



2009

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Courtney J. Jefferson
University of Baltimore School of Law

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Recommended Citation

Jefferson, Courtney J. (2009) "Comments: Gender Confusion: The Need for Effective Legislation to Protect against Gender Identity Discrimination," *University of Baltimore Law Review*: Vol. 39: Iss. 1, Article 5.
Available at: <http://scholarworks.law.ubalt.edu/ubl/vol39/iss1/5>

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GENDER CONFUSION: THE NEED FOR EFFECTIVE LEGISLATION TO PROTECT AGAINST GENDER IDENTITY DISCRIMINATION.

I. INTRODUCTION

Imagine interviewing for a job for which you are fully qualified.¹ The process goes well, and you receive the highest interview score amongst all of the applicants.² Ultimately, the employer offers you the job because you are “significantly better than the other candidates,”³ and you accept it.⁴ At this point, you choose to disclose private information about yourself to your future employer, including details about medical procedures that you are currently undergoing and will undergo in the future.⁴ The procedures do not affect your ability to perform the functions of your job.⁵ Nevertheless, because of this conversation and the information you choose to disclose, the employer rescinds the offer of employment.⁶ It may seem far-fetched that an employer can or will rescind a job offer based solely upon one’s private life or medical treatments. However, under both Maryland⁷ and federal⁸ law, transgendered individuals may be subjected to such employment action if they disclose their transgendered status to a current or potential employer.⁹

The situation described above is precisely what Diane Schroer¹⁰ experienced after interviewing for a position with the Library of Congress.¹¹ Charlotte Preece, who initially offered Schroer the job, recanted the offer after a lunch meeting where Schroer disclosed her

1. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).
2. See *id.* at 296.
3. See *id.*
4. See *id.* at 296–97.
5. See *id.* at 302.
6. See *id.* at 299.
7. See *infra* Part VI.A.
8. See *infra* Part III.C.
9. See, e.g., *Schroer*, 577 F. Supp. 2d at 299.
10. Ms. Schroer was born a genetic male named David Schroer. *Id.* at 295. At the time of the incident she had not yet transitioned from male to female. *Id.* However, she filed suit in the United States District Court for the District of Columbia as “Diane J. Schroer.” *Id.* at 293. As such, she will be referred to using the feminine pronoun. For purposes of this Comment, all transgendered individuals will be referred to by their preferred gender identity, regardless of their biological sex at birth.
11. See *id.* at 295.

status as transgendered.¹² By Preece's own admission, it was Schroer's decision to transition from male to female that raised concerns about hiring her.¹³ Although the District Court ultimately ruled in Schroer's favor under Title VII of the Civil Rights Act of 1964,¹⁴ it is unclear whether the statute actually required the court to find unlawful discrimination on the part of the Library of Congress.¹⁵ Furthermore, the statute does not explicitly prohibit discrimination against transgendered individuals.¹⁶

Diane Schroer is not the only person to experience employment discrimination due to gender identity.¹⁷ Federal appellate courts encountered claims of gender identity discrimination as early as 1977.¹⁸ Initially, there was little question as to whether Title VII¹⁹ protected individuals against gender identity discrimination — it did not.²⁰ In 1989, however, the Supreme Court interpreted Title VII in a way that made some courts re-evaluate their position on gender identity discrimination under the statute.²¹ In *Price Waterhouse v. Hopkins*,²² the Supreme Court determined for the first time that Title VII's prohibition against discrimination on the basis of sex also prevented employers from engaging in sex stereotyping.²³ This interpretation resulted in new litigation that forced the federal circuits to reconsider the issue of whether Title VII provides protection against gender identity discrimination in employment.²⁴

This Comment will evaluate the current status of gender identity discrimination in employment. It will first discuss the various

12. *Id.* at 296.

13. *Id.* at 297.

14. *Id.* at 308. The court relied upon the Sixth Circuit's holding that discrimination on the basis of an individual's transgendered status constitutes sex stereotyping and is prohibited under the rationale of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Schroer*, 577 F. Supp. 2d at 303. It further found that the Library's decision to rescind Schroer's job offer "was *literally* discrimination 'because of . . . sex.'" *Id.* at 308.

15. See 42 U.S.C. § 2000e (2006); see also *infra* Part III.

16. See 42 U.S.C. § 2000e.

17. See *infra* Part III.

18. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

19. 42 U.S.C. § 2000e-2.

20. See *id.* The Ninth Circuit held that Title VII does not prohibit employers from terminating employees due to their decision to undergo gender reassignment. *Holloway*, 566 F.2d at 664.

21. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

22. *Id.*

23. *Id.* at 250. See also *infra* Part III.B (discussing the scope of Title VII in the Court's decision).

24. See *infra* Part III.C.

meanings of gender identity,²⁵ as well as how federal²⁶ and state legislation²⁷ has responded to claims of gender identity discrimination. It will then focus on how the State of Maryland has addressed this issue by evaluating legislation proposed in the Maryland General Assembly, as well as ordinances enacted in cities and counties in the state.²⁸

In defining gender identity discrimination, Part II of this Comment will first examine the word “transgender” as a social and medical concept.²⁹ A common misconception is that only those who have undergone medical treatment to change their physical sex are transgendered.³⁰ The term actually encompasses a far more diverse group.³¹ This Comment will further explain the ways in which employers engage in either overt or subtle gender identity discrimination.³² Some employers engage in adverse action against transgendered individuals in an open manner, acknowledging that their decisions are motivated by an employee or potential employee’s gender identity.³³ More often, however, employers give neutral explanations for their discriminatory actions.³⁴

After explaining basic concepts related to gender identity, this Comment will evaluate the legal response to gender identity discrimination at the federal level.³⁵ Part III will examine the federal protection that is, debatably, currently provided against gender identity discrimination. Specifically, Title VII’s prohibition against sex discrimination will be evaluated in light of the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*,³⁶ which held that sex discrimination exists where an employer engages in sex stereotyping.³⁷ At present, the federal circuits are split in their determination as to whether Title VII similarly prohibits discrimination against transgendered individuals.³⁸ This Comment

25. See *infra* Part II.A.

26. See *infra* Part III.

27. See *infra* Part V.

28. See *infra* Part VI.

29. See *infra* Part II.A.

30. See *Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417, at *4 (E.D. La. Sept. 16, 2002).

31. *Id.*

32. See *infra* Part II.B.

33. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 298 (D.D.C. 2008).

34. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1083–84 (7th Cir. 2000).

35. See *infra* Part III.

36. 490 U.S. 228 (1989).

37. *Id.* at 250.

38. See *infra* Part III.C.

will examine this divide in order to evaluate the strength of Title VII based gender identity protection in the circuits that have addressed the issue.³⁹

The Supreme Court has not provided explicit guidance as to whether Title VII prohibits gender identity discrimination.⁴⁰ Congress, however, has attempted to clarify the issue through new legislation.⁴¹ Part IV of this Comment will discuss two efforts in the House of Representatives to pass an Employment Non-Discrimination Act (ENDA).⁴² The first act would have explicitly prohibited employment discrimination on the basis of an individual's "actual or perceived sexual orientation or gender identity."⁴³ The amended ENDA contained lesser protection than its predecessor.⁴⁴ If enacted, it would have prohibited employment discrimination on the basis of an individual's actual or perceived sexual orientation.⁴⁵ It would not, however, have granted explicit protection to transgendered individuals.⁴⁶ This Comment will discuss the current status of each proposed bill.⁴⁷ It will then evaluate the impact of each bill, as well as each proposed bill's potential implications for the transgendered community.⁴⁸

After discussing gender identity discrimination under federal law, this Comment will examine legal responses to the issue at the state and local level.⁴⁹ At present, thirteen states and the District of Columbia have statutes expressly prohibiting gender identity discrimination in employment.⁵⁰ In many areas without state-level

39. See *infra* Part III.C.

40. See Darrell R. VanDeusen, *VanDeusen on Gender Identity Discrimination: Gender Identity Issues Under Title VII*, LEXISNEXIS EXPERT COMMENTARIES, October 26, 2007, available at 2008 EMERGING ISSUES 793 (2007).

41. See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

42. See H.R. 2015; H.R. 3685; see also *infra* Part IV.

43. H.R. 2015 § 4(a)(1)–(2).

44. Compare H.R. 3685 (prohibiting employment discrimination on the basis of actual or perceived sexual orientation), with H.R. 2015 (prohibiting employment discrimination based on actual or perceived sexual orientation or gender identity).

45. H.R. 3685.

46. See H.R. 3685.

47. See *infra* Part IV.

48. See *infra* Part IV.

49. See *infra* Part V.

50. NAT'L GAY AND LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS (2008), http://www.the-taskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf. As of August of 2008, the states explicitly barring gender identity discrimination in

protection, city and county legislatures have assumed the task of granting necessary protection to transgendered persons.⁵¹ Part V of this Comment will evaluate state and local transgender discrimination prohibitions, analyzing their strength and effectiveness.⁵²

Finally, this Comment will focus on legislation in the State of Maryland.⁵³ Laws passed first in Baltimore City,⁵⁴ and more recently in Montgomery County,⁵⁵ both contain language barring employers from discriminating against employees and applicants on the basis of their gender identities.⁵⁶ Part VI will discuss recent attempts by the Maryland General Assembly to prohibit gender identity discrimination. To date, the Maryland legislature has not followed the example of other states and its own local jurisdictions;⁵⁷ no state-level legislation expressly protects individuals against gender identity discrimination.⁵⁸ Maryland must amend its current anti-discrimination laws to adequately protect the transgendered community.

II. DEFINITIONS

A. Gender Identity

Gender identity, simply stated, is an individual's "personal sense of being male or female."⁵⁹ Although it most often coincides with a person's biological sex, such is not always the case. A transgendered individual is one whose biological sex and psychological gender

employment include: California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

51. *Id.*

52. *See infra* Part V.

53. *See infra* Part VI.

54. *See* BALTIMORE CITY, MD., CODE art. 4 § 1-1(f) (2009).

55. MONTGOMERY COUNTY, MD., CODE ch. 27, § 27-19 (2009). On November 13, 2007, the Montgomery County Council unanimously enacted Bill 23-07. MONTGOMERY COUNTY BILL 23-07 (2007). This new legislation expanded upon previous statutes which included sexual orientation, but not gender identity, as a protected class. *Id.*

56. *See* BALTIMORE CITY, MD., CODE art. 4 § 1-1(f) (2009); Montgomery County Bill 23-07 (2007).

57. The Maryland Constitution allows jurisdictions within its borders to obtain charters, allowing them to enact local laws relating to matters designated in their charters. *See* MD. CONST. art. 11-A, § 3. Home rule jurisdictions can extend protection to individuals in the locality beyond that provided by the state. *Id.*

58. *See* MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis 2009).

59. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

identity do not match.⁶⁰ The term “transgender” is a broad one which encompasses historically familiar concepts such as transsexuality⁶¹ and transvestitism,⁶² as well as modern constructs such as transgenderism.⁶³

In addition to social ideas attached to the concept, gender identity is recognized and evaluated from a medical standpoint.⁶⁴ The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM) recognizes Gender Identity Disorder (GID) as a legitimate medical diagnosis.⁶⁵ It sets forth specific diagnostic criteria which must be met to substantiate such a diagnosis:

- A. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex). In children, the disturbance is manifested by four (or more) of the following:
 1. repeatedly stated desire to be, or insistence that he or she is, the other sex
 2. in boys, preference for cross-dressing or simulating female attire; in girls, insistence on wearing only stereotypical masculine clothing

60. See VanDeusen, *supra* note 40, at 2; see also Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS 3–4* (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

61. See VanDeusen, *supra* note 40, at 2. A transsexual is defined as being “a person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sex organs).” *MERRIAM-WEBSTER ONLINE DICTIONARY* (2009), <http://www.merriam-webster.com/dictionary/transsexual> (last visited Aug. 17, 2009).

62. See VanDeusen, *supra* note 40, at 2. A transvestite is an individual, often male, who “adopts the dress and often the behavior typical of the opposite sex especially for purposes of emotional or sexual gratification.” *MERRIAM-WEBSTER ONLINE DICTIONARY* (2009), <http://www.merriam-webster.com/dictionary/transvestite> (last visited Aug. 17, 2009).

63. See VanDeusen, *supra* note 40, at 2. Transgenderism occurs when a person lives full-time in the gender opposite his or her biological sex. See Jessica Xavier, *A Primer by Transgender Nation* (Feb. 25, 2007), available at <http://www.critpath.org/plaf-talk/tgprimer.htm>. Transgenderists differ from transsexuals in that transgenderists, although living as the opposite gender, often have no desire to undergo surgical gender reassignment. *Id.* Transgenderists also differ from transvestites, as transvestites generally dress or behave as the opposite gender for sexual or emotional gratification, and do not live full-time as that gender. *Id.*

64. See *Schroer*, 577 F. Supp. 2d at 306.

65. See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 576–82 (4th ed., text rev. 2000).

3. strong and persistent preferences for cross-sex roles in make-believe play or persistent fantasies of being the other sex
 4. intense desire to participate in the stereotypical games and pastimes of the other sex
 5. strong preference for playmates of the other sex
- B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
 - C. The disturbance is not concurrent with a physical intersex condition.
 - D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.⁶⁶

Although individuals may be diagnosed with GID, such a diagnosis is controversial and is not necessary for a person to be considered transgendered.⁶⁷ An individual within any of the categories discussed above may be considered transgendered,⁶⁸ and thus may be subjected to gender identity discrimination in employment.

B. Forms of Discrimination

In its broadest articulation, employment discrimination occurs when an employer takes adverse employment action against an applicant or employee.⁶⁹ This goes beyond circumstances where an employer fails to hire or terminates an individual—it also encompasses circumstances where the employer acts against the person’s interests as they relate to “compensation, terms, conditions, or privileges of employment”⁷⁰ It can include actions which range from passing over the individual for a promotion, to failing to

66. *Id.* at 581.

67. See VanDeusen, *supra* note 40, at 2; Ken Hausman, *Controversy Continues to Grow Over DSM’s GID Diagnosis*, 38 PSYCHIATRIC NEWS 14, July 18, 2003, at 25, available at <http://pn.psychiatryonline.org/cgi/content/full/psychnews;38/14/25>.

68. See VanDeusen, *supra* note 40, at 2. A transgendered individual is defined as “a person . . . who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.” MERRIAM-WEBSTER ONLINE DICTIONARY (2009), <http://www.merriam-webster.com/dictionary/transgender> (last visited Aug. 17, 2009).

69. See 42 U.S.C. § 2000e-2(a) (2000).

70. *Id.*

provide paid leave where others receive it, or to giving an employee unfavorable working hours.⁷¹

In recent years, the federal courts have encountered a variety of circumstances in which transgendered individuals allege gender identity discrimination.⁷² These include claims of sexual harassment,⁷³ retaliation,⁷⁴ termination,⁷⁵ and refusal to hire due to an applicant's transgendered status.⁷⁶ Each of these claims clearly falls within the definition of employment discrimination.

Of course, not all discrimination is actionable. If a plaintiff is to succeed in a claim of employment discrimination, the employer's actions must be prohibited under either state or federal law.⁷⁷ States vary in the protections they afford to individuals.⁷⁸ In the federal system, Title VII outlines the classes of people protected from employment discrimination.⁷⁹

III. CURRENT FEDERAL PROTECTIONS AGAINST GENDER IDENTITY DISCRIMINATION

A. *The Starting Point for Gender Identity Discrimination Claims Under Title VII*

When the idea of gender identity discrimination first reached the federal courts, there was little doubt as to whether transgendered individuals were protected under Title VII. The Ninth Circuit was the first appellate court to consider whether Title VII's prohibition against sex discrimination also prevented employers from discriminating based on gender identity.⁸⁰ The court responded to the theory with a resounding "no."⁸¹

Ramona Holloway appealed to the Ninth Circuit after the United States District Court for the Northern District of California dismissed

71. See *Smith v. City of Salem*, 378 F.3d 566, 575–76 (6th Cir. 2004).

72. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008); *Smith*, 378 F.3d at 567–68; *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 869 (9th Cir. 2001).

73. See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082 (7th Cir. 2000); *Nichols*, 256 F.3d at 869.

74. See *Spearman*, 231 F.3d at 1082; *Smith*, 378 F.3d at 569.

75. See *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *1 (S.D. Ind. June 17, 2003).

76. See *Schroer*, 577 F. Supp. 2d at 295.

77. See, e.g., 42 U.S.C. § 2000e-2(a) (2006).

78. See *infra* Part V.

79. See 42 U.S.C. § 2000e-2.

80. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977); see also *VanDeusen*, *supra* note 40, at 1–2.

81. See *Holloway*, 566 F.2d at 664.

her claim of gender identity discrimination for lack of subject matter jurisdiction.⁸² The District Court reasoned that gender identity is not a protected class under Title VII.⁸³

Although Holloway began working for Arthur Andersen in 1969, she did not initially disclose her transgendered status.⁸⁴ It was not until after she received a promotion in February of 1974 that she informed her supervisor that she was receiving treatment “in preparation for anatomical sex change surgery.”⁸⁵ Four months later, she received her annual performance review, during which a company official suggested that she might “be happier at a new job where her transsexualism would be unknown.”⁸⁶ After the review, Holloway received a pay raise.⁸⁷ Then, in November of that year, Holloway made a request that her records be altered to reflect her new name.⁸⁸ Arthur Andersen terminated her employment shortly thereafter.⁸⁹ Holloway alleged that she was fired for being a transsexual and that the company’s actions were unlawful under Title VII.⁹⁰

Because the District Court dismissed Holloway’s claim for lack of subject matter jurisdiction, the Ninth Circuit only addressed the issue of whether transsexuality was protected under Title VII.⁹¹ The court referred to the lack of legislative history relating to the use of the word “sex” in the statute and determined that Congress demonstrated no intent to give the term anything other than its traditional meaning.⁹² It refused to expand the definition to protect transsexuals.⁹³ Rather, it found that the prohibition against sex discrimination in employment existed to require employers to treat biological men and women equally.⁹⁴ Under this interpretation, Title VII does not protect transgendered persons.

82. *Id.* at 661.

83. *See id.* at 662–63.

84. *Id.* at 661.

85. *Id.* Holloway began female hormone treatments in 1970. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* “Ramona Holloway” was, in fact, her new name. *Id.* When Holloway began working for Arthur Andersen in 1969, her legal name was “Robert Holloway.” *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 662–63.

93. *Id.* at 663.

94. *Id.* Although the court also acknowledged that Title VII allows men and women to be treated disparately if there is a bona fide relationship between the employment qualifications and an individual’s sex (a “BFOQ”), the concept is irrelevant for

The Ninth Circuit was not alone in its interpretation of Title VII's protection as it pertained to gender identity.⁹⁵ The Eighth Circuit, reached the same conclusion in *Sommers v. Budget Marketing, Inc.*,⁹⁶ a 1982 case appealed from a grant of summary judgment.⁹⁷ Audra Sommers, a male to female transsexual, alleged she was discriminated against on the basis of sex in violation of Title VII.⁹⁸ Specifically, she claimed that her employer terminated her employment due to her status as "a female with the anatomical body of a male."⁹⁹ The court affirmed the grant of summary judgment, finding that Title VII did not extend protection to those who are discriminated against because of their transsexuality.¹⁰⁰ In so finding, the court employed reasoning virtually identical to that of the Ninth Circuit.¹⁰¹

The Seventh Circuit followed suit when presented with the issue.¹⁰² It overturned a decision in the Northern District of Illinois that allowed recovery under Title VII to a plaintiff who was discriminated against for being a transsexual.¹⁰³ The case concerned an airline pilot, hired by Eastern Airlines as a male, who was terminated after she returned to work as a female.¹⁰⁴ The court narrowly defined the word "sex," determining that absent Congressional action to indicate otherwise, Title VII protects only those who are discriminated against for being biologically male or biologically female.¹⁰⁵ Having been

purposes of this discussion. *Id.* Finding that gender identity discrimination is prohibited under Title VII would do no more than confer standing to those who claim they have been discriminated against for being transgendered. All established exceptions to Title VII, which occasionally permit discrimination to occur legally, would apply with equal force to transgendered persons.

95. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

96. 667 F.2d 748.

97. *Id.* at 750.

98. *Id.* at 749.

99. *Id.*

100. *Id.*

101. *Id.* at 750. It also focused primarily on the dearth of legislative history relating to the word "sex" used in Title VII, proceeding to acknowledge that the primary purpose of the late addition to the statute was to ensure women be treated equally to men in employment. *Id.* As such, absent an express congressional intent to grant protection to transsexuals, no protection existed under Title VII. *Id.*

102. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

103. *Id.* at 1082, 1084.

104. *Id.* at 1082-83. Karen Ulane was terminated despite the fact that she was able to retain her Federal Aviation Administration certification. *Id.* at 1083.

105. See *id.* at 1087.

discriminated against for being a transsexual, Karen Ulane was not protected by the statute.¹⁰⁶

The pattern in the federal circuits, after these three cases, was clear: transsexuals were not protected under Title VII.¹⁰⁷ The courts' interpretation further indicated that only an act of Congress could change this determination.¹⁰⁸

B. *The Turning Point of Price Waterhouse v. Hopkins*¹⁰⁹

Although the federal courts agreed that Title VII afforded no protection against gender identity discrimination, this basic assumption changed in 1989.¹¹⁰ At that time, the Supreme Court held that Title VII prohibits not only discrimination based on an individual's biological sex, but also discrimination based on a sex stereotype.¹¹¹ In essence, employers are not permitted to make an employment decision based on preconceived notions of how a man or a woman should behave.¹¹²

In its landmark decision of *Price Waterhouse v. Hopkins*,¹¹³ the Court considered the case of Ann Hopkins.¹¹⁴ Hopkins was considered for a partnership at Price Waterhouse, a national accounting firm.¹¹⁵ Rather than receiving a partnership, Hopkins was held over to be considered again the following year.¹¹⁶ This occurred despite numerous glowing compliments from partners in her office, praising her character and job performance.¹¹⁷

106. *Id.* The Seventh Circuit also focused primarily on congressional intent to resolve the issue presented in the case. *Id.* at 1085.

107. *See id.* at 1085; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

108. *See Ulane*, 742 F.2d at 1086 ("If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation."); *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662–63.

109. 490 U.S. 228 (1989)

110. *See id.* at 250; *see also* VanDeusen, *supra* note 40, at 3.

111. *Price Waterhouse*, 490 U.S. at 250.

112. *See id.*

113. 490 U.S. 228.

114. *Id.* at 231.

115. *Id.* at 231–32.

116. *Id.* at 231.

117. *Id.* at 234. Hopkins was recognized as having one of the best records in the preceding year "in terms of successfully securing major contracts for the partnership." *Id.* As an employee, she was described as an "outstanding professional" who had a "deft touch, . . . strong character, independence and integrity." *Id.* Her intellectual faculties were also generously praised. *See id.*

In addition to the positive remarks partners made about Hopkins, some concerns were also expressed.¹¹⁸ Namely, some of her superiors viewed her as sometimes being “overly aggressive, unduly harsh, difficult to work with and impatient with staff.”¹¹⁹ Each of these points would seem legitimate if not for additional comments that indicated that the partners were concerned about these attributes solely because she was a woman.¹²⁰ Partners elaborated in their remarks about Hopkins by describing her as “macho,” stating that she “overcompensated for being a woman,” and suggesting that she go to charm school.¹²¹ Perhaps most shocking of all, however, was the statement that if Hopkins wished to better her chances at achieving partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹²² The Court, in a plurality opinion¹²³ written by Justice Brennan, recognized this statement as the “*coup de grace*.”¹²⁴

The Supreme Court proceeded to interpret Title VII’s express terms, finding that an employer discriminates “because of” sex if “gender was a factor in the employment decision *at the moment it was made*.”¹²⁵ An individual need not prove that he or she was discriminated against directly due to his or her biological sex.¹²⁶ Rather, the Court found that the person need only prove that the employer relied upon “sex-based considerations” when making its decision.¹²⁷ The Court accepted the District Court’s determination that the partners’ comments constituted sex stereotyping.¹²⁸ More

118. *Id.* at 234–35.

119. *Id.* at 235.

120. *See id.*

121. *Id.* Additional comments were made in which some partners criticized her for using profane language and one partner admitted that the real objection was that it was “a lady using foul language.” *Id.* Further, one of Hopkins’ supporters was quoted as saying she “ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.” *Id.*

122. *Id.*

123. Although the opinion was a plurality, six of the nine Justices agreed that sex stereotyping does constitute discrimination “because of . . . sex” under Title VII. *See id.* at 250–51 (1989) (plurality opinion); *id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O’Connor, J., concurring).

124. *Id.* at 235 (plurality opinion).

125. *Id.* at 241.

126. *Id.*

127. *Id.* at 241–42.

128. *Id.* at 251.

importantly, the Court refused to allow employers to engage in sex stereotyping when making employment decisions:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’¹²⁹

The status of gender identity discrimination under Title VII, previously so clear,¹³⁰ has been questioned following the decision in *Price Waterhouse*.¹³¹ If sex stereotyping is prohibited under the statute, the question becomes whether, by discriminating against individuals due to their transgendered status, an employer is really subjecting them to a sex stereotype.¹³²

C. The Current Circuit Split

After the Supreme Court handed down the *Price Waterhouse* decision, the federal circuits began reexamining their approach to gender identity discrimination under Title VII.¹³³ At present, there is little consistency in the way transgendered individuals are treated in the federal courts.¹³⁴ The Supreme Court has yet to weigh in on the issue, and until it does, the question remains open whether Title VII makes it unlawful for employers to discriminate on the basis of gender identity.

1. Seventh Circuit

Despite the holding in *Price Waterhouse*, the Seventh Circuit maintains precedent holding that Title VII does not protect transgendered individuals.¹³⁵ The court has not directly reconsidered gender identity discrimination claims under the statute, but it has

129. *Id.*

130. *See supra* Part III.A.

131. VanDeusen, *supra* note 40, at 1.

132. The sex stereotype in question would be that biological males and females should live and present themselves as such full-time.

133. Shannon H. Tan, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 589–90 (2007).

134. VanDeusen, *supra* note 40, at 1.

135. *See Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

made clear that prior precedent disallowing transgender discrimination claims is still valid.¹³⁶ The court quoted with approval language from *Ulane v. Eastern Airlines, Inc.*¹³⁷ when faced with the question of whether a plaintiff can maintain a Title VII hostile work environment claim when he is harassed due to his sexual orientation.¹³⁸

Edison Spearman worked for Ford Motor Company when the activity giving rise to his suit took place.¹³⁹ His coworkers engaged in conduct ranging from calling him a “‘little bitch’”¹⁴⁰ to writing graffiti on a bulletin board reading “‘Aids kills faggots dead . . . RuPaul, RuSpearman.’”¹⁴¹ During the course of his employment, Spearman repeatedly filed complaints of harassment to his employer.¹⁴² After Spearman filed suit, the district court granted Ford’s motion for summary judgment, finding that Spearman did not show that he suffered adverse employment action.¹⁴³ The circuit court, in affirming the lower court’s decision, placed particular emphasis on the perception that Spearman’s coworkers were motivated to harass him because he was a homosexual rather than because he was a man.¹⁴⁴ The stereotypes he was subjected to were viewed as related directly to his sexual orientation rather than his biological sex.¹⁴⁵ The court viewed this as distinct from sex stereotyping and found that Title VII afforded Spearman no

136. *See id.* at 1084.

137. 742 F.2d 1081 (7th Cir. 1984).

138. *Spearman*, 231 F.3d at 1084.

139. *Id.* at 1082.

140. *Id.*

141. *Id.* at 1083. Spearman also complained of behavior from his foreman, Anthony Perez. *Id.* Spearman alleged that he felt uncomfortable when, on two occasions, Perez offered to give him a hug. *Id.* He was further bothered by a hypothetical Perez used during a department meeting about sexual harassment. *Id.* The hypothetical was as follows: “Say for instance, Greg and Ed are in the back bringing in a coil, and Ed touches Greg in a way that made him feel uncomfortable, that can be a charge of sexual harassment.” *Id.* Although Perez claimed the hypothetical referred to a different coworker, Spearman believed “Ed” was intended to be himself. *Id.*

142. *Id.* at 1082. Spearman filed his first complaint in December of 1995, after which he did not file another until May 16, 1997. *Id.* A total of five complaints were filed between that date and May 4, 1998, when Spearman returned to work following a period of medical leave to find his toolbox destroyed and his tools stolen. *Id.* at 1082–84. At this point, Spearman filed suit against Ford Motor Company, alleging that the company violated Title VII. *Id.* at 1084.

143. *Id.*

144. *Id.* at 1085–86.

145. *Id.* at 1086.

protection.¹⁴⁶ In so finding, it emphasized that Title VII “does not prohibit harassment in general or of one’s homosexuality in particular.”¹⁴⁷ In the Seventh Circuit, plaintiffs cannot maintain a Title VII action for discrimination without directly connecting the employer’s conduct to either their biological sex or a related stereotype.¹⁴⁸

Although *Spearman* focused on discrimination based on sexual orientation rather than gender identity, district courts within the Seventh Circuit regard it as effectively affirming the *Ulane* decision.¹⁴⁹ Because *Spearman* was decided in 2000, it is seen to demonstrate that *Price Waterhouse* does not alter the analysis of transgender claims under Title VII.¹⁵⁰

2. Ninth Circuit

Since the Supreme Court decided *Price Waterhouse*, the Ninth Circuit has not had occasion to address directly the question of whether transgendered individuals are also protected under the statute. However, the court has clearly indicated that it will now give a broader interpretation to the word “sex.”¹⁵¹ The court’s previous analysis in *Holloway v. Arthur Andersen & Co.*¹⁵² is no longer considered valid.¹⁵³ In *Schwenk v. Hartford*,¹⁵⁴ the Ninth Circuit

146. *See id.*

147. *Id.*

148. *See id.* (“Because *Spearman* was not harassed because of his sex, his hostile environment claim fails.”) (citing *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

149. *See Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003).

150. *See id.*; *see also Oiler v. Winn-Dixie La., Inc.*, No. Civ. A 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002) (citing *Spearman*, 231 F.3d at 1084–85) (distinguishing a claim based on a sex stereotype from one based on an individual’s gender identity; the former is protected under *Price Waterhouse* while the latter is not).

151. *See Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *cf. Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is on the basis of “gender” rather than “sex.”).

152. 566 F.2d 659.

153. *Schwenk*, 204 F.3d at 1201. The Ninth Circuit did not expressly overrule its prior holding in *Holloway* because a different question was before the court under a different statute, the Gender Motivated Violence Act (GMVA). *Id.* at 1194–95. However, the court analogized Title VII’s prohibition against sex discrimination to the GMVA, acknowledging that the term “sex” extends beyond pure biological sex. *Id.* at

analogized the meaning of “sex” under Title VII to the Gender Motivated Violence Act.¹⁵⁵ In doing so, it acknowledged that, after *Price Waterhouse*, the terms “sex” and “gender” are interchangeable for purposes of Title VII analysis.¹⁵⁶ When people endure disparate treatment due to their transgendered status, it can constitute sex discrimination.¹⁵⁷ If a man is discriminated against for appearing feminine, he is effectively subjected to the gender stereotype that only women, and not men, should be feminine.¹⁵⁸ The court did not hold that discrimination on the basis of gender identity is forbidden under Title VII.¹⁵⁹ By acknowledging a broad definition of “sex,” however, it provided future plaintiffs with the groundwork necessary for transgender discrimination claims to succeed in the Ninth Circuit.

One year after the Ninth Circuit acknowledged the broadened definition of “sex” under Title VII, it faced a case of sex stereotyping.¹⁶⁰ Antonio Sanchez claimed he was harassed for failing to meet coworkers’ views of how a man should behave.¹⁶¹ His coworkers and supervisor continually referred to him in the feminine and mocked him for being too effeminate.¹⁶²

Sanchez cited the holding of *Price Waterhouse*, contending that imposing a sex stereotype on a man is prohibited in the same way that imposing one on a woman is barred.¹⁶³ The court agreed with his interpretation.¹⁶⁴ The court further concluded that the harassment Sanchez’s coworkers and supervisor subjected him to was, in fact, closely related to sex.¹⁶⁵ He was perceived as being too feminine, and suffered constant ridicule as a result.¹⁶⁶ Because the harassment

1201 (“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.”).

154. 204 F.3d 1187.

155. *Id.*

156. *Schwenk*, 204 F.3d at 1202.

157. *See id.*

158. *See id.*

159. *See id.*

160. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 869 (9th Cir. 2001).

161. *Id.*

162. *Id.* at 870. Males who worked with Nichols ridiculed him for carrying himself “like a woman.” *Id.* They further harassed him by calling him a “faggot” and a “fucking female whore.” *Id.*

163. *Nichols*, 256 F.3d at 874.

164. *Id.* at 874–75.

165. *Id.* at 874.

166. *Id.* The court found it significant that Sanchez’s supervisor and coworkers chose feminine pronouns with which to taunt him. *Id.* Sanchez’s perceived femininity is further underlined by the fact that “the most vulgar name-calling directed at [him] was cast in female terms.” *Id.*

stemmed from a sex stereotype, that men should not be effeminate, it clearly violated Title VII's prohibition against sex discrimination.¹⁶⁷

To date, the Ninth Circuit has not officially recognized gender identity discrimination claims under Title VII. The court's recent line of precedent does, however, provide an expansive interpretation of the word "sex" in Title VII.¹⁶⁸ At a minimum, sex stereotyping claims fall firmly within those which can succeed.¹⁶⁹ It remains to be seen whether transgendered individuals will find themselves protected in the Ninth Circuit under a sex stereotyping theory.

A transgendered person may claim to be discriminated against for failure to conform to a preconceived sex or gender stereotype.¹⁷⁰ A biological male or female will often be expected to live as that sex; by choosing to live otherwise, the person fails to meet that stereotype.¹⁷¹ It would appear that, if a transgendered, biological male claims his employer viewed him as too feminine and discriminated as a result, the claim would be actionable under Title VII despite his transgendered status.¹⁷² The same would be true for a transgendered, biological female who is viewed as too masculine.¹⁷³ Until this theory is tested in court, however, protection against gender identity discrimination under Title VII cannot be assured in the Ninth Circuit.

3. Sixth Circuit

The Sixth Circuit first addressed the issue of gender identity discrimination under Title VII in 2004,¹⁷⁴ fifteen years after the Supreme Court acknowledged sex stereotyping as actionable under Title VII.¹⁷⁵ When it considered the issue of whether transgendered individuals are protected under the prohibition against sex discrimination, it became the first federal appellate court to explicitly hold that Title VII does extend such protection.¹⁷⁶ It reversed a decision by the District Court for the Northern District of Ohio which had dismissed Jimmie Smith's complaint.¹⁷⁷

167. *Id.* at 875 ("Under *Price Waterhouse*, Sanchez must prevail.").

168. *See, e.g., id.* at 864; *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

169. *See Nichols*, 256 F.3d 864.

170. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

171. *See id.*

172. *See Nichols*, 256 F.3d at 874.

173. *See id.*

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

175. *See id.*; *Price Waterhouse*, 490 U.S. 228.

176. *Smith*, 378 F.3d 566; *Tan*, *supra* note 133, at 589.

177. *Smith*, 378 F.3d at 566.

Smith was employed by the Salem Fire Department for seven years without incident.¹⁷⁸ Although born a biological male, he was diagnosed with Gender Identity Disorder (GID).¹⁷⁹ Upon receiving the diagnosis, Smith decided to begin “expressing a more feminine appearance on a full time basis” not only in his private life, but also at work.¹⁸⁰ Shortly thereafter, Smith’s coworkers began asking him questions about and commenting on his physical appearance.¹⁸¹

Smith reacted to his coworkers’ inquiries and comments by speaking to his supervisor, Thomas Eastek, and disclosing his GID diagnosis.¹⁸² He informed Eastek that he was presenting himself in a more feminine way as part of his treatment and that he would likely eventually undergo surgical gender reassignment.¹⁸³ Smith made clear that his intent in disclosing the information was to preemptively respond to any questions Eastek had about his recent change in appearance, and to allow Eastek to respond to his coworkers’ comments.¹⁸⁴ He specifically requested, however, that the substance of the conversation not be disclosed to any of Eastek’s supervisors—particularly Walter Greenamyre.¹⁸⁵ Despite this request, Eastek soon informed Greenamyre about Smith’s GID diagnosis.¹⁸⁶ Shortly thereafter, Greenamyre attended multiple meetings intending to develop a plan to terminate Smith for his transsexuality.¹⁸⁷

Smith initiated legal proceedings against the City of Salem after he was informed of the plan to terminate him for being a transsexual.¹⁸⁸ He alleged that the Fire Department engaged in sex discrimination

178. *Id.* at 568.

179. *Id.*; see also discussion *supra* Part II.A.

180. *Smith*, 378 F.3d at 568. Smith’s decision was consistent with recognized protocol for treating Gender Identity Disorder (GID): *Id.*

181. *Id.* Smith’s coworkers did not believe his appearance and mannerisms were “masculine enough.” *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* Greenamyre met with both the City of Salem’s Executive Body and the City’s Law Director to discuss the issue. *Id.*

188. *Id.* at 569. Ultimately, the plan devised would require Smith to submit to three psychological evaluations with physicians chosen by the City, under the hope that he would refuse or choose to resign. *Id.* If he refused the evaluations, he would be terminated on grounds of insubordination. *Id.* Salem Safety Director Henry L. Willard informed Smith of these intentions, prompting Smith to take preemptive action against his ultimate termination. *Id.*

and retaliation in violation of Title VII.¹⁸⁹ The district court dismissed the action, but was overruled on appeal.¹⁹⁰

The Sixth Circuit focused on the analysis in *Price Waterhouse* when evaluating Smith's sex discrimination claim.¹⁹¹ Whereas the district court was dismissive of Smith's sex stereotyping theory,¹⁹² the appellate court considered it valid.¹⁹³ Smith claimed his coworkers and superiors reacted negatively to him because he was not masculine enough.¹⁹⁴ The court found it sufficient, for purposes of a Title VII sex stereotyping claim, that Smith alleged the motivating factor behind his employers' actions to be a preconceived stereotype of how a man should appear and behave, to which Smith did not conform.¹⁹⁵

In making its decision, the Sixth Circuit acknowledged and dismissed the series of federal cases permitting transgender discrimination under Title VII as being effectively overruled.¹⁹⁶ Although prior jurisprudence indicated that only discrimination based on biological sex was prohibited by the statute, *Price Waterhouse* definitively changed the interpretation of the word "sex."¹⁹⁷ The use of any sex stereotype in making employment decisions was found impermissible under Title VII.¹⁹⁸ Thus, people who are subjected to the stereotype because they are transgendered are no longer prevented from invoking statutory protection.¹⁹⁹

Less than one year after deciding *Smith v. City of Salem*,²⁰⁰ the Sixth Circuit reaffirmed its holding that transgendered persons are

189. *Id.*

190. *Id.* at 566. Initially, Smith proceeded against the City of Salem through the Equal Employment Opportunity Commission. *Id.* at 569. Greenamyre responded by suspending Smith for one twenty-four hour shift, allegedly because Smith violated either a City or fire department policy. *Id.* Ultimately, Smith filed his suit in federal district court. *Id.*

191. *Smith*, 378 F.3d at 571–72.

192. *See id.* at 571. The district court essentially found that Smith's true claim was not one of sex stereotyping, but that he was discriminated against for being transsexual. *See id.*

193. *Id.* at 575.

194. *Id.* at 572.

195. *Id.*

196. *Id.* at 572–73. *See also supra* Part III.A–B.

197. *See Smith*, 378 F.3d at 573–74. Following the Supreme Court's decision in 1989, gender-based discrimination is prohibited by Title VII. *Id.* As a result, an employer who subjects an applicant or employee to a sex-based stereotype in making an employment decision violates the statute. *See id.*

198. *Id.* at 574–75.

199. *See id.* at 575.

200. 378 F.3d 566.

protected under Title VII.²⁰¹ The court saw no need to re-analyze the issue, instead deferring to its previous holding.²⁰² Although the opinion in *Barnes v. City of Cincinnati*²⁰³ does not delve into the intricacies of transgender rights under the statute, it makes clear that in the Sixth Circuit, transsexuality does not bar a Title VII claim of sex discrimination.²⁰⁴ The Sixth Circuit is currently the only federal court in which there is a clear holding that allows claims of gender identity discrimination to proceed under a Title VII sex stereotyping theory.²⁰⁵

IV. CONGRESSIONAL RESPONSE TO GENDER IDENTITY DISCRIMINATION

From the split in the federal circuits it is clear that there is significant confusion regarding the interpretation of the federal government's primary employment discrimination statute.²⁰⁶ Without the Supreme Court's interpretation to provide clarity, it falls on Congress to determine transgender employment rights.²⁰⁷ In 2007, two potential comprehensive non-discrimination acts were proposed in the House of Representatives.²⁰⁸

A. *The Employment Non-Discrimination Act*

The 110th Congress first attempted to pass legislation protecting transgendered individuals from discrimination in the form of H.R. 2015.²⁰⁹ On March 24, 2007, Representative Barney Frank of Massachusetts proposed a comprehensive act²¹⁰ that would thereafter prohibit employment discrimination based on an individual's "actual

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

202. *Id.* at 737 ("Sex stereotyping based on a person's gender non-conforming behavior is 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 non-conformity.") (quoting *Smith*, 378 F.3d at 575)).

203. 401 F.3d 729.

204. *See id.* at 737 ("In *Smith*, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections" (citing *Smith*, 378 F.3d at 575)).

205. *See id.*; *Smith*, 378 F.3d at 570-75.

206. *See* 42 U.S.C. § 2000e-2.

207. *See* Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

208. *See* H.R. 2015; H.R. 3685.

209. *See* H.R. 2015.

210. H.R. REP. NO. 110-406, pt. 1, at 9 (2007).

or perceived sexual orientation or gender identity.”²¹¹ This bill never reached a vote in the House of Representatives.²¹²

On September 28, 2007, Representative Frank, with Representative Deborah Pryce, proposed a new version of the Employment Non-Discrimination Act (ENDA).²¹³ They chose to propose a new act after determining that a comprehensive bill would not gain enough votes to pass the House.²¹⁴ The new ENDA does not include “gender identity” as a protected class, but instead only bars discrimination on the basis of an individual’s “actual or perceived sexual orientation.”²¹⁵ The House of Representatives passed the legislation by a vote of 235 to 184 on November 7, 2007.²¹⁶ Although the bill was read in the Senate twice, it was not voted on by the Senate before the 110th Congress concluded.²¹⁷

B. Public Response to the Amended ENDA

1. Criticisms in the Lesbian, Gay, Bisexual, and Transgendered Community

The revised ENDA has been criticized for providing too narrow protections with too broad of a religious exemption.²¹⁸ Although some individuals view the act as a positive “historic milestone,”²¹⁹ much of the lesbian, gay, bisexual, and transgendered (LGBT) community opposes the amended ENDA because it does not include gender identity as a protected class.²²⁰ For example, the National

211. H.R. 2015.

212. See H.R. REP. NO. 110-406, pt. 1, at 49–52.

213. *Id.* at 9.

214. Christine Daniels, Op-Ed., *Civil rights for LGB . . . and T*, L.A. TIMES, Oct. 10, 2007, at A21, available at <http://www.latimes.com/news/print/edition/asection/la-oe-daniels10oct10,0,3386369.story>.

215. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

216. LIBRARY OF CONGRESS, FINAL VOTE RESULTS FOR ROLL CALL 1057 (Nov. 7, 2007), available at <http://clerk.house.gov/evs/2007/roll1057.xml>.

217. LIBRARY OF CONGRESS, H.R. 3685—SUMMARY OF ALL ACTIONS, available at <http://thomas.loc.gov/bss/search.html> (search “H.R. 3685”; then follow “All Congressional Actions”) (last visited Sept. 9, 2009).

218. See Kathleen Clark, *SALT Statement on Employment Non-Discrimination Act (HR 3685) and Call for Action*, SOC’Y OF AM. LAW TEACHERS, Oct. 17, 2007, available at http://www.saltlaw.org/~salt2007/files/uploads/10-17-07SALT_Statement_on_Employment_Non_0.pdf.

219. See Kathi Wolfe, Editorial, *Another Voice: House Passage of the Anti-Discrimination Bill Is a Historic Milestone*, DAILY PRESS (Newport News, Va.), Nov. 17, 2007, at A18.

220. See Clark, *supra* note 218.

Center for Lesbian Rights has viewed this attempt at incremental protection with scorn, stating, “[w]e are being asked what no community involved in a civil rights struggle should ever be asked to do: leave part of our community behind in order to secure an advance for some.”²²¹

It is not just activist organizations that are displeased with Representative Frank’s decision to exclude protection for transgendered individuals. Journalists²²² and private citizens²²³ alike have spoken out against the new bill. While most admit that minorities have historically gained civil rights in incremental steps,²²⁴ few accept Representative Frank’s decision to leave an entire group behind as a step forward in the quest for comprehensive civil rights.²²⁵ Rather, many consider Representative Frank’s actions a betrayal.²²⁶ The new bill does not promote all-inclusive civil rights, but instead sets transgendered individuals back in their quest to obtain equal treatment under federal law.

2. Concerns that the Employment Non-Discrimination Act is Over-Broad

Although much of the LGBT community finds the ENDA to be insufficient, it would be a fallacy to assume that all, or even most, of the bill’s criticism stems from its failure to protect against gender identity discrimination. Opponents of the bill have also criticized it as being too broad.²²⁷ They fear that granting federal protection against employment discrimination on the basis of sexual orientation will result in frivolous lawsuits.²²⁸ Republicans, such as Ron Paul, even believe the bill sweeps widely enough to effectively impose a quota on employers.²²⁹ This fear, however, is in direct conflict with

221. NAT’L CTR. FOR LESBIAN RIGHTS, THE EMPLOYMENT NON-DISCRIMINATION ACT, http://www.nclrights.org/site/DocServer/ENDA_Talking_Points_formatted_FINAL.pdf (last visited Sept. 2, 2009).

222. See Daniels, *supra* note 214.

223. See Matt Forman, Letter to the Editor, *Falling Short on Equal Rights*, N.Y. TIMES, Nov. 16, 2007, <http://www.nytimes.com/2007/11/16/opinion/lweb16gay.html>.

224. See *id.*

225. See *id.*

226. See *id.* Journalist Christine Daniels describes Representative Frank’s actions as having “low-bridg[ed]” the transgender community. Daniels, *supra* note 214 (explaining that “low bridg[ing]” is “the act of suddenly taking out a player’s legs . . . a cheap and devious move . . .”).

227. See Editorial, *Test of Tolerance*, L.A. TIMES, Nov. 15, 2007, at A24.

228. See Wolfe, *supra* note 219.

229. See Tara Bozick, *Anti-Discrimination Bill Against Gays Making Its Way Through Congress*, VICTORIA ADVOCATE (Victoria, Tex.), Dec. 6, 2007, at A4 (“Paul, a

the bill's express provision in subsection (f), entitled "No Preferential Treatment or Quotas," which provides:

Nothing in this Act shall be construed or interpreted to require or permit—

(1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such actual or perceived sexual orientation in any community, State, section, or other area, or in the available work force in any community, State, section, or other area; or

(2) the adoption or implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation.²³⁰

C. *Legal Repercussions of the Amended Act*

1. The Possibility of Transgendered Protection

Despite the public criticism of the ENDA being too narrow in its protections, it is possible that a bill which prohibits discrimination on the basis of "perceived sexual orientation" might provide protection to transgendered individuals.²³¹ However, it would aid transgendered persons only when an employer believes that the applicant or employee is not heterosexual.²³² Even then, it is unclear to what extent protection would be granted.²³³ The term "perceived" is not

Republican, believes . . . employers would hire [homosexual or bisexual] people to avoid being charged with discrimination.").

230. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 4(f) (2007).

231. *Id.* at § 4(a).

232. See Amy M. Scott, *Expanding Employer Liability: Mental Health Parity and Sexual Orientation Protections*, EMP. BENEFIT PLAN REV., Dec. 2007, at 29.

233. See *id.*

defined in House Bill 3685.²³⁴ Without a definition to explain what it means to discriminate based on an individual's "perceived sexual orientation," it is likely that the courts would have difficulty determining who Congress intended to protect.²³⁵

2. Potential Judicial Exclusion of Gender Identity as a Protected Class

While some possibility of transgender protection under House Bill 3685 or a similarly phrased bill exists, it is more likely that the passage of an act protecting only sexual orientation will wreak havoc on protections which transgendered persons currently receive in some circuits.²³⁶ To date, the federal appellate courts have been called on only to determine whether Title VII's prohibition against discrimination on the basis of sex also extends protection to transgendered individuals.²³⁷ The circuits which allow claims of gender identity discrimination to proceed, do so by finding that an employer imposed a sex stereotype on a given applicant or employee.²³⁸ The courts have not, however, had to contend with a situation in which Congress has considered, and effectively rejected, a bill barring employers from discriminating based on gender identity. Should a bill similar to H.R. 3685 be enacted, this is precisely the situation the courts will face next.

The maxim of statutory interpretation *expressio unius est exclusio alterius* stands for the proposition that when Congress explicitly mentions one possibility in a statute, it is presumed to have excluded all others.²³⁹ This maxim is somewhat limited, as it "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."²⁴⁰ In the case of employment discrimination protection, it is clear that the enumerated protected classes are members of such an "associated group or series."²⁴¹ Should Congress amend Title VII to include sexual orientation, but not gender identity, as a protected class, the maxim

234. See H.R. 3685; Scott, *supra* note 232, at 29.

235. See Scott, *supra* note 232, at 29.

236. See *supra* Part III.C.

237. See *supra* Part III.C.

238. See *supra* Part III.C.3.

239. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

240. *Id.* (quoting *Vonn*, 535 U.S. at 65).

241. *Id.*; see 42 U.S.C. §§ 2000e-2 to -3 (2006).

would apply.²⁴² The history of H.R. 2015 would provide explicit proof that Congress has both considered and rejected the possibility of banning employment discrimination on the basis of gender identity.²⁴³

What is unclear is whether the Supreme Court would extend the maxim where there are multiple statutes legislating on the same matter. The proposed ENDAs would not have amended Title VII, but would have expanded employment discrimination protection by way of an entirely separate statute.²⁴⁴ However, Representative Frank's deliberate exclusion of gender identity as a protected class when proposing H.R. 3685²⁴⁵ may prompt the Supreme Court to conclude that gender identity is not protected either under Title VII, should the issue reach the Court, or under any future act banning sexual orientation discrimination. Such a judicial presumption would devastate transgender rights currently acknowledged in some circuits.²⁴⁶

V. THE STATE RESPONSE TO GENDER IDENTITY DISCRIMINATION

Although Congress has yet to include gender identity as a protected class under Title VII or a separate statute,²⁴⁷ some states have recognized and assumed the duty to grant protection.²⁴⁸ At present, thirteen states and Washington, D.C., protect individuals against discrimination based on their gender expression.²⁴⁹ Amongst the most recent states to grant protection to transgendered individuals are Iowa,²⁵⁰ New Jersey,²⁵¹ and Colorado.²⁵² In 2007, all three of these

242. See *Barnhart*, 537 U.S. at 168 (citing *Vonn*, 535 U.S. at 65).

243. Daniels, *supra* note 214, at A21. Representative Frank did not merely propose alternative legislation after he initially sponsored H.R. 2015. *Id.* Rather, he took note that preliminary polls showed that the bill would not pass if it came to a vote in the House of Representatives in its original form, and subsequently proposed legislation that deliberately excluded "gender identity" from its protection. *Id.*

244. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

245. Daniels, *supra* note 214, at A21.

246. See *supra* Part III.C.

247. See *supra* Part IV.A.

248. Michelle Garcia, *ENDA, State by State*, THE ADVOCATE (Los Angeles, Cal.), Nov. 20, 2007, available at http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=171535165.

249. *Id.*

250. See IOWA CODE ANN. § 216.6(1)(a)-(c) (West Supp. 2009).

251. See N.J. STAT. ANN. § 10:5-12(a)-(c) (West Supp. 2009).

252. See COLO. REV. STAT. ANN. §§ 24-34-401(7.5), -402(1)(a)-(c) (West 2008 & West Supp. 2008).

states enacted new legislation explicitly prohibiting gender identity discrimination.²⁵³

Beginning July 1, 2007,²⁵⁴ Iowa's Civil Rights Act provided comprehensive protection against discrimination.²⁵⁵ Whereas previously the Act closely resembled Title VII, it now includes both sexual orientation and gender identity as protected classes.²⁵⁶ Further, the Act gives expansive definitions to each of these newly acknowledged categories.²⁵⁷ Sexual orientation includes an individual's actual or perceived sexual preference.²⁵⁸ Gender identity, meanwhile, is defined as being "a gender-related identity of a person, regardless of the person's assigned sex at birth."²⁵⁹ Under the Act, it is now illegal for an employer, subject to specific exemptions,²⁶⁰ to refuse to hire, terminate, or otherwise discriminate against an individual due to his or her sexual orientation or gender identity.²⁶¹

Like Iowa, New Jersey has amended its existing non-discrimination act to provide protection against gender identity discrimination.²⁶² Effective June 17, 2007, the State's "Law Against Discrimination"²⁶³ bars employers from discriminating on the basis of an individual's gender identity or expression.²⁶⁴ The statute defines "[g]ender identity or expression" as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth."²⁶⁵ This expansive

253. *State Legislative Action Expanding Protected Classes for Employment Discrimination to Include Sexual Orientation and Gender Identity*, NEWS FLASH (Koley Jessen, P.C., Omaha, Neb.), Aug. 2007, at 1–2, <http://www.koleyjessen.com/assets/NewsFlashAugust2007.pdf> [hereinafter *State Legislative Action*].

254. *Id.* at 1.

255. IOWA CODE ANN. § 216.6 (West Supp. 2009).

256. *Id.* § 216.6(1)(a).

257. *Id.* § 216.2(10), (14).

258. *See id.* § 216.2(14).

259. *Id.* § 216.2(10).

260. *Id.* § 216.6(6). All exemptions save one apply to all protected groups under the Act. *Id.* The Act does contain a religious exemption, however, which only allows a bona fide religious organization to discriminate on the basis of sexual orientation or gender identity, so long as the employer's actions are related to a "bona fide religious purpose." *Id.* § 216.6(6)(d).

261. *Id.* § 216.6(1)(a).

262. *State Legislative Action*, *supra* note 253, at 2.

263. *Id.*

264. N.J. STAT. ANN. § 10:5-12(a) (West 2009).

265. *Id.* § 10:5-5(rr).

definition²⁶⁶ grants protection to transsexuals, transvestites, and other transgenderists where it did not previously exist in New Jersey.

The State of Colorado adopted a different approach to gender identity discrimination than either Iowa²⁶⁷ or New Jersey.²⁶⁸ Its employment non-discrimination statute does not include gender identity as a protected class, but does include sexual orientation.²⁶⁹ The term “sexual orientation,” however, is given an expansive definition: “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer’s perception thereof.”²⁷⁰ Through this broad definition of sexual orientation, the Colorado legislature explicitly prohibits discrimination against transgendered individuals.²⁷¹

VI. MARYLAND’S RESPONSE TO GENDER IDENTITY DISCRIMINATION

A. Current State-Level Legislation

At present, the State of Maryland is not among those that include gender identity as a protected class.²⁷² Although Maryland does prohibit discrimination in employment based on sexual orientation, the legislature has not yet seen fit to extend similar protections to the transgendered community.²⁷³ Unlike Colorado, Maryland currently defines sexual orientation narrowly: “the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.”²⁷⁴

Although gender identity is not yet a protected class in Maryland, attempts have been made by delegates in the state legislature to remedy that fact.²⁷⁵ On March 3, 2008, a bill was introduced in the Maryland House of Delegates with the purpose of adding “gender

266. *See supra* Part II.A.

267. IOWA CODE ANN. § 216.6 (West Supp. 2009).

268. N.J. STAT. ANN. § 10:5-12 (West Supp. 2009).

269. COLO. REV. STAT. ANN. § 24-34-402(1)(a) (West Supp. 2008).

270. *Id.* § 24-34-401(7.5) (West 2008).

271. *See id.*

272. *See* MD. CODE ANN., STATE GOV’T § 20-606(a)(1) (LexisNexis 2009).

273. *See id.*

274. *Compare* COLO. REV. STAT. ANN. § 24-34-401(7.5) (West 2008) (including an individual’s transgendered status within the definition of sexual orientation), *with* MD. CODE ANN., STATE GOV’T § 20-101(f) (LexisNexis 2009) (limiting sexual orientation to the concepts of heterosexuality, homosexuality, and bisexuality).

275. *See* H.B. 1598, 2008 Leg., 425th Sess. (Md. 2008).

identity” to the enumerated protected classes.²⁷⁶ If passed, the bill would have defined gender identity as being “a gender-related identity, appearance, expression, or behavior of an individual regardless of the individual’s assigned sex at birth.”²⁷⁷ Employers would be prohibited from refusing to hire, terminating, or otherwise discriminating against an employee or applicant based on gender identity.²⁷⁸ This bill died when the Maryland General Assembly adjourned on April 7, 2008.²⁷⁹

In February of 2009, legislation virtually identical to that before the House of Delegates in 2008 was again proposed, this time in both the House of Delegates²⁸⁰ and the Maryland State Senate.²⁸¹ Although the proposed bills sought to expand the protected classes in Maryland to include gender identity,²⁸² defined in a manner identical to the 2008 proposal,²⁸³ both bills died again when the legislative session ended on April 13, 2009.²⁸⁴

B. Local Protection

Within the State of Maryland, two local jurisdictions²⁸⁵ provide protection against discrimination beyond that granted by the state.²⁸⁶ Baltimore City explicitly bars employers from discriminating based

276. *Id.* The proposed bill was similar in form to that enacted in Iowa in 2007. *Compare* IOWA CODE ANN. § 216.6 (West Supp. 2009), *with* Md. H.B. 1598.

277. Md H.B. 1598.

278. *Id.*

279. Maryland HB 1598/SB 976, <https://www.hrc.org/issues/transgender/9348.htm> (last visited Sept. 2, 2009).

280. H.B. 474, 2009 Leg., 426th Sess. (Md. 2009).

281. S.B. 566, 2009 Leg., 426th Sess. (Md. 2009).

282. The House Bill was proposed on February 4, 2009. Md. H.B. 474. The Senate Bill was proposed on February 6, 2009. Md. S.B. 566.

283. *Compare* H.B. 1598, 2008 Leg., 425th Sess. (Md. 2008), *with* H.B. 474, 2009 Leg., 426th Sess. (Md. 2009).

284. Maryland HB 474/SB 566, <http://www.hrc.org/issues/transgender/12563.htm> (last visited Aug. 29, 2009). Before it died at the end of the legislative session, the House Bill was sponsored by 67 of Maryland’s 141 delegates. HOUSE BILL 474, <http://mlis.state.md.us/2009rs/billfile/hb0474.htm> (last visited Aug. 29, 2009); WELCOME TO THE MARYLAND GENERAL ASSEMBLY, <http://mlis.state.md.us/#gena> (last visited Aug. 29, 2009). The Senate Bill was sponsored by 14 of the 47 state Senators. SENATE BILL 566, <http://mlis.state.md.us/2009rs/billfile/SB0566.htm> (last visited Aug. 29, 2009); WELCOME TO THE MARYLAND GENERAL ASSEMBLY, <http://mlis.state.md.us/#gena> (last visited Aug. 29, 2009).

285. *See supra* note 57.

286. *See* BALTIMORE CITY, MD., CODE art. 4 § 3-1 (2003); MONTGOMERY COUNTY, MD., CODE ch. 27, § 27-19 (2009).

on an individual's gender identity or expression.²⁸⁷ The ordinance, which became effective January 5, 2003,²⁸⁸ defines gender identity or expression as "an individual's having or being perceived as having a gender-related self-identity, self-image, appearance, expression, or behavior, whether or not those gender-related characteristics differ from those associated with the individual's assigned sex at birth."²⁸⁹

Baltimore City is not the only Maryland jurisdiction to legislate on the issue of gender identity discrimination. In 2007, the Montgomery County Council unanimously passed an ordinance expanding county protections to include gender identity as a protected class.²⁹⁰ The ordinance prohibits an employer from engaging in discrimination based on gender identity.²⁹¹ Montgomery County defines gender identity in a manner virtually identical to Baltimore City's ordinance.²⁹²

Both the Baltimore City²⁹³ and the Montgomery County²⁹⁴ ordinances are prime examples of the form of protection which transgendered individuals should receive. It is important to remember, however, that these comprehensive non-discrimination statutes only apply to employers in the jurisdictions in which they were passed. An individual will only be protected when employed by, or applying to, an employer within the borders of these progressive jurisdictions. It is still necessary for the Maryland General Assembly to legislate on the issue of gender identity

287. BALTIMORE CITY, MD., CODE art. 4, § 3-1 (2008).

288. CMTY. RELATIONS COMM'N, DISCRIMINATION IS ILLEGAL! TRANSGENDER PEOPLE HAVE THE RIGHT TO BE FREE FROM UNLAWFUL DISCRIMINATION (2003), http://www.ci.baltimore.md.us/government/community/downloads/1208/Transgender_Brochure_Green.pdf (last visited Sept. 28, 2009).

289. BALTIMORE CITY, MD., CODE art. 4, § 1-1(1-1) (2003).

290. Press Release, National Gay and Lesbian Task Force, Task Force Expresses Disappointment in Montgomery County Court Decision (July 24, 2008), http://www.thetaskforce.org/press/releases/pr_072408.

291. MONTGOMERY COUNTY, MD., CODE ch. 27, § 27-19 (2009).

292. Compare BALTIMORE CITY, MD., CODE art. 4, § 1-1(1-1) (2008) (defining gender identity as "an individual's having or being perceived as having a gender-related self-identity, self-image, appearance, expression, or behavior, whether or not those gender-related characteristics differ from those associated with the individual's assigned sex at birth."), with MONTGOMERY COUNTY, MD., CODE ch. 27, § 27-6 (2008) (defining gender identity as "an individual's actual or perceived gender, including a person's gender-related appearance, expression, image, identity, or behavior, whether or not those gender-related characteristics differ from the characteristics customarily associated with the person's assigned sex at birth.").

293. BALTIMORE CITY, MD., CODE art. 4 § 3-1 (2009).

294. MONTGOMERY COUNTY, MD., CODE ch. 27, § 27-19 (2009).

discrimination. Transgendered citizens in Maryland will not adequately be protected otherwise.

VII. CONCLUSION

Gender identity discrimination is a significant problem in the United States. Multiple studies have shown that approximately fifty percent of transgendered individuals report having experienced discrimination in the workplace.²⁹⁵ Yet, to date, transgendered individuals receive, at best, inconsistent protection under Title VII.²⁹⁶ Although there have been attempts to expand federal protection against employment discrimination, these efforts are insufficient both in immediacy and comprehensiveness.²⁹⁷ The delayed action on proposed federal House Bill 3685, coupled with the absence of protection against gender identity discrimination, leaves a hole in the law.²⁹⁸ If an act such as the proposed ENDA passes, transgendered individuals will be even less certain of protection than if it does not.²⁹⁹ Passage of an act that establishes sexual orientation as a protected class while failing to include gender identity may even create a judicial presumption that Congress intended to exclude gender identity from receiving federal protection.³⁰⁰

Due to Congress's failure to enact federal legislation, states have assumed the responsibility of protecting transgendered citizens.³⁰¹ Maryland, however, has yet to include gender identity as a protected class.³⁰² It has therefore fallen on Maryland's local jurisdictions to grant comprehensive civil rights to citizens.³⁰³

In light of Congress's failure to prohibit employment discrimination against the LGBT community, the Maryland General Assembly must weigh in on the side of protection. The state legislature should follow Montgomery County's model³⁰⁴ by providing broad protections that include gender identity as a protected class in Maryland. To do otherwise separates the LGBT

295. Kyler W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in *TRANSGENDER RIGHTS* 93 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

296. *See supra* Part III.C.

297. *See supra* Part IV.A–B.

298. *See supra* Part IV.C.1–2.

299. *See supra* Part IV.C.1–2.

300. *See supra* Part IV.C.2.

301. *See supra* Part V.

302. *See supra* Part VI.A.

303. *See supra* Part VI.B.

304. *See supra* Part VI.B.

community into two groups, causing individuals who share one cause to receive disparate treatment. Existing state law, though it provides greater protection than that available on a federal level,³⁰⁵ remains insufficient. The law is designed to protect all citizens, not to classify them in a manner that allows discrimination to occur. The only way to provide adequate protection in Maryland is for the state legislature to pass a comprehensive non-discrimination statute. This will ensure that employers make legitimate employment decisions rather than taking action against individuals based solely on animus toward others' lifestyles.

Courtney J. Jefferson

305. Compare MD. CODE ANN., STATE GOV'T § 20-606(a)(1) (LexisNexis 2009), with 42 U.S.C. § 2000e to -17 (2006).