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Sent: Wednesday, December 12, 2012 12:28 PM
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Subject: FYI
Attachments: EXEMPTION 5 [redacted]

EXEMPTION 5 [redacted]

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EXEMPTION 5

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MEMORANDUM FOR: Donna R. Lenhoff
Senior Civil Rights Advisor

FROM: Peter Dang
Law Clerk

Jonide Simon
Presidential Management Fellow

SUBJECT: Gender Identity Discrimination

DATE: December 12, 2012

ISSUE PRESENTED: Whether gender identity discrimination is a form of sex discrimination.

SUMMARY OF CONCLUSION:

Initially, the courts strictly followed the "plain meaning" approach and adopted very traditional interpretations of "sex," offering no protections for transgender individuals under Title VII. However, *Price Waterhouse v. Hopkins* gave transgender individuals an avenue for recovery against employment discrimination by adopting the "sex-stereotype" approach.[1] Most recently, a new line of cases has begun to emerge which equate gender discrimination with sex discrimination. Although the courts initially offered no protection for transgender individuals under Title VII, the courts are trending towards finding that prohibition of discrimination on the basis of transgender status is inherent in the statute's prohibition of discrimination on the basis of sex. Currently, there is a split in the Circuits on this issue.

ANALYSIS:

I. Introduction

[1] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. (The Court in *Price Waterhouse* held that the defendant's showing that it would have made the same decision without consideration of the protected characteristic relieved the employer of liability. *Id.* at 245–46. However, Congress superseded this part of the holding in the Civil Rights Act of 1991 which provides that an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. 42 U.S.C. § 2000e-2(m)).

Over the last few decades, controversy has surrounded the issue of whether gender identity discrimination should be considered sex discrimination under Title VII. Ilana Gelfman published an article in 2010 that sorted decisions into three "generations," depending on the type of analysis the court adopted. Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of… [Perceived] Sex,"* 34 N.Y.U. Rev. L. & Soc. Change 55 (2010). The first generation of cases focused on the plain meaning and congressional intent in analyzing the phrase "because of… sex." The second generation of cases generally followed the precedent set by *Price Waterhouse v. Hopkins* and focused on employees who were discriminated based on behaviors that did not conform to "sex stereotypes," creating a new avenue for transgender individuals to seek claims for sex discrimination. The third, and most recent, line of cases is still developing but is trending towards removing the distinction between gender and sex discrimination, and instead, equating one to the other.

The first generation of cases rejects transgender plaintiffs' claims on the basis of: (1) plain meaning, (2) Congressional intent, and (3) the legislature's failure to amend Title VII. Gelfman, *supra* at 74. These three lines of reasoning were exhibited by the oft-cited case, *Ulane v. Eastern Airlines*, where the Seventh Circuit held that Title VII does not protect transsexuals. *Ulane v. Eastern Airlines.*, 742 F.2d 1081 (7th Cir. 1984). Courts, such as *Ulane*, that adopt the "plain meaning" approach uniformly interpret "sex" as a binary term, referring to only males and females. They also believe that the dearth of legislative history does not support a liberal interpretation, reasoning that at the time of the Act's enactment, Congress only had traditional notions of sex in mind. To support this interpretation, these courts often refer to the legislature's subsequent failure to amend Title VII to include protection from discrimination on the basis of sexual orientation. By attempting but failing to amend Title VII, the legislature demonstrated that the Act was indeed intended not to protect against discrimination on the basis of sexual orientation or gender identity.

The second generation of cases rely on sex stereotyping, a concept put forth by *Price Waterhouse.* In *Price Waterhouse*, the plaintiff brought a claim of sex discriminaton after she was denied a partnership position at her accounting firm. *Price Waterhouse ,* 490 U.S. at 232. She argued that her employer's decision was largely due to her failure to conform to traditional sex stereotypes, and described how her supervisors would urge her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Court found that there was sufficient evidence to establish that sexual stereotyping played a part in evaluating the plaintiff's candidacy. *Id.* at 250-251. The Court's acceptance of sexual stereotyping as a basis for sex discrimination created a new avenue for transgender plaintiffs to bring sex discrimination claims under Title VII.[2]

The third generation of cases interprets the phrase "because of… sex" directly to include discrimination against transgender individuals. They believe that "sex" should be more broadly read and analogize "sex" with the term "religion" which also appears in Title VII. Their reasoning is that individuals who are discriminated against because they change religion are no different than

[2] The EEOC has applied the gender-stereotyping theory in another controversial context as well. In *Veretto v. Donohue*, 2011 WL 2663401 (EEOC Appeal No. 0120110873 (July 1, 2011)), the Commission held that a man's failure to conform to gender-role expectations by marrying another man can be the basis for an actionable claim of a sexually hostile work environment.

individuals who are discriminated against because they change, or are in the process of changing, sex.

The three generations of cases have resulted in a direct split in the circuits. Those that have recently held gender-identity discrimination can be unlawful sex stereotyping and/or sex discrimination are the Sixth, Ninth, and Eleventh Circuits. The Seventh, Eighth, and Tenth Circuits, on the other hand, have held that gender-identity discrimination is never unlawful sex discrimination. The cases listed below lay out the landscape of the different circuits' decisions on this issue. After each citation is a parenthetical denoting the generation into which that case falls.

II. Supreme Court

a. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (2nd)

As described above, the plaintiff, Hopkins, was a candidate for partner at an accounting firm. Evaluations written by current partners conveyed a highly stereotypical idea of how she, and women in general, should behave. Hopkins was denied the position and brought a sex discrimination claim under Title VII against the firm.

The Court reasoned that the purpose of Title VII was to promote hiring on the basis of job qualifications. The intent of Congress in passing the act was "to drive employers to focus on qualifications rather than on race, religion, sex, or national origin," and this is a theme that echoes in the statute's legislative history. *Id. at* 243. If an employer focused its hiring decisions on whether the candidate acted in a way that conformed to a perceived stereotype, such a decision would stray from measuring the actual qualifications of the candidate. In an often cited quote, the Supreme Court reasoned:

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

Id. at 251. From this reasoning, the court concluded that penalizing individuals for not acting in a stereotypical manner based on their sex constitutes sex discrimination.

b. *Oncale v. Sundowner,* 523 U.S. 75 (1998). (2nd)

The plaintiff in Oncale was a male employee who brought a sexual harassment claim under Title VII against his male supervisors and co-workers. After the District Court and Court of Appeals granted a summary judgment for the defendants, the Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. *Id. at*82. The Court reasoned that the phrase "because of … sex" protects men as well as women and held that a male's having been harassed by another male did not preclude him from bringing an action under Title VII. *Id.* at 78. The Court noted previous decisions that rejected the argument that employers could not discriminate against members of their own race. *Id*.

Although neither *Price Waterhouse* nor *Oncale* specifically addresses the protection of transsexuals under Title VII, their liberal interpretation of the statute suggests that sex discrimination under Title VII should be interpreted broadly. The Court acknowledged that male-on-male sexual harassment in the workplace was "assuredly not the principal evil Congress was concerned with when it enacted Title VII" but proceeded to state that comparable evils are also covered under the law. *Id.* at 81. Perhaps more important, the cases provide firm doctrinal basis for the theory that failure to conform to gender stereotypes gives rise to a cause of action for sex discrimination – the theory that courts have adopted to protect transgender individuals from discrimination in the second-generation cases.

III. D.C. Circuit

a. Court of Appeals – None

b. District Courts

i. *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008). (2nd and 3rd)

Schroer was offered a job at the Library of Congress. Although she had been diagnosed with Gender Identity Disorder (GID) around the time of her application, she applied for the job as a male. When her potential employers learned that she was transgender, they revoked the offer. She sued the Library of Congress alleging sex discrimination under Title VII. The District Court held that the explanations proffered by the Library of Congress were pretextual, and that withdrawal of the job offer constituted both sex-stereotyping discrimination *and* "because of sex" discrimination in violation of Title VII. *Id.* at 302-308.

The court found that the Library's hiring decision was greatly influenced by sex stereotypes, as discussed in *Price Waterhouse*. However, the Court took this one step further and explained that "because of… sex" discrimination encompasses transgender individuals. *Id.* at 306.The Court analogized transitioning from one sex to another with converting from one religion to another. If discriminating against someone based on him or her converting religions constitutes discrimination "because of...religion," then the same can be said of sex. *Id.* The Court went on to explain that the failure of Congressional attempts to add gender identity and sexual orientation to the protected classes did not mean that these classes were not protected. Instead, the failure to include these classes indicated that the protection was already encompassed by the existing language. *Id.* at 307-308. While "because of… sex" was narrowly interpreted by *Ulane*, the Court stated that a more liberal interpretation is the correct one. *Id.* By denying Schroer employment, the Library of Congress violated Title VII.

ii. *Doe v. U.S. Postal Service*, 1985 WL 9446 (D.D.C. June 12, 1985). (1st)

Doe was offered and accepted a temporary position at the Postal Service that was withdrawn when her employer discovered that she was about to undergo gender reassignment surgery. The District Court held that Doe failed to state a claim under Title VII and cited *Ulane*'s "plain meaning" interpretation that "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 are born." *Id.* at *2 (citing *Ulane*, 742 F.2d at 1085). It also noted the absence of a legislative history on the subject. *Id.*

IV. First Circuit

a. Court of Appeals

i. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000). (2nd)

Rosa, a biological male, dressed in traditionally feminine attire. He went to the bank and was told he would be denied a loan unless he went home and returned in more traditionally male clothing. He brought a sex discrimination action under the Equal Credit Opportunity Act (ECOA) and the Court of Appeals held that the bank's actions constituted prohibited discrimination in violation of ECOA. The District Court dismissed the case, but the Court of Appeals reversed, holding that it would be reasonable to infer that the employee did not give the loan because Rosa's attire did not accord with his male gender. *Id.* at 215-216. The Court cited *Price Waterhouse*, stating that discrimination based on sex stereotyping could be the basis for the discrimination claim. *Id.* at 216. Although this was not an employment discrimination case, the court accepted the same sex-stereotyping theory that has been used in a number of Title VII cases to find protection for a transgender individual.

b. District Courts – None

V. Second Circuit

a. Court of Appeals – None

b. District Courts

i. *Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003 WL 22757935 (W.D.N.Y., Sept. 26, 2003). (2nd)

Plaintiff was an employee who was beginning sexual reassignment surgery. When he was hired, he informed his employer that he was a transsexual in transition and he assumed the role of a woman during this transition period. After a series of incidents, he was fired and brought a sex discrimination claim under Title VII. The defendant moved to dismiss, arguing that transsexuals are not protected under Title VII. *Id.* at *3. The court upheld the plaintiff's Title VII claim, stating that the plaintiff was not claiming protection as a transsexual, but was claiming that his discrimination was due to his refusal to "act like a man." *Id.* at *4. Accordingly the court cited *Price Waterhouse* for the proposition that sex discrimination was evidenced by sex stereotyping.

VI. Third Circuit

a. Court of Appeals – None

b. District Courts

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

Plaintiff was a pre-operative transsexual who was diagnosed with Gender Identity Disorder (GID). Plaintiff presented as a male for the first few years of employment, but was terminated soon after announcing his intention to transition from male to female. He brought a sex discrimination claim under Title VII and defendant filed a motion to dismiss. Citing *Price Waterhouse*, the court stated that the plaintiff's "failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions" and thus held that the plaintiff had sufficiently pled a claim for gender discrimination. *Id. at* *2.

ii. *Grossman v. Bernards Twp. Bd. Of Educ.*, 1975 WL 302 (D.N.J. Sept. 10, 1975). (1st)

Grossman claimed she was wrongfully discharged from her teaching position due to her sex reassignment from male to female. The defendant denied the allegation of sex discrimination, arguing that such discrimination could not have occurred because the plaintiff, despite the medical and surgical procedures performed, remained a member of the male gender. *Id*. at *4. The court refused to engage in the dispute about Grossman's sex, and instead focused on the narrow issue of whether Grossman's claim fell under Title VII. *Id.* Accordingly, the court held that Grossman did not state a Title VII claim, noting an "absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII." *Id*.

VII. Fourth Circuit

a. Court of Appeals – None

b. District Courts

i. *Powell v. Read's, Inc.,* 436 F. Supp. 369, 371 (D. Md. 1977). (1st)

Powell, who was living as a woman as a prerequisite to having a sex change operation, was fired from her position as a waitress after her boss learned that she was a biological male. She alleged that her dismissal was unlawful sex-based discrimination under Title VII. The court ruled against Powell, holding that Title VII did not reach discrimination against transsexuals. *Id. at371* (noting that the Equal Employment Opportunity Commission (EEOC) "also holds that discrimination against transsexuals is

not protected by existing law").[3] Although not binding, the Court found the EEOC's decision that "sex" should be narrowly interpreted persuasive. The court also reasoned that the plain meaning of the term "sex" should be adopted because there was a lack of legislative history indicating otherwise. *Powell,* 436 F. Supp. at 371.

VIII. Fifth Circuit

a. Court of Appeals – None

b. District Courts

i. *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.,* 542 F. Supp. 2d 653 (S.D. Tex. 2008). (2nd)

Plaintiff was a biological male who presented herself as a female. Shortly after receiving a job offer, she was informed that her offer was rescinded because she misrepresented herself as a female during the application process. Adopting the "sex stereotype" theory established in *Price Waterhouse,* the court held that the plaintiff had a viable Title VII claim because she was facing discrimination due to her failure to comport with her employer's notions of how a male should look. *Id.* at 660-661.

IX. Sixth Circuit

a. Court of Appeals

i. *Myers v. Vuyahoga County,* 182 Fed. Appx. 510 (6th Cir. 2006). (2nd)

Plaintiff was a transsexual who brought a claim of sex discrimination under Title VII when she was terminated from her position. The District Court granted summary judgment for the defendant and the Court of Appeals affirmed. The appellate court held that she failed to establish a prima facie case of gender discrimination, absent evidence she was replaced by a gender-conforming person. *Id.* at ** 7. The court found that she was terminated for legitimate reasons, but for our purposes, did acknowledge that a sex discrimination claim based on sex stereotyping could be successful in the right case.

ii. *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005). (2nd)

Plaintiff, a pre-operative male-to-female transsexual, was a police officer who failed evaluations during the probationary period required to become a police sergeant. Upon failing, he brought a sex discrimination claim against the city under Title VII. The plaintiff presented evidence that showed he was discriminated against because of failing to

[3] *See* EEOC Decision No. 75-030 , 1974 WL 3872 (September 24, 1974), at *2 ("We therefore are compelled to conclude that Charging Party's termination, based in part upon having undergone a sex reassignment operation, does not constitute discrimination because of sex.").

conform to sex stereotypes. *Id*. at 733-735. For example, one evaluator told him he was not "masculine" enough. *Id.* The Court of Appeals affirmed the District Court's decision, and ruled that there was sufficient evidence to show intentional discrimination by the city. Citing *Smith v. City of Salem, infra,* the Court reasoned that "by alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind the defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition on sex discrimination." *Id.* at 737.

iii. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). (2nd)

Smith, a biological male, worked at the fire department. After he informed his supervisor about his Gender Identity Disorder, he alleged that his superiors schemed to compel his resignation by forcing him to participate in multiple psychological evaluations about his non-conforming behavior. The Sixth Circuit held that Smith's claims were actionable pursuant to Title VII, stating:

> Discrimination against a plaintiff who is a transsexual -- and therefore fails to act and/or identify with his or her gender -- is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman.

Id. at 575.

iv. Holloway v. Arthur Anderson Co., 566 F.2d 659 (6th Cir. 1977).[4] (1st)

Holloway began treatments for a sex reassignment surgery. Upon changing her name, she was terminated from her job. The Court held that: (1) Title VII does not protect an employee who initiates the process of sex transformation; (2) under the Fourteenth Amendment, transsexuals are not a "suspect class"; and (3) firing an employee for sex change procedures does not violate the doctrines of due process and equal protection. *Holloway,* 566 F.2d at 661-663. The Court adopted the "plain meaning" interpretation of the term "sex" and believed that the traditional notions of "male" and "female" were the intended meaning of Congress. *Id.* The Court also noted that although several bills were introduced, Congress failed to amend the Civil Right Act to prohibit discrimination based on sexual preference, an indication that Congress acknowledged transsexuals were not protected. *Id.* at 662.

b. District Courts

i. *Doe v. United Consumer Fin. Servs.,* 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001). (2nd)

[4] Overruling recognized by *Schwenk v. Hartford,* 204 F.3d 1187, 1201-1202 (9th Cir.2000) ("The initial judicial approach taken in cases such as ***Holloway*** has been overruled by the logic and language of *Price Waterhouse.* In *Price Waterhouse,* which was decided after ***Holloway*** and *Ulane,* the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman"-that is, to conform to socially-constructed gender expectations.").

Doe was born a male but later underwent hormone therapy and sex surgery. She also changed her traditionally male name to a traditionally female name and began to live as a person of the female gender. She later acquired a job, where, after a series of incidents, she was interrogated in her employer's office about her sex. She was subsequently fired and brought a sex discrimination claim under Title VII. The defendant moved to dismiss the case but the Court denied the motion regarding the Title VII claim.

The court held that even if the holding in *Ulane, supra,* was good law, Doe could still state a claim under *Price Waterhouse* if she could show that she was discriminated against because she engaged in non-stereotypical behaviors. The court thus upheld her Title VII claims, stating, "[S]ince Doe may have been fired, at least in part, because her appearance and behavior did not fit into her company's sex stereotypes, rather than solely because of her transgendered status, dismissal of Doe's Title VII claims [was] not warranted." I*d.* at *5.

X. Seventh Circuit

a. Court of Appeals

i. *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081 (7th Cir. 1984). (1st)

Ulane worked as an airline pilot. After reassignment surgery and returning to work as a woman, she was fired. Ulane alleged that her dismissal was due to sex discrimination under Title VII. The District Court held in favor of Ulane, but the Circuit Court overruled the decision and held that Title VII does not protect transsexuals. The three drivers of the decision were the plain meaning of the statute, congressional intent, and the legislature's failure to amend Title VII.

The court adopted the "plain meaning" approach when analyzing the statute, and interpreted it to prohibit unlawful discrimination "against women because they are women and men because they are men," leaving out individuals with sexual identity disorder. *Id.* at 1084. Focusing on the congressional intent, the Court reasoned that "Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation." *Id. at*1085. It pointed out that Congress had attempted to amend Title VII to include homosexuals, but failed every time, indicating that the term "sex" should be given a traditional interpretation and exclude transsexuals. *Id.*

ii. *Creed v. Family Express Corp.*, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007). (2nd)

Creed was born a biological male. She began working as a sales associate, exhibiting a masculine demeanor and appearance. Over time, she began to present herself as more feminine by putting on make-up, nail polish and styling her hair in more feminine styles. She was eventually told by her supervisor to present herself in a more masculine way. She failed to comply and was subsequently terminated from her position, which led her to sue under Title VII. She claimed that she was discharged because she was a transsexual and did not conform to particular stereotypes. The court granted

defendant's motion to dismiss the claim of discrimination based on her gender identity, but declined to dismiss the claim based on sex stereotyping.

Trying to reconcile the decisions in *Ulane* and *Price Waterhouse,* the court stated that *Ulane* simply held that discrimination against transsexuals based on the mere fact they were transsexuals did not violate Title VII. *Id.* at *2-4. *Price Waterhouse*, on the other hand, upheld a discrimination claim based on the failure to act according to sex stereotypes. *Id.* The court noted that *Price Waterhouse* does not protect an individual based solely on transgender status but it was "the disparate treatment of men and women by sex stereotype that violated Title VII." *Id. at* *3. The court concluded that Creed presented a plausible claim because a jury could reasonably infer that the employer perceived her to be insufficiently masculine. *Id.* at *4.

XI. Eighth Circuit

a. Court of Appeals

i. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982). (1st)

Sommers presented herself as female, but was anatomically male. Upon discovering this, her employer dismissed her for misrepresenting herself as a female during the application process, and Sommers filed a sex discrimination claim under Title VII. The Court of Appeals rejected her claim of sex discrimination, holding that Title VII does not encompass discrimination against transgender individuals.

The court reasoned that the "plain meaning" of "sex" should be used unless there was "clear congressional intent to do otherwise." *Id.* at 750. Although medical professionals may disagree on what the strict definition of "sex" is, the court concluded that sex is defined anatomically, for the purposes of Title VII. *Id.* at 749. Additionally, the court noted that "proposals to amend the Civil Rights Act to prohibit discrimination on the basis of 'sexual preference'" were never successful: three bills were introduced in the 94th Congress and seven in the 95th Congress , none of them successfully. *Id.* at 750.

b. District Courts

i. *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000). (2nd)

Broadus was a biological female transitioning to male. He resigned from his position, alleging that his employer harassed him because he did not conform to a stereotype of how a woman should look. He filed a Title VII suit, and submitted evidene of instances in which his employer gave him disapproving looks and avoided eye contact with him. *Id.* at *5.The court ultimately dismissed the case due to a lack of evidence, but pointed out that "[s]exual stereotyping which plays a role in an employment decision is actionable under Title VII." *Id. at* 4.

XII. Ninth Circuit

a. Court of Appeals

i. *Kastl v. Maricopa County College*, 325 Fed.Appx. 492 (9th Cir. 2009). (2nd)

Kastl was a transsexual who was banned from using the women's restroom until she could prove completion of sex reassignment surgery. Her contract was subsequently not renewed and she brought a Title VII claim for sex discrimination. The court held that it is unlawful to discriminate against transgender employees because they do not conform to an employer's expectations of sex stereotypes, but it dismissed the claim because it concluded that the employer's proffered reason for excluding her from the women's restroom (safety concerns) was a nondiscriminatory justification for its actions. *Id.* at **1.

ii. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). (2nd)(3rd)

Schwenk was a pre-operative male-to-female transsexual and was incarcerated in an all-male penitentiary. She exhibited several stereotypical female traits and one prison guard presented several unwelcome sexual advances which culminated in an attempted rape. Schwenk brought charges under the Gender Motivated Violence Act (GMVA) against the prison guard, Hartford. The defendant moved for summary judgment which the District Court denied. He appealed the dismissal and the court reversed the decision on the grounds that the guard was entitled to qualified immunity from the GMVA claim because the law had not been established at the time of the alleged assault. However, the Court of Appeals held that GMVA applied equally to both men and women, and that its protection extends to transsexuals.

GMVA was enacted as part of the Violence Against Women Act and provided civil rights causes of action for victims of gender motivated violence – that is, violence which is committed because of or on the basis of gender. One of the issues presented to the court was whether the GMVA includes men and transsexuals. The court reasoned that GMVA was entirely gender neutral and that the legislative history made it clear that Congress intended to include men in the statute's protection. *Id.* at 1200.Regarding transsexuals, the court discussed both *Price Waterhouse* and *Ulane*. It concluded that *Ulane* is no longer good law and that "the initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*." *Id. at*1201. The court drew a parallel between the protections of GMVA and Title VII, noting that "sex" under Title VII means both sex and gender and the two have become interchangeable for purposes of the two acts. *Id.* at 1202. Citing evidence offered by Schwenk, the Court suggested that it was feasible that the defendant's action was motivated by Schwenk's gender. *Id.* at 1205.

iii. *Voyles v. Ralph Davies Med. Ctr*, 403 F. Supp. 456 (N.D. Cal. 1975), aff'd 570 F.2d 354 (9th Cir. 1978). (1st)

Voyles was discharged from her employment as a technician because she told her employer she intended to undergo sex conversion surgery. The court held that employment discrimination based on transsexuality does not violate Title VII. *Id.* at 457. It reasoned that the sole purpose of Title VII was to prevent discrimination by the opposite

sex, meaning between males and females. *Id.* It said the legislative history does not mention transsexuals anywhere and thus does not afford them any protection. *Id.* The court also reasoned that Members of the House of Representatives have acknowledged the lack of protection for transsexuals by attempting to amend Title VII to include them. *Id.*

b. District Courts – None

XIII. Tenth Circuit

a. Court of Appeals

i. *Etsitty v. Utah Transit. Auth.*, 502 F.3d 1215 (10th Cir. 2007) (1st)

Etsitty was a male-to-female transsexual who worked for the Utah Transit Authority. She filed a Title VII sex discrimination claim after her supervisor fired her due to concerns about her using female restrooms. The court ruled against Etsitty, holding that discrimination based on a person's gender-identity status was not discrimination under Title VII. It cited *Ulane* and its "plain meaning" approach, as well as the legislative intent behind Title VII. *Id.* at 1221-1222. In response to Etsitty's reliance on *Price Waterhouse*, the court decided not to rule on whether this case fell under the 2nd generation line of reasoning (sex stereotyping) because there was insufficient evidence to show that the employer's concern over Etsitty's restroom usage was a pretext for discrimination. *Id.* at 1224.

b. District Courts – None

XIV. Eleventh Circuit

a. Court of Appeals

i. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (2nd)(3rd)

Glenn was born a biological male and was diagnosed with GID. She was in the transition period when she told her employer that she would start coming to work as a woman. She was subsequently terminated and brought a §1983 action under the 14th amendment. The District Court granted summary judgment in favor of Glenn on the sex discrimination claim, and the Court of Appeals affirmed.

The Court reasoned that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's being described as being on the basis of sex or gender." *Id. at*1317. Thus, discriminating against someone on the basis of gender-nonconformity constitutes sex-based discrimination under Title VII and the 14th amendment's Equal Protection Clause. *Id.* In reaching this conclusion, the Court analyzed decisions demonstrating that "sex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms." *Id*.

XV. EEOC

a. *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012) (3rd)

Complainant applied for a job with the Bureau of Alcohol, Tobacco and Firearms, hoping to relocate to California. Presenting as a male, she interviewed over the phone and was told she would be able to have the position assuming there were no problems with the background check. A few months into the background check, she told her potential employers that she was in the process of transitioning from male to female. Five days later, she received an email stating that, due to budget cuts, the position was no longer available. She later found out someone else had been hired.

Initially, Macy brought two separate claims, one based on the third-generation gender-identity-as-sex-discrimination theory and the other on sexual-stereotyping discrimination. The agency accepted her sex-stereotyping claim but rejected her direct sex-discrimination claim as not cognizable under Title VII. Macy dropped her sex-stereotyping claim so that she could appeal the denial of the sex-discrimination claim to the Commission.

The Commission rejected the agency's denial of Macy's sex-discrimination claim, reasoning that each of the formulations of complainant's claims were simply different ways of stating the same claim of discrimination "based on… sex." *Id.* at 5. The Commission held that the phrase "because of… sex" encompassed more than biological sex discrimination: gender encompasses not only biological sex, but also the "cultural and social aspects associated with masculinity and femininity." *Id.* at 6.

b. Previous Positions of the EEOC and Other Federal Agencies

Prior to *Macy*, the EEOC had at best inconsistent positions on the question whether gender-identity discrimination is a form of unlawful sex discrimination under Title VII. As mentioned above, the court in *Powell v. Read's, supra,* suggested that the EEOC at the time of that decision (1977) held "that discrimination against transsexuals is not protected by existing law." According to Jennifer Pizer, legal director of the UCLA School of Law's Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy, "it was common for transgender workers to have their complaints rejected by EEOC regional offices and state civil rights agencies due to confusion about the state of the law." Fox News, *Federal Agency Says Transgender People Protected*, (April 25, 2012), http://www.foxnews.com/us/2012/04/25/federal-agency-says-transgender-people-protected/#ixzz23TxGke5O).

On the other hand, more recent pre-*Macy* policy statements by the federal Office of Personnel Management (OPM), Department of Justice, EEOC, and Department of Labor explicitly consider "sex" to include gender identity.[5] While these were all internal policy

[5] *See* U.S. Office of Personnel Management, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, http://www.opm.gov/diversity/Transgender/Guidance.asp (last visited November 16, 2012); EEOC, *Memorandum from EEOC Chair Jacqueline Berrien*,

statements, issued with regard to unlawful discrimination against federal employees, the law and legal principles governing discrimination in this context is the same as those governing discrimination by any employer, public or private.

XVI. Conclusion

There are now four Circuits with recent authority holding that gender-identity discrimination can be unlawful sex-stereotyping discrimination: the First (*Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); Sixth (*Myers v. Vuyahoga County,* 182 Fed. Appx. 510 (6th Cir. 2006)). ; Ninth (*Kastl v. Maricopa County College*, 325 Fed.Appx. 492 (9th Cir. 2009)); and Eleventh (*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)). The recent holdings in the Sixth and Ninth Circuits supplanted earlier 1st generation cases holding that gender-identity discrimination is not unlawful sex discrimination.

On the other hand, three Circuits – the Seventh, Eighth, and Tenth – have held that gender-identity discrimination is *not* unlawful sex discrimination. The Seventh and Eighth Circuit authorities pre-date *Price Waterhouse*, having been decided in 1984 and 1982, respectively, and thus do not squarely present a conflict with the later rulings that apply *Price Waterhouse* to gender-identity discrimination. Indeed, in both these circuits, more recent district-court opinions (*Creed v. Family Express Corp.*, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007), and *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000)) suggest that the older, 1st generation precedent may no longer be good law in light of the subsequent development of sex-stereotyping theory. In contrast, the Tenth Circuit decision, *Etsitty v. Utah Transit. Auth.,* 502 F.3d 1215 (10th Cir. 2007), is relatively recent.

Thus, there is a direct split in the circuits between the First, Sixth, Ninth, and Eleventh Circuits on the one hand, and the Tenth Circuit, on the other.

In five Circuits, there are district-court but no appellate-level decisions on this point. Of these, the weight of district-court authority in four (D.C.,[6] Second, Third[7], and Fifth) is that gender-identity discrimination can be, and in one (the Fourth), that gender-identity discrimination is not unlawful sex discrimination. The case in the Fourth Circuit,[8] however, relies on pre-*Macy* EEOC precedent, suggesting a different result if it were revisited today.

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http://www.eeoc.gov/eeoc/internal/eeo_policy_statement.cfm (last visited November 16, 2012); U.S. Department of Labor, *Policy on Equal Employment Opportunity*, http://www.dol.gov/oasam/programs/crc/crc-internal/eeo.htm (last visited on November 16, 2012).

[6] In the D.C. Circuit, there are two district-court cases, one holding that gender-identity discrimination can be, and one that it cannot be, a form of sex discrimination. But the former is much more recent than the latter.

[7] In the Third Circuit, there are two district-court cases, one holding that gender-identity discrimination can be, and one that it cannot be, a form of sex discrimination. But the former is much more recent than the latter.

[8] *Powell, 436 F. Supp. at 369.*

Summary Chart
Weight of Court Authority
(With Date of Most Recent Authority Shown)

Circuit	Gender ID = Sex Court of Appeals	Gender ID = Sex District Court(s)	Gender ID ≠ Sex Court of Appeals	Gender ID ≠ Sex District Court(s)
1st	√ (2000)			
2nd		√ (2003)		
3rd		√ (2006)		
4th				√ (1977)**
5th		√ (2008)		
6th	√ (2006)			
7th			√ (1984)*	
8th			√ (1982)*	
9th	√ (2009)			
10th			√ (2007)	
11th	√ (2011)			
D.C.		√ (2008)		
Agency				
EEOC	√ (2012)			

*Subsequent district-court case law suggests sex-stereotyping theory might now be available.
**Subsequent EEOC authority suggests a different result today.