S.C. § 2000e-2(a)(1) (2012).

38. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>39</sup>

In later cases, the Court has repeatedly held that by establishing a *prima facie* case, the plaintiff has met his burden.<sup>40</sup> The burden then shifts to the "respondent to 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'" <sup>41</sup> The Court recognized that, "[o]n remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."<sup>42</sup> "The 'ultimate question' in every Title VII case is whether the plaintiff has proved that the defendant intentionally discriminated against her because of a protected characteristic."<sup>43</sup>

Under *Price Waterhouse*, the Court held that:

once a plaintiff in a Title VII case shows that gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability *only* by proving that it would have made the same decision even if it had not allowed gender to play such a role.<sup>44</sup>

However:

an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason . . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.<sup>45</sup>

In addition to this altered burden-shifting framework, *Price Waterhouse* is notable because it expanded the scope of Title VII by prohibiting employers from insisting that an individual possess or exhibit certain traits or characteristics due to his or her group membership.<sup>46</sup> The Court's ruling also encompassed a prohibition on

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39. *Id.*

40. *See, e.g.,* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

41. *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

42. *McDonnell Douglas Corp.*, 411 U.S. at 804.

43. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

44. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (emphasis added) (footnote omitted).

45. *Id.* at 252.

46. *See Yuracko, supra* note 28, at 761, 764-65.

*ascriptive* sex stereotyping: a situation in which the “employer assumes that an individual possesses certain [sex-stereotypical] traits and attributes . . . that render her unqualified for a particular position.”<sup>47</sup>

The current standard, which at best is an unclear restatement of *Price Waterhouse*, seems to greatly limit a plaintiff’s options in illustrating that he or she was a victim of sex stereotyping.<sup>48</sup> “In practice, the sex stereotyping prohibition encourages plaintiffs to endorse and adopt highly stereotyped gender packages in order to convince courts of the steep costs associated with their forced gender expression.”<sup>49</sup> In other words, the plaintiff in a sex stereotyping case must show that his or her gender nonconformity was so permanent and obvious that the disparate treatment she endured had to have been a result of sex stereotyping.<sup>50</sup> As such, Title VII seems to require a “stable and workable definition of gender” despite the fact that “complete gender freedom is incompatible” with any such definition.<sup>51</sup>

### B. The Earlier Transgender Case Law

In *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit refused to allow a male-to-female transsexual individual to bring a Title VII claim for sex discrimination.<sup>52</sup> “Holloway was first employed by Arthur Andersen [and Company, an accounting firm,] in 1969” and at that time, went by the name of Robert Holloway.<sup>53</sup> Holloway began taking female hormones a year later and in 1974 she informed her supervisor that she would be undergoing anatomical sex reassignment surgery.<sup>54</sup> During that year, Holloway had been promoted and given a pay raise.<sup>55</sup> After Holloway requested to have her records changed to reflect her new first name, Ramona, she was terminated.<sup>56</sup> Interestingly, in a footnote, the court points to Holloway’s supervisor’s affidavit which “detailed many

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47. *Id.* at 763.

48. *See id.* at 761-64.

49. *Id.* at 761.

50. *See id.* at 763 (citing *Price Waterhouse*, 490 U.S. at 251).

51. *Id.* at 771.

52. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977). Holloway’s employer fired her after Holloway transitioned on the job. *Id.* at 661; *see also* Lee M. Peterson, *Workplace Harassment Against Transgender Individuals: Sex Discrimination, Status Discrimination, or Both?*, 36 SUFFOLK U. L. REV. 227, 227 (2002).

53. *Holloway*, 566 F.2d at 661.

54. *Id.*

55. *Id.*

56. *Id.*

of the personnel problems created by appellant's transitional appearance" such as the "red lipstick and nail polish, hairstyle, jewelry and clothing."<sup>57</sup> Ms. Passard, her supervisor, "stated that Holloway was not terminated because of transsexualism, 'but because the dress, appearance and manner he was affecting were such that it was very disruptive and embarrassing to all concerned.'"<sup>58</sup>

The question before the court was "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."<sup>59</sup> The court examined Title VII's legislative history and the concerns of Congress when the Civil Rights Act of 1964 was promulgated.<sup>60</sup> In doing so, the court found that "the clear intent of the 1972 [amendment to Title VII] was to remedy the economic deprivation of women as a class."<sup>61</sup> As such, the court concluded that "Congress had only the traditional notions of 'sex' in mind" when it enacted these amendments.<sup>62</sup> Because "Congress ha[d] not shown any intent other than to restrict the term 'sex' to its traditional meaning[.]" the court refused to "expand Title VII's application" in this case.<sup>63</sup>

This narrow interpretation of Title VII was reinforced by the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.*<sup>64</sup> There, the court of appeals reversed the district court's ruling in favor of the plaintiff-employee, holding that: (1) "Title VII does not protect transsexuals," and (2) even if the transsexual was considered female, there were "no factual findings . . . to support his conclusion that Eastern discriminated against her on this basis."<sup>65</sup>

In *Ulane*, Karen Ulane, formerly Kenneth, was hired by Eastern Airlines in 1968 and logged over 8,000 flight hours.<sup>66</sup> "Ulane was 'diagnosed' [as] a transsexual in 1979" and "underwent 'sex reassignment surgery'" in 1980.<sup>67</sup> Eastern Airlines was unaware of Ulane's transsexuality "until she attempted to return to work after her reassignment surgery"; at this time, she was immediately fired.<sup>68</sup> The

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57. *Id.* at 661 n.1.

58. *Id.*

59. *Id.* at 661.

60. *See id.* at 662.

61. *Id.*

62. *Id.*

63. *Id.* at 663.

64. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085-87 (7th Cir. 1984).

65. *Id.* at 1084, 1087.

66. *Id.* at 1082-83.

67. *Id.* at 1083.

68. *Id.* at 1082-83.

court held that “[w]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals.”<sup>69</sup> Its reasoning, like that of the Ninth Circuit in *Holloway*, rested primarily on statutory construction and congress’s intent in passing Title VII:

The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male; a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.<sup>70</sup>

### *C. Positive Outcomes for Transgender Plaintiffs*

In *Smith v. City of Salem*, the Sixth Circuit held that plaintiff, Jimmie Smith, had been a victim of discrimination and that the Salem Fire Department had violated Title VII.<sup>71</sup> Jimmie Smith was suspended from her job as a firefighter after informing her supervisors that she intended to transition from male to female.<sup>72</sup> Smith had been a lieutenant in the Salem Fire Department in a small Ohio town and had worked “for seven years without any negative incidents.”<sup>73</sup> After learning of her plans to transition genders, the department supervisors conspired to get rid of Smith by requiring her to submit to three separate psychological evaluations.<sup>74</sup> They hoped this would induce Smith to either resign or to refuse to follow the order.<sup>75</sup> The latter would have allowed the supervisors to terminate Smith for insubordination.<sup>76</sup> Smith learned of the department’s plan and hired a lawyer who subsequently informed the department of her legal representation and the potential consequences of its plan.<sup>77</sup> The department then suspended Smith, who responded with a sex discrimination claim under Title VII against the

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69. *Id.* at 1084 (footnote omitted).

70. *Id.* at 1085.

71. *See Smith v. City of Salem*, 378 F.3d 566, 566 (6th Cir. 2004).

72. *See id.* at 568-69.

73. *Id.* at 568.

74. *See id.* at 569.

75. *Id.*

76. *Id.*

77. *Id.*

fire department.<sup>78</sup>

The court held 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.”<sup>79</sup> The court found Smith to be a victim of discrimination because of her “gender non-conforming behavior”<sup>80</sup> and because of her identification as a transsexual, thus qualifying her for coverage under Title VII.<sup>81</sup>

One year later, in *Barnes v. City of Cincinnati*, the Sixth Circuit affirmed a jury finding of sex discrimination.<sup>82</sup> The plaintiff, Philecia Barnes, was a preoperative male-to-female transsexual police officer who was denied a promotion to the position of sergeant because she violated masculine stereotypes.<sup>83</sup> The court relied on its prior ruling in *Smith* to hold “that a jury could have reasonably concluded that Barnes was discriminated against because of her failure to conform to masculine gender norms.”<sup>84</sup>

Barnes’s alleged lack of “command presence” seemed to present the biggest problem for him during the probationary period required to become a police sergeant.<sup>85</sup> It was a known fact among members of the department that “[a]t the time of his promotion, Barnes was a male-to-female transsexual who was living as a male while on duty but often lived as a woman when off duty.”<sup>86</sup> He had been assigned to a lieutenant who “openly spoke about the number of lesbians in the [Department; this lieutenant] did not believe he violated any policy by speaking about the sexual orientation of female police officers while on duty.”<sup>87</sup> Another lieutenant testified that when Barnes arrived in the new district for his probationary period, people did not take him seriously because he “had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions.”<sup>88</sup> After displaying signs of stress,<sup>89</sup> “Barnes was placed in a new training program. . . . [It]

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78. *Id.*

79. *Id.* at 574.

80. *Id.* at 575.

81. *Id.*

82. *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005).

83. *See id.* at 733.

84. Yuracko, *supra* note 28, at 766; *see id.* at 737.

85. *See Barnes*, 401 F.3d at 734.

86. *Id.* at 733.

87. *Id.* at 734.

88. *Id.*

89. *See id.* (“Within a month of Barnes’s promotion, Lt. Wilger reported to the head of

required Barnes's superiors to evaluate him on a daily basis over a three month period."<sup>90</sup> "The program required seven other sergeants to rate Barnes on a daily basis."<sup>91</sup> The sergeants required Barnes "to wear a microphone at all times and ride in a car with a video camera during the last weeks of his probation" period.<sup>92</sup> "No other sergeants were evaluated in this manner."<sup>93</sup> "Sergeant Ford testified that '[t]he purpose of the program was to scrutinize him and to document every mistake that he made so that he could be failed on probation.'"<sup>94</sup>

The circuit court affirmed the district court's finding that Barnes had proved a *prima facie* case of sex discrimination under Title VII.<sup>95</sup> Barnes had established that he was (1) "a member of a protected class"; (2) that he "had applied and was qualified for a promotion"; (3) that he had been "considered for and [subsequently] denied [that] promotion; and" (4) that "other employees of similar qualifications who were not members of the protected class [had] received promotions."<sup>96</sup> The court found that "Barnes produced sufficient evidence at trial to carry his burden of proof" and this evidence showed that "the City's proffered reason for demoting Barnes was false and that the real reason for his demotions was unlawful discrimination."<sup>97</sup> The court reiterated its decision in *Smith* that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>98</sup>

In *Schroer v. Billington*, "the District Court for the District of Columbia held that the Library of Congress had engaged in sex discrimination by revoking its job offer to the plaintiff because she failed to satisfy stereotypes of what a woman should look like."<sup>99</sup> In *Schroer*, the plaintiff applied for and was offered a job as a terrorism specialist at the Library of Congress while presenting herself as a man.<sup>100</sup> Shortly after informing her new supervisor that she intended to begin work as a

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District One, Captain ("Capt.") Demasi, that Barnes was having trouble fulfilling his duties. Lt. Wilger noted that Barnes had trouble preparing documents, exercising proper judgment in the field and completing assignments on time.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 736.

96. *Id.* at 736-37 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

97. *Id.* at 738.

98. *Id.* at 737 (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

99. Yuracko, *supra* note 28, at 768.

100. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 295-96 (D.D.C. 2008).

woman and eventually obtain sex reassignment surgery, Schroer's offer was revoked.<sup>101</sup> Specifically, when her new supervisor saw photographs of Schroer in traditionally feminine attire, the supervisor admitted at trial that when she saw these pictures she "saw a man in women's clothing."<sup>102</sup> "The Library argue[d] that it had a number of non-discriminatory reasons for refusing to hire Schroer, including concerns about her ability to maintain or timely receive a security clearance, her trustworthiness, and the potential that her transition would distract her from her job."<sup>103</sup> "The Library also argue[d] that a hiring decision based on transsexuality [was] not unlawful discrimination under Title VII."<sup>104</sup> The judge not only found these arguments to be pretexts for discrimination, but also that the Library's conduct, "whether viewed as sex stereotyping or as discrimination literally 'because of . . . sex,'" did in fact violate Title VII.<sup>105</sup> The court held that the Library's decision to revoke Schroer's job offer was "infected by sex stereotypes"<sup>106</sup> and thus impermissible.

Similarly, in *Glenn v. Brumby*, the Eleventh Circuit affirmed the judgment of the district court granting Glenn, a transgender woman, summary judgment on the basis of her gender non-conformity.<sup>107</sup> Glenn was hired as an editor in the Georgia General Assembly's Office of Legislative Counsel (OLC) in 2005 while still presenting as a man.<sup>108</sup> "Brumby [was] the head of the OLC and [was] responsible for OLC personnel decisions, including the decision to fire Glenn."<sup>109</sup> "In 2006, Glenn informed her direct supervisor . . . [that she] was in the process of becoming a woman."<sup>110</sup> On Halloween of that year, "OLC employees were permitted to come to work [in] costumes, Glenn came to work presenting as a woman."<sup>111</sup> Brumby told her that "her appearance was not appropriate and asked her to leave the office."<sup>112</sup> "Brumby stated that 'it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing,' and that a male in

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101. See *id.* at 296, 299.

102. *Id.* at 305.

103. *Id.* at 300.

104. *Id.*

105. *Id.*

106. *Id.* at 305.

107. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

108. *Id.* at 1314.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

women's clothing is 'unnatural.'"<sup>113</sup>

In the fall of 2007, Glenn informed her direct supervisor that she would be moving forward with the gender transition and that she would be presenting at work as a woman and was also changing her legal name.<sup>114</sup> Brumby was notified and promptly terminated Glenn because "Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."<sup>115</sup>

Unlike other plaintiffs, Glenn did not sue under Title VII *per se*, but rather, under the Equal Protection Clause of the Fourteenth Amendment.<sup>116</sup> The court looked to a different federal statute, § 1983, to assess Glenn's claim: Civil Action for Deprivation of Rights.<sup>117</sup> The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .<sup>118</sup>

"In any § 1983 action, a court must determine 'whether the plaintiff has been deprived of a "right secured by the Constitution and laws"' of the United States."<sup>119</sup> The court framed the issue as "whether discriminati[on] against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause."<sup>120</sup> In holding that such discrimination violates the Equal Protection Clause, the court cited *Price Waterhouse* and explained that instances of discrimination against transgender plaintiffs specifically "because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*."<sup>121</sup> Thus, the court held that "discrimination against

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113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* at 1313, 1321.

117. 42 U.S.C. § 1983 (2012); *see id.* at 1313.

118. 42 U.S.C. § 1983.

119. *Glenn*, 663 F.3d at 1315 (quoting *Baker v. McCollan*, 443 U.S. 137, 140 (1979)).

120. *Id.* at 1316.

121. *Id.* at 1317, 1320.

a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex *or* gender.”<sup>122</sup>

#### D. The Bathroom Issue

In *Etsitty v. Utah Transit Authority*, the Tenth Circuit held that Title VII does not extend to transsexual individuals.<sup>123</sup> Etsitty was a pre-operative male-to-female transsexual bus driver for the Utah Transit Authority (UTA).<sup>124</sup> Etsitty began dressing as a woman at work and was fired due to concerns that she would use the women's restrooms while she was still biologically a man.<sup>125</sup> “Soon after being hired, [Etsitty] met with her supervisor [to inform him] that she was a transsexual” and that she planned on eventually undergoing reassignment surgery.<sup>126</sup> At the time, her supervisor “expressed support for Etsitty and stated that he did not see any problem with her being a transsexual.”<sup>127</sup> After this discussion, “Etsitty began wearing makeup, jewelry, and acrylic nails to work,” and “[s]he also began using female restrooms.”<sup>128</sup> “Shirley, the operations manager of the UTA division where Etsitty worked, heard a rumor that there was a male operator who was wearing makeup.”<sup>129</sup> Consequently, she held a meeting with Etsitty's direct supervisor who informed her that Etsitty was a transsexual who planned on going through a sex change.<sup>130</sup>

With this information, Shirley and a representative from Human Resources met with Etsitty and asked her “where she was in the sex change process and whether she still had male genitalia.”<sup>131</sup> At this point, “Etsitty explained that she still had male genitalia” only because she could not yet afford the sex change operation.<sup>132</sup> Shirley explained to Etsitty that they were concerned about the possibility of liability for UTA if she was observed using the female restroom even though she

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122. *Id.* at 1317 (emphasis added).

123. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007).

124. *Id.* at 1218-19.

125. *See id.* at 1219, 1224.

126. *Id.* at 1219.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

still had male genitalia.<sup>133</sup> They were also worried that “Etsitty would switch back and forth between using male and female restrooms.”<sup>134</sup> As a result of this meeting, Shirley and the human resources generalist “placed Etsitty on administrative leave and ultimately terminated her employment.”<sup>135</sup> They “explained to Etsitty that the reason for her termination was UTA’s inability to accommodate her restroom needs.”<sup>136</sup> “On the record of termination, Shirley indicated [that] Etsitty would [in fact] be eligible for rehire after completing [her] sex reassignment surgery.”<sup>137</sup>

The issue in this case concerned the pleading requirement for raising a Title VII claim when the plaintiff is transgender.<sup>138</sup> The court concluded that the sex-stereotyping element is essential and agreed with the district court that “transsexuals are not a protected class under Title VII.”<sup>139</sup> The court also noted that “[h]owever far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms.”<sup>140</sup> Simply alleging discrimination based on transgender status will not permit a claim to survive.<sup>141</sup> “[T]he plain language of the statute and not the primary intent of Congress” guided the court’s interpretation of Title VII.<sup>142</sup> The court explained that “[i]n light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual.”<sup>143</sup>

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1220-21.

139. *Id.* at 1220.

140. *Id.* at 1224.

141. See DARRELL R. VANDEUSEN, 2008 EMERGING ISSUES 793 ¶¶ 53-54, 56 (Oct. 26, 2007), available at LEXIS (“Unless you are in the Sixth Circuit, claiming that transgender is protected as ‘sex’ under Title VII will be an uphill, and possibly insurmountable, battle. . . . If you pursue a Title VII transgender claim, frame it as a *Price Waterhouse* sex stereotype case, not simply as disparate treatment because of transgender.” The facts of the case must be “developed to establish that the termination decision was based on the perception that Pat was not conforming to traditional gender roles, and that her employer bowed to pressure from its customers.”).

142. *Etsitty*, 502 F.3d at 1221.

143. *Id.* at 1222.

### E. EEOC Ruling in *Macy v. Holder*

“On December 9, 2011, [c]omplainant [Mia Macy] filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964.”<sup>144</sup> Macy, a transgender woman, had been offered a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives in San Francisco while still presenting as a man.<sup>145</sup> During the background check required for the position, Macy informed her future employer that she was in the “process of transitioning from male to female.”<sup>146</sup> Five days later, Macy received an email that stated “due to federal budget reductions, the position . . . was no longer available.”<sup>147</sup>

Believing she had been incorrectly informed that the position had been cut, Macy “filed [a] formal EEO complaint with the Agency. . . . stat[ing] that she was discriminated against on the basis of [her] ‘sex, gender identity (transgender woman) and on the basis of sex stereotyping.’”<sup>148</sup> Before this case, “claims of discrimination on the basis of gender identity stereotyping [could not] be adjudicated before the [Equal Employment Opportunity Commission (EEOC)]”; they had to “be processed according to Department of Justice policy.”<sup>149</sup> The Department of Justice had a “separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees.”<sup>150</sup> This option offered fewer remedies and, unlike regular Title VII claims, did not “include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.”<sup>151</sup> Thus, the EEOC informed Macy “that it would process only her claim ‘based on sex (female)’ under Title VII” and that her “claim based on ‘gender identity stereotyping’ would be processed instead under the Agency’s ‘policy and practice.’”<sup>152</sup>

Macy argued that the EEOC not only had “jurisdiction over her entire claim” but that “the Agency’s ‘reclassification’ of her claim of

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

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at \*2.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at \*3.

discrimination into two separate claims” was a “‘de facto dismissal’ of her Title VII claim of discrimination based on gender identity and transgender status.”<sup>153</sup> Ultimately, Macy withdrew “her claim of ‘discrimination based on sex (female),’ as characterized by the Agency . . . to pursue solely the Agency’s dismissal of her complaint of discrimination based on her gender identity.”<sup>154</sup>

As a result, the EEOC issued a formal ruling that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC’s federal sector EEO complaints process.”<sup>155</sup> The EEOC explained its decision by stating that the term “sex,” as used in Title VII, “encompasses both sex—that is, the biological differences between men and women—and gender.”<sup>156</sup> In addition, the Commission clarified the use of Title VII in gender-based disparate treatment cases:

If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.<sup>157</sup>

Federal courts are not strictly bound by EEOC decisions, however, and the Supreme Court could overturn this particular interpretation of sex-discrimination under Title VII if lower courts disagree.<sup>158</sup> Also, this decision does not directly impact the fact that in many states it is still legal to fire an employee because of his or her sexual orientation.<sup>159</sup>

### F. Cases Since Macy

In *Rice v. Deloitte Consulting LLP*, plaintiff Danielle Rice, a transgender woman, claimed that “she was discharged from her job as

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153. *Id.*

154. *Id.* at \*4.

155. *Id.*

156. *Id.* at \*5 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

157. *Id.* at \*6.

158. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 487 (1982) (Blackmun, S., dissenting).

159. See Ashley E. McGovern, *Macy v. Holder: Title VII and Workplace Justice for Transgender Employees*, JLP (June 21, 2012, 8:01 AM), <http://jlp.org/blogzine/?p=843>.

Senior Manager . . . because . . . [of] her failure to conform to Defendant's preferred gender stereotypes."<sup>160</sup> The District Court for the District of Colorado found that Rice failed to show she had been terminated or discriminated against due to her gender nonconformity.<sup>161</sup>

In her complaint, Rice asserted that she was the target of discrimination "from the moment [Deloitte] bought out her previous employer, Bearing Point."<sup>162</sup> To support her argument, plaintiff asserted "that Deloitte's employees 'were consistently concerned about her appearance.'"<sup>163</sup> An email between two colleagues stated that plaintiff lacked "any shred of [p]rofessionalism. From unruly hair to a style of dress that appeared disheveled. The impact was so great that Alan and I debated asking her not to attend [a client meeting]."<sup>164</sup> In another email plaintiff was described as being "unique/odd in her mannerisms, style and interactions. . . ."<sup>165</sup>

Defendant argued for summary judgment as to this claim because Rice failed to present evidence that "supports a reasonable inference that Deloitte discriminated against her . . . based on her failure to conform to stereotypical gender norms."<sup>166</sup> The court quoted parts of *Price Waterhouse v. Hopkins* and *Smith v. City of Salem* to establish the legal standard it used to assess Rice's claim:

Sex stereotyping based on a person's gender non-conforming behavior has been held to be "impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity."<sup>167</sup>

The court provided numerous examples to show that the criticisms of plaintiff's performance were directed at her "unprofessional appearance, poor writing skills, and poor verbal communications and client interactions," rather than her failure to conform to stereotypical gender norms.<sup>168</sup> Such examples include the fact that plaintiff "'clearly

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160. Rice v. Deloitte Consulting LLP, No. 12-cv-00253-WYD-KMT, 2013 U.S. Dist. LEXIS 95439, at \*1 (D. Colo. July 9, 2013).

161. See *id.* at \*15.

162. *Id.* at \*1.

163. *Id.* at \*16.

164. *Id.* (alteration in original).

165. *Id.*

166. *Id.* at \*14.

167. *Id.* at \*13 (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

168. *Id.* at \*14.

struggled' throughout her [oral] presentations—her delivery was found to be 'weak' and on one occasion she was noted to have 'interjected relatively forcefully with an irrelevant comment.'"<sup>169</sup> Rice's colleagues were also critical of her client calls, which were "poorly run and lacked focus when she was lead senior manager."<sup>170</sup> The court found these criticism to be gender neutral and thus, unsupportive of a sex stereotype discrimination claim.<sup>171</sup> In addition, the court found that the criticism's regarding plaintiff's appearance were a reflection of Rice's "lack of professionalism rather than the failure to be more feminine or conform to a gender stereotype."<sup>172</sup> The court's rationale for this conclusion was that Rice's colleagues' references to "unruly hair, a disheveled style of dress or being unique/odd in mannerisms, style and interactions can be attributed to anyone—male or female."<sup>173</sup> The court reasoned that the aforementioned comments, while certainly unflattering, were nonetheless "gender neutral" and unsupportive of an inference that plaintiff was terminated because of "failed gender stereotype expectations."<sup>174</sup>

In *Hart v. Lew*, the District Court for the District of Maryland denied the defendant's motion to dismiss plaintiff Sydney Hart's claim of sex discrimination.<sup>175</sup> Sydney Hart, a male-to-female transsexual, sued the Department of the Treasury (the Department) for violating Title VII by alleging sex discrimination and retaliation.<sup>176</sup> Hart worked as a revenue agent for the Internal Revenue Service (IRS), a sub-agency of the Department, but was discharged from her position on May 9, 2011.<sup>177</sup>

During the time Hart worked at the Department, she "filed numerous complaints regarding various actions taken by her supervisors and coworkers."<sup>178</sup> Hart's first complaint was based on an incident that occurred on June 9, 2006 while Hart was still presenting as a male: Hart's on-the-job instructor informed Hart that "his attire was not appropriate for the office."<sup>179</sup> After a meeting with Hart's first-line

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169. *Id.*

170. *Id.* at \*15.

171. *See id.*

172. *Id.* at \*16.

173. *Id.*

174. *Id.* at \*16-17.

175. *See Hart v. Lew*, 973 F. Supp. 2d 561, 565 (D. Md. 2013).

176. *See id.* at 564.

177. *See id.* at 565, 570.

178. *Id.* at 565.

179. *Id.*

supervisor, “plaintiff voluntarily withdrew this first complaint.”<sup>180</sup> After a series of other filed and withdrawn EEO complaints, the “National Treasury Employees Union (‘NTEU’) filed three grievances on plaintiff’s behalf in 2007 and 2008.”<sup>181</sup> The third grievance alleged that management had “obstructed Plaintiff’s promotional opportunities,” which was denied by the territory manager.<sup>182</sup>

Hart “began Hormone Replacement Therapy in February 2009. . . . [and] changed her first name from Stuart to Sydney in March 2009.”<sup>183</sup> Hart explained to her supervisors that she had begun her transition from male to female and asked for a key to the women’s restroom so that she would not have to use the men’s restroom while wearing women’s clothing.<sup>184</sup> She was denied this request.<sup>185</sup> Hart appeared dressed as a woman for the first time on April 1, 2009 and “surrendered her key to the men’s bathroom on April 15, 2009.”<sup>186</sup> She was still, however, denied access to the women’s restroom by the Territory Manager because she “still had male genitalia.”<sup>187</sup>

In July of 2009, Hart still did not have access to the women’s restroom.<sup>188</sup> At that time, “she was promoted to a new position [that] required her to transfer from her post in Fairfax, Virginia to Baltimore, Maryland.”<sup>189</sup> At this new location, she would be permitted to work from home.<sup>190</sup> However, in “late August and early September 2009, [Hart] and her workgroup attended training workshops in Denver, Colorado and Washington, D.C. . . . [where her colleagues] allegedly ridiculed her, laughed at her appearance, and balked at her use of the women’s restroom.”<sup>191</sup>

Due to numerous ambiguous offhand comments from her colleagues and supervisors, Hart entered into an agreement with the Department that diversity training would be provided to her workgroup.<sup>192</sup> The training did not seem to improve the workplace

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180. *Id.*

181. *Id.* at 565-66.

182. *Id.* at 567.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 568.

environment for Hart however as she continued to fear her supervisor and preferred to work from home.<sup>193</sup> The Department informed Hart of its decision to dismiss her on May 9, 2011.<sup>194</sup> On May 31, 2011, plaintiff contacted an EEO counselor and “proceeded to file a formal complaint challenging the termination decision.”<sup>195</sup> On April 17, 2012, the Department issued its Final Agency Decision finding that her manager, Hansen, had made “discriminatory remarks but that plaintiff’s termination was not based on sex discrimination or retaliation.”<sup>196</sup> On May 31, 2012, “Hart filed suit in the U.S. District Court [in] the District of Columbia . . . alleging employment discrimination in violation of Title VII.”<sup>197</sup> The case was transferred to the District of Maryland because Hart “was working at the defendant’s office in Baltimore, Maryland when a substantial part of the alleged misconduct occurred and when she was fired.”<sup>198</sup>

The court applied the *McDonnell Douglas* pretext structure to plaintiff’s claim.<sup>199</sup> The court explained that in considering a motion to dismiss, plaintiff need only make out a prima facie case which would “allow the Court ‘to draw the reasonable inference’ that she was discharged because of her sex, her status as a transsexual, and/or her failure to conform with gender norms.”<sup>200</sup> The court found that plaintiff “has alleged facts sufficient to state a claim of sex discrimination in employment that is plausible on its face” because her complaint was “replete with allegations of incidents in which her supervisors made improper remarks or took improper actions based on sex.”<sup>201</sup> Moreover, the court remarked that plaintiff’s complaint “alleges that her supervisors attempted to impede her gender transition in at least three ways.”<sup>202</sup> Thus, the court concluded that Hart had presented “allegations sufficient to withstand a motion to dismiss.”<sup>203</sup>

Most recently, in *Chavez v. Credit Nation Auto Sales, Inc.*, the District Court for the Northern District of Georgia adopted the magistrate judge’s recommendation to deny defendant employer’s

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193. *See id.* at 569.

194. *Id.* at 570.

195. *Id.*

196. *Id.*

197. *Id.* at 571.

198. *Id.*

199. *Id.* at 580-81.

200. *Id.* at 580 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

201. *Id.* at 580-81.

202. *Id.* at 581.

203. *Id.* at 582.

motion to dismiss.<sup>204</sup> Plaintiff first went to the EEOC office in Atlanta after being terminated, allegedly due to her gender identity and expression.<sup>205</sup> When she went to the EEOC office, she brought along handwritten notes describing a meeting “in which [p]laintiff and [d]efendant’s owner discussed [her] transition from male to female and Defendant’s owner’s alleged request that [p]laintiff not wear certain feminine clothing when coming to and leaving work.”<sup>206</sup> After consulting her supervisor, the EEOC investigator informed plaintiff that because her transgender status was unprotected, she would be unable to file a complaint.<sup>207</sup>

Eventually, “plaintiff returned to the EEOC office in Atlanta” and was permitted to file a complaint against defendant employer.<sup>208</sup>

## II. TRANSGENDER PLAINTIFFS AT SCHOOL

Schools are increasingly protecting transgender students from harassment and discrimination as a result of progressive state laws that either “specifically protect[] transgender students in public schools” or that “classify public schools as public accommodations where gender identity discrimination is prohibited.”<sup>209</sup> In addition, states that prohibit gender identity discrimination in public schools (such as Connecticut, Colorado, and Massachusetts) have released regulations or guidance explaining what schools should do to protect and assist transgender students.<sup>210</sup> For example, schools may be required to update educational records, allow access to the restroom of the transgender student’s choice, and enforce strong bullying prevention policies.<sup>211</sup>

In 2013, California passed a law that requires that students be “permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, *irrespective of the gender listed on the pupil’s records*.”<sup>212</sup> Prior to the bill’s passage, many of the

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204. *Chavez v. Credit Nation Auto Sales, Inc.*, 966 F. Supp. 2d 1335, 1350 (N.D.Ga. 2013).

205. *Id.* at 1338.

206. *Id.*

207. *Id.*

208. *Id.* at 1338-39.

209. *Know Your Rights-Transgender People and the Law*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (follow “Circle 6” hyperlink) (last visited May 17, 2015).

210. *Id.*

211. *Id.*

212. Cal. Assemb. B. 1266, 2013-2014 Reg. Sess. (Cal. 2013) (emphasis added) *available at*

state's nearly 1,000 school districts "separated transgender students from their peers or required them to enroll in and attend classes that conflicted with their gender identity."<sup>213</sup>

### A. *Bullying on the Basis of Sexual Orientation or Perceived Sexual Orientation*

Studies of LGBT children reveal that approximately thirty-one percent "report having missed at least one day of school in the previous month" because they were scared to go to school.<sup>214</sup> Courts across the country have been grappling with bullying on the basis of sexual orientation or gender nonconformity in the last few decades.<sup>215</sup>

In *Montgomery v. Independent School Dist. No. 709*, the District Court of Minnesota held that the school district was not entitled to summary judgment on claims relating to plaintiff's sexual harassment during the eleven years of education he received in defendant's schools.<sup>216</sup> Between kindergarten and tenth grade, and recurring on an almost daily basis, plaintiff was teased and harassed due to his perceived sexual orientation.<sup>217</sup> Some of the taunts used against him included: "femme boy," "gay boy," "bitch," "queer," "pansy," and "queen."<sup>218</sup> In addition, he was often punched, kicked, sexually grabbed, and even thrown to the floor by other students.<sup>219</sup> In order to avoid harassment, plaintiff stayed home from school five or six times.<sup>220</sup> Eventually, after finishing the tenth grade, plaintiff "transferred to another school district altogether."<sup>221</sup>

Defendant School District sought dismissal as to plaintiff's claims of discrimination under the Minnesota Human Rights Act (MHRA) because prior to August 1, 1993, the MHRA "explicitly prohibited only

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[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1266](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266).

213. Sarah McBride, *California's New Protections for Transgender Students*, CENTER FOR AM. PROGRESS (Aug. 23, 2013), <http://www.americanprogress.org/issues/lgbt/news/2013/08/23/72800/californias-new-protections-for-transgender-students/>.

214. See Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 612 (2001).

215. See *infra* Part II.A-B.

216. *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1095 (D. Minn. 2000).

217. *Id.* at 1084.

218. *Id.*

219. See *id.* at 1084-85.

220. *Id.* at 1085.

221. *Id.* at 1086.

discrimination ‘because of race, color, creed, religion, national origin, sex, age, marital status, [or] status with regard to public assistance or disability.’”<sup>222</sup> The students who bullied plaintiff targeted him mainly because of his perceived sexual orientation, and thus defendant concluded that the plaintiff did not state a claim for relief under the MHRA.<sup>223</sup> The court disagreed explaining that “although the MHRA did not prohibit sexual orientation discrimination prior to 1993, it did prohibit discrimination based on sex”<sup>224</sup> and that such discrimination included “sexual harassment.”<sup>225</sup>

From the 1990s to the early 2000s, numerous similar cases arose in which courts refused to grant defendant school districts summary judgment that were based on arguments that plaintiffs failed to allege facts sufficient to support a claim of discrimination.<sup>226</sup> In many of these cases, the plaintiff student was tormented on a regular basis by his peers.<sup>227</sup> Teachers and administrators were generally unhelpful at best,<sup>228</sup> or encouraged the bullying at worst.<sup>229</sup> The courts were not sympathetic to this habitual inaction on the part of the school districts.<sup>230</sup> Such disapproving verdicts “not only provide a remedy for the discrete

222. *Id.* at 1087. The MHRA was amended on August 1, 1993 “to include ‘sexual orientation’ as a prohibited basis for discrimination.” *Id.* (citing 1993 Minn. Laws, ch. 22, §§ 8-25).

223. *Id.*

224. *Id.*

225. *See id.* (citing MINN. STAT. § 363.01 (1993)).

226. *See, e.g.,* *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 439 (6th Cir. 2009) (concluding that the plaintiffs demonstrated that there was a genuine issue of material fact as to whether the school district’s responses to plaintiff’s reported student-on-student sexual harassment were clearly unreasonable); *Doe v. Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790, at \*30 (W.D. Pa. Mar. 24, 2006) (denying defendant school district’s motion for summary judgment as to plaintiff’s claim of discrimination on the basis of sex under Title IX); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1166-67, 1171 (N.D. Cal. 2000) (holding that plaintiff, the son of a transgender female, had stated a cause of action for sex discrimination under Title IX by alleging that he was harassed at school due to other students’ perception that he was a homosexual, and due to his mother’s physical appearance, and that defendant is not entitled to judgment as a matter of law).

227. *Patterson*, 551 F.3d at 439.

228. *Id.* (“DP reported at least some of these instances to the school and was told ‘kids will be kids, it’s middle school.’”).

229. *Id.* at 440 (“The Pattersons learned from DP that he had been assaulted at school. This incident led to further teasing, including teasing from geography teacher John Redding, who asked DP later that same day in front of a full class of students: ‘[H]ow does it feel to be hit by a girl[?]’ . . . The class laughed at DP.”).

230. *See, e.g., Antioch*, 107 F. Supp. 2d at 1170 (“The agents and employees of Defendant Antioch Unified School District took no action to curtail the harassing conduct of Defendant Jonathon Carr, when they knew or should have known he presented a specific threat to Plaintiff’s safety. . . . Taking these allegations as true, Plaintiff has established that Defendant Antioch Unified School District acted with deliberate indifference.”).

plaintiff but can also serve as a call to action to other school districts, thus ultimately benefiting a number of both actual and potential victims.”<sup>231</sup>

### *B. Recent Decisions on the Basis of Gender Nonconformity*

The more recent cases courts are deciding address the issue of how schools can best make transgender students feel comfortable at school.

In 2001, a Massachusetts Superior Court ruled that a middle school may not prohibit a transgender student from wearing clothes that she feels most comfortable in simply because she was born biologically male.<sup>232</sup> In early 1999, when plaintiff was in seventh grade, she began to “express her female gender identity by wearing girls’ make-up, shirts, and fashion accessories to school.”<sup>233</sup> The school had a dress code that prohibited “clothing which could be disruptive or distracting to the educational process or which could affect the safety of students.”<sup>234</sup> On this basis, the principal would often send the plaintiff home to change her clothes if she came to school dressed in typical female attire.<sup>235</sup> On some occasions, plaintiff would simply stay at home because she was too upset to return to school.<sup>236</sup>

Plaintiff returned to school as an eighth grader the following year and was instructed by the principal to check into his office every day so that he could approve her appearance.<sup>237</sup> Again, plaintiff would often be sent home to change; she sometimes came back to school in different clothes and sometimes she just stayed at home.<sup>238</sup> During the 1999-2000 school year, plaintiff ceased to go to school entirely due to the hostile environment she felt the principal had created.<sup>239</sup> As a result of these absences, plaintiff had to repeat the 8<sup>th</sup> grade.<sup>240</sup> Plaintiff was also suspended three times for using the women’s restroom after expressly

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231. Higdon, *supra* note 20, at 864-65.

232. Doe *ex rel.* Doe v. Yunits, 001060A, 2000 WL 33162199, at \*1 (Mass. Super. Ct. Oct. 11, 2000), *aff’d* Doe v. Brockton Sch. Comm., 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

being told not to.<sup>241</sup> Ultimately, the principal and the Senior Director for Pupil Personnel Services met with plaintiff and informed her that she would not be allowed to return to school the following year if she continued to “wear any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs.”<sup>242</sup>

Plaintiff filed a claim requesting a preliminary injunction prohibiting defendants from excluding her from South Junior High School, on the basis of the plaintiff’s sex, disability, or gender identity and expression.<sup>243</sup> The court thoroughly analyzed plaintiff’s argument and defendants’ contention in its decision that plaintiff had indeed been impermissibly discriminated against on the basis of sex:

Plaintiff contends that defendants’ action constitute sex discrimination because defendants prevented plaintiff from attending school in clothing associated with the female gender solely because plaintiff is male. Defendants counter that, since a female student would be disciplined for wearing distracting items of men’s clothing, such as a fake beard, the dress code is gender-neutral. Defendants’ argument does not frame the issue properly. Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male. Therefore, defendants’ reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestism are not controlling in this case because plaintiff is being discriminated against because of her gender.<sup>244</sup>

In conclusion, the court held that it could not “allow the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort.”<sup>245</sup> It then went on to quote the dissenting opinion of Justice Harlan in the landmark case *Plessy v. Ferguson*: “Our constitution . . . neither knows nor tolerates classes among citizens.”<sup>246</sup> Thus, the court essentially compares plaintiff’s treatment at school to that of African Americans under segregation.<sup>247</sup> This comparison

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241. *Id.*

242. *Id.* at \*2.

243. *Id.*

244. *Id.* at \*6.

245. *Id.* at \*7.

246. *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

247. *See id.*

highlights the court's view that plaintiff's isolation at school is impermissible.<sup>248</sup>

In *Doe v. Regional School Unit 26*, the Supreme Judicial Court of Maine held that the "school [had] violated the Maine Human Rights Act (MHRA) and discriminated against [the] transgender student . . . when it prohibited [the] student from using the girls' communal bathroom and required her to use the unisex staff bathroom."<sup>249</sup> Susan Doe, the plaintiff, is a transgender teenage girl who used the girls' restroom at her school without any disturbance until the start of the fifth grade when a male student, following his grandfather's instructions, followed her into the bathroom.<sup>250</sup> The student had been directed by his grandfather to use the girls' restroom "as long as Susan used it."<sup>251</sup> The staff subsequently required her to use a staff-only designated restroom.<sup>252</sup> No other students beside Susan used this restroom.<sup>253</sup>

The Gay & Lesbian Advocates & Defenders (GLAD) filed suit against the Orono School Department Superintendent and other school district entities on behalf of Susan and her family in May 2011 putting forth counts of "discrimination in education and public accommodation, harassment, and infliction of emotional distress."<sup>254</sup> On November 20, 2012 the Maine Superior Court (the trial court) granted summary judgment for the defendants.<sup>255</sup> GLAD appealed this decision in March of 2013 before the Maine Supreme Judicial Court.<sup>256</sup> The appellants' brief alleged violations of the MHRA, which bans "a school from treating a transgender girl differently from every other girl."<sup>257</sup> The MHRA prohibits discrimination on the basis of sexual orientation in educational institutions and public accommodations.<sup>258</sup> Specifically, it is unlawful education discrimination on the basis of sex and a violation of a civil right to, "[e]xclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic,

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248. *See id.*

249. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 600 (2014).

250. Sherry F. Colb, *A Restroom of One's Own: The Maine Supreme Court Considers A Transgender Student's Exclusion From the Girls' Bathroom*, VERDICT (June 26, 2013), <http://verdict.justia.com/2013/06/26/a-restroom-of-ones-own>.

251. *Id.*

252. *Reg'l Sch. Unit 26*, 86 A.3d at 603.

253. *Id.*

254. *Doe v. Clenchy*, GLAD (Jan. 30, 2014), <http://www.glad.org/work/cases/doe-v.-clenchy>.

255. *Id.*

256. *Id.*

257. Brief of Appellants John and Jane Doe as Parents and Next Friend of Susan Doe at 17, *Doe v. Clenchy*, 2011 Me. Super. LEXIS 70 (Me. Sup. Jud. Ct. 2013) (No. PEN-12-582).

258. ME. REV. STAT. ANN. tit. 5, §§ 4601-4602 (2013); ME. REV. STAT. tit. 5, § 4591 (2005).

extracurricular, research, occupational training or other program or activity.”<sup>259</sup>

On January 30, 2014, a six-panel court found that the school district had in fact violated the MHRA and vacated the decision of the lower court.<sup>260</sup> The court remarked that although school buildings must, pursuant to a state statute on sanitary facilities (section 6501), have separate bathrooms for each sex, the statute “does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA.”<sup>261</sup> In addition, the court noted that the statute, in mandating sex-separated facilities, does not suggest any manner in which transgender students should be treated.<sup>262</sup> The court held that the type of discrimination Susan endured as a result of her transgender status “is forbidden by the MHRA and it is not excused by the school’s compliance with section 6501.”<sup>263</sup>

A similar situation arose recently in Colorado where Coy Mathis, a 6-year-old biologically male child who identifies as a girl, was told “she could no longer use the girls’ bathroom . . . but instead [had to] use a gender-neutral restroom.”<sup>264</sup> A lawyer for the Fountain-Fort Carson school district explained in a letter that, “as Coy grows older and his male genitals develop along with the rest of his body, at least some parents and students are likely to become uncomfortable with his continued use of the girls’ restroom.”<sup>265</sup>

Colorado’s anti-discrimination law “expanded protections for transgender people in 2008.”<sup>266</sup> “According to the Transgender Legal Defense and Education Fund, which . . . filed a complaint with Colorado’s civil rights division on the Mathises’ behalf, [sixteen] states and the District of Columbia offer some form of legal protections for transgender [individuals].”<sup>267</sup>

259. ME. REV. STAT. tit. 5, § 4602(1)(A) (1985); *see also* ME. REV. STAT. ANN. tit. 5, § 4601 (declaring sexual orientation a civil right).

260. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 606 (2014).

261. *See id.* at 606; *see also* ME. REV. STAT. ANN. tit. 20-A, § 6501(1)(B) (2008) (“A school administrative unit shall provide clean toilets in all school buildings, which shall be . . . [s]eparated according to sex and accessible only by separate entrances and exits[.]”).

262. *Reg’l Sch. Unit 26*, 86 A.3d at 606.

263. *Id.*

264. Dan Frosch, *Dispute on Transgender Rights Unfolds at Colorado School*, N.Y. TIMES (Mar. 17, 2013), [http://www.nytimes.com/2013/03/18/us/in-colorado-a-legal-dispute-over-transgender-rights.html?\\_r=0](http://www.nytimes.com/2013/03/18/us/in-colorado-a-legal-dispute-over-transgender-rights.html?_r=0).

265. *Id.*

266. *Id.*

267. *Id.*

In June of 2013, the Colorado Civil Rights Division rendered a verdict on the Mathis family's complaint against Coy's school.<sup>268</sup> Director Steven Chavez decided in Coy's favor, allowing her to use the girls' restroom, and admonishing the school district's treatment of Coy: "Telling [Coy] that she must disregard her identity while performing one of the most essential human functions . . . creates an environment that is objectively and subjectively hostile."<sup>269</sup> Chavez added that "the school's rationale behind forcing Coy to use a different bathroom is 'reminiscent of the "separate but equal" philosophy.'"<sup>270</sup>

### III. WHAT CAN THE STUDENTS TEACH THE ADULTS?

Mia Macy commenting on her win said, "I never thought in my life that it would be over, but to have it not only be over but to have them say, 'yes, unfortunately, your civil rights were violated. They did do this.' To have that vindication, it's surreal."<sup>271</sup>

#### A. *The Double-Bind as Applied in the Aforementioned Cases*

In the earlier cases examined above, *Holloway* and *Ulane*, the transgender plaintiffs were unsuccessful under Title VII because the Ninth and Seventh Circuits, respectively, found that Congress did not intend to protect transgender individuals in its passage of Title VII.<sup>272</sup> Both courts reasoned that the "personnel problems"<sup>273</sup> created by the plaintiffs' transitional appearance outweighed any discrimination that the individuals might face due to their "discontent with the sex into which they were born."<sup>274</sup>

Then came the *Price Waterhouse* decision in 1989. "After *Price Waterhouse*, transgender employees began basing their discrimination claims not on their transgender status—a basis which had proved

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268. Sabrina Ruben Erdely, *About A Girl: Coy Mathis' Fight to Change Gender*, ROLLING STONE (Oct. 28, 2013), <http://www.rollingstone.com/culture/news/about-a-girl-coy-mathis-fight-to-change-change-gender-20131028?page=5>.

269. *Id.*

270. *Id.*

271. Chris Geidner, *Federal Government Decisions Mark A Changed Landscape for Transgender Workers*, BUZZFEED (July 15, 2013), <http://www.buzzfeed.com/chrisgeidner/federal-government-decisions-mark-a-changed-landscape-for-tra>.

272. *See supra* Part II.

273. *See supra* Part II.

274. *See supra* Part II.

unsuccessful in *Ulane*—but instead on their gender-nonconformity.”<sup>275</sup> It was not until 2004, however, that the first big transgender win came down in *Smith*. In *Smith*, the Sixth Circuit Court found the plaintiff to be a victim of discrimination because of his “gender non-conforming conduct”<sup>276</sup> and “because of his identification as a transsexual”, thus qualifying her for coverage under Title VII.<sup>277</sup> In fact, it was “[o]nly by assuming that Smith’s sex [was] male could the court could determine that she had been discriminated against on the basis of her ‘gender non-conforming behavior.’”<sup>278</sup> Smith is likely to have a successful Title VII claim because she is the “perfect gender-nonconformist.”<sup>279</sup> Unfortunately, this “neat mismatch between sex and gender”<sup>280</sup> not only “obscures the complexity of . . . transgenderism[,]”<sup>281</sup> but seems to create a new category exclusive to perfect transgender people.<sup>282</sup>

Thus, the plaintiffs in the more recent cases have exhibited a variety of issues in attempting to adjudicate their claims.<sup>283</sup> In *Rice v. Deloitte Consulting*, the plaintiff, who exhibited “unruly hair, a disheveled style of dress” and odd “mannerisms, style and interaction,”<sup>284</sup> was not the perfect gender non-conformist.<sup>285</sup> The court reasoned that such qualities “can be attributed to anyone—male or female.”<sup>286</sup>

In deciding that gender (or gender nonconformity) did not play a motivating part in employer Deloitte Consulting’s decision to discharge Rice, the court seems to circumvent the possible inference that Rice’s colleagues were so critical of her appearance and mannerisms precisely *because of her gender nonconformity*.<sup>287</sup> As noted above, men who

275. Glazer & Kramer, *supra* note 27, at 656 (footnote omitted).

276. *Smith v. City of Salem*, 378 F.3d 566, 571 (2004).

277. *Id.*

278. Tran & Glazer, *supra* note 27, at 419 (citing *Smith*, 378 F.3d at 575).

279. *See id.* at 421-22.

280. *Id.* at 419.

281. *Id.*

282. *See id.* at 420-21 (providing a discussion of sexless and genderless cases).

283. *See supra* Part I.F.

284. *See supra* notes 160, 165 and accompanying text.

285. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (2005) (providing an example of a perfect gender conformist). “Barnes was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions.” *Id.*

286. *See supra* note 173 and accompanying text.

287. *See Rice v. Deloitte Consulting LLP*, 2013 U.S. Dist. LEXIS 95439, at \*16-17 (D. Colo. July 9, 2013) (“Moreover, the references to unruly hair, a disheveled style of dress or being unique/odd in mannerisms, style and interactions can be attributed to anyone—male or female. While these comments may be unflattering, they are gender neutral and do not support a reasonable inference that Deloitte terminated Plaintiff because of her gender or because of failed gender stereotype expectations.”).

exhibit feminine qualities tend to be doubly despised “for manifesting the disfavored qualities”<sup>288</sup> deemed feminine and for “descending from [their] masculine gender privilege to do so.”<sup>289</sup> As such, the court seemed to ignore the possibility that Rice was harshly scrutinized by her supervisors, at least in part, due to their discomfort with her gender identity. In addition, it is possible that because her gender identity did not seem to be set in stone, her colleagues struggled with the threat of uncertainty she posed.<sup>290</sup>

Similarly, in *Hart v. Lew*, plaintiff, appearing dressed as a woman but “still ha[ving] male genitalia,” was repeatedly denied access to the women’s restroom.<sup>291</sup> In addition, plaintiff’s colleagues made her feel uncomfortable and nervous on numerous occasions. One instance is particularly telling:

[O]n October 6, 2010, Hansen allegedly criticized the length of plaintiff’s skirt, chastised her for contacting NTEU and EEO counselors, and said, “Why don’t you just resign?” According to plaintiff, Hansen’s tone, body language, and facial expressions made her “afraid and fearful.” After the meeting, plaintiff left Hansen’s office, notified him that she was feeling sick, and returned to her home. Hansen denied Hart’s request for a sick day, instead charging her with 6.5 hours of “AWOL.”<sup>292</sup>

The court in this case is sympathetic to plaintiff Hart.<sup>293</sup> The court took note of Hart’s allegations of “animus and hostility regarding her appearance, dress, sex, and gender transition,”<sup>294</sup> and expressly stated that while it “may ultimately be persuaded by evidence supporting defendant’s explanation[,]” it still denied the defendant’s motion to dismiss.<sup>295</sup>

In *Chavez*, the court used indifferent language regarding plaintiff’s mistakes in filing EEOC complaints:

The November Meeting Notes describe a meeting, nearly two months

288. *Supra* note 11 and accompanying text.

289. *Supra* note 12 and accompanying text.

290. See Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 916 (2014). This is unlike the plaintiff in *Smith* who had to take on a male identity, “namely, as a man who wanted to participate in the workplace dressing and looking like a woman.” *Id.*

291. *Hart v. Lew*, 973 F. Supp. 2d 561, 567 (D. Md. 2013).

292. *Id.* at 569.

293. *Id.* at 582.

294. *Id.*

295. *Id.*

before Plaintiff's termination, between plaintiff and Defendant's owner. The Separation Notice and the November Meeting Notes do not state that Plaintiff was terminated for a discriminatory reason, and they do not manifest Plaintiff's intent for the EEOC to investigate a charge of discrimination or to inform Defendant of such a charge.<sup>296</sup>

If the court held any sympathy for the plaintiff in this case, it is very difficult to discern.

### *B. The Students as Plaintiffs*

In the cases examined above in Part II B, the courts came down hard on the schools, using language reminiscent of courts admonishing the "separate but equal" philosophy.<sup>297</sup> Notably, the plaintiffs in both the bullying cases and the transgender bathroom cases were granted much wider latitude with respect to their rights.<sup>298</sup> The courts were sympathetic to the plight of these students regardless of how "perfectly" they presented their respective genders.<sup>299</sup> For example, student plaintiffs who were bullied due to their perceived homosexual sexual orientation won their claims.<sup>300</sup>

More recently, transgender plaintiffs have garnered the support of their families and peers.<sup>301</sup> They have also looked to state specific statutes regarding human rights in their complaints of discrimination on the basis of sex.<sup>302</sup> Most remarkable, however, is the courts' strong support and encouragement of the transgender students. The disparity in language between the courts' opinions in these cases and those in the aforementioned employee-employer cases is evident.

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296. *Chavez v. Credit Nation Auto Sales, Inc.*, 966 F. Supp. 2d 1335, 1341 (2013).

297. *See Erdely, supra* note 268.

298. *See supra* Part II.

299. *See supra* Part II; *see also* *Logan v. Gary Cmty. Sch. Corp.*, 2008 WL 4411518, at \*1, 5 (N.D. Ind. Sept. 25, 2008) (denying defendant School District's Motion to Dismiss where plaintiff, a young male-to-female transgender individual, wore girls' apparel to school throughout the year, and a dress to prom).

300. *See, e.g., Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1165-67, 1171 (N.D. Cal. 2000) (holding that defendant was not entitled to judgment as a matter of law because plaintiff, the son of a transgender female, stated a cause of action for sex discrimination under Title IX by alleging that he was harassed at school due to other students' perception that he was a homosexual, and due to his mother's physical appearance).

301. *See generally* *Erdely, supra* note 268.

302. *See supra* notes 257-61 and accompanying text.

### *C. A Possible Solution for Imperfect Transgender Employees*

Mia Macy commented on possible solutions for transgender employees:

I think in the workplace, if employers have to step up and they're the ones to tell people, "It's OK, these people are allowed to work with us. They're just like you and me. They're fine," and the employers start accepting that, I think the people take that with them home . . . It's a piece of the puzzle. I am happy that I got to be a part of taking down a wall—one more wall.<sup>303</sup>

In order to resolve some cases in the workplace that seem to be adjudicated at least arguably improperly, courts may want to consider bullying in the school context. The precise reasons why strong measures against bullying and discrimination are enforced in schools disappear in the workplace context. Perhaps if courts did take seriously the notion that transgender plaintiffs—both perfect and imperfect—might feel bullied or, at the very least, uncomfortable in their work environments, they may be able to glean some helpful insight.<sup>304</sup>

In addition, it is clear that “teachers can play a significant and positive role when they model empathy and acceptance of individual differences and when they establish a classroom atmosphere where bullying, taunting, and teasing . . . are not tolerated.”<sup>305</sup>

As such, perhaps the solution is two-fold. Step one must take place in the workplace context itself: employers and colleagues with relatively higher positions of power should be encouraged to emulate teachers by treating employees who are facing challenges (that may be) related to their gender identity with more compassion and sympathy. Perhaps if teachers and administrators defended or supported the mistreated students in cases above, the students were more likely to continue coming to school and felt a greater sense of safety and comfort in the school environment.

Secondly, the courts should look to their analyses in cases where the plaintiffs are students. Whether they are being bullied due to their gender nonconformity or perceived sexual orientation, or whether they

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303. Geidner, *supra* note 271.

304. See e.g., *Hart v. Lew*, 973 F. Supp. 2d 561, 569 (D. Md. 2013) (describing plaintiff's negative feelings about coming into work because she had been made to feel so unwelcome at the office).

305. JEAN M. BAKER, *HOW HOMOPHOBIA HURTS CHILDREN* 40 (2001).

are simply challenging antiquated school policies, student plaintiffs have had an easier time persuading judges to step into their shoes.<sup>306</sup> By evaluating these cases, the courts may be able to shed light on issues concerning employees who are singled out for similar reasons. Courts should also look to the EEOC's interpretation of Title VII as an indication of the federal government's desire to consider transgender plaintiffs' claims as seriously as any other discrimination claims.<sup>307</sup>

The combination of both of these remedial measures may lead to a more tailored and flexible standard for courts to consider in this employee-employer context. More importantly, the work environment will be a better place for all employees when a transgender plaintiff does not feel that his or her only means of redress is to file mass EEO complaint.

As our society becomes increasingly accepting and open-minded, it is nonetheless crucial to remember that bullying is still prevalent and that qualities associated with masculinity remain in high esteem as compared with characteristics associated with femininity. The workplace itself is where most adults spend the majority of their time; it is thus necessary that this environment be as welcoming and accepting as possible. Naturally, employers cannot control the socialization and deeply rooted preconceived notions of their employees. Courts can, however, influence the workplace to become a more accepting environment by empathizing with individuals who are facing challenges related to their gender identity. As Justice Brennan noted in the majority opinion of *Price Waterhouse*:

It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.<sup>308</sup>

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306. See *supra* Part II.

307. See *supra* Part I.E.

308. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

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It is the role of the judiciary, after all, to ensure that justice is dealt and that no one is being treated unfairly for reasons outside of his or her control.

*Julia Elmaleh-Sachs\**

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