

**LAW, POLICIES IN PRACTICE AND SOCIAL NORMS:  
COVERAGE OF TRANSGENDER DISCRIMINATION  
UNDER SEX DISCRIMINATION LAW\***

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I. INTRODUCTION

To achieve any lasting change in social justice, three variables must operate in a synergistic fashion: law, policies in practice, and social norms.

In this context, “law” means the words of the law developed by Congress, the President, and the courts, and their equivalents at the state and local levels. Law thus includes the text of the statute as written and enacted by a legislature, the text of regulations and guidance that are issued by an agency implementing the law, and finally the text of judicial decisions interpreting either the statute or administrative regulations and guidance. In other words – a lot of *words*.

“Policies in practice” refers to whether and how the text of a statute, a regulation or guidance, or a court decision has been *absorbed* into the workings of an entity that is regulated by the law. Simply having a law in place, written and implemented by a legislature, agency and court, will not guarantee effective policies in practice. For that, one needs entities governed by the law to truly absorb the law into the very sinews of their organizations. For example, if employers do not fully understand a law,

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\*\* Commissioner Feldblum delivered the 28<sup>th</sup> I. Goodman Cohen Lecture at Wayne State University School of Law on September 28<sup>th</sup>, 2012. Commissioner Feldblum’s remarks focused on the role that law, policies in practices, and social norms play in the achievement of social justice. The article that follows incorporates and expands upon those themes.

then they will not comply with it very well. Similarly, if employers are antagonistic about a law, for whatever reason, they will be less likely to follow it.

Finally, "social norms" are the normative assumptions or beliefs behind a social justice goal. This is about how important the general population feels and thinks about the social goal that the law seeks to achieve. Social norms are about changing hearts and minds – not something we usually associate with law. Yet, social norms affect and are affected by the law and policies in practice.

Law schools have historically focused mainly on one segment of the first variable – law as described in judicial opinions. However, to develop effective social justice advocates, law schools must educate students about all three variables — and about how they interact with each other.

This Article explores the intersection of these variables by considering the development of coverage for transgender persons under Title VII, including the role played by the Equal Employment Opportunity Commission ("EEOC" or "the Commission") in its 2012 decision in *Macy v. Department of Justice*.<sup>1</sup> Several factors have operated together to achieve the social justice goal of prohibiting the use of gender in employment decisions -- the use of the term "sex" in Title VII, as created by Congress and as interpreted by the agencies and the courts; the policies put into practice to advance women's workforce participation; and changes in social norms, both with regard to women and to transgender people.

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The Commission issued thousands of decisions in 2012, the vast majority of which were issued by the Office of Federal Operations, pursuant to power delegated to it by the Commission. The Office of Federal Operations decides what cases should receive extra review and be voted on by the Commission, based on the issues in question. In 2012, the Commission reviewed and voted on only 13 cases, including the *Macy* case.<sup>2</sup>

The Commission's ruling in *Macy* was straightforward: complaints of discrimination on the basis of transgender status should be processed under Title VII of the Civil Rights Act of 1964 and through the federal

1. *Mia Macy v. Eric Holder, Attorney General, Department of Justice, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).*

2. *Id.*

sector equal employment opportunity complaint process as claims of sex discrimination.<sup>3</sup>

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) prohibits employment discrimination on the basis of "sex."<sup>4</sup> This means that an employer cannot take sex into account when hiring, unless hiring a person of a particular sex is a "bona fide occupational qualification" (BFOQ).<sup>5</sup> 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, then that employer has taken sex into account in violation of the statute.<sup>6</sup>

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 social norms 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 argue that changes in social norms have helped bring the plain words of the statute back to life.

## II. THE BEGINNING: THE STATUTE CAN'T POSSIBLY MEAN WHAT IT SAYS

Courts and commentators created the myth that there was not much legislative debate about adding sex to Title VII of the Civil Rights Act of 1964. They also created the myth, which unfortunately has had significant staying power, that Congressman Howard Smith proposed the term "sex" to the bill *solely* to kill the bill.

Both of these myths have been thoroughly discredited by historians and legal scholars.<sup>7</sup> While Congressman Smith was perfectly happy to

3. *Id.* at 11.

4. 42 U.S.C. § 2000e-16(a).

5. *See, e.g.*, 29 C.F.R. § 1604.2.

6. *Macy*, *supra* note 1, at 10.

7. *See, e.g.*, CYNTHIA ELLEN HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988); *see also* 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. HIST. 37 (1983); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. J. 163, 165-72 (1991); 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); 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); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L.

have the Civil Rights Act be defeated, he was not happy with the idea that black men would have more rights than white women in employment. Moreover, there was plenty of legislative and social history on prohibiting discrimination based on sex — not on the Title VII amendment, but rather, going back further in debates on the Equal Rights Amendment, which both Congressman Smith and the Republican Party platform had endorsed.

Courts created and perpetuated these myths because taking the word “sex” on its face would have required major changes in how both society and the workplace operated. Indeed, while the EEOC initially balked at the plain meaning of the term “sex” as well, the agency ultimately took the lead throughout the 1970s in trying to give the plain meaning of the statute its due.

In *Phillips v. Martin Marietta Corp.*,<sup>8</sup> one of the earliest Title VII cases to reach the Supreme Court, the Fifth Circuit simply announced that there wasn’t much legislative history for it to use in deciding whether refusing female applicants with pre-school age children for a training program, while male applicants with similar-age children were accepted, violated Title VII. Mrs. Phillips ran afoul of this rule and filed a charge with the EEOC. The Commission investigated and

REV. 765 (2002); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

The myth that there is little legislative history to inform our understanding of the addition of sex to Title VII appears to have been started by (or at least, heavily supported by) Harvard Law School students, who announced in a 1971 overview of sex discrimination law that there was no legislative history or prior consideration given to the addition of sex, and that it was simply a ploy to undermine passage of the law. As the students opined: “The addition of sex as a forbidden basis of discrimination in employment was offered as a floor amendment to Title VII in the House, without any prior legislative hearings or debate. The original proponent of the measure was a southern congressman who voted against the Act, and whose strategy was allegedly to “clutter up” Title VII so that it would never pass at all. The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America.” That was the entire analysis proffered by the students and their only citation (footnote 3) was to a statement by Congresswoman Edith Green (D-OR), the only woman Member to speak against the amendment. Congresswoman Green’s arguments were very similar to the ones that she and other progressive legislators had advanced against the Equal Rights Amendment over the years. See 110 Cong. Rec. 2581 (1964) (statement of Rep. Green). Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012)

8. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

concluded there was reasonable cause to believe the rule violated the statute by discriminating on the basis of sex.<sup>9</sup>

However, since these events occurred prior to 1972, when EEOC did not yet have authority to bring litigation, Mrs. Phillips filed a class action suit on her own. But EEOC attorneys David Cashdan and Philip Sklover, under the leadership of Daniel Steiner and Russell Specter, then General Counsel and Assistant General Counsel at the EEOC respectively, participated as *amicus curiae* in her case.<sup>10</sup> Phillips lost on summary judgment in the district court and on appeal to the Fifth Circuit Court of Appeals, but following a Supreme Court decision, won the right to bring her claim under Title VII.<sup>11</sup>

The Fifth Circuit noted the EEOC’s position that “where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a *per se* violation of the Act.”<sup>12</sup> That sounds like a pretty straightforward application of the words of the statute to me. One might assume that having young children could have an impact on job performance and that employers might want to hire only employees who have children above a certain age. However, if an employer has a neutral criterion, such as requiring that an employee’s children must be above a certain age, presumably it must apply that criterion equally to both women and men in order not to violate Title VII. That was the EEOC’s position.

The Fifth Circuit then presented the company’s position, which — to a modern ear — might appear to be a somewhat stretched and creative view of the plain language of Title VII: that “before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman.”<sup>13</sup>

One might expect the court to have then turned to the plain words of the statute to see which party’s argument was correct. Instead, the Fifth Circuit observed that “neither litigant is able to present substantive support for its theory,” although each “cite[s] selected sections from the congressional history of the bill.”<sup>14</sup> The court then summarily concluded that “a perusal of the record in Congress will reveal that the word ‘sex’

9. *Id.* at 2.

10. *Id.* at 1.

11. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

12. *Phillips*, 411 F.2d at 3.

13. *Id.*

14. *Id.*

was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress."<sup>15</sup>

Perhaps there was no "helpful discussion" in the legislative debates that the Fifth Circuit panel could find. However, there was actually a fair amount of debate about the meaning of prohibiting discrimination (or mandating equality) on the basis of sex, including a fair amount of hysteria.<sup>16</sup> Although the rhetoric used at the time might strike us as excessive today, the reality is that women and men played very different roles in work and family in 1964. Moreover, it was commonly understood that one of the ways to ensure that these very different roles could continue was to ensure that employers would be permitted to apply sex stereotyping in the workplace.<sup>17</sup> Taking the prohibition against sex discrimination on its face, therefore, could have wrecked havoc. Presumed Congressional intent thus became the means to both manage and constrain that potential "havoc."

The useful result, at least for the courts, can be seen in the *Phillips* case. The Fifth Circuit was forced to acknowledge that "[w]here an employer... differentiates between men with pre-school age children, on the one hand, and women with pre[-]school age children, on the other, there is arguably an apparent discrimination founded upon sex."<sup>18</sup> However, since the EEOC had argued that the employer could not, under the statute, justify this differential treatment under the "bona fide employment disqualification" 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.<sup>19</sup>

The Supreme Court, in its opinion in *Phillips*, rescued the nation from the EEOC's plain reading of text. 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."<sup>20</sup> But the Court then ensured many more years of

15. *Id.*

16. See, e.g., Franklin, *Traditional Concept*, *supra* note 7 (statement of Rep. Celler, quoting 110 Cong. Rec. 2577) ("What would become of traditional family relationships? ... Would fathers rank equally with mothers in the right of custody to children? What would become of the crimes of rape and statutory rape? ... Would the many State and local provisions regulating working conditions and hours of employment for women be struck down?"); see generally, *supra* note 7.

17. See, e.g., Franklin, *supra* note 7; see also Case, *supra* note 7.

18. *Phillips*, 411 F.2d at 4.

19. *Id.* ("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.")

20. *Phillips*, 400 U.S. at 544.

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.<sup>21</sup>

In his concurrence, Justice Marshall rejected the possibility of a BFOQ defense for such a rule, quoting the EEOC's Guidelines of Discrimination on the Basis of Sex: "Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'"<sup>22</sup> Justice Marshall sensibly noted that an employer "could require that all of his employees, both men and women, meet minimum performance standards" and could "try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with."<sup>23</sup>

Using the historical account by Professor Cynthia Harrison, Professor Cary Franklin recounts how the EEOC had to go through its own evolution before interpreting the sex discrimination provision of Title VII in the straightforward manner later endorsed by Justice Marshall. When first presented with the natural implications of the plain meaning of the statute, the majority of the EEOC had recoiled:

In September of 1965, the EEOC announced . . . that the practice of dividing job advertisements into male and female columns did not qualify as sex discrimination because "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women." Thus, the EEOC concluded, segregating ads by sex simply helped applicants and employers find what they were looking for.<sup>24</sup>

The EEOC's decision did not go over well with the budding feminist movement. Indeed, the National Organization for Women (NOW) was founded in 1966 precisely because advocates felt that the EEOC was ignoring women's claims of sex discrimination.<sup>25</sup> Ultimately, the EEOC

21. *Id.*

22. *Id.* at 545 (quoting 29 C.F.R. §1604.1(a)(i)-(ii)).

23. *Id.* at 544-45.

24. Franklin, *supra* note 7, at 1340 (citing HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960-1972 (1992) (quoting Franklin D. Roosevelt, Jr.)).

25. See NATIONAL ORGANIZATION OF WOMEN, THE FOUNDING OF NOW (2006), available at [http://www.now.org/history/the\\_founding.html](http://www.now.org/history/the_founding.html).

became one of the fiercest advocates for the position that the statute does not permit taking sex stereotypes into account, including as a basis for a BFOQ justification.

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, but they were the weight of controversy for almost two decades. 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,<sup>26</sup> employers redoubled their efforts to cabin the reach of what the statute meant in prohibiting discrimination "because of sex."

This Article cannot do justice to the effort to create this new "traditional" understanding of the term "sex" in Title VII. Suffice it to say that a significant victory for such cabining was achieved with the Supreme Court's opinion in *General Electric Co. v. Gilbert*,<sup>27</sup> in which the Court decided that pregnancy discrimination did not constitute sex discrimination and that the "traditional" understanding of sex discrimination were practices that divided men and women into two groups and not anything else.<sup>28</sup> Although Congress overturned the *Gilbert* decision itself through the passage of the Pregnancy Discrimination Act in 1978,<sup>29</sup> the Supreme Court's pronouncements regarding the "traditional" understanding of sex discrimination continued to impact the reasoning of lower courts.<sup>30</sup>

By the time transgender individuals started bringing cases under Title VII, two myths were well entrenched: first, that there was little legislative history regarding the sex discrimination provision, and second, that Congress' sole intent had been to ensure that men and women were not classified differently. Moreover, the emphasis on legislative intent was so strong that the Fifth Circuit in a 1975 *en banc* decision overturning a panel decision applying the plain meaning of "sex" in a hair grooming case, stated that, "[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question."<sup>31</sup>

There was a minor chord in Supreme Court jurisprudence sounding in sex stereotyping theory, reflected in its 1978 decision in *Water &*

26. See, e.g., *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971).

27. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

28. *Id.* at 145.

29. Pub. L. No. 95-555, § 995, 92 Stat 2076 (1978).

30. See *Franklin*, *supra* note 7, at 1358-1377.

31. *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1971).

*Power v. Manhart*.<sup>32</sup> While the Supreme Court in the case of *Price Waterhouse v. Hopkins* would ultimately resurrect this approach, 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.

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 anti-discrimination sex protection. Indeed, the EEOC played a role in enabling the courts to reach this conclusion. While the words of the statute carried sufficient weight to generate one positive district court ruling and one dissent in an appellate decision, these represented the minority chord during this time.

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 courts in judicial decisions often adopted the legal reasoning used by the Commission.

The first written Commission decision involving a transgender person concerned a music grammar school teacher who started employment with a school system in 1957 as a man and was fired in 1971 after transitioning to 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. The Commission explained its reasoning as follows:

There is no . . . 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

32. *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (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." However, the Court explained, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." 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.").

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.<sup>33</sup>

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 receive no protection under Title VII. The Commission's decision was appended by the defendant in the case as an exhibit to the court. In an unpublished opinion in 1975, *Grossman v. Bernards Township Board of Education*,<sup>34</sup> the district judge essentially tracked the reasoning of the Commission directly. The court 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."<sup>35</sup> 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."<sup>36</sup> 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.<sup>37</sup> The court observed that the EEOC's determination, while 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.

In the first case to receive a full appellate decision, *Holloway v. Arthur Anderson & Co.*,<sup>38</sup> a transgender woman asked her company to change her personnel records to reflect her female name. The company did so and then fired her. As the Ninth Circuit in *Holloway* stated: "the sole issue before us is whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."<sup>39</sup>

33. EEOC Decisions (CCH) ¶6499 (Sept. 24, 1974).

34. *Grossman v. Bernards Twp. Bd. of Educ.*, 11 FEP 1196, 1975 WL 302 (D.N.J. 1975).

35. *Id.* at 4 (emphasis in original).

36. *Id.*

37. *Id.*

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

39. *Id.* at 661.

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 that "[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."<sup>40</sup> 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."<sup>41</sup> Anything beyond such an anti-classification prohibition would, as far as the panel majority was concerned, have to wait for Congress to act.

In his dissent, Judge Goodwin found it harder than the court 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."<sup>42</sup> 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."<sup>43</sup>

The 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, Inc.* reversed a district court ruling finding that a transgender woman had experienced unlawful discrimination under Title VII.<sup>44</sup> Kenneth Ulane was hired as a pilot for Eastern Air Lines in 1968, and was fired after she transitioned to be Karen Frances Ulane in 1981. Judge Grady, hearing the case in the Northern District of Illinois, 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."<sup>45</sup> In ultimately ruling in favor of Ulane, Judge Grady noted that he "continue[d] to hold that layman's reaction to the simple word and to the facts as alleged in the complaint."<sup>46</sup>

40. *Id.* at 662.

41. *Id.* at 663.

42. *Id.* at 664. (Goodwin, J., dissenting).

43. *Id.*

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

45. *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821, 822 (N.D. IL1983).

46. *Id.*

Acknowledging his own preconceptions about the meaning of "sex," Judge Grady also observed that, prior to his participation in the case, he would have had "no doubt that the question of sex was a very straightforward matter of whether you are male or female."<sup>47</sup> However, after listening to the evidence during the trial, he concluded 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."<sup>48</sup> Judge Grady also proffered his observation that he had "not a shadow of a doubt" that Congress had not contemplated covering transgender individuals under Title VII, but that "working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way."<sup>49</sup>

The Seventh Circuit would have none of that. In a panel decision with no dissent, the court stated, "[w]hile 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."<sup>50</sup> According to the court, its duty was to "determine what Congress *intended* when it decided to outlaw discrimination based on sex."<sup>51</sup>

The Seventh Circuit began 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."<sup>52</sup> 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."<sup>53</sup>

Anything beyond this "traditional concept" of sex discrimination was dismissed by the Seventh Circuit based on "[t]he total lack of legislative history supporting the sex amendment." As the court concluded, "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."<sup>54</sup> And that traditional concept did not include protecting transgender individuals.<sup>55</sup>

47. *Id.* at 823.

48. *Id.* at 825.

49. *Id.*

50. *Ulane*, 742 F.2d at 1084.

51. *Id.* (emphasis added).

52. *Id.* at 1085.

53. *Id.*

54. *Id.*

55. *Id.* See also, *Sommers v. Budget Marketing*, 667 F.2d 748 (8<sup>th</sup> Cir. 1982) (the court concluded that there was "no genuine issue of fact as to the plaintiff's sex at the

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

In October of 1993, Harvard Law School held an event named "Celebration 40," which celebrated forty years of women students at the institution.<sup>56</sup> During the event, I spoke on a panel with Anne Hopkins, the plaintiff in *Price Waterhouse*,<sup>57</sup> a landmark Supreme Court Title VII case. Anne Hopkins introduced me to her children in the audience, informing me that she was heterosexual and not a lesbian. The statement struck me as unusual, since most individuals do not ordinarily inform me of their sexual orientation. They assume that being heterosexual is the societal default, and they disclose their sexual orientation only if it differs from the societal norm.

For legal purposes, however, the fact that Hopkins was not a lesbian was a key variable of the *Price Waterhouse* case. Hopkins joined Price Waterhouse's Office of Government Services in Washington, D.C. in 1977 and was proposed for partnership five years later.<sup>58</sup> In a statement supporting her candidacy, the partners in her office "showcased her successful 2-year effort to secure a \$25 million contract with the Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out 'virtually at the partner level.'"<sup>59</sup> During the trial, she had an 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.'"<sup>60</sup>

At the time, Price Waterhouse had 662 partners at the firm, only seven of which were women. Also, of the 88 individuals proposed for partnership that year, only one -- Anne Hopkins -- was a woman.<sup>61</sup> 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

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.").

56. Rajath Shourie, *Ginsburg Speaks At Law Reunion: Justice Honored By Women Grads*, THE HARVARD CRIMSON, Oct. 4, 2003, available at <http://www.thecrimson.com/article/1993/10/4/ginsburg-speaks-at-law-reunion-pus/>.

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

58. *Id.* at 232.

59. *Id.* at 233.

60. *Id.* at 234.

61. *Id.* at 233.

discourage his comments and recorded his vote in the overall summary of the evaluations.<sup>62</sup>

Nonetheless, the Washington office of Price Waterhouse clearly wanted Hopkins to be a partner and put her forward as a candidate. That year, 47 of the 88 candidates were accepted for partnership, 21 were rejected, and the rest, including Hopkins, were "held" over for reconsideration to the following year.<sup>63</sup> What a shock that must have been to Hopkins, given her track record at the company.

Hopkins did not take action against Price Waterhouse at the time. But as the trial evidence eventually showed, the partners at Price Waterhouse had expressed 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."<sup>64</sup>

But it is hard to unpack some of those concerns from the partners' perception of how a woman was expected to act in the workplace.. As reported in the plurality Supreme Court decision:

One partner described her as "macho"... another suggested that she "overcompensated for being a woman"... a third advised her to take "a course at charm school". . . Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate."<sup>65</sup>

Although it is uncertain whether Ann Hopkins knew about those comments before suing Price Waterhouse, it is certain 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 make-up, have her hair styled, and wear jewelry.'"<sup>66</sup> 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.<sup>67</sup> At that point, in 1984, Hopkins sued Price Waterhouse under Title VII of the Civil Rights Act of 1964 for sex discrimination.

62. *Id.* at 236.

63. *Price Waterhouse*, 490 U.S. at 233.

64. *Id.* at 234-35.

65. *Id.* at 235.

66. *Id.*

67. *Id.* at 231-232.

By 1984, 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, which would have made her case practically impossible to win. So the fact that Anne Hopkins was heterosexual and not a lesbian was, indeed, a very relevant fact.

It is interesting to note in *Price Waterhouse* 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,"<sup>68</sup> and the Court focused primarily on those factors. 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.

However, the 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."<sup>69</sup> This 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 in order to avoid the plain meaning of Title VII's prohibition on sex discrimination by equating sexual and racial 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,"<sup>70</sup> and the plurality "[took] these words to mean that gender must be irrelevant to employment decisions."<sup>71</sup>

As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership, the plurality observed that, "[i]n the specific context of sex stereotyping, an employer

68. *Id.* at 232.

69. *Price Waterhouse*, 490 U.S. at 239. The Court added that it was disregarding, for purposes of its discussion, "the special context of affirmative action." *Id.* at n. 3.

70. *Id.*

71. *Id.* at 240.

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.”<sup>72</sup> With regard to the “legal relevance of sex stereotyping,” the plurality simply returned to the sex stereotyping analysis that had been present in its 1978 case of *Los Angeles Department of Water & Power v. Manhart*, stating, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”<sup>73</sup>

Neither Justice White nor Justice O’Connor, concurring in the judgment and writing separately on the burden of proof question, took issue with the simple and straightforward manner in which the plurality had set forth the Title VII requirement that gender could not be taken into account in employment decisions. Indeed, Justice O’Connor observed that there “is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, ‘[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.’”<sup>74</sup>

Even Justice Kennedy, writing for the dissent, did not take issue with the concept that sex stereotyping might result in a violation of Title VII’s sex discrimination prohibition. Rather, he simply emphasized that there is “no independent cause of action for sex stereotyping” under Title VII, but that “[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent[.]”<sup>75</sup> that is, whether gender has inappropriately been taken into account under the law. Hence, seventeen 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,” 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 been unlikely in the mid to late 1970’s is not surprising. A number of important social and cultural movements related to sex 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, etc. Academic researchers began to

72. *Id.* at 250.

73. *Id.* at 251 (quoting *Sprogis*, 444 F.2d at 1198).

74. *Price Waterhouse*, 490 U.S. at 265 (O’Connor, J., concurring) (citing 110 Cong. Rec. 7218 (1964)).

75. *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting).

examine the pervasive impact of gender socialization from an early age,<sup>76</sup> and to question the assumption that conforming to gender stereotypes was necessarily healthy or desirable.<sup>77</sup> Labor-force participation by women began to steadily increase and depictions of independent working women became common themes for television programs and films.<sup>78</sup>

Together, these changes helped to increase societal awareness of gender roles. While the perception of sexual differences had previously been limited to physical characteristics, the idea that societal notions and conceptions were also intrinsically related to sex was gaining ground in society. These cultural shifts gradually fed into the legal understanding of “sex” in Title VII.

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. It was not until the Supreme Court held in *Oncale v. Sundowner Offshore Services*<sup>79</sup> 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, that courts began to take seriously that, indeed, the words of Title VII mattered significantly – not just Congress’ intent when it enacted the 1964 Civil Rights Act.

I am not personally an adherent of the theory of statutory construction espoused by Justice Scalia, the author of the *Oncale* decision; my theory is more in line with that of Justice Stevens, as set forth in his opinion in *INS v. Cardoza-Fonseca*.<sup>80</sup> But I believe Justice Scalia’s consistent focus on statutory text has had the salutary effect of forcing courts, agencies and even Congress itself to focus more carefully on the words of a statute. I cannot imagine any court today pronouncing that “[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question.”

Instead, the words of a statute must always be the beginning point of any statutory analysis. If the statutory text is not ambiguous or if the legislative history does not provide a clear and direct reason to disregard what appears to be the plain meaning of the statute, then agencies and courts should apply the words of the statute. If Congress wants a different result, it can always enact a change in that statutory text.

76. See Richard A. Fabes et al., *Gender Development Research in Sex Roles: Historical Trends and Future Directions*, 64 SEX ROLES 826 (June 2011).

77. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L.J. 1, 19-37 (October 1995).

78. See *The Editors Desk: Women in the Labor Force, 1970-2009*, BUREAU OF LABOR STATISTICS (Jan. 5, 2011), [http://www.bls.gov/opub/led/2011/led\\_20110105.htm](http://www.bls.gov/opub/led/2011/led_20110105.htm).

79. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

80. 480 U.S. 421 (1987).

Justice Scalia's analysis in *Oncale* was thus understandably 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."<sup>81</sup> He observed that, while courts had "little trouble with that principle" in cases where an employee was passed over for a job or promotion, in cases of sexual harassment, courts had taken "a bewildering variety of stances."<sup>82</sup>

The lower courts had struggled with that question precisely because they were trying to decide what the 1964 Congress had intended with regard to same-sex harassment. However, as Justice Scalia explained:

[While] 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.<sup>83</sup>

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 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 discrimination because of their lack of gender conformity. In *Schwenk v. Hartford*,<sup>84</sup> the Ninth Circuit upheld a claim by a transgender prisoner under the Gender Motivated Violence Act. Analogizing to Title VII, the court found 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."<sup>85</sup> 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*."<sup>86</sup> Under

81. *Id.* at 79.

82. *Id.*

83. *Id.*

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

85. *Id.* at 1201.

86. *Id.*

*Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."<sup>87</sup> As such, a transgender female prisoner who 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.*,<sup>88</sup> 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.<sup>89</sup> The claim was brought under the Equal Credit Opportunity Act (ECOA), which prohibits discrimination "with respect to any aspect of a credit transaction[,] on the basis of race, color, religion, national origin, sex or marital status, or age."<sup>90</sup> *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's actions were based on *Rosa's* choice of clothing, not her sex.<sup>91</sup> The First Circuit reversed, concluding that the record could show 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."<sup>92</sup>

A few years following the opinions in *Schwenk* and *Rosa*, the Sixth Circuit adopted a similar line of reasoning in *Smith v. City of Salem*,<sup>93</sup> a Title VII case. *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."<sup>94</sup> 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

87. *Id.* at 1202.

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

89. *Id.* at 214.

90. *Id.* at 215 (citing 15 U.S.C. § 1691(a)).

91. *Id.* at 214.

92. *Id.* at 215-16. See generally, Katherine M. Franke, *Rosa v. Park West Bank: Do Clothes Really Make The Man?*, 7 MICH. J. GENDER & L. 141 (2001); 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*, 7 MICH. J. GENDER & L. 163 (2001).

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

94. *Id.* at 571.

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.”<sup>95</sup> Both prior to and following these federal court cases, state courts had also begun interpreting state and local sex discrimination laws to protect transgender individuals who had experienced discrimination based on gender identity.<sup>96</sup>

Two additional breakthroughs in federal court occurred in 2008 and 2011 respectively. In the 2008 *Schroer v. Billington* case,<sup>97</sup> 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 Karen 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 found, just as district court Judge Grady had in *Ulane* many years earlier, that discrimination against a transsexual because he or she is transsexual is “literally” discrimination “because of...sex.”<sup>98</sup>

In 2011, the Eleventh Circuit in *Glenn v. Brumby*<sup>99</sup> found that a legislative attorney 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 . . . [a]ccordingly, discrimination against a transgender individual

95. *Id.* at 574-75.

96. State courts had also been moving in this direction. See *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 372-73 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by the state law prohibition against sex discrimination); *Doe ex rel. Doe v. Yuntis*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 392-96 (N.Y. Sup. Ct. 1995) (holding that harassment based on the fact an employee changed his sexual status also constituted sex discrimination under the New York statute that proscribes discrimination on the basis of “sex”); *Jette v. Honey Farms Mini Market*, No. 95-0421, 2001 WL 1602799, at \*1 (Mass. Comm’n Against Discrimination Oct. 10, 2001) (noting the holding that “discrimination against transsexuals because of their transsexuality is discrimination based on ‘sex’”); accord *Rentos v. Oce-Office Sys.*, No. 95-7908, 1996 WL 737215, at \*\*8-9 (S.D.N.Y. Dec. 24, 1996) (relying on *Maffei* to hold that plaintiff could maintain a transgender discrimination claim under New York City and State law)

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

98. *Id.* at 307-08.

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

because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>100</sup>

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

In 2009, President 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, Victoria Lipnic, and myself as Commissioners to fill the available Republican and Democratic seats, respectively.<sup>101</sup> The four of us started working as recess appointees in April 2010 and were 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 *Pacheco v. Freedom Buick GMC Truck*,<sup>102</sup> a transgender woman 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.<sup>103</sup>

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.<sup>104</sup> Second, following the reasoning in *Schroer*, discrimination because an individual intends to change, is changing, or has changed his

100. *Id.* at 1316-17.

101. See *The Commission*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2013), available at <http://www.eeoc.gov/eeoc/commission.cfm>.

102. *Pacheco v. Freedom Buick GMC Truck*, No. 7:10-CV-116, Docket No. 1 (W.D. Tex. Sept. 27, 2010).

103. *Id.*

104. *Pacheco*, No. 7:10-CV-116 (W.D. Tex. Oct. 13, 2011) (Brief of United States Equal Employment Commission as Amicus Curiae in Opposition to Summary Judgment).

or her sex, is likewise prohibited by the plain language of Title VII.<sup>105</sup> 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.<sup>106</sup>

Approximately five months following the Commission's approval of the amicus brief in *Pacheco*, the Office of Federal Operations (OFO) sent the Commission a draft opinion of *Macy*<sup>107</sup> for its approval. In any case where the OFO determines that a particular issue warrants review and a vote by the full Commission, a draft opinion is sent to the Commission. The Commission reviews and analyzes the draft and makes whatever changes it deems necessary and appropriate. If no Commissioner calls for a vote within a designated time period, the opinion is approved by unanimous consent. If a Commissioner puts an opinion "on hold" and calls for a vote, each Commissioner's vote is recorded through an electronic system. The *Macy* decision was ultimately approved (following various revisions) through the unanimous consent system.

To understand the *Macy* decision, one must understand the Commission's role in federal sector discrimination claims. In 1972, Congress granted federal employees and applicants for federal employment an additional set of remedies regarding alleged employment discrimination, beyond the right to bring a claim in federal court. Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment [in the federal government] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."<sup>108</sup> The law then gives the EEOC authority to enforce this non-discrimination guarantee "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to issue regulations or instructions necessary to carry out its responsibilities.<sup>109</sup> The EEOC has issued a set of regulations that lay out

105. *Id.*

106. See *Pacheco*, No 7:10-CV-116, Docket No. 34 (W.D. Tex. Nov. 1, 2011) (Order Denying EEOC's Motion for Leave to File Brief as Amicus Curie); see also *Pacheco*, No. 7:10-CV-116, Docket No. 33 (W.D. Tex. Oct. 28, 2011) (Order Denying Defendant's Motion for Summary Judgment). 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. 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.

107. *Macy*, *supra* note 1.

108. 42 U.S.C. § 2000e-16(a).

109. 42 U.S.C. § 2000e-16(b).

the complaint process that agencies must make available to employees and applicants.<sup>110</sup> This process ends with the right to appeal directly to the five-member Commission to consider the facts of a complaint and issue a remedy.<sup>111</sup> If the Commission rules that an agency has engaged in unlawful discrimination, the agency must comply with the remedy that the Commission orders.

In *Macy*, the complainant, Mia Macy, had been a police detective in Phoenix, Arizona.<sup>112</sup> 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.<sup>113</sup>

Believing that her transgender status had been the cause for the position being withdrawn, Macy utilized the ATF process designed to comply with EEOC's regulations under Title VII.<sup>114</sup> 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)."<sup>115</sup> 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 for her complaint.<sup>116</sup>

The problem for Macy was that "[t]he Department of Justice ha[d] one system for adjudicating claims of sex discrimination under Title VII, and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination."<sup>117</sup> 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.<sup>118</sup> The ATF wanted to deal with Macy's claim of discrimination under its system created for claims based on

110. 29 C.F.R. § 1614 (called the "1614 process").

111. 29 C.F.R. § 1614.110.

112. *Macy*, *supra* note 1.

113. *Id.*

114. *Id.* at 2.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Macy*, *supra* note 1, at 2.

sexual orientation and gender identity because, according to the agency, those types of claims were not within the EEOC's jurisdiction.<sup>119</sup>

Macy then turned to the EEOC to appeal that question of jurisdiction.<sup>120</sup> The legal question before the Commission was 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.<sup>121</sup>

In one respect, the Commission's decision in *Macy* was just the Commission catching up with federal and state courts that had concluded 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. The Commission, after reviewing the cases decided by the Ninth, First, and Sixth Circuits, as well as cases decided by various district courts and state courts, concluded with the following paragraph from the Eleventh Circuit's decision in *Glenn*:

119. *Id.* at 4.

120. *Id.*

121. *Id.* at 5 ("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 that 'an employer may not take gender into account in making an employment decision.'") (quoting *Price Waterhouse*, 490 U.S. at 242).

The question before the Commission in *Macy* was whether a claim of discrimination on the basis of gender identity could proceed under the federal government's Title VII process. The Commission did not address the question of whether the ATF had discriminated against Ms. Macy in this instance. That determination was made approximately one year later in a Final Agency Decision ("FAD") issued by the Department of Justice. The FAD stated that the ATF had "discriminated against complainant based on her transgender status, and thus her sex, when it stopped complainant's further participation in the hiring process" and ordered the Bureau to offer Ms. Macy a position as a Ballistics Forensic Technician at the Walnut Creek Lab and provide back pay with interest. Department of Justice Final Decision in the case of *Mia Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Agency Complaint No. ATF-2011-00751 available at <http://transgenderlawcenter.org/wp-content/uploads/2013/07/DOJ-decision-redacted.pdf>.

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)... There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.<sup>122</sup>

Thus, one basis for the Commission's decision that a discrimination claim based on transgender status is a sex discrimination claim relies on *Price Waterhouse's* theory of sex stereotyping. The Commission's decision makes clear, however, that no proof of gender stereotyping is needed beyond the fact that discrimination has occurred *because of* the person's transgender status or intent to transition.<sup>123</sup> As the Eleventh Circuit correctly noted, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."<sup>124</sup>

However, the Commission's decision in *Macy* also should provide clarity by returning to the core principle that *Price Waterhouse's* gender stereotyping analysis was based on in the first place -- that Title VII prohibits employers from taking gender into account, except in the limited case of applying a bona fide occupational qualification. 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.<sup>125</sup>

122. *Macy*, *supra* note 1, at 9 (quoting *Glenn*, 663 F.3d at 1316).

123. *Id.* at 10 (emphasis added). (?)

124. *Id.* at 9.

125. *Id.* at 10 ("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.'")

The Commission's statement in *Macy* made it clear that 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:

[I]f Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman - she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.<sup>126</sup>

In other words, the plain meaning of the statute would be applied to determine whether sex had been taken into account in violation of the statute.

This type of analysis is a simple case of applying the sex discrimination provision of Title VII in the same manner as the other protected characteristics, such as race or religion. Indeed, as the Commission observed in *Macy*,

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. 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 religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion 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 religion in making its employment decision.<sup>127</sup>

126. *Macy*, *supra* note 1, at 10.

127. *Id.* at 11.

In a similar fashion, employers are not permitted to use sex as a basis for employment decisions, except in the application of a bona fide occupational qualification or pursuant to an appropriate affirmative action remedy.

## V. CONCLUSION

Following the passage of Title VII, the EEOC – and more importantly, the courts – struggled for ways to constrain the plain meaning of the statute so that employers could continue to make decisions based on societal expectations of the role that women and men should play in the family. Various legal mechanisms were used to achieve that goal, including perpetuation of the myth that adding “sex” to the statute had been done solely to stop passage of the law and that there was little legislative history to discern Congress’ intent in adopting the provision.

Thankfully, changes in society occurred, including the rise of a vigorous feminist movement that pushed for changes in societal expectations and practices. By the time the Supreme Court decided the *Price Waterhouse* case in 1989, the reality of women’s full workforce participation had been sufficiently accepted in society that no Justice had difficulty accepting that the sex discrimination provision in the law should be read identically to the other provisions of the law. The Supreme Court thus embraced the basic requirement of Title VII’s sex discrimination prohibition: that apart from a limited bona fide occupational qualification exception, employers may not take gender into account in making employment decisions.

The plain meaning of the term “sex” in Title VII has always been powerful. But it is only now that society has begun to evolve significantly in its understanding and acceptance of gender identity, that the power of the plain meaning of sex discrimination can offer transgender people important protection against discrimination.