# Gender Identity and Sexual Orientation Discrimination in the Workplace

## A Practical Guide

**Chapter 39: Law and Culture in the Making of *Macy v. Holder***

***Chai R. Feldblum, Esq.***


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Chapter 39

# LAW AND CULTURE IN THE MAKING OF *MACY v. HOLDER*

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***Editor's Note:*** This treatise provides a practical guide to both the law and human resource practices. It is also a reader, providing a selection of essays that discuss the implications of gender and sexual orientation in society, across areas such as education, religion, and the workplace, as well as in the lives of several essayists who have shared their personal stories. To help bridge these parts of the treatise, I invited Chai Feldblum, formerly professor of law at Georgetown University Law Center and currently commissioner of the U.S. Equal Employment Opportunity Commission (EEOC), to write an essay on how societal views toward gender—and changes

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[*]The views expressed by Ms. Feldblum in this essay are her personal views and do not necessarily represent the views of the EEOC or the U.S. Government.

in those views over time—have greatly influenced the development of Title VII jurisprudence, especially in the context of LGBT employees. Her essay also serves as a bridge between the EEOC's first foray into the rights of gender-affirmed employees under Title VII—in a 1974 case involving Paula Grossman—which resulted in the first of more than 30 years of adverse EEOC decisions for such employees, and its landmark decision that reversed course in view of significant changes in Title VII jurisprudence—in a 2012 case involving Mia Macy. Commissioner Feldblum is ideally suited to write on this topic, given her body of work as an advocate and scholar in the areas of civil rights and workplace practices. She was actively involved in the drafting and negotiation of the Americans with Disabilities (ADA), the 2008 amendments to the ADA, and drafts of the proposed Employment Non-Discrimination Act (ENDA). And, as discussed below, she participated as a commissioner in the EEOC's landmark decision in *Macy v. Holder*.[a]

Mia Macy discusses her litigation in a short video prepared by the Center for American Progress.[b] The *Macy* decision is discussed at length in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.D.2., which includes a summary of what happened to Macy's case after the EEOC issued its decision.

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[a]In Section III of this chapter, Commissioner Feldblum discusses several of the early court decisions that restricted the definition of "sex" to a person's anatomic sex. As discussed in detail in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Section III.E.1–2, the medical community and numerous courts have recognized that the biological meaning of "sex" includes a multitude of factors, including anatomic sex and gender identity. In 1983, in the *Ulane* case discussed in Section III.C. of this chapter and in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Judge Grady had the foresight to recognize this, although he was reversed by the Seventh Circuit:

> I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, "sex," as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.

Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 825, 35 FEP 1332 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081, 35 FEP 1348 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). Twenty-two years later, in the first of his published decisions in the landmark *Schroer* litigation (discussed in Section IV.C. of this chapter and in Chapter 14 (Title VII of the Civil Rights Act of 1964)), Judge Robertson commented:

> [I]t may be time to revisit Judge Grady's conclusion in [*Ulane*] that discrimination against transsexuals *because they are transsexuals* is "literally" discrimination "because of . . . sex." That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender.

Schroer v. Billington, 424 F. Supp. 2d 203, 212–13, 97 FEP 1506 (D.D.C. 2006).

[b]*See* Preston Mitchum and Lauren Santa Cruz, *Workplace Discrimination Series: Mia Macy* (Center for American Progress July 9, 2013), *available at* www.americanprogress.org/issues/lgbt/news/2013/07/09/69016/workplace-discrimination-series-mia-macy.

## I. Introduction

On April 20, 2012, the Equal Employment Opportunity Commission (EEOC or Commission) issued its decision in *Mia Macy v. Eric Holder, Attorney General, Department of Justice (Bureau of Alcohol, Tobacco, Firearms and Explosives)*[1] (*Macy v. Holder*, or *Macy*).

*Macy v. Holder* was one of thousands of decisions issued by the Commission regarding the rights of federal employees in 2012. Of these decisions, the vast majority were issued by the Commission's Office of Federal Operations (OFO), pursuant to power delegated to it by the Commission. The OFO decides what cases should be reviewed and voted on by the Commission, based on the issues raised in the case. In 2012, the Commission reviewed and voted on only 13 cases, including *Macy*.

The Commission's ruling in *Macy* was straightforward:

> [C]laims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and [should] therefore be processed under Part 1614 of EEOC's federal sector [equal employment opportunity (EEO)] complaints process.[2]

The legal reasoning in *Macy* was also straightforward. Title VII of the Civil Rights Act of 1964 (as amended in 1972 to apply to the federal government)[3] prohibits employment discrimination on the basis of "sex." That means that a covered employer may not take sex into account, unless hiring a person of a particular sex is a "bona fide occupational qualification" (BFOQ) or in limited circumstances dealing with voluntary affirmative action or court-ordered relief. If an employer is willing to hire a person when that person is a man but is not willing to hire that same person if she has transitioned and is now a woman—that employer has taken sex into account in violation of the statute.

In *Macy*, legal logic has come full circle. But the opinion's legal logic had to be preceded by changes in cultural logic. In this essay, I briefly lay out how culture hindered courts from applying the plain meaning of the word "sex" in Title VII following passage of the law because of the role women were expected to play in the family and how those legal developments subsequently hindered protection for transgender individuals. I then explain how changes in society have helped bring back to life the plain words of the statute. In so doing, I hope this essay will provide a foundation for better understanding the misadventures in the development of Title VII's "because of … sex" jurisprudence, especially in the context of transgender individuals.

## II. The Beginning: The Statute Can't Possibly Mean What It Says

Early decisions related to the meaning of "sex" in Title VII were marked by a flawed line of reasoning that maintained that (1) the debate and

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[1] 2012 WL 1435995 (EEOC Apr. 20, 2012).
[2] *Id.* at *4 (referencing 29 C.F.R. pt. 1614).
[3] 42 U.S.C. §2000e *et seq.*

"sparse" legislative record on the addition of sex to Title VII provided no help in interpreting the meaning of the term "sex," and (2) in the absence of legislative history pointing otherwise, the "obvious" and limited legislative intent underpinning Title VII was sufficient to overcome arguments that the plain meaning of the term "sex" encompassed something more expansive.[4] This reasoning was created and perpetuated because the courts could not imagine that the word "sex" in the statute could possibly mean what it said.

The Fifth Circuit's 1969 decision in *Phillips v. Martin Marietta Corp.*,[5] one of the earliest Title VII cases to reach the Supreme Court, is an excellent example of this line of thinking in action. In its decision, the Fifth Circuit simply announced that there wasn't much legislative history for it to use in deciding whether a rule adopted by Martin Marietta—that female applicants with preschool-age children would not be considered for certain employment, while male applicants with similar-age children would be—violated Title VII. The court summarily concluded that: "[A] perusal of the record in Congress will reveal that the word 'sex' was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress."[6]

Perhaps there was no "helpful discussion" in the legislative debates that the Fifth Circuit panel could find. But there was actually a fair amount of debate about what adding sex would mean—including a fair amount of hysteria regarding the wide-ranging impact that prohibiting discrimination on the basis of sex would have on social roles and family structure.[7] The

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[4]This erroneous historical statement has since been comprehensively rebutted by historians and legal writers who have provided us with the actual story of the long and complicated history of adding sex discrimination prohibition to our employment laws. *See*, *e.g.*, CYNTHIA ELLEN HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES: 1945–1968 (1988); Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. LEGAL HIST. 37 (1983), *available at* www.jstor.org/stable/2209305; Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. 163, 165–72 (1991), *available at* http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/lieq9&div=12&id=&page=; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995), *available at* http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/pnlr144&div=10&id=&page; Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 19–37 (1995), *available at* http://www.jstor.org/stable/797140; Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997), *available at* http://scholarship.law.wm.edu/wmjowl/vol3/iss1/6; Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012), *available at* www.harvardlawreview.org/media/pdf/vol125_franklin.pdf.

[5]411 F.2d 1, 1 FEP 746, 1 FEP 894, 71 LRRM 2323, 71 LRRM 3158, *reh'g denied*, 416 F.2d 1257, 2 FEP 185 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542, 3 FEP 40 (1971).

[6]411 F.2d at 3.

[7]Anyone who wants to know more about this can read Cynthia Harrison's fascinating historical account (ON ACCOUNT OF SEX), first published in 1988, the extensive research done by Katherine Franke and Mary Anne Case in their 1995 articles (*The Central Mistake of Sex Discrimination Law* and *Disaggregating Gender from Sex and Sexual Orientation*, respectively), or Cary Franklin's 2012 piece (*Inventing the "Traditional Concept" of Sex Discrimination*), cited in note 4 *supra*.

reality is that women and men played very different roles in work and family in 1964, and one of the ways to ensure that those very different roles continued was to limit the definition or concept of "sex" to ensure that employers would be permitted to apply sex stereotyping in the workplace (e.g., by allowing employers to assume that women with young children would not be good employees without having to make the same assumption about men).[8] Taking the prohibition against sex discrimination on its face, therefore, could have wreaked havoc on the social construct existing at the time—a fact that several Representatives acknowledged in exaggerated form during the 1964 debate.[9] A new and different presumed Congressional intent—one more limited than a plain reading of "sex" would suggest—thus became the means to both manage and constrain the potential havoc.

In *Martin Marietta*, the Fifth Circuit was forced to acknowledge that "[w]here an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with preschool age children, on the other, there is *arguably an apparent discrimination founded upon sex*."[10] But because the EEOC, as amicus curiae, had argued that the employer could not, under the statute, try to justify this differential treatment under the BFOQ provision, the court explained that it was left with no choice but to conclude that the rule did not discriminate based on sex in the first place. To do this, the court had to limit the concept of discrimination "because of . . . sex" in such a way that Title VII would not apply when an employer's policy or practice classified employees based on sex and another characteristic (e.g., children).[11]

If you doubt that the court actually said that, it did:

> [The Commission] has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude *absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children*, and to require that an employer *treat the two exactly alike in the administration of its general hiring policies*. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon 'sex' as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.[12]

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[8]For excellent discussions of the potential impact of Title VII on women's roles in society and the family, see the articles by Katherine Franke (*The Central Mistake of Sex Discrimination Law*), Mary Anne Case (*Disaggregating Gender from Sex and Sexual Orientation*), and Cary Franklin (*Inventing the "Traditional Concept" of Sex Discrimination*), cited in note 4 *supra*.

[9]See Cary Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 HARV. L. REV. 1307, 1317–20 (2012), *available at* www.harvardlawreview.org/media/pdf/vol125_franklin.pdf.

[10]Phillips v. Martin Marietta Corp., 411 F.2d 1, 4, 1 FEP 746, 1 FEP 894, 71 LRRM 2323, 71 LRRM 3158, *reh'g denied*, 416 F.2d 1257, 2 FEP 185 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542, 3 FEP 40 (1971) (emphasis added).

[11]411 F.2d at 3–4.

[12]*Id*. at 4 (emphasis added).

The Supreme Court rescued the Fifth Circuit from this rather unseemly and convoluted analysis. In an unsigned and brief per curiam opinion, the Court simply stated that Title VII prohibited having "one hiring policy for women and another for men—each having pre-school-age children."[13] But the Court then ensured many more years of litigation and lengthy law review articles (espousing new and complicated theories of "sex plus" discrimination) by stating that "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man" could form the basis of a BFOQ defense.[14]

Employment rules requiring married women to leave a job, or banning women who have children below a certain age from applying for a job, may seem anachronistic now (the stuff of the television series *Mad Men*). But they were the freighted weight of controversy for almost two decades. And as employers began losing the battle of convincing courts that, although they had taken sex into account, a sexual stereotype nonetheless served as a legitimate BFOQ (for example, the airlines' dramatic loss in *Sprogis v. United Air Lines, Inc.*[15]), employers redoubled their efforts to cabin the reach of what the statute meant in prohibiting discrimination "because of sex."

This essay cannot do justice to the effort to create this new "traditional" understanding of the term "sex" in Title VII. For that, I commend to you the various law review articles I cite earlier.[16] Suffice it to say that the Supreme Court's 1976 decision in *General Electric Co. v. Gilbert*[17]—in which the Court decided that pregnancy discrimination did not constitute sex discrimination and that the "traditional" understanding of sex discrimination meant practices that divided men and women into two groups and not anything else—marked a significant turn toward a cabined reading of the statute.[18]

By the time transgender individuals started bringing cases under Title VII, therefore, two myths were well entrenched: (1) that there was little legislative history regarding the sex discrimination provision and (2) that Congress' sole intent had been to ensure that men and women were not classified differently. There was a minor chord in Supreme Court jurisprudence sounding in sex stereotyping theory, reflected in its 1978 decision

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[13] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544, 3 FEP 40 (1971).

[14] *Id.* "The term 'sex plus' originated with Judge Brown's dissent to the denial of rehearing en banc in . . . *Martin Marietta*." BARBARA T. LINDEMANN, PAUL GROSSMAN, AND C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW, §10.VIII.A (Sex Plus), 10-92 n.451 (5th ed. 2012), citing Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260, 2 FEP 185 (5th Cir. 1969) (Brown, J., dissenting), *vacated and remanded*, 400 U.S. 542, 3 FEP 40 (1971).

[15] 444 F.2d 1194, 3 FEP 621 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In *Sprogis*, less than five months after the Supreme Court's decision in *Martin Marietta*, the Seventh Circuit held that United Air Lines' no-marriage rule for female flight attendants violated Title VII.

[16] *See* sources cited in note 4 *supra*.

[17] 429 U.S. 125, 13 FEP 1657, 1 EB 1046 (1976).

[18] Congress overturned the *Gilbert* decision with the passage of the Pregnancy Discrimination Act, Pub. L. No. 95-555, §1, codified as amended at 42 U.S.C. §2000e(k). *See generally* EMPLOYMENT DISCRIMINATION LAW §10.VII.A (Discrimination on the Basis of Pregnancy). But the creation of a "traditional" interpretation of "sex" as set forth in the *Gilbert* reasoning continued to hold sway in the lower courts.

in *Los Angeles Department of Water & Power v. Manhart*.[19] Although this approach would ultimately be resurrected by the Supreme Court in the 1989 case of *Price Waterhouse v. Hopkins*,[20] the primary message throughout the 1970s and 1980s was that Title VII should be interpreted solely to enact the presumed Congressional intent that employers not divide men and women into separate categories.

## III. Extension of the Initial Interpretation to Transgender Individuals

Given this context, it is of little surprise that courts found it easy to rule that transgender individuals who experienced discrimination because of their gender identity could not avail themselves of Title VII's antidiscrimination sex protection.[21] Indeed, the EEOC played a role in enabling the courts to reach this conclusion. Although the plain words of the statute carried sufficient weight to generate one positive district court ruling and one dissent in an appellate decision, that was a minority chord during this time period.

### A. *Grossman v. Bernards Township Board of Education*

In the early years of the EEOC, the Commission issued its findings of cause and no cause in written decisions. The confidentiality requirements of Title VII mandated that charging parties and employers not be identified by name, but the legal reasoning used by the Commission was often adopted by courts in judicial decisions.

The first written Commission decision involving a transgender person concerned a grammar school music teacher who started employment with a school system in 1957 as a man and was fired in 1972 after transitioning to

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[19] 435 U.S. 702, 17 FEP 395, 1 EB 1813 (1978). In *Manhart*, a case challenging a Los Angeles City Water Department's policy that required female employees to make larger pension contributions than male employees, the Court noted that "[b]efore the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid." *Id*. at 707. However, the Court explained, "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Id*. According to the Court, in "forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id*. at 708 n.13. This strand of Supreme Court jurisprudence was reinvigorated with the issuance of the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP 954 (1989). See Section IV.A. *infra*.

[20] 490 U.S. 228. See Section IV.A. *infra*.

[21] As law review articles by numerous legal academics, including Mary Anne Case and Katherine Franke, make clear, there were also complicated issues around the definitional and ideological aspects of gender and sex. *See* Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 Cal. L. Rev. 765 (2002), *available at* http://scholarship.law.berkeley.edu/californialawreview/vol90/iss3/4; Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. Pa. L. Rev. 1 (1995), *available at* http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/pnlr144&div=10&id=&page.

being a woman. In August 1972, the teacher filed a charge with the EEOC claiming the school board had discriminated against her on the basis of sex. Two years later, in September 1974, the EEOC issued its decision finding no cause to believe that discrimination had occurred on the basis of sex. As the Commission explained:

> Charging Party alleges that Respondent's actions, which were based upon Charging Party having undergone a sex reassignment operation, constitute discrimination on the basis of sex. Charging Party does not allege, and the record in the instant case provides no evidence, that Charging Party was treated disparately by Respondent on the basis of sex. There is no evidence of record, for example, that different standards of incapacity or unfitness have been utilized by Respondent for male and female teachers. There is no evidence that Respondent ever employed a similarly situated person of the opposite gender of Charging Party, i.e. a female who underwent sex reassignment.
>
> In addition, Charging Party does not allege, and there is no evidence to indicate, that discrimination against individuals having sex reassignment operations has a significant disproportionate impact upon either the male or female gender. In fact, the proportion of individuals undergoing such operations is so small as to negate such a conclusion. Finally, Charging Party does not allege, and there is no evidence to indicate, that Charging Party would have been suspended or required to undergo psychiatric examinations had Charging Party remained a male or had Charging Party always been a female.
>
> There is no further evidence of record which would lead us to conclude that Charging Party has alleged a case of discrimination because of sex, rather than a case of possible discrimination because of having undergone a particular operation. Although the operation in question was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase "discrimination because of sex," in accordance with its plain meaning, to connote discrimination because of gender.
>
> 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.[22]

The EEOC issued the charging party a "right to sue" letter, which enabled her to continue her case in federal court. Her case became one of the first in which a district court found that discrimination based on transgender status would get no protection under Title VII. The Commission's decision was submitted to the court by the defendant as an exhibit. In the 1975 opinion in *Grossman v. Bernards Township Board of Education*,[23] the

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[22] EEOC Decision No. 75-030 (CCH) ¶6499 (Sept. 24, 1974), Summary of Investigation at ¶¶3–6 (footnotes omitted).

[23] 1975 WL 302, 11 FEP 1196 (D.N.J. 1975), *aff'd without opinion*, 538 F.2d 319, 13 FEP 1360 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976). See Chapters 4 (The Shattering of Illusion: The Case of Paula Grossman, Pioneering Transgender Plaintiff) and 5 (Why the Fuss? My Best Grammar School Teacher Was Fired Simply Because She Was a "Transsexual") for essays written by Richard Schachter, who was one of Paula Grossman's lawyers in state court litigation relating to her de-tenure proceedings and entitlement to a disability pension, and Scott Keeler, one of her students and the son of the educator who had hired Grossman and was acting school superintendent at the time she was terminated.

district judge observed that Grossman "was discharged by the defendant school board *not* because of her status as a female, but rather because of her *change* in sex from the male to the female gender."[24] The court also noted that there was no indication that Grossman had been fired "because of any stereotypical concepts about the ability of females to perform certain tasks."[25] After pointing out the "scarcity of legislative history" and its "reluctan[ce] to ascribe any import to the term 'sex' other than its plain meaning," the court summarily held that Title VII does not protect against discrimination based on a change in sex.[26] The court also observed that the EEOC's determination (which, as noted, had been included as an exhibit in the case by the defendant), although not binding on the court, was also that the school board's action did not constitute discrimination on the basis of sex. Without opinion, the Third Circuit affirmed the dismissal of Grossman's lawsuit.

### B. *Holloway v. Arthur Andersen & Co.*

In the first case to receive a full appellate decision, *Holloway v. Arthur Andersen & Co.*,[27] a transgender woman asked her company to change her personnel records to reflect her female name. The company did so and then fired her.

A majority of the Ninth Circuit panel found it simple to affirm the district court's grant of summary judgment for the employer. The majority noted the now-familiar myth that "[t]here is a dearth of legislative history" regarding the sex provision in Title VII and then, "[g]iving the statute its plain meaning," it concluded that "Congress had only the traditional notions of 'sex' in mind."[28] Those traditional notions were very clear: "The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."[29] Anything beyond such an anticlassification prohibition would, as far as the panel majority was concerned, have to wait for Congress to act.

Judge Goodwin, in a short dissent, found it harder than the majority to ignore the plain meaning of the statute. He agreed that "Congress probably never contemplated that Title VII would apply to transsexuals," but nonetheless stated his "dissent from the decision that the statute affords such plaintiffs no benefit."[30] As Judge Goodwin noted, "The only issue before us is whether a transsexual whose condition has not yet become stationary can state a claim under the statute if discharged because of her undertaking to change her sex. I read from the language of the statute itself that she can."[31]

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[24] *Grossman,* 1975 WL 302, at *4.
[25] *Id.*
[26] *Id.*
[27] 566 F.2d 659, 16 FEP 689 (9th Cir. 1977).
[28] 566 F.2d at 662.
[29] *Id.* at 663.
[30] *Id.* at 664 (Goodwin, J. dissenting).
[31] *Id.*

### C. *Ulane v. Eastern Airlines*

The panel majority approach in *Holloway* became the prevailing one, however, without much difficulty. In 1984, largely following *Holloway*'s reasoning, the Seventh Circuit in *Ulane v. Eastern Airlines*[32] reversed a district court ruling finding that a transgender woman had experienced unlawful discrimination under Title VII. Kenneth Ulane had been hired as a pilot for Eastern Air Lines in 1968 and had been fired after she transitioned to be Karen Frances Ulane in 1981.

Hearing the case in the northern district of Illinois, Judge Grady denied the company's motion to dismiss because he "believed the complaint adequately alleged that the discharge was related to sex or had something to do with sex."[33] In ultimately ruling in favor of Ulane, Judge Grady noted that he "continue[d] to hold that layman's reaction to the simple word ['sex'] and to the facts as alleged in the complaint."[34]

The Seventh Circuit would have none of that. In a panel decision with no dissent, the court stated: "While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals and that the district court's order on this count therefore must be reversed for lack of jurisdiction."[35] According to the court, its duty was to "determine what Congress *intended* when it decided to outlaw discrimination based on sex."[36]

Unlike other courts, the Seventh Circuit did at least begin its analysis by noting that "[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."[37] But it then concluded that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[38] That "plain meaning" did not include protections for transgender individuals.

### D. *Sommers v. Budget Marketing*

*Sommers v. Budget Marketing*,[39] the third appellate court decision of this period, was an oddly argued and decided opinion. The district court required the plaintiff, Sommers, "to submit an amended complaint to indicate whether she had been discriminated against because she was male, female, or transsexual, and whether she had in fact successfully undergone

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[32] 742 F.2d 1081, 35 FEP 1348 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

[33] Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 822, 35 FEP 1332 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081, 35 FEP 1348 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

[34] *Id.*

[35] *Ulane*, 742 F.2d at 1084 (footnote omitted).

[36] *Id.* (emphasis added).

[37] *Id.* at 1085.

[38] *Id.*

[39] 667 F.2d 748, 27 FEP 1217 (8th Cir. 1982).

sexual conversion surgery."[40] Sommers' amended complaint claimed "she had been discriminated against because of her status as a female, that is, a female with the anatomical body of a male, and further stated that sexual conversion surgery had not been performed."[41] According to the Eighth Circuit, Sommers had "nonetheless argued that the court should not be bound by the plain meaning of the term 'sex' under Title VII as connoting either male or female gender, but should instead expand the coverage of the Act to protect individuals such as herself who are psychologically female, albeit biologically male."[42] The court concluded that there was "no genuine issue of fact as to the plaintiff's sex at the time of discharge from employment," and that there was no dispute that Sommers is "for the purposes of Title VII, … male because she is an anatomical male."[43] Because the court accepted "the biological fact as the basis for determining sex," it found entry of summary judgment for the employer to be appropriate.[44]

## IV. THE MIDDLE: MAYBE THE STATUTE MEANS A BIT OF WHAT IT SAYS

### A. *Price Waterhouse v. Hopkins*

Almost 20 years ago, in October 1993, I participated in an event at Harvard Law School called "Celebration 40." The event celebrated 40 years of women attending Harvard Law School. I spoke on a panel with Ann Hopkins, the plaintiff in an important case the Supreme Court had decided five years earlier, *Price Waterhouse v. Hopkins*.[45]

I distinctly remember Ann Hopkins introducing me to her children in the audience and then informing me that she was heterosexual and not a lesbian. That struck me as unusual, because people did not ordinarily bother to tell me that they were heterosexual. They (correctly) assumed that being heterosexual was the societal default and that they would need to disclose their sexual orientation to me only if it differed from the societal norm—i.e., if they were gay, lesbian, or bisexual.

But I ultimately came to realize that the fact that Ann Hopkins was not a lesbian was a key variable of the *Price Waterhouse* case of which she was the star.

Hopkins joined Price Waterhouse's Office of Government Services in Washington, D.C., in 1977 and was proposed for partnership five years later. I am sure she had every reason to assume she would be made a partner. In the statement supporting her candidacy, the partners in her office "showcased her successful 2-year effort to secure a $25 million contract with the

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[40] 667 F.2d at 749.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 490 U.S. 228, 49 FEP 954 (1989).

Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out virtually at the partner level.' "[46] At trial, she had one official from the State Department "describe her as 'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative,' " while another praised her "decisiveness, broadmindedness, and 'intellectual clarity.' "[47] What's not to like?

The Washington office of Price Waterhouse clearly wanted Hopkins to be a partner and put her forward as a candidate. Of the 88 candidates for partnership that year, 47 were accepted, 21 were rejected, and the rest, including Hopkins, were "held over" for reconsideration to the following year.[48] What a shock it must have been to this highly competent woman when she did not come through with flying colors.

But of the 662 partners at the firm at that time, only seven were women. And of the 88 individuals proposed for partnership that year, only one—Ann Hopkins—was a woman.[49] Indeed, some partners at Price Waterhouse apparently believed that a woman should never be a partner. As the trial judge found, in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations."[50]

Hopkins did nothing that year, although she must have heard through the grapevine some of the thoughts that had been expressed. As the trial evidence ultimately showed, the partners at Price Waterhouse had some concerns about her interpersonal skills. Judge Gesell, the trial judge, noted that both supporters and opponents of Hopkins "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."[51]

I don't know how many of those comments Hopkins knew about before she sued Price Waterhouse. But we do know that Thomas Beyer, the partner who had to tell Hopkins that she was being held over for a year, advised her that "in order to improve her chances for partnership," she "should 'walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.' "[52]

Hopkins presumably gritted her teeth and soldiered on, perhaps even with more makeup. But the following year, the partners in her office refused to propose her again for partnership.[53] At that point, Hopkins sued Price Waterhouse under Title VII for sex discrimination.

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[46] 490 U.S. at 233.
[47] *Id.* at 234.
[48] *Id.* at 233.
[49] *Id.*
[50] 490 U.S. 228, 236, 49 FEP 954 (1989) (internal quotation marks omitted).
[51] 490 U.S. at 235 (internal quotation marks omitted).
[52] *Id.*
[53] *Id.* at 231–32.

Ann Hopkins began her suit in 1984. At that point, courts had consistently rejected claims by gay men and lesbians who had experienced what they claimed to be sex discrimination, as well as claims by transgender individuals. Had Ann Hopkins been a lesbian (or had been perceived as such), it is quite possible that any comments about her not being sufficiently feminine would have been mixed in with comments about her actual or presumed sexual orientation. And any lawyer worth his or her salt would have told Ann Hopkins not to bother bringing a suit given the state of the case law at the time.

So the fact that Hopkins was heterosexual and not a lesbian was, indeed, a very relevant fact.

What is ultimately interesting about the *Price Waterhouse* decision is how little attention was paid to the gender-stereotyping analysis in the case. The Supreme Court accepted the case "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[54] And that is precisely what most of the case focused on, although the Court's ruling on that issue garnered only a plurality (Justices Brennan, Marshall, Blackmun, and Stevens), with Justices White and O'Connor concurring in the judgment and writing separately on the burden of proof issue.

But all six Justices had no difficulty with the gender stereotyping analysis. The plurality's legal analysis began as follows:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.[55]

The footnote to this sentence stated: "We disregard, for purposes of this discussion, the special context of affirmative action."[56]

Well, let me be clear—this in fact was a "simple, but momentous" statement for the Supreme Court plurality to make. The reality is that courts (including the Supreme Court) had twisted themselves into pretzels over previous decades to avoid the plain meaning of Title VII's prohibition on sex discrimination. But that cognitive conflict was strikingly absent in the *Price Waterhouse* decision. Instead, the plurality observed that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,"[57] and that the plurality "[took] these words to mean that gender must be irrelevant to employment decisions."[58]

As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership, the plurality observed

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[54] *Id.* at 232.
[55] 490 U.S. 228, 239, 49 FEP 954 (1989).
[56] 490 U.S. at 239 n.3.
[57] *Id.* at 239.
[58] *Id.* at 240.

that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[59] With regard to the "legal relevance of sex stereotyping," the plurality simply returned to the sex-stereotyping strand that had been present in its 1978 case of *Los Angeles Department of Water & Power v. Manhart,* stating: "[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.' "[60]

Hence, 17 years after the EEOC had stated in its guidelines that employers could not refuse "to hire an individual based on stereotyped characterizations of the sexes,"[61] new life was breathed into that prohibition by the *Price Waterhouse* decision.

The fact that the Supreme Court reached a conclusion in 1989 that had previously seemed unthinkable in the mid to late 1970s is not surprising. A number of important social and cultural movements related to sex had flourished in the intervening years. A resurgent feminist movement, for instance, sought to inject awareness of gender and its implications into every avenue of society—political, social, sexual, and so forth. Academic researchers began to examine the pervasive impact of gender socialization from an early age[62] and to question the assumption that conforming to gender stereotypes was necessarily healthy or desirable.[63] Labor-force participation by women began to steadily increase, and depictions of independent working women became common themes for television programs and films.[64]

Together, these changes helped to increase societal awareness of gender roles. Although the perception of sexual differences previously had been limited to physical characteristics, the idea that societal notions and conceptions were also intrinsically related to sex was gaining ground in

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[59] *Id.* at 250.

[60] 490 U.S. 228, 251, 49 FEP 954 (1989) (internal quotation marks omitted) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13, 17 FEP 395, 1 EB 1813 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198, 3 FEP 621 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971))).

[61] 29 C.F.R. §1604.2(a)(1)(ii). *See* U.S. Equal Employment Opportunity Commission, *Guidelines on Discrimination Because of Sex*, 37 Fed. Reg. 6836 (1972) (codified as amended at 29 C.F.R. pt. 1604), *available at* www.eeoc.gov/laws/types/sexual_harassment.cfm.

[62] *See* Kristina M. Zosuls et al., *Gender Development Research in Sex Roles: Historical Trends and Future Directions*, 64 SEX ROLES 826 (2011), *available at* http://dx.doi.org/10.1007/s11199-010-9902-3.

[63] *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 19–37 (1995), *available at* http://www.jstor.org/stable/797140.

[64] *See* U.S. Department of Labor Bureau of Labor Statistics, *The Editors Desk: Women in the Labor Force, 1970–2009* (Jan. 5, 2011), *available at* www.bls.gov/opub/ted/2011/ted_20110105.htm. Also, the 1970s saw the introduction of the *Mary Tyler Moore Show* and *One Day at a Time*, both of which centered on independent women in the workforce.

society. These cultural shifts gradually fed into the legal understanding of "sex" in Title VII.

### B. *Oncale v. Sundowner Offshore Services*

It took a bit of time for courts to apply the *Price Waterhouse* analysis to cases brought once again by transgender individuals under Title VII. Justice Scalia's opinion for a unanimous Supreme Court in *Oncale v. Sundowner Offshore Services*,[65] holding that workplace harassment can violate Title VII's prohibition against sex discrimination even when the harasser and the harassed employee are of the same sex, probably helped courts focus on the actual *words* of Title VII—not just what the 1964 Congress had contemplated in enacting those words.

Justice Scalia's analysis in *Oncale* was brief. He noted that nothing in the language of "Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[66] And he observed that, although courts had had "little trouble with that principle" in cases in which an employee was passed over for a job or promotion, in cases of sexual harassment, courts had taken "a bewildering variety of stances."[67]

Well, of course they had—because those courts were struggling to decide what the 1964 Congress had intended with regard to same-sex harassment. But as Justice Scalia explained, although "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," statutory prohibitions "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[68]

### C. Application of *Price Waterhouse* and *Oncale* to Transgender Individuals

The combination of *Price Waterhouse* and *Oncale* freed the lower courts to look once again at the plain language of Title VII in cases brought by transgender individuals under that law, as well as under other sex discrimination laws.

The first breakthrough came in 2000, just one year after *Oncale* was decided, when both the Ninth Circuit and the First Circuit applied the logic of *Price Waterhouse* to find protection for transgender women who had experienced adverse actions because of their lack of gender conformity.

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[65] 523 U.S. 75, 76 FEP 221 (1998).
[66] 523 U.S. at 79.
[67] *Id.*
[68] *Id.*

- In *Schwenk v. Hartford*,[69] the Ninth Circuit upheld a claim by a transgender prisoner under the Gender Motivated Violence Act.[70] Analogizing to Title VII, the court stated that "federal courts (including this one) initially adopted the approach that sex is distinct from gender and, as a result, held that Title VII barred discrimination based on the former but not on the latter."[71] However, the court noted that "[t]he initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."[72] Under *Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII."[73] As such, a prisoner with a female gender identity who had experienced violence by a guard for her failure to conform to behavior expected of her genital sex (male) had a valid claim under the law.
- Similarly, in *Rosa v. West Bank & Trust Co*,[74] the First Circuit applied the logic of *Price Waterhouse*. In *Rosa*, a transgender woman filed suit against a bank that denied her a loan because she presented as a woman, rather than in a manner that comported with her male identification cards. The claim was brought under the Equal Credit Opportunity Act,[75] which prohibits discrimination with respect to credit transactions on the basis of, among other categories, sex or marital status. Rosa alleged that the bank's decision to deny her a loan was based on gender stereotypes and constituted sex discrimination under *Price Waterhouse*. The district court disagreed, holding that the bank actions were based on Rosa's choice of clothing, not her sex.[76] The First Circuit reversed the dismissal of Rosa's complaint, concluding that she adequately pled that the bank's actions were motivated by gender stereotypes such as the fact that "Rosa's attire did not accord with his male gender."[77]

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[69]204 F.3d 1187 (9th Cir. 2000).

[70]42 U.S.C. §13981.

[71]*Schwenk*, 204 F.3d at 1201.

[72]*Id.*

[73]*Id.* at 1202.

[74]214 F.3d 213 (1st Cir. 2000).

[75]15 U.S.C. §§1691–1691f.

[76]Rosa v. Park West Bank & Trust Co., Civ. Action No. 99-30085-FHF, slip op. at 1 (D. Mass. Oct. 18, 1999), *rev'd*, 214 F.3d 213 (1st Cir. 2000).

[77]*Rosa*, 214 F.3d at 215. For an interesting perspective on early efforts to apply the reasoning of *Price Waterhouse* to claims brought by transgender individuals, see Katherine M. Franke, Rosa v. Park West Bank: *Do Clothes Really Make the Man?*, 7 MICH. J. GENDER & L. 143 (2001), and Katherine M. Franke, Amicus Curiae Brief of NOW Legal Defense and Educational Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal (Feb. 3, 2000), reprinted in 7 MICH. J. GENDER & L. 162 (2001). Both documents are *available at* www2.law.columbia.edu/faculty_franke/AllTYPESET.pdf. *See also* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 104 (2006). Professor Levi's essay is reproduced in Chapter 47 (Clothes Don't Make the Man (or Woman), But Gender Identity Might). Professor Levi represented Ms. Rosa, as well as Pat Doe, the plaintiff in *Doe v. Yunits*, which is cited in note 81 *infra*.

A few years following the opinions in *Schwenk* and *Rosa*, the Sixth Circuit adopted a similar line of reasoning—this time in a Title VII case. In *Smith v. City of Salem*,[78] Smith, a transgender woman, brought a claim of employment discrimination alleging she had experienced discrimination "both because of [her] gender non-conforming conduct and, more generally, because of [her] identification as a transsexual."[79] The district court rejected her claim, but the Sixth Circuit reversed. Noting that *Price Waterhouse* "does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual," the Sixth Circuit reasoned that "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 [the plaintiff] in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[80]

Both prior to and following these federal court cases, state courts had also begun to interpret state and local sex discrimination laws to protect transgender individuals who had experienced discrimination based on gender identity.[81]

Two additional breakthroughs in federal court occurred in 2008 and 2011, respectively.

- In 2008, in *Schroer v. Billington*,[82] a federal district court in the District of Columbia held that the Library of Congress violated Title VII when it withdrew a job offer to Diane Schroer after it learned that she was transitioning from male to female. Unlike other courts, the judge in *Schroer* did not rely solely on a gender-stereotyping theory as set forth in *Price Waterhouse*. Rather, Judge Robertson

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[78] 378 F.3d 566, 94 FEP 273 (6th Cir. 2004).

[79] 378 F.3d at 571.

[80] *Id.* at 574–75.

[81] *See*, *e.g.*, Doe v. Yunits, 2000 WL 33162199, at *6–7 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom*. Doe v. Brockton School Comm., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law, noted that "[t]his court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort"); Jette v. Honey Farms Mini Market, 23 Mass. Discr. L. Rep. 229, 2001 WL 1602799, at *1 (Comm'n Ag. Discr. Oct. 10, 2001) (noting the holding that "discrimination against transsexuals because of their transsexuality is discrimination based on 'sex' "); Enriquez v. West Jersey Health Sys., 777 A.2d 365, 371–73, 86 FEP 197 (N.J. Super. Ct. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibition against sex discrimination); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 392–96, 68 FEP 1039 (Sup. Ct. 1995) (relying on case law under the New York Human Right Law in holding that harassment based on the fact an employee changed his sexual status also constituted sex discrimination under the New York City Human Rights Law that proscribes discrimination on the basis of "sex"); Rentos v. Oce-Office Sys., 1996 WL 737215, at *8–9, 72 FEP 1717 (S.D.N.Y. 1996) (relying on *Maffei* to hold that plaintiff could maintain a transgender discrimination claim under New York City and State law); See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace) for detailed summaries of state employment law protections for LGBT employees.

[82] 577 F. Supp. 2d 293, 104 FEP 628 (2008).

also found, just as district court Judge Grady had in *Ulane* 25 years earlier, that discrimination against a transsexual because he or she is transsexual is "literally" discrimination because of sex.[83]

- And in 2011, the Eleventh Circuit in *Glenn v. Brumby*[84] found that a legislative editor who had transitioned from male to female and was fired for that reason by the State of Georgia had proven a viable equal protection claim as sex discrimination. Relying on *Price Waterhouse*, the court stated that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.... Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[85]

## V. THE PRESENT: THE STATUTE MEANS WHAT IT SAYS

In 2009, President Barack Obama made four new nominations to the EEOC, which had been languishing without a full roster of commissioners for some time. He named Jacqueline Berrien as chair, Patrick David Lopez as general counsel, and Victoria Lipnic and me as commissioners to fill the available Republican and Democratic seats, respectively. The four of us started working as recess appointees in April 2010 and were all subsequently confirmed by the Senate in December 2010 to our respective terms.

With a full complement of commissioners and a general counsel, the EEOC took to its work with gusto—finishing work on a series of regulations and actively engaging in approving amicus briefs, reviewing subpoena determinations, approving litigation requests, and voting on opinions dealing with claims of discrimination brought by federal employees.

The first opportunity the Commission had to consider and vote on the question of coverage for transgender individuals under Title VII was in October 2011. In the western district of Texas, in *Pacheco v. Freedom Buick GMC Truck*,[86] a transgender woman had filed a lawsuit claiming that her employer had fired her from her job as a receptionist because of her transgender status. The defendant filed a motion for summary judgment, contending that discharging a person because she is transgender is not discrimination because of sex and hence not covered under Title VII.

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[83] 577 F. Supp. 2d at 306–08. The Massachusetts Commission Against Discrimination also had reached the same result under its state's fair employment practices law. Millett v. Lutco, Inc., 23 Mass. Discr. L. Rep. 231, 2001 WL 1602800, at *5 (Comm'n Ag. Discr. Oct. 10, 2001) ("While the current state of federal law is that discrimination based on *change of sex* is not the same thing as discrimination *based on sex*, the rationale of these cases is utterly unsatisfying to us.").

[84] 663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011).

[85] 663 F.3d at 1316–17. Vandy Beth Glenn provides a firsthand account of the litigation in her essay in Chapter 6 (*Glenn v. Brumby:* Forty Years After *Grossman*).

[86] No. 7:10-CV-116, Docket No. 1 (W.D. Tex.) (complaint filed Sept. 27, 2010).

The general counsel, acting at the request of the Commission, filed an amicus brief with the district court that put forward two arguments. First, under the reasoning of *Price Waterhouse*, discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of . . . sex" under Title VII. Second, following the reasoning in *Schroer*, discrimination because an individual intends to change, is changing, or has changed his or her sex is likewise prohibited by the plain language of Title VII.[87]

Although the court chose not to accept the Commission's brief, the court did deny the defendant's motion for summary judgment, and the case was ultimately settled prior to trial.[88]

To return full circle to the start of this essay, approximately five months following the Commission's approval of the amicus brief in *Pacheco*, the OFO sent to the Commission a draft opinion in *Macy v. Holder* for its approval. The Commission issued its decision on April 20, 2012.

Mia Macy had been a police detective in Phoenix, Arizona. She decided to relocate to San Francisco and applied for a position with a ballistics lab at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The application process appeared to be going well until Macy informed the hiring contractor that, although she had begun the application process as a male, she would begin work as a female. Five days later, Macy was informed that, due to federal budget reductions, the position was no longer available.

Believing that her transgender status had been the cause for the position being withdrawn, Macy used the ATF process designed to comply with EEOC's regulations under Title VII. Macy spoke with an equal employment opportunity counselor and explained she felt she had been discriminated against based on sex, describing her claim of discrimination as "change in gender (from male to female)."[89] The counselor helped her fill out the formal complaint form, where Macy checked off "sex" as the basis of the complaint, checked the box "female," and "then typed in 'gender identity' and 'sex stereotyping' as the basis of her complaint."[90]

The problem for Macy was that the Department of Justice had one system for adjudicating claims of sex discrimination under Title VII and a

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[87]*See* EEOC Motion for Leave to File Brief as Amicus Curiae and Amicus Brief in *Pacheco*, Docket No. 30, 2011 WL 5410747, 5410751 (W.D. Tex. Oct. 17, 2011).

[88]The *Pacheco* trial court denied the EEOC's motion for leave to file an amicus brief because (1) the EEOC's position in its brief was inconsistent with its administrative handling of the plaintiff's EEOC charge, which the EEOC had dismissed because it was unable to conclude from its investigation that Title VII was violated; and (2) the EEOC's motion was moot because the trial court had denied the motion for summary judgment a few days earlier due to a genuine issue of material fact. *See Pacheco*, Docket No. 34 (W.D. Tex. Nov. 1, 2011) (Order Denying EEOC's Motion for Leave to File Brief as Amicus Curiae); *Pacheco*, No. 7:10-CV-116, Docket No. 33 (W.D. Tex. Oct. 28, 2011) (Order Denying Defendant's Motion for Summary Judgment). The manner in which the EEOC field staff investigated and dismissed Pacheco's charge of discrimination was consistent with EEOC rulings in earlier cases, as discussed above and as cited in Chapter 14 (Title VII of the Civil Rights Act of 1964).

[89]Macy v. Holder, 2012 WL 1435995, at *2 (EEOC Apr. 20, 2012).

[90]*Id*.

separate system for adjudicating complaints of sexual orientation and gender identity discrimination. The latter system was similar in many respects to the former, but did not include the same remedies, including the right to appeal to the Commission for a ruling that the agency would be required to comply with, should the Commission find that discrimination occurred. The ATF wanted to deal with Macy's "gender identity stereotyping" claim of discrimination under its system created for claims based on sexual orientation and gender identity because, according to the agency, those types of claims were not within EEOC's jurisdiction.[91]

Macy then turned to the EEOC to appeal that question of jurisdiction. The legal question before the Commission was thus simple and straightforward: Did the Commission have the authority, under Title VII, to hear a claim of discrimination based on gender identity? The answer by the Commission was equally simple and straightforward: Yes, it had jurisdiction to hear such a claim because discrimination on the basis of gender identity was simply a form of discrimination based on sex.

As the Commission made clear in its opinion:

> This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition [in *Price Waterhouse*] that "an employer may not take gender into account in making an employment decision."[92]

In one respect, the Commission's decision in *Macy* was simply the Commission catching up with federal and state courts that had concluded, as discussed earlier, that the gender stereotyping theory of *Price Waterhouse* included protection for transgender individuals who had been discriminated against on the basis of their transgender status. Thus, the Commission's decision recognizes that the *Price Waterhouse* theory of sex stereotyping is one way to prove a claim of sex discrimination based on transgender status. The Commission's decision makes clear, however, that no additional proof of gender stereotyping is needed other than the fact that discrimination has occurred *because of* the person's transgender status or intent to transition. As the Eleventh Circuit correctly noted in *Glenn*, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[93]

But the Commission's decision in *Macy* also, I hope, aided clarity by returning to the core principle on which *Price Waterhouse*'s gender

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[91] *Id.* at *3. The ATF had agreed to process Macy's "based on sex (female)" discrimination claim under its Title VII procedures. *Id.*

[92] *Id.* at *7 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 244, 49 FEP 954 (1989)).

[93] Glenn v. Brumby, 663 F.3d 1312, 1316, 113 FEP 1543 (11th Cir. 2011).

stereotyping analysis had been based in the first place: that Title VII prohibits employers from taking gender into account, except in the limited case of applying a BFOQ (or, as noted earlier, in limited circumstances dealing with voluntary affirmative action or court-ordered relief). As the Supreme Court made clear in *Price Waterhouse*, statements expressing gender stereotypes are *evidence* that gender has been taken into account in violation of the act. But what violates the law is taking gender into *account*, regardless of the reason for doing so. As the Commission noted in *Macy*:

> Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the *Price Waterhouse* Court noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision."[94]

In other words, similar to the alternative, direct approach taken by Judge Robertson in *Schroer*—that discrimination against an individual because he or she changed her gender (or religion)—violates Title VII, the Commission explained:

> There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some [gender] stereotype—although, clearly, discomfort with the choice made by the employee with regard to [gender] would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used [gender] in making its employment decision.[95]

Thus, as the Commission made clear in the *Macy* decision, it is possible for a transgender person to make out a claim based on the very simple and direct evidence that an employer has inappropriately taken gender into account in an employment decision. In other words, the plain meaning of the words of the statute would be applied to determine whether sex had been taken into account in violation of the statute. As a result, "discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII."[96]

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[94]Macy v. Holder, 2012 WL 1435995, at *10 (EEOC Apr. 20, 2012) (footnotes omitted) (quoting *Price Waterhouse*, 490 U.S. at 251).

[95]*Id*. at *11.

[96]*Id*. at *1.

Sometimes, legal logic does prevail. But often, one needs changes in cultural logic first before legal logic can catch up and enable the plain words of a statute to be applied.