EEOC DOC 0120120821, 2012 WL 1435995 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

*1 MIA MACY, COMPLAINANT,
v.
ERIC HOLDER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, (BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES), AGENCY.

Appeal No.
0120120821
Agency No. ATF-2011-00751

April 20, 2012

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND[FN1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"), [FN2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check. [FN3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

***2** According to Complainant, she was concerned about this quick change in events and on May 10, 2011, [FN4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation. [FN5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office."The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy."The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has 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 by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames -- including an ADR program, an EEO investigation and issuance of a final Agency decision -- the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

***3** On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping."However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination -- one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

***4** In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]."See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § l-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

***5** We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex....*"42 U.S.C. § 2000e-16(a) (emphasis added).*Cf.*42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's. . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex--that is, the biological differences between men and women--and gender."SeeSchwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see alsoSmith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping--failing to act and appear according to expectations defined by gender."As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

***6** That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235.She was informed, for example, that 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."Id. at 235.The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding 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."Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim."Schwenk, 204 F.3d at 1201-02;see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'"Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." SeePhillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring)."The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her."Price Waterhouse, 490 U.S. at 242. [FN6]

*7 When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim."SeeSchwenk, 204 F.3d at 1202. 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."Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways. [FN7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future."Id. at 1202.According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"-- that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor."Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations."Id. at 1201-02.Accordingly, the Ninth Circuit concluded, discrimination against transgender females -- i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf.Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

***8** Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID).Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70.Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual."Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which 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. As such, 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. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574-75.[FN8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320.The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition."Id. at 1320-21.According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

***9** In setting forth its legal reasoning, the Eleventh Circuit explained:

> 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); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender

> and transsexual individuals and discrimination on the basis of gender-based behavioral norms.
> 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.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[FN9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."Id. at 305.In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ."Id.[FN10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

> ***10** [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] 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. Title VII prohibits "discrimination] . . . because of. . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80;see alsoNewport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

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, [FN11] by a desire to protect people of a certain gender, [FN12] by assumptions that disadvantage men, [FN13] by gender stereotypes, [FN14] or by the desire to accommodate other people's prejudices or discomfort. [FN15] 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."Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if 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.

***11** 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.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title **VII** in this manner does not create a new "class" of people covered under Title VII--for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. SeeBrumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII. [FN16]

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0610)

***12** The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request. A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action."29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999).**If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

***13** The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

***14** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c).**The grant or denial of the request is within the sole discretion of the Court.**Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

[FN1]. The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

[FN2]. It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers, The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[FN3]. On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[FN4]. In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

[FN5]. The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

[FN6]. There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, seeJohnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

[FN7]. See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender

stereotyping harassment under Title VII); Medina v. IncomeSupport Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' -- i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

[FN8]. See alsoBarnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes"' and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes"').

[FN9]. But seeEtsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[FN10]. The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex."' Schroer, 577 F. Supp. 2d at 308;seealso id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, seeMichaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

[FN11]. SeeMeritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[FN12]. SeeInt'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[FN13]. See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[FN14]. See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[FN15]. See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

[FN16]. The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII."EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

EEOC DOC 0120120821, 2012 WL 1435995 (E.E.O.C.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

ALEX PACHECO	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 7:10-CV-116-RAJ**
	)	
FREEDOM BUICK GMC TRUCK, INC.,	)	
	)	
Defendant.	)	
	)	

BRIEF OF UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN OPPOSITION TO SUMMARY JUDGMENT

P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DANIEL T. VAIL
Acting Assistant General Counsel

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M. Street NE
Washington, DC 20507

JUSTIN MULAIRE
Trial Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
33 Whitehall Street, 5th Floor
New York, NY 10004
212-336-3722
Fax: 212-336-3623
justin.mulaire@eeoc.gov

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STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000e et seq. This case presents the question whether, under Title VII, disparate treatment of an employee because she is transgender is discrimination "because of ... sex." Given the Commission's enforcement interest in the resolution of this question, we offer our views to the Court.

It is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of ... sex" under Title VII. This is so for at least two reasons: (1) under the reasoning of the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), 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; and (2) following the reasoning in Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008), discrimination because an individual intends to change, is changing, or has changed his or her sex – including by changing aspects of his or her biological sex or gender expression – is likewise prohibited by Title VII. Further, in this case, the record evidence presents a genuine dispute of fact as to whether Defendant Freedom Buick GMC, Inc. ("Freedom") violated Title VII by firing Plaintiff Alex Pacheco ("Pacheco") "because of ... sex."[1]

Accordingly, the EEOC, as amicus curiae, respectfully submits that Freedom's motion for summary judgment should be denied.

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[1] The EEOC refers to and relies on evidence contained in the unsealed portions of the record. Citations herein to "Dominguez Dep.," "Hooker Dep.," and "Pacheco Dep." refer to the depositions attached to the Defendant's Appendix (Doc. No. 17), and "P.App." refers to the Plaintiff's Appendix (Doc. No. 22).

STATEMENT OF FACTS

When first hired by Freedom in January 2009 as a receptionist, Pacheco identified as and presented as male. Pacheco Dep. at 104, 237. Subsequently, Pacheco began taking hormones in order to undergo a physical transition from male to female. Id. at 94. These hormones caused changes in her physical appearance, including the development of breasts. Id. The plaintiff also grew her hair and nails out and began identifying, dressing, and otherwise "liv[ing] my life as a female" whenever she was not at work at Freedom. Id. at 98-99, 157.

In May 2010, Pacheco asked Sarah Dominguez ("Dominguez"), a cashier at Freedom, to ask Freedom's president, Josefina Hooker ("Hooker"), if Pacheco could begin presenting as female at work. Dominguez Dep. at 89. According to Dominguez, Hooker responded that this would be "inappropriate" and would not be permitted. Id. at 91.

Also at about that time, Hooker saw Pacheco presenting as a female one day when Pacheco was off-duty but had stopped by the workplace to give Dominguez a ride home. Pacheco Dep. at 210-11. According to Dominguez, Hooker later related that she was "shocked" to see Pacheco dressed as a woman. Dominguez Dep. at 83. Hooker's facial expression and manner of speaking while relating this made it clear to Dominguez that Hooker was shocked "in a bad way and found [Pacheco's] dressing as a woman to be very offensive." Id. at 95; see also id. at 83. Dominguez also testified that Hooker asked her repeatedly whether Pacheco planned to "get a sex change," id. at 103, in a manner that made it clear that Hooker found the idea objectionable, id. at 106. On another occasion at about this time, Dominguez heard Hooker and other employees express disapproval of Pacheco's appearance in pictures they saw on Pacheco's Myspace page in which Pacheco presented as a female. Id. at 98-101.

On June 15, 2010, Pacheco and Dominguez were summoned individually to Hooker's office and discharged. Dominguez Dep. at 77; Pacheco Dep. at 176, 189-90; Hooker Dep. at 38.

According to Pacheco and Dominguez, Hooker told each of them that she was discharging them because she was "simply reorganizing the office duties." Dominguez Dep. at 63; Pacheco Dep. at 176. Hooker recorded this in company records as the reason for Pacheco's discharge, and does not dispute that it is the reason she provided to Pacheco and Dominguez. Hooker Dep. at 34; see also Employee Disciplinary Report, P.App. Exh. D. Pacheco maintains that during this conversation Hooker also told her that "you just don't fit in the picture with the rest of the employees." Pacheco Dep. at 177. Hooker denies this. Hooker Dep. at 154. However, Hooker did not make any similar comment to Dominguez. Dominguez Dep. at 77.

Pacheco was replaced by a new receptionist the next day, on June 16, 2010, and Dominguez was replaced by a new cashier on June 15, 2010. Hooker Dep. at 38, 164. According to the defendant, the new receptionist's job description was the same as Pacheco's. Compare Answer to Interrogatory No. 3 with Answer to Interrogatory No. 13, P. App. Exh. F.

Later, during litigation, Hooker offered other, performance-related reasons for discharging Pacheco and Dominguez. Hooker Dep. 135-37. As set forth more fully in Pacheco's response to Freedom's motion, these explanations are contradicted by Hooker's deposition testimony, company records, or both. See Response to Motion for Summary Judgment at 4-10. Additionally, although Freedom maintains that Hooker decided to fire Dominguez and Pacheco because of an incident of misconduct on June 11, 2010, see Motion for Summary Judgment at 7-8, citing Hooker Dep. at 137, Hooker also testified that she had actually decided to discharge Dominguez at least two days earlier, on June 9, 2010, see id. at 39-40.

ARGUMENT

I. DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE HE OR SHE IS TRANSGENDER IS DISCRIMINATION "BECAUSE OF . . . SEX" UNDER TITLE VII.

A. Discharging a Transgender Employee Because He or She Fails to Identify, Look, or Live in Conformance with A Preferred or Expected Gender Norm Is Discrimination Because of Sex Under Title VII.

In Price Waterhouse, the Supreme Court recognized that Title VII's prohibition of discrimination "because of ... sex" means "that gender must be irrelevant to employment decisions." See 490 U.S. at 240. The Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" Id. at 251 (internal citations omitted). Thus "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004). As one court of appeals has explained, in Price Waterhouse:

> the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman" – that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one.

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

After Price Waterhouse, every federal circuit court of appeals that has addressed the question has recognized that disparate treatment of a transgender plaintiff can be discrimination

"because of ... sex" if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. See Smith, 378 F.3d at 572-73 (holding that adverse action taken because of transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful gender discrimination); Schwenk, 204 F.3d at 1201-02 (concluding that the transsexual prisoner had stated a viable sex-discrimination claim under the Gender Motivated Violence Act because "[t]he evidence offered ... show[s] that [the prison guard's assault was] motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor" and noting that its analysis was equally applicable to claims brought under Title VII); see also Kastl v. Maricopa County Cmty. Coll. Dist., 325 Fed.Appx. 492 at 494, 2009 WL 990760, at **1 (9th Cir. 2009) (concluding that after Price Waterhouse, "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222-24 (10th Cir. 2007) (assuming without deciding that a "transsexual" could bring a gender-stereotyping claim under Price Waterhouse, but also concluding that "transsexuals" are not a protected class under Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of "preoperative male-to-female transsexual" police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 213-15 (1st Cir. 2000) (applying Price Waterhouse to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender").[2]

[2] In addition, numerous federal district courts have come to the same conclusion. See, e.g., Glenn v.

Thus under Price Waterhouse, and in light of the clear weight of authority from lower courts applying its holding and rationale, it is unlawful sex discrimination under Title VII to discharge a transgender employee because he or she does not conform to the gender norms or stereotypes to which an employer expects or prefers the employee to conform.[3]

B. Discharging an Employee Because of a Change in Aspects of His or Her Sex, Including a Change in Gender Expression, Is Discrimination Because of Sex.

A plaintiff may also prove a claim of sex discrimination under Title VII by demonstrating that her employer discriminated against her because she planned to change, was in the process of changing, or had changed her sex. In Schroer, the court concluded that "no court would take seriously the notion" that religious converts are not protected by Title VII's prohibition against discrimination "because of ... religion." 577 F.Supp.2d at 306. Similarly, in Hobbie v. Unemployment Appeals Commission of Florida, the Supreme Court rejected the argument that unemployment benefits could be denied to a plaintiff who had been discharged for refusing to

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Brumby, 724 F.Supp.2d 1284, 1297-1301 (N.D. Ga. July 2, 2010) (on appeal); Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at *4 (D. Colo. June 24, 2010); Schroer, 577 F.Supp.2d 293; Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003); Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

[3] In its motion for summary judgment, Freedom draws a sharp distinction between cases alleging "sex stereotyping" (which it acknowledges may be actionable) and those involving discrimination on the basis of "sexual identity" or "gender identity disorders" (which it alleges are not). This is an artificial dichotomy, and Freedom construes Price Waterhouse too narrowly. Preferring or insisting that an employee's gender identity "match" the employee's actual or perceived biological sex (e.g., anatomy) is itself an impermissible sex stereotype. Thus, if an employer were to take an adverse employment action because an employee's gender identity is not consistent with the employee's biological sex, the employer would be discriminating "because of ... sex." See Smith, 378 F.3d at 574-75 ("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"); Schwenk, 204 F.3d at 1202 (discrimination because of gender in part because the perpetrator had targeted the transgender victim "only after he discovered that she considered herself female") (emphasis added); Myers v. Cuyahoga County, 182 Fed.Appx. 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender") (emphasis added).

work on her Sabbath if her need for a religious accommodation was the result of a religious conversion rather than preexisting religious beliefs. 480 U.S. 136, 144 (1987) ("In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so.").

Likewise, the Schroer court reasoned, "refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'" Id. at 308. The court's analogy to religious discrimination illustrates that discrimination on the basis of a protected characteristic encompasses discrimination because of a change in a protected characteristic. The fact that the protected characteristic at issue is "sex" rather than "religion" is immaterial. Accordingly, there is no basis for singling out transgender plaintiffs for less protection under Title VII's sex discrimination provision on the ground that aspects of their biological sex or gender-related expression changed at some point in time.

C. Contrary Caselaw Decided Before Price Waterhouse Is Not Controlling.

Several early appellate cases decided before Price Waterhouse rejected sex discrimination claims brought by transgender individuals. See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977), overruling recognized by Schwenk, 204 F.3d at 1201-02. Freedom, relying on these cases, likewise contends that transgender status is not a protected classification under Title VII. Motion for Summary Judgment at 3-5. These cases, however, have been abrogated by the Supreme Court's subsequent decisions in Price Waterhouse and Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75, 76 (1998).

The courts that held that Title VII did not protect transgender individuals did so primarily for two reasons. First, according to these courts, Congress intended the term "sex" to refer only to a person's biological status as male or female; therefore, only discrimination on the basis of that biological status is proscribed. See, e.g., Ulane, 742 F.2d at 1086 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); see also Sommers, 667 F.2d at 750 (concluding "the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation"); Holloway, 566 F.2d at 662 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."). And second, according to these courts, Congress did not specifically intend to protect transgender individuals. See Ulane, 742 F.2d at 1085 ("Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."); see also Sommers, 667 F.2d at 750 ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."); Holloway, 566 F.2d at 663 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

The rationales undergirding these decisions, however, have been eviscerated by the Supreme Court's decisions in Price Waterhouse and Oncale. As noted above, Price Waterhouse makes clear that Title VII does not simply prohibit discrimination based on biological aspects of sex, but also discrimination on the basis of gender-related stereotypes. See 290 U.S. at 251; see also Schwenk, 204 F.3d at 1201 ("sex" "encompasses both sex – that is, the biological differences between men and women – and gender"). And second, in Oncale, in ruling that same-sex harassment is actionable, the Supreme Court explicitly rejected the notion that Title VII only proscribes types of discrimination specifically contemplated by Congress. 523 U.S. at 79-80 (explaining that "statutory prohibitions often go beyond the principal evil [they were

passed to combat] 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").

In short, as the Ninth Circuit noted when it repudiated its earlier decision in Holloway, "[t]he initial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse." Schwenk, 204 F.3d at 1201-02; see also Smith, 378 F.3d at 572-73 (reasoning that Price Waterhouse "eviscerated" Ulane, Sommers, and Holloway). It thus is now well-established that a plaintiff's transgender does not provide a basis for excluding him or her from Title VII's protections. See Smith, 378 F.3d at 574-75 (under Price Waterhouse, "a label, such as 'transsexual' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of ... gender non-conformity"); see also Schroer, 577 F.Supp.2d at 308 (discrimination on the basis of a change in sex is discrimination "because of ... sex").[4]

Freedom's argument – that Pacheco cannot prevail because transgender status is not a protected classification specifically listed in Title VII – therefore disregards Supreme Court precedent and rests on discredited reasoning. Discrimination against a transgender individual because the individual fails to conform (or stops conforming) with certain gender norms or stereotypes is discrimination "because of ... sex." Likewise, discrimination against a transgender individual because the individual intends to change, is changing, or has changed aspects of his or her sex/gender also is discrimination "because of ... sex." Thus, discrimination against a plaintiff because she is transgender is unlawful not because transgender status is a freestanding protected classification, but because such discrimination is a subcategory of sex discrimination.

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[4] For the same reason, certain district court decisions declining to recognize that Title VII protects transgender individuals also are no longer persuasive. See, e.g., Sweet v. Mulberry Lutheran Home, 2003 WL 21525058, at *3 (S.D. Ind.) (relying on Ulane); Oiler v. Winn-Dixie Louisiana, Inc., No. Civ.A.00-3114, 2002 WL 31098541, at *5 (E.D. La) (relying on Ulane and other pre-Price Waterhouse appellate decisions); Dobre v. Natl. Railroad Passenger Corp., 850 F.Supp.2d 284, 286-87 (E.D. Penn. 1993) (relying on Holloway prior to its overruling).

II. THERE IS A GENUINE DISPUTE OF FACT AS TO WHETHER FREEDOM FIRED PACHECO BECAUSE OF HER SEX.

Given the record in this case, there is a genuine issue as to whether Freedom decided to discharge Pacheco because of her sex. A reasonable jury could find that shortly before Pacheco's discharge, Hooker was "shocked" by and reacted negatively to the plaintiff's appearance as a female, stated that it would be "inappropriate" for the plaintiff to present as a female at work, asked Dominguez repeatedly whether Pacheco planned to "get a sex change," and found the idea of such a sex reassignment surgery objectionable. Further, there is evidence that Hooker told Pacheco when discharging her that "you just don't fit in the picture with the other employees," but did not make such a comment to Dominguez, whom Hooker discharged on the same day, purportedly for the same incident of misconduct. It can also be inferred that Hooker knew that biological aspects of Pacheco's sex were changing and was concerned that Pacheco might have surgery that would result in further such changes. Finally, there is evidence that the reasons offered by Freedom for Pacheco's discharge are pretextual, since they have changed over time and are contradicted by Hooker's own testimony or the company's own records.

Given this evidence, a reasonable jury could conclude that Hooker expected or preferred that Pacheco look and act male, rather than dressing and otherwise presenting as female, and that the reason for Pacheco's discharge was Hooker's disapproval of Pacheco's transition from male to female and/or Pacheco's resulting failure to conform to male gender norms.[5] Accordingly, there is a genuine dispute of fact as to whether Pacheco was discharged because of sex, and Pacheco's claim cannot be resolved on summary judgment.

---

[5] For this reason, it is hardly dispositive that, as Freedom argues, Pacheco was already "effeminate" when first hired. Motion for Summary Judgment at 6. Hooker may not have been bothered by the fact that Pacheco was an effeminate man as long as he stayed male. Here, a reasonable jury could find that Hooker actually was motivated by Pacheco's full-fledged presentation as female (e.g., Pacheco's non-conformance with the stereotypical norm that males should look and act like males) and/or Pacheco's actual transition from male to female. That would be discrimination "because of ... sex" and thus a violation of Title VII.

CONCLUSION

For the reasons set forth above, the EEOC respectfully requests that the motion for summary judgment be denied.

October 13, 2011

Respectfully submitted,

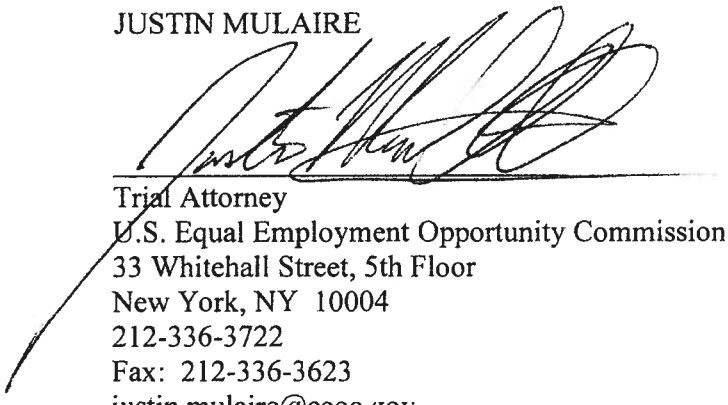
P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

DANIEL T. VAIL
Acting Assistant General Counsel

Equal Employment Opportunity Commission
Office of General Counsel
131 M. Street, NE
Washington, DC 20507

JUSTIN MULAIRE



Trial Attorney
U.S. Equal Employment Opportunity Commission
33 Whitehall Street, 5th Floor
New York, NY 10004
212-336-3722
Fax: 212-336-3623
justin.mulaire@eeoc.gov
N.Y. Bar ID # 4311031

C

EEOC DOC 0120110873, 2011 WL 2663401 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 JASON E.
VERETTO
, COMPLAINANT,
v.
PATRICK R. DONAHOE, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (NORTHEAST AREA), AGENCY.

Appeal No. 0120110873
Agency No. 4B-060-0130-10

July 1, 2011

DECISION

Complainant filed a timely appeal with this Commission from the Agency's final decision dated October 20, 2010, dismissing a formal complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

BACKGROUND

During the period at issue, Complainant worked as a Rural Carrier at the Agency's Farmington, Connecticut facility.

On July 22, 2010, Complainant initiated contact with an EEO counselor and, on September 28, 2010, filed a formal EEO complaint alleging he had been subjected to a hostile work environment because of his sex (male).

In his formal complaint, Complainant stated that, on March 9, 2010, an announcement appeared in the society section of the Hartford, Connecticut newspaper indicating that he was going to be married to his male partner. On March 12, 2010, Complainant alleged that a male coworker (CW1) approached another employee with the newspaper in his hand and asked him if he had seen Complainant's wedding announcement. When the other employee answered in the affirmative, and also stated that he had been invited to and would be attending the wedding, CW1 "became extremely upset and began, at once, yelling about [Complainant] and the wedding and the fact that [Complainant] was marrying another man."

On March 24, 2010, Complainant alleged he had a minor verbal disagreement with CW1's wife, who worked next to him, over the placement of a cart. Complainant alleged that CW1 intervened, "charging" into Complainant's work area, bumping bis chest into Complainant's chest, poking Complainant in the chest, backing him up and trapping him. Complainant contended that throughout this assault, CW1 continued to scream and swear, including threatening Complainant that, "I will beat you, you fucking queer."

Complainant reported the incident to management and CW1 was immediately removed from the workplace. A postal inspector was called to conduct an investigation. As a result of the investigation, management took some son of "administrative action" [FN1] against CW1 and he remained away from Complainant's work site for the next three months. However, on July 6, 2010, with no advance notice to Complainant, CW1 returned to the workplace. Complainant alleged that he asked that CW1 be reassigned to another location, but management did not act on the request. Complainant alleges that prior to his wedding announcement, CW1 had made a number of derogatory remarks about Complainant's sexual orientation, but he believed that, "his attack on me on March 24 was as a result of being incensed at my upcoming wedding."

***2** On October 20, 2010, the Agency dismissed the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, reasoning that Complainant was really alleging discrimination based on his sexual orientation, not his gender, and therefore had not asserted a claim under Title VII. The Agency also dismissed the March 2010 incidents as untimely raised with the EEO counselor, noting Complainant's initial request for counseling was on July 22, 2010, more than 45 days from the latest March incident. The instant appeal followed,

On appeal, Complainant argues that he is, in fact, asserting a claim of sex discrimination under Title VII. He states that he believes CW1 subjected him to harassment sufficient to create a hostile work environment because CW1 learned that he was marrying a man. Complainant argues that if he had been a woman marrying a man, CW1 would not have been upset or motivated to take action against him. With regard to the timeliness issue, Complainant asserts that he thought that Agency management had taken appropriate action to protect him from CW1 until he reappeared in the workplace on July 6, and it was clear that management was not going keep them apart. Complainant claims that he initiated EEO counseling shortly thereafter, and well within 45 days.

ANALYSIS AND FINDINGS

As an initial matter, we find that the Agency improperly fragmented the claim in this case by asserting the complaint consisted of three separate claims of discrimination involving "discrete acts." A fair reading of the complaint, in conjunction with the related EEO counseling report, indicates that Complainant is actually alleging a single claim of a pattern of harassment sufficient to create a discriminatory hostile work environment. In the case of coworker harassment, as alleged here, an agency is responsible for acts of harassment in the workplace by a complainant's co-workers where, the agency knew or should have known of the conduct, and failed to take immediate and appropriate corrective action. See29 C.F.R. § 1604.11(d).

In its final decision, the Agency dismissed the events which occurred in March 2010 as untimely raised with the EEO counselor because Complainant did not seek counseling until July 2010, more than 45 days later. Complainant explains that he did not seek counseling until July because he believed the Agency had taken immediate and appropriate corrective action based on his complaint to management about the actions of CW1. However, he asserted that he realized for the first time that that was not true when management returned CW1 to his workplace in July. Based on the correct characterization of Complainant's complaint as a hostile work environment claim, we conclude that the Agency erred in dismissing the March incidents as untimely raised. The Supreme Court has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. SeeNational Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (June 10, 2002). In this case, the Agency's decision to return CW1 to the workplace and deny Complainant's request that he be transferred to another facility occurred in July 2010, well within the 45-day limitation period. This act created Complainant's claim that the Agency should be liable for the acts of CW1 because it failed to take appropriate corrective action as required.

Therefore, we find that Complainant's entire claim, including the March 2010 incidents, was timely raised.

***3** The Agency also dismissed the entire complaint for failure to state a claim, arguing that Complainant is really alleging discrimination because of his sexual orientation, which is not covered by Title VII. Complainant disputes this characterization of claim, asserting instead that he is claiming sex (male) discrimination because CW1's actions were motivated by his anger over the fact that Complainant was a man marrying a man, rather than a woman marrying a man.

The Agency is correct that the Title VII's prohibition of discrimination does not include sexual preference or orientation as a basis. SeeMorrison v. Department of the Navy, EEO Request No. 05930964 (June 16, 1994); Johnson v. United States Postal Service, EEOC Request No. 05910858 (December 19, 1991).

Title VII does, however, prohibit sex stereotyping discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (finding that an employer's decision to withdraw a job offer from a transsexual applicant constituted sex stereotyping discrimination in violation of Title VII); see also, Morin v. Department of Health and Human Services, EEOC Appeal No. 0120092626 (August 26, 2010). In Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997), the Commission made clear that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. In this case, we find that Complainant has alleged a plausible sex stereotyping case which would entitle him to relief under Title VII if he were to prevail. He alleges that he was subjected to a hostile work environment because CW1 learned that he was marrying a man. He has essentially argued that CW1 was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype by announcing his marriage to a man in the society pages of the local newspaper. In other words, Complainant alleges that CW1's actions were motivated by his attitudes about stereotypical gender roles in marriage. Complainant further alleges that the Agency should be held liable for CW1's actions because it failed to take appropriate corrective action once the harassment was reported to management. These allegations are sufficient to state a viable hostile work environment claim under Title VII.

Accordingly, for the reasons stated above, the Agency's dismissal decision is REVERSED and the complaint is REMANDED to the Agency for further processing in accordance with the following Order.

ORDER (E0610)

***4** The Agency is ordered to process the remanded claim (hostile work environment based on sex stereotyping) in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614408, A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999).**If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

***5** The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or

her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

***6** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c).**The grant or denial of the request is within the sole discretion of the Court.**Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

[FN1]. The record does not indicate whether any disciplinary action was taken against CW1 as a result of the incident with Complainant.

EEOC DOC 0120110873, 2011 WL 2663401 (E.E.O.C.)

END OF DOCUMENT

H

EEOC DOC 0520110649, 2011 WL 6960810 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 CECILE E.
CASTELLO
, COMPLAINANT,
v.
PATRICK R. DONAHOE, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE (NORTHEAST AREA), AGENCY.

Request No. 0520110649
Appeal No. 0120111795
Agency No. 1G-701-0071-10

December 20, 2011

DECISION TO RECONSIDER

The Equal Employment Opportunity Commission (EEOC or Commission), on its own motion, reconsiders the decision in Cecile E. **Castello** v. U.S. Postal Service. EEOC Appeal No. 0120111795 (July 22, 2011). EEOC Regulations provide that the Commission may, in its discretion, reconsider any previous Commission decision. 29 C.F.R. § 1614.405(b).

ISSUE PRESENTED

The issue presented is whether the Agency properly dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Handler at the Agency's Processing and Distribution Center in New Orleans, Louisiana. On December 28, 2010, Complainant filed an EEO complaint alleging that the Agency subjected her to discriminatory harassment when, on September 15, 2010, the Manager of Distribution Operations (MDO) stated, "Cece [Complainant] gets more pussy than the men in the building."

On her Information for Pre-Complaint Counseling Form, Complainant listed "sexual orientation / sex - female" as the discrimination factors. In the EEO Counselor's Report, the EEO Counselor wrote that Complainant alleged discrimination based on sex. In addition, the EEO Counselor checked the "sex" box and specified "female." On her formal complaint form, Complainant checked the "sex" box and wrote the term "sexual orientation" next to the box.

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency determined that Complainant was alleging harassment on the basis of sexual orientation and noted that sexual orientation was not a basis covered by the EEOC Regulations.

On appeal, Complainant asserted that she was the victim of ongoing workplace harassment. Complainant argued that the Agency's Policy on Workplace Harassment prohibits, in pertinent part, " making offensive or derogatory comments or engaging in physically threatening, intimidating or humiliating behavior based upon ... "sex (including gender identity and gender stereotypes) ... [and] sexual orientation."[emphasis in original]. In response, the Agency requested that we affirm its dismissal.

***2** In Cecile E. **Castello** v. U.S. Postal Service, EEOC Appeal No. 0120111795 (July 22, 2011), the Commission affirmed the Agency's dismissal of Complainant's complaint for failure to state a claim. The previous decision found that Complainant alleged harassment based on sexual orientation, a basis not covered by Title VII. The previous decision acknowledged that Title VII prohibits sex stereotyping discrimination, but determined that Complainant did not allege sex stereotyping in the instant case.

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

While Title VII's prohibition of discrimination does not explicitly include sexual orientation as a basis, Title VII does, however, prohibit sex stereotyping discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ; seeHitchcock v. Dep't of Homeland Sec., EEOC Appeal No. 0120051461 (May 3, 2007) (affirming an AJ's decision to dismiss a claim of sexual orientation discrimination but remanding Complainant's sex stereotyping discrimination claim); see alsoSchroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008) (finding that an employer's decision to withdraw a job offer from a transsexual applicant constituted sex stereotyping discrimination in violation of Title VII). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

In this case, based upon a fair reading of the record, we find that Complainant has alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail. Complainant alleged that she was subjected to a hostile work environment when MDO made an offensive and derogatory comment about her having relationships with women.

***3** Complainant has essentially argued that MDO was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype. In other words, Complainant alleged that MDO's comment was motivated by his attitudes about stereotypical gender roles in relationships.

In light of the Commission's decision in Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873 (July 1,

2011), which found that the Agency erred in dismissing a claim of sex stereotyping discrimination under Title VII (where a gay man alleged he was harassed because he intended to marry a man rather than a woman), we find that Complainant's allegation is sufficient to state a viable hostile work environment claim under Title VII. [FN1]

CONCLUSION

After reconsidering the previous decision and the entire record on its own motion, the Commission VACATES the decision in Cecile E. **Castello** v. U.S. Postal Service, EEOC Appeal No. 0120111795 (July 22, 2011), REVERSES the Agency's decision dismissing Complainant's complaint, and REMANDS the matter to the Agency for further processing in accordance with the Order below.

ORDER (E0610)

The Agency is ordered to process the remanded claim (hostile work environment based on sex stereotyping) in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claim within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request. A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K06I0)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See29 C.F.R. § 1614.409.

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***4** This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with

the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c).**The grant or denial of the request is within the sole discretion of the Court.**Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

FN1. In her statement on appeal and in her comments on reconsideration, Complainant alleged other incidents of discrimination. If she has not already done so, we advise Complainant to contact an EEO Counselor if she wishes to pursue those matters.

EEOC DOC 0520110649, 2011 WL 6960810 (E.E.O.C.)

END OF DOCUMENT