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ABSTRACT

This article analyzes the application of employment discrimination law to sexual minorities – lesbians, gays, bisexuals, transgender and intersex individuals. It evaluates Title VII and state anti-discrimination laws' treatment of these individuals, and is the first article to use masculinities research, theoretical and empirical, to explain employment discrimination against sexual minorities.

While the article concludes that new legislation would further the interests of sexual minorities, it posits that it is neither necessary nor sufficient to solving the employment discrimination problems of sexual minorities. A major problem lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites, and that sees gender as naturally flowing from biological sex. Without courts' understanding that our current binary concept of gender may be socially constructed and artificially rigid rather than a natural result of biology, even new legislation may fail to protect workers it seeks to protect.

The article demonstrates that research on masculinities can help courts understand why their decisions are often based on a misunderstanding of sexual minorities and of the motivations of those who discriminate against them in the workplace. It concludes that even in the absence of new legislation, Title VII's sex discrimination provision should protect sexual minorities from discrimination and should provide reasonable accommodation to allow sexual minorities to live and work with dignity and security. With an understanding of sexual minorities and the reasons why discrimination occurs, Title VII's prohibition of discrimination "because of sex" should be sufficient to grant sexual minorities workplace rights.

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I. INTRODUCTION

Title VII of the 1964 Civil Rights Act [1] protects against employment discrimination based on sex. The law is unsettled, however, as it relates to sexual minorities. The statute does not explicitly protect individuals based on sexual orientation, gender identity or expression.[2] In fact, the federal courts have uniformly held that discrimination based on sexual orientation is not discrimination based on sex, and, therefore, is not prohibited by the federal act. [3] Moreover, all but one federal court to hear the issue have concluded that discrimination because a person is transgender [4] is not prohibited by the statute. [5]

But sexual minorities have made some progress toward protection against employment discrimination by using the *Price Waterhouse* stereotyping doctrine to advance their cause. *Price Waterhouse v. Hopkins* [6] held that it is illegal sex

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[1] 42 U.S.C. Sec. 2000e (2000).

[2] Gender identity is the personal concept of whether a person is a man or a woman. CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 69 (1998). Gender role or expression is the public manifestation of a person's gender identity such as behavior and dress. Shubo Ghosh & Leslie Walker, *Sexuality: Gender Identity*, http://www.emedicine.com/ped/TOPIC2789.htm (last visited Oct. 7, 2008). As used here, the term "sexual orientation" refers to the orientation that a person has with respect to sexual pleasure, which is defined by the object of the individual's sexual attention: homosexual, heterosexual, bisexual or other.

[3] *See, e.g*., Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

[4] "Transgender" or "transgendered" is the umbrella term used to describe persons whose gender identity and/or expression differ from those expected of persons of their biological sex. *See* Sexuality http://apa.org/topics/transgender.html (last visited Oct. 7, 2008). Transsexuals are transgender persons who live and/or work in a gender other than that assigned to them at birth. They often accomplish this endeavor by taking hormones and having sex reassignment surgery and/or other surgeries such as facial feminizing surgery for men transitioning to women, and chest reconstruction for women transitioning to men. *Id*. *See also* Kristen Schilt and Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. ECON. ANAL. & POL'Y *1, *6 (2008), available at http://.bepress.com/bejeap/vol8/iss1/art39

[5] *See, e.g*., Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (holding that discrimination based on transgender status is not illegal sex discrimination under Title VII) ; Sommers v. Cornish, 569 F.2d 325 (5th Cir. 1978) (same); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (same). *But see* Schroer v. Billington, 577 F. Supp. 2d 293 (D. D.C. 2008) (holding that Title VII prohibits discrimination against an individual because he or she is transgender).

[6] 490 U.S. 228 (1989) (concluding that an employer's refusal to promote the plaintiff because of her failure to adhere to feminine sex stereotypes is discrimination because of sex).

discrimination to deny a masculine woman a promotion at the employer's firm because of her failure to adhere to stereotypes of appropriate feminine behavior and dress. A number of courts have interpreted *Price Waterhouse* to protect gay, lesbian or transgender workers where the discrimination occurs because of the individual's failure to conform to prescribed gender norms and stereotypes.[7] Courts have not uniformly accepted this interpretation, however, and even courts that accept the doctrine often hold that it does not protect individual litigants before them.[8] Courts have drawn boundaries in various ways, often avoiding protection for sexual minorities. These boundaries include barriers between discrimination based on sexual stereotyping (which is sex discrimination) and discrimination based on sexual orientation or gender identity (which is not). Even in response to motions for summary judgment, courts distinguish between harassing behaviors that are motivated by sex stereotyping and those that are motivated by sexual orientation or gender identity. Determining motivation in such a complex area as gender is artificial and unconvincing, especially without a full record and expert testimony.

Because of the uneven protection of sexual minorities from employment discrimination, advocates for sexual minorities have lobbied Congress for years either to amend Title VII or to pass a new law to protect against employment discrimination based on sexual orientation and gender identity. While a number of bills have been introduced in the House and the Senate, to date, none of these bills has passed both houses of Congress. Even if Congress reintroduces and enacts one of these bills in the

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[7] *See infra* Part III.C.
[8] *See infra* notes 117, 123, 126, 203, 208. .

future, there remains a question as to whether courts will interpret it to give broad protection to sexual minorities in the workplace.

The problem lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex. Without understanding that our current binary concept of gender may be socially constructed and artificially rigid rather than a natural result of biology, the law, even if it is amended to protect persons based on sexual orientation and gender identity, may fail to protect those workers it seeks to protect. Gender scholars and, in particular, masculinities scholars can help courts understand why the boundary-drawing is based on a misunderstanding of sexual minorities.

This article discusses how the law applies to the different groups of individuals who do not fit within binary conceptions of gender or sex – lesbians, gays, bisexuals, transgender and intersex [9] individuals. It analyzes Title VII and state anti-discrimination laws' treatment of these individuals at work, and uses masculinities and other gender research to provide a theoretical account that explains, at least in part, discrimination against members of these groups. Finally, it proposes that the best solution is to pass a federal statute or amendment to Title VII that would protect individuals from discrimination based on sexual orientation, intersex condition, gender identity and expression and that would provide reasonable accommodations to transgender and

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[9] Intersex individuals are persons born with indeterminate sex, because their chromosomes do not match their genitalia, or their genitalia is ambiguous, or they carry an extra chromosome or a mosaic chromosomal pattern. CATHERINE HARPER, INTERSEX 9-12 (2007); Anne Fausto-Sterling, *The Five Sexes*, THE SCIENCES 20, 22 (Mar./Apr. 1993). The American Academy of Pediatrics has recommended that the terms "intersex" "hermaphrodite" and "pseudohermaphrodite" be replaced because they are considered pejorative. The Academy recommends the term "disorders of sex development" (DSD). *See* Peter A. Lee, et.al, *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e488 (2006). Because "intersex" continues to be used commonly in non-derrogatory ways and the term "DSD" has not acquired much of a following, I use both terms in this article.

intersex individuals for access to appropriate rest room and locker facilities at work. Even without passage of a federal act, however, this article concludes that courts should interpret the sex discrimination provisions of Title VII and its state counterparts, with the aid of masculinities and other social science research to protect persons from discrimination at work based on sexual orientation, intersex condition, gender identity or expression. Masculinities research demonstrates that much harassing behavior directed at gays and transsexuals occurs because of sex, (or gender, which is protected by Title VII). It occurs because of the sex or gender of the harasser and of the victim. The harasser is motivated to harass in order to negotiate his masculinity in the workplace and to prove that the job in question is masculine. The victim is harassed because he or she (in the case of a Male-to-Female transsexual) is perceived to be insufficiently masculine to continue in the job.

Part II of the article analyzes the gender and masculinities research that challenges our binary concept of gender. Part III explains the uneasy political alliance that makes up the LGBT,[10] which, in part, accounts for the lack of a coherent view concerning the protection of sexual minorities. It also examines the federal and state case law dealing with employment discrimination against sexual minorities and reveals the underlying assumptions supporting much of the analysis. Part IV demonstrates how theoretical understandings of masculinities theory would inform courts and Congress about the nature of gender, which in turn would lead to the passage of federal legislative protections, and even in the absence of federal legislation, better judicial interpretations. Finally, the article concludes that masculinities research should inform

[10] "LGBT" stands for "lesbians, gays, bisexual and transsexuals." At times it is written as "LGBTI" to include intersex individuals or "LGBTQ" to include queer individuals. While I use "LGBT" throughout the article because it is more common, I do not intend to exclude intersex or queer individuals.

the courts' analysis. Only with an understanding of this research will courts interpret the law, either amended or not, in a manner that respects sexual minorities and gives them full rights in the workplace.

II. BACKGROUND: GENDER AS A BINARY: FEMINISM, QUEER THEORY AND MASCULINITIES THEORY

A. Feminist Accounts of Gender

Popular culture perceives of gender as a fixed phenomenon that derives naturally from an individual's biological sex. It assumes that persons categorized as female biologically should be, and naturally are, feminine and attracted to men, and that persons categorized as male biologically should be, and naturally are, masculine and attracted to women. According to popular culture, gender is a means of promoting reproduction; gender relates to biological sex as "feminine" relates to female and "masculine" relates to male. Many of these perceptions are unconscious or hidden because they seem natural.

Sociologists and feminist scholars argue that gender is socially constructed,[11] that gender role or expression is not natural but learned behavior. It is a performance that is contestable or changeable. The popular binary view exaggerates differences between men and women and disregards similarities.[12] It does not take into account biological variety, individual difference, diverse sexual orientation and the role that society plays in

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[11] *See, e.g.*, Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality and Gender*, 66 SOC. INQUIRY 143, 146-47(1996) (stating that gender is "a social institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society such as the economy, ideology, the family, and politics and is also an entity in and of itself.").

[12] *See, e.g.*, Judith Lorber*, Using Gender to Undo Gender: A Feminist Degendering Movement in* 1 FEMINIST THEORY 79, 83 (Gabrielle Friffin et al.eds., 2000); Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality and Gender*, 66 SOC. INQUIRY 143, 144-45 (1996) (arguing that adopting binary concepts reinforces the view of normal and deviant); JUDITH LORBER, PARADOXES OF GENDER 294-302 (1994); R.W. CONNELL, MASCULINITIES 231-34 (1995).

constructing biology,[13] gender and sexual orientation. It converts persons who do not fit into the binary into unnatural outcasts. These outcasts include, among others, feminine men, masculine women, gays, lesbians, bisexuals,[14] transgender, transsexual, intersex and gender queer individuals.[15] While biology clearly plays an important role in behavior, the history of the American medical profession in constructing gender by attempting to force individuals to conform to gender norms and roles clearly demonstrates the importance of social construction of gender. [16]

*B. Sexual Orientation and Heteronormativit*y: *Queer Theory*

The binary concept also leads to the inevitable conclusion that heterosexuality is normal and that homosexuality is abnormal. Queer theorists argue that heterosexuality as "the norm" is socially constructed.

Queer theory, which derives from cultural studies, comprises four different concepts: 1) that sexuality is central to the struggle for political power whether it is obvious or not; 2) that identity is performative, not natural; 3) that political struggle is an ironic parody rather than a true struggle for liberation; and 4) that popular culture may

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[13] Society constructs biology by deciding which sex a child who is born with ambiguous sexuality will be raised and by subjecting the child to surgery to attempt to make the child's body align with the chosen sex. Alice Domurat Dreger, *"Ambiguous Sex": Or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, 28 THE HASTINGS CENTER REPORT 24, 27 (May-June, 1998).

[14] Defining "bisexual" may be more complicated that originally one would think. *See infra* Part III.C.2.

[15] "Gender queer" individuals are persons who are constrained by the sex/gender binary. This term can include gays, lesbians, bisexuals and transgender individuals and even heterosexuals who find sex/gender constricting. Queer individuals can be part of a queer social movement if they are willing to accept the term and to identify as queer and to recognize their own privilege vis a vis others. *See* Coralee Drechsler, *We Are All Others: An Argument for Queer in* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS 265, 273-4 (Jonathan Alexander & Karen Yescavage, eds., 2003) "Queer," then, is more of a political movement than a sexual or gender identity.

[16] *See, e.g*., Joanne Meyerowitz, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 125-6 (2002) (describing leading doctors in the 1960's who established gender identity programs for parents that taught parents how to establish and reinforce gender roles for their children, including attempts to get "sissy" boys to act more masculine and "tomboy" girls to act more feminine).

offer a window into the struggle for political power that may actually prove to be transformative.[17]

Queer theorists like Judith Butler argue that power and political meaning are created through binaries that "are inflected with sex." These binaries include heterosexual/homosexual, reason/desire, man/woman.[18] The binary terms, however, are not equal. While one depends on the other for its meaning, the first is cast as acceptable and good and the second is of questionable legitimacy. Queer theory distinguishes itself from other postmodern thought by asserting that every binary is inflected with sex, even those that appear to have nothing to do with sexuality.[19] Persons who are associated with the questionable term tend to closet themselves while those associated with the acceptable term may "out" them. An example of this dynamic is the insecure heterosexual who engages in "gay bashing" in order to secure his or her superior position as heterosexual.[20] Thus, according to queer theory, heterosexuality needs homosexuality in order to establish heterosexual identity as "non homosexual" and to maintain a superior position. While LGBT groups have encouraged coming out of the closet as a means of communicating one's true identity, many queer theorists are skeptical, arguing that sexuality is not fixed, but elusive and changing and that coming out permits heterosexuality to use homosexuality as a foil so that heterosexuals may maintain a dominant position.[21]

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[17] *See* Susan Burgess, *Queer (Theory) Eye for the Straight (Legal) Guy:* Lawrence v. Texas' *Makeover of* Bowers v. Hardwick, 59 POL. RES. Q. 401, 402-05 (2006)
[18] *Id*. at 403.
[19] *Id*.
[20] *Id*.
[21] *Id*.

Queer theorists claim that identity is fluid and is therefore performative. They differ from the gay identity approach that sees some people as homosexual and others as heterosexual. Gay identity is receptive to the idea that sexuality has biological roots.[22] Queer theorists argue instead that identity is not fixed or natural, but relational and learned – it depends on the interaction with others.[23] They conclude that lesbian and gay identities, even though they are constructed on the ideal of equality, actually exclude others such as transgender persons as outsiders.[24] Queer theorists use parody and irony as strategies to comment on gender and sex. For example, they see drag queens as offering an exaggerated and humorous parody on sex and gender. Such drag performances may "destabilize well-worn, yet firmly entrenched discourses, such as identity discussions that are a product of the heterosexual/homosexual binary."[25]

C. Masculinities Theory and Gender

Developed primarily by sociologists to understand men and masculinity, masculinities studies also draw from psychology, criminology, feminist theory, queer theory, anthropology and geography.[26] Most masculinities theorists accept that gender is socially constructed, but there are variations among masculinities experts in their view of the importance of the body, and in whether biology plays any role in establishing norms of behavior. R.W. Connell, a leading theorist in masculinities, for example, sees gender as an ordering of social practice based on reproductive capacity rather than on biology. He concludes that categories of male and female matter only because society says they

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[22] JANET HALLEY, SPLIT DECISIONS 113 (2006).
[23] *See* Burgess, *supra* note 17 at 403.
[24] *See* Drechsler, *supra* note 15 at 273.
[25].Burgess, *supra* note 17 at 404.
[26] *See* Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 223 *Wis. J.L. Gender & Soc'y* 201, 211-21 (2008).

do. Connell believes that gender exists to fill in the gaps left by biology.[27] But he disagrees with those social constructionists who see the body as merely a "landscape" on which to draw or a perspective from which one speaks. Instead, he argues that while gender is socially constructed and not biologically predetermined, our bodies play a role in this material construction.[28]

Masculinities researchers consider how societal norms shape behavior of individual men and women, how masculinities are imbedded in the structure of institutions, and how individuals and groups perform masculinities within those institutions. The term "masculinities" has multiple meanings. For purposes of this article, it refers to the construction of masculine identities at work through performance, and a set of practices and the active engagement in these practices by men or women at work. These practices, consciously or unconsciously, reinforce the gender hierarchy in workplaces by conflating "doing masculinity" with work itself.

1. *The Construction of Masculine Identities Through Performance*

Masculinities are plural. There are multiple forms of masculinity that are affected by time, place, social class, race, gender, sexual orientation, disability and national origin. Thus, masculinities theorists prefer the term "masculinities" to "masculinity." Moreover, masculinities are not static, but active and changeable.

The normative masculinity in the American workplace includes aggression, competition, and anxiety.[29] Although numerous masculinities exist in tension with one

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[27] *See, e.g.*, R.W. CONNELL, MASCULINITIES 71-72 (2d.ed. 2005).
[28] *Id*. at 51-52.
[29] *See* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, *in* FEMINISM & MASCULINITIES 182, 183–84 (Peter F. Murphy ed., 2004).

another, the powerful hegemonic masculinity is white, middle class, and heterosexual.[30] Masculinities researchers posit that our culture rewards white middle class men who compete to prove their masculinity, exclude women from power because they lack masculinity, and exclude men from power who do not live up to the normative definition of masculinity.[31] Masculinity as anti-femininity "lies at the heart of contemporary and historical conceptions of manhood, so that masculinity is defined more by what one is not rather than who one is."[32] Masculinity involves a flight from the feminine, and a fear of homosexuality. Men engage in "homosocial events" to gain acceptance[33] by testing themselves in order to prove to other men that they are masculine.[34] This is a dangerous experience for the men, full of risk and relentless competition.[35] The pressure to prove one's masculinity is constant and relentless and the competition is keen.

Masculinity is fragile. Men compete to prove that they are masculine because without masculinity, they are empty vessels. But the vast majority of men can not achieve the ideal hegemonic form of masculinity. As they fall short, they suffer and often cause others who are subordinated to them to suffer as well in order to capture whatever masculinity they can. [36]

Many who perform masculinities see homosexuality as feminine behavior; homophobia "is a central organizing principle of our cultural definition of manhood.

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[30] *Id*. at 184.
[31] *Id*. at 184–85.
[32] *Id.* at 185. As Kenneth Karst states, "[t]he main demands for positive achievement of masculinity arise outside the home, and those demands reinforce the boy's need to be what his mother is not. In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don't be a girl." Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).
[33] Kimmel*, supra* note 29 at 185.
[34] *Id.* at 186.
[35] *Id.* at 186–87.
[36]

Homophobia is more than the irrational fear of gay men, more than the fear that we might be perceived as gay." [37] It is a fear that other men will recognize that men are not as masculine as they pretend to be.[38] This fear creates shame and leads to an unwillingness to stand up for others who are harassed. [39] Moreover, it compels men to enact exaggerated masculine behaviors and to project attitudes that women and gays are "the other" with whom men compare themselves in order to establish their own "manhood."[40]

Hegemonic masculinity is the powerful masculinity in a particular place at a particular time. It is the "configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees … the dominant position of men and the subordination of women."[41] Subordinated masculinities are forms of masculinity performed by those who do not have the power to perform hegemonic masculinities because of their position in society. Often the response of the subordinated masculinities is subversive in that it resists the hegemonic form of masculinity and presents a different, often more forceful or violent form of masculinity. Social scientists have studied the performance of masculinities in workplace environments that are all male or predominantly male. [42] They observe that even in the absence of women workers, the men enact masculinities in relationship to one another. That is, they engage in competitive ritual behaviors such as sexual humor, aggressive derogatory comments and physical touching and grabbing of other men's genitals. The

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[37] Kimmel, *supra* note 29 at 188.
[38] *Id*. at 189.
[39] *Id.*
[40] *Id*. at 191.
[41] CONNELL, *supra* note 12 at 77.
[42] *See* David L. Collinson, *'Engineering Humor': Masculinity, Joking and Conflict in Shop-floor Relations*, 9 ORG. STUD. 181 (1988).

men compete aggressively by engaging in these behaviors in order to prove their masculinity to one another.

Men use humor to build a sense of solidarity, to break the monotony of their jobs, and to resist the tight control exercised over them by the managers.[43] In a study of the relationship between humor and masculinity in blue collar shops in England,[44] the men working on the shop floor developed a "shared sense of masculinity" by adopting exaggerated nicknames for each other and by using hyper-masculine banter on the shop floor, "permeated by uninhibited swearing, mutual ridicule, [and] displays of sexuality and 'pranks.'"[45] By contrasting their own hyper-masculinity with what they characterized as effeminate behavior of management, the men actively resisted their subordination by management.[46] Note that their resistance was couched in explicit gender terms. They characterized management as effeminate: "twats" and "nancy boys."[47] This humor gave them a sense of power and authority at work, permitting them to "negate and distance" [48] their managers, even though the shop jobs required monotonous, repetitious tasks. Their use of humor also allowed the men to exercise pressure on the group to conform to working-class masculinity.

Collinson observes, however, that many of the men admitted to him that they did not act this way at home.[49] Indeed, their behavior at work was a performance that established their identities as masculine men, a performance that was necessary to survive the work environment. The gendered behavior did not exist outside of the workplace;

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[43] *Id*.
[44] *See id.*
[45] *Id*. at 186.
[46] *See id*.
[47] *See id*.
[48] *See id*.
[49] *See id*. at 192.

rather, the men's gender identities were socially enacted at work through their performances and their interactions with one another. Devon Carbado and Mitu Gulati explain that the performance of identities helps outsiders become more acceptable in the workplace, but may become a denial of oneself.[50] While men perform masculinities in the shop context to resist supervisors' authority, these behaviors also appear to be identity performances to gain acceptance.

Women, effeminate men and transgender individuals may be harassed to undermine their competence, to force them out of the job, and to preserve the job as a masculine enclave.[51] Men also direct this behavior at newcomers and even at those who have been in the workplace for a period in order to assure that they conform to the group's masculine norms and that they perform the behaviors that reinforce the norms.[52] These behaviors assure the job's masculine identity, and the masculine identity of those holding the jobs. These performances often involve harassment directed at the outsider who can not or will not perform masculinity in an acceptable manner. Common targets are effeminate men, gay men, and transgender individuals. The harassment of these individuals occurs because of sex or gender because the harasser uses the victim, who displays a less fulsome masculinity, as a means of proving his own masculinity.

2. *Masculinities: Practices at Work*

Besides constructing identity through performance, the term "masculinities" as used here refers to practices. These practices become so conflated with work and success

[50] *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (describing how outsider employees perform their identities in the workplace).
[51] *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683,1762–69 (1998).
[52] *Id. Compare* PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 166–79 (2d ed. 2007) (describing hazing in college fraternities).

at work that they are often invisible to those who practice them. Moreover, because of their association with the norm at work, both women and men can engage in these behaviors. These practices vary depending on the type of workplace, but their dominant characteristic is that they often affect men and women differently in the workplace.

a) White Collar Masculinities

Collinson and Hearn identified five types of masculinities practiced in white collar workplaces. They include authoritarianism, paternalism, entrepreneurialism, informalism and careerism.[53] Managers who practice authoritarianism broach no dissent or difference, are unwilling to engage in dialogue and prefer coercive power, and control over subordinates. Paternalism is enacted by managers who model themselves on the father in a family. They emphasize personal trust and loyalty. The effect is to ensure the subordinate's cooperation and to enhance the manager's power. Entrepreneurialism is a highly competitive style that elevates efficiency and managerial control over other values. It requires subordinates to work long hours, to be mobile geographically, and to meet tight deadlines. Informalism is a method of building relationships based on shared interests. Talk about women, sex, and baseball build relationships between men while screening out female colleagues. Careerism is a masculinity enacted by middle class white managers whose masculine identity is linked to hard work and upward movement in their careers.

b) Blatant Masculinities

In more blatant forms, masculinities may include physical and verbal abuse of females in predominately male workplaces, of male victims who are homosexual, or

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[53] David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13–16 (1994).

otherwise do not conform to masculine stereotypes and of transgender individuals. The victims are harmed because of their gender. Women suffer severe hostility and sexual harassment when they are the objects of the behavior. The harm to gender non-conforming men is obvious: they are pushed, prodded, threatened, ridiculed and even raped at work. Male to female transsexuals are particularly vulnerable to these behaviors because they threaten the masculinity of the group and of the work itself. Victims are degraded through taunts and practices that compare the male victims to women or that ascribe traits to the victims that are considered "feminine." By openly abusing men who do not conform to gender stereotypes, men police the social and gender order at work, reinforcing the definition of certain jobs as "masculine" and closed to non-conforming men and most women. Finally, the abusive behavior toward gender non-conforming men reinforces the gendered institution of work, an institution that privileges heterosexual white men over women, homosexual men and transsexuals.

3. *Applications of Masculinities Studies to Title VII*

While masculinities theory shares many premises with feminist theory and draws much of its analysis from feminism, masculinities theory attempts to demonstrate why a reverence for the hegemonic forms of masculinity harms men as well as women.[54] It acknowledges that men as a group are powerful, but also claims that individual men often feel powerless.[55] These feelings of powerlessness derive from pressure on men to act as

[54] *See* Peter F. Murphy, *Introduction*, *in* FEMINISM & MASCULINITIES 9-10 (Peter F. Murphy ed., 2004); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, *in* FEMINISM & MASCULINITIES 57-60, 67 (Peter F. Murphy ed., 2004).

[55] *See* Kimmel, *supra* note 29 at 194–195.

breadwinners, to compete with other men to demonstrate their masculinity, and to deny their emotions. [56]

Masculinities studies combine with other social science research to make visible hidden gendered expectations and biases, to interpret cultural meanings and to provide new interpretations of the law. Combined with other research on gender, masculinities studies can offer a unique perspective into the way men and women behave and into the culture's interpretations of that behavior.

While masculinities studies alone may not create a comprehensive theory for understanding human behavior, they offer explanations that other theories do not. First, by focusing on men's behaviors and motivations as well as the structures that benefit men, masculinities studies help us understand men and power, and the importance of recognizing that although individual men might benefit from the patriarchal dividend,[57] they may not be entirely powerful in their daily lives. This is because men are not all situated in similarly powerful positions vis a vis one another. A focus on men helps us understand that men are unequally positioned because of race, national origin and even appearance and height. Inequalities result from these other identity factors as they intersect with gender. Perhaps even more crucial, masculinities studies help explain that workplace structures are themselves masculine and that masculine structures and behaviors are conflated with work. Women, trangender individuals, gay men and men of color who attempt to assimilate into the masculine workplace will have to work harder because their lived experiences are often different from those of straight white men.

[56] *See id.*; Pleck, supra note 54 at 59–60.
[57] The "patriarchal dividend" is the "advantage men in general gain from the overall subordination of women." *See* CONNELL, *supra* note 12 at 79.

Despite these efforts, often these individuals fail because they do not conform to gender expectations and are therefore subject to discrimination and harassment at work.

III. The Law of Sexual Minorities and Employment Discrimination

A. Background: Political and Identity Issues in the LGBT Community

Generally, Title VII law has not protected lesbian, gay, bisexual, transgender, intersex, and queer individuals from discrimination based on their failure to fit neatly into the binary concepts of male and female. The binary concept of male and female, masculine and feminine gives rise to heteronormativity, the conclusion that heterosexual relations between women and men are natural and that homosexual behavior is unnatural. While heteronormativity prevails, society's opinion of homosexuality has changed significantly over the past 25 years. Homosexuality was listed as a mental disorder until 1973 in *The Diagnostic and Statistical Manual of Mental Disorders*; in 1973 the American Psychiatric Association reversed course and concluded that homosexuality is not a mental disorder. Today, although still controversial, many consider homosexuality to be an identity, rather than an illness or deviant behavior, and a number of state laws protect civil unions between gays or gay marriage. Nonetheless, lesbians, and gays continue to suffer discrimination in workplaces, and recognition of gay relationships may exclude other sexual minorities by reinforcing a new binary concept of heterosexuality vs. homosexuality.

Even with the increasing acceptance of homosexual identity and relationships, this newly expanded binary presumes that persons are either male or female and that they fit into one of two categories of sexual orientation: heterosexual or homosexual. This presumption does not track reality. Other groups experiencing discrimination because their gender identities or expressions do not comport with binary definitions include bisexuals, transgender and transsexual, intersex and queer individuals. While there has been considerable scholarship on gay and lesbian rights, legal scholars have just recently begun to grapple with the treatment of transgender and intersex individuals.[58] There is to date no published legal scholarship on bisexuals in the workplace.

While the members of the different groups of the LGBT community would emphasize different aspects of their gender -- based on sexual orientation, gender identity and gender expression or role, they share a common interest in revising the law to make it more protective of all sexual minorities. There have been political battles within the LGBT community, and what some would call a betrayal of the transgender community.[59]

In order to understand the issues confronting members of the LGBT community, it is necessary to contemplate why the community constitutes an uneasy alliance. Some lesbians and gays arguing for gay marriage and other legal protections enjoyed by the straight community believe that their sexual orientation is a fixed identity, with some arguing that it has biological origins. As a political matter, this argument makes

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[58] *See, e.g.*, L. Camille Hebert, *Transforming Transsexual and Transgender Rights*, 15 WM & MARY J. WOMEN & L. ___ (2009) (concluding that courts should treat discrimination against transgender persons as discrimination because of sex under Title VII); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 U.C.L.A. WOMEN'S L.J. 243 (2008) (same); Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersexions*, 7 GEO. J. GENDER & L. 31 (2006) (discussing the courts' distortion of issues confronting sexual minorities though categorization); Nancy Ehrenreich, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices*," 40 HARV. C.R.-C.L. L. REV. 71, 77-79 (2005) (comparing surgery on intersex infants in the United States with female circumcisions performed in African nations); Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J. L. & GENDER 99 (2005) (describing the debates between the intersex community and other members of the LGBT); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (arguing that the law should permit self-identification of sexual minorities).

[59] This disagreement occurred most recently with the Employment Non Discrimination Act of 2007 (ENDA), whose original version protected against discrimination based on sexual orientation and gender identity. Eventually, as we shall see below, lesbian and gay proponents of the law decided to "save" the bill by jettisoning protection against discrimination based on gender identity.

acceptance by the straight community more likely because defining sexual orientation as an identity makes lesbians and gays appear more like straight persons. Moreover, as a legal matter, sexual orientation as a fixed identity raises compelling reasons supporting legal protection for gay individuals. Bisexual identity, in contrast, may appear to the general public to assert a sexual preference (rather than orientation) that is based on choice, and perhaps even promiscuity, rather than biological origins.[60] In law, an historic justification for the assignment of rights to persons based on their difference has relied on the immutability of the difference. Thus, the concept that persons of color deserve protection from discrimination based on their race is that because race is an immutable characteristic, persons of different races deserve the equal protection of the law. The corollary concept is that if a characteristic is changeable, there is less of a constitutional mandate to protect the person based on the characteristic. While the concept of immutable characteristics has lost some of its luster as necessary to create legal rights, it still underlies many of the legal concepts protecting individual rights.

Historically, some gay and lesbian groups have resented bisexual and transgender individuals because they view them as enjoying the privileges of straight persons without having to commit to an identity. Some gays and lesbians considered bisexuals as living "on the fence" and as lacking commitment to a homosexual lifestyle. Some have historically seen bisexuals as confused, and have complained that bisexuals enjoy the privileges of heterosexual identity while also engaging in homosexual behaviors.[61] They have also found fault with transgender persons, criticizing male to female transsexuals for

[60] Jillian Todd Weiss, *GL vs. BT: The Archaeology of Biphobia and Transphobia Within the U.S. Gay and Lesbian Community*, 25, 33 *in* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage, eds. 2003).
[61] *Id* at 44-48.

using male patriarchy to infiltrate the lesbian community, and regarding the hyperfemininity of many male to female transsexuals as a distasteful resort to gender stereotypes. Janice Raymond, for example, argued that the medicalization of transexuality was an act of patriarchal society that obscured the political and social meaning of transsexuals. She accused the transsexuals themselves of being "tokens" and argued that gender identity clinics that treated transsexuals harmed women.[62] She also accused female to male transmen as "women seduced by the desire for patriarchal power."[63]

Finally, because of their emphasis on homosexuality as an identity rather than a preference, some gays and lesbians fear that bisexuals and transgender persons, if associated with homosexuality, would harm their political cause because they are too unlike heterosexuals who live traditional lifestyles. The message of gays and lesbians that they are like straight individuals would be contradicted, this group fears, by the presence in their group of persons who have queer identities.[64] In essence, some gays and lesbians choose not to challenge the gender/sexuality binary, but to emphasize that homosexuality is one side of the binary. Bisexuals and many transgender individuals, however, have no choice but to challenge the binary definitions: their identities by their essence challenge the binary concepts of gender and sexuality. Especially at the end of the twentieth century, transgender diversity and fluidity has emerged, breaking away from the binary concepts of sex and gender.[65]

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[62] Richard Ekins, *Transgendering, Men, and Masculinities* 379, 386-7, citing Janice Raymond, THE TRANSSEXUAL EMPIRE (1980) in HANDBOOK OF STUDIES ON MEN & MASCULINITIES (Kimmel, et. al., eds. 2005).
[63] CLAIRE HEMMINGS, BISEXUAL SPACES: A GEOGRAPHY OF SEXUALITY AND GENDER, 105 (2002), citing Janice Raymond, THE TRANSSEXUAL EMPIRE (1980) at xix.
[64] Weiss, *supra* note 60 at 48-50.
[65] *See* Elkins, *supra* note 62 at 388-90.

As Michaela D.E. Meyer notes:

> While scholarly research tends to define bisexual identity in terms of a heterosexual/homosexual dichotomy, identity for these individuals is a far more dynamic process that includes a constant, day-to-day adaptation of identity defining the sexual self. In other words, bisexual and transgendered individuals are displaced from heterosexual and lesbian/gay communities, to the point that their identities become debatable by the social system. [66]

Some bisexual women view lesbian demands as too constricting. They see both the heterosexual and the gay communities as erecting barriers to keep others out and as creating restrictions that bind rather than liberate. Many bisexual women talk about their sexual orientation as a release from the barriers erected by both the heterosexual and the homosexual communities. They envision sexuality as changeable and negotiable, as a continuum with the "straight straights" and the "straight gays" at the extreme ends of the spectrum and the bisexuals occupying the center.[67]

With these tensions in mind, we can move to a discussion of the Congressional attempts to amend Title VII or pass a new statute that would forbid discrimination based on sexual orientation and gender identity.

B. Congressional Attempts to Ban Sexual Orientation and Gender Identity Discrimination

Title VII prohibits discrimination against employees and applicants based on sex, but does not expressly protect employees and applicants from discrimination based on sexual orientation, gender identity or gender expression. Twenty four states [68] and the

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[66] Michaela D.E. Meyer, *Looking Toward the InterSEXions: Examining Bisexual and Transgender Identity Formation for a Dialectical Theoretical Perspective* 151, 154 *in* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage, eds. 2003).

[67] *See* Carol Berenson, *What's in a Name?: Bisexual Women Define Their Terms*, 9, 16-19 *in* BISEXUAL WOMEN IN THE TWENTY-FIRST CENTURY (Dawn Atkins, ed., 2002).

[68] Alaska, Admin. Order 195 (2002); California, Cal. Gov. Code Sec. 12926 (q)(2005); Colorado, Colo. Rev. Stat. Sec. 24-34-401(2008); Connecticut, Conn. Gen. Stat. Sec. 46a-81c (2008); Delaware, Del. Exec.

District of Columbia protect against discrimination in employment based on sexual orientation, and a number of municipalities and counties have enacted similar laws. Of the twenty four states and the District of Columbia, sixteen jurisdictions prohibit discrimination based on gender identity as well.[69] A few of the states that prohibit discrimination based on sexual orientation or gender identity limit the prohibition to state employment or to a particular agency in state employment.[70] Without federal protection, these local and state laws create an uneven patchwork of protection against discrimination.[71]

The federal Americans with Disabilities Act expressly excludes persons based on their sexual orientation and transgender status from the definition of disability.[72] A few state disability statutes, however, have been interpreted to protect transgender individuals as persons with disabilities.[73] This protection, however, is sparse and uneven.

Ord. 10 (2001); District of Columbia, D.C. Stat. St. Sec. 2-1402.11 (2006); Hawaii, HI. Rev. Stat. Sec. 378-2(1) (1999); Illinois, 775 Ill Comp. Stat. 5/1-102 (2007); Indiana, Dept. Child Serv. , Policy No.: HR- 2-5 (2005); Iowa, IA Code Sec. 216.6 (1a)(2007); Maine, 5 ME. Rev. Stat. Sec. 1825-L (2005); Maryland, MD. Code, Art. 49B Sec. 16 (2001); Massachusetts, Mass. Gen. Laws 151B Sec. 4 (2006); Minnesota, Minn. Stat. Sec. 363A (2004); Nevada, N.R.S. 613.330 (1) (2008); New Hampshire, N.H. Rev. Stat. Sec. 354-A (2008); New Jersey, N.J. Stat. 10:5-4, 10:5-5, 10:5-6 and 10:5-12 (2008); New Mexico, N.M. Stat. 28-1-7 (2004); New York, McKinney's Exec. Law Sec. 296 (1) (2008); Oregon, OR. Rev. Stat. Sec. 659A.003(1) (2008); Pennsylvania, Exec. Ord. 2003-10; Rhode Island, R.I. Gen. Laws Sec. 28-5-3 28-5-7 (2003); Vermont, 21 V.S.A. Sec. 495 (2007), Washington, West's RCWA 49.60.030 (2007); Wisconsin, W.S.A. 111.32 (2007).

[69] California, Cal. Gov. Code Sec. 12929 (2005); Colorado, Colo. Rev. Stat. Sec. 24-34-401(2008); Connecticut, Conn. Gen. Stat. Sec. 46a-66 (a) (2008); District of Columbia, D.C. Stat. St. Sec. 2-1402.11 (2006); Illinois, 775 Ill Comp. Stat. 5/1-102 (2007); Indiana, Dept. Child Serv. , Policy No.: HR- 2-5 (2005); Iowa, IA Code Sec. 216.6 (1a)(2007); Maine, 5 ME. Rev. Stat. Sec. 1825-L (2005); Minnesota, Minn. Stat. Sec. 363A (2004); New Jersey, N.J. Stat. 10:5-4, 10-5-6 and 10-5-12 (2008); New Mexico, N.M. Stat. 28-1-7 (2004); Oregon, OR. Rev. Stat. Sec. 659A.003, 659A.006 (2008); Pennsylvania, Exec. Ord. 2003-10; Rhode Island, R.I. Gen. Laws Sec. 28-5-6, 28-5-7 (2003); Vermont, 21 V.S.A. Sec. 495 (2007), Washington, West's RCWA 49.60.030 (2007).

[70] *See, e.g.*, Alaska, Admin. Order 195 (2002) (sexual orientation only); Indiana, Dept. Child Serv. Policy No.: HR- 2-5 (2005) (sexual orientation and gender identity); Pennsylvania, Exec. Order 2003-10 (sexual orientation and gender identity).

[71] H.R. REP. NO. 110-406, at 20-21, 23 (2007). *See also* Hebert *supra* note 58 at n. 44-54.

[72] 42 U.S.C. Sec. 12208, 12211.

[73] *See e.g*., Enriquez v. West Jersey Health Systems, 342 N.J. Super. 501 (2001); Doe v. Electro-Craft Corp., 1988 WL 1091932 (N.H. Super. 1988). *But see* Doe v. Boeing, 121 Wash. 2d 8 (1993) (holding that plaintiff's gender dysphoria was not a handicap under state law because no proof that employer

Over the past thirty-three years, the United States Congress has considered many bills that would prohibit discrimination based on sexual orientation. In 1975, Bella Abzug introduced in the United States House of Representatives the first bill to amend Title VII to expressly protect employees and applicants from discrimination based on their sexual orientation. Since that date, numerous bills have been introduced in the House of Representatives and the United States Senate to protect persons from sexual orientation discrimination. While at least one of these bills came close to passing in the United States Senate, none of them has passed. Most recently, Representative Barney Frank introduced the Employment Non-Discrimination Act of 2007 (ENDA) in the House of Representatives.[74] In its original form, ENDA (H.R.2015) protected against discrimination based on sexual orientation, actual or perceived, and gender identity, actual or perceived. The gender identity provision also required that the employer provide reasonable shower and locker room accommodations to transgender persons. The hearing on H.R. 2015 elicited significant opposition from religious and employer's groups.[75] These groups were most concerned with the narrow exemption for religious organizations and what they considered to be the vagueness of the definition and protection based on gender identity. Opponents also objected because they believed that a provision in the statute that permitted an employer to require reasonable dress codes could not co-exist with the protections of gender identity.[76] In order to pass the bill, its proponents agreed to a compromise that protects individuals based on sexual orientation,

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discriminated because of her gender dysphoria, but implying that if proof of causation existed, gender dysphoria would be protected by the disability statute).

[74] H.R. REP. NO. 110-406, at 2-8 (2007).

[75] ENDA of 2007 (H.R. 2015), Hearing Before the Subcomm. on Health, Emp. Labor & Pensions, Comm. on Ed. & Labor, 110th Cong., (2007).

[76] *See, e.g.*, ENDA of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Emp. Labor & Pensions, Comm. on Ed. & Labor, U.S. House of Rep., 110th Cong., 36-39 (2007)(statement of Lawrence Lorber, Partner, Proskauer Rose LLP).

actual or perceived, and that gives broad exemptions to religious organizations, but does not expressly protect individuals based on gender identity.[77] Consequently, the compromise also eliminated the employer's duty to provide reasonable accommodations to an individual's gender identity. The newly amended bill, H.R. 3685, which defines the term "sexual orientation" to mean "homosexuality, heterosexuality, or bisexuality,"[78] passed the House of Representatives on November 7, 2007 and was placed on the Senate calendar.[79] There was no Senate action on the bill.

The bill tracked much of the language of Title VII, but it would have created a separate law making it illegal to discriminate against employees and applicants based on their sexual orientation or perceived sexual orientation. Moreover, while it permitted employees to bring disparate treatment claims for damages if there is proof that the employer intentionally violated the Act, it did not provide for a cause of action if an employer's neutral policies and practices created a disparate impact on gay men, lesbians and bisexuals.[80] Finally, it explicitly stated that it did not invalidate or limit the rights, remedies or procedures available to an individual claiming discrimination under the law or regulations of the federal government, the states, or any political subdivision. This section explicitly confirms that Congress did not intend to overrule the portion of the opinion in *Price Waterhouse v. Hopkins* that has been interpreted by lower courts to

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[77] *See* H.R. 2015 (protecting gender identity); H.R. 3685 (protecting against discrimination based on sexual orientation, actual or perceived, but not referring to gender identity).

[78] H.R. 3685, 110th Cong. 1st Sess. Sec. 3 (a)(8).

[79] 2007 H.R. 3685; 110 H. R. 3685, http://web.lexis-nexis.com/congcomp

[80] H.R. REP. NO. 110-406, at 9 (2007). This contrasts with at least one state statute that has been interpreted to grant a disparate impact cause of action based on sexual orientation. *See* Taylor v. New York Univ. Center, 21 Misc.3d 23 (Sup. Ct., 1st Dept. 2008) (noting that NY law grants a disparate impact cause of action).

protect individuals, including lesbians and gays and transgender persons, from discrimination for their failure to conform to sex or gender stereotypes.[81]

C. The Case Law: Sexual Orientation, Gender Identity and Expression: Gays, Lesbians, Bisexuals, Intersex, and Transgender Individuals' Protection by Title VII and State Statutes

Courts have uniformly concluded that Title VII does not prohibit discrimination based on an individual's sexual orientation or transgender status. For example, in *De Santis v. Pacific Tel. & Tel. Co.*,[82] the Ninth Circuit considered three consolidated cases brought by gays and lesbians who alleged discriminatory treatment in the workplace or failure to hire because of their sexual orientation. The court rejected the plaintiffs' arguments that Title VII protects individuals from discrimination based on their sexual orientation and concluded that when it passed Title VII, Congress did not intend that the term "sex" be interpreted to include sexual orientation. After *DeSantis*, the other circuits followed suit. [83]

The early cases brought by transgender individuals, *Holloway v. Arthur Andersen and Co.*,[84] *Sommers v. Cornish* [85]and *Ulane v. Eastern Airlines, Inc.*,[86] held that Title VII's prohibition against discrimination because of sex did not protect transsexuals from discrimination based on their identities as transsexuals, even though there may be a Title

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[81] H.R. Rep. No. 110-406 at 35. For a discussion of the *Price Waterhouse* sex stereotyping theory and the courts' application of it to lesbians, gays and transsexuals, *see infra* Part III.C.1.and 3.
[82] 608 F.2d 327 (9th Cir. 1979).
[83] *See supra* note 3.
[84] 566 F.2d 659 (9th Cir. 1977).
[85] 569 F.2d 325 (5th Cir. 1978).
[86] 742 F.2d 1081 (7th Cir. 1984). *See also* Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (IA 1983) (holding that transsexuals were not protected by prohibition of sex discrimination in state employment statute). Subsequently, the Iowa statute prohibited discrimination based on gender identity. Iowa Code Sec. 216.2 (10) (2007).

VII action if a transsexual is discriminated against because she is female or he is male.[87] The courts analogized discrimination based on gender identity, role or expression to discrimination based on sexual orientation which the courts had concluded was not prohibited by Title VII. They concluded that prohibition of discrimination based on transsexuality, like sexual orientation discrimination, would require Congress to amend the statute. The courts noted that Congress had bills before it to amend the statute to protect against sexual orientation discrimination, but that the amendments did not pass both the House and the Senate. Thus, the courts concluded, without an amendment that covers transsexuals as a protected category, the law does not prohibit employment discrimination against transsexuals. [88]

Since 1989, however, the United States Supreme Court has decided two cases that blur the bright line between sex and sexual orientation and between sex and transgender status. In *Price Waterhouse v. Hopkins*,[89] the Supreme Court expanded the definition of "because of sex" to include a prohibition to discriminate because of a person's gender. In this context, "gender," means gender role or expression, the manifestation of a person's congruity or incongruity with the cultural norms describing and prescribing the behavior of a person of a particular biological sex. After *Price Waterhouse*, a number of courts

[87] A New York court has interpreted the New York gender discrimination provision to ban discrimination against transsexuals because of their transsexuality. *See* Mafei v. Kolaeton Industry, Inc., 164 Misc. 2d 547, 553-4 (N.Y. Sup. Ct. 1995).

[88] *See e.g.*, 742 F.2d at 1085-6. *See also* Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047 (5th Cir. 1981) (holding that transsexuals were not members of a protected class in a lawsuit brought under 42 U.S.C. Sec. 1985 (c). Recently, at least one court disagrees. The federal district court in the District of Columbia held that discrimination against a transsexual because she is changing her sex is discrimination because of sex based on the clear language of the statute. This case, *Schroer v. Billington*, is discussed below.

[89] 490 U.S. 228 (1989).

have concluded that it is illegal to engage in gender discrimination or harassment because of a person's failure to conform to gendered expectations in dress and behavior. [90]

In *Price Waterhouse*, Ann Hopkins, a successful accountant at the defendant firm, was denied partnership because the partners perceived her as too masculine and aggressive.[91] Her mentor explained that she could improve her chances of election to partnership if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[92] The Court explained that Title VII forbids stereotyping that would place women in a double bind in a competitive work environment:

> As for the legal relevance of sex stereotyping, 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.'" An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[93]

The Court concluded that evidence of sex stereotyping tainting the decision making process in *Price Waterhouse* was sufficient to prove that sex was a motivating factor in the refusal to promote Hopkins. Under *Price Waterhouse*, adverse decision making

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[90] *See e.g.*, Hamm, Spearman, *infra* note 96. Exceptions to this doctrine are the appearance and dress code cases that permit an employer to impose "reasonable" differential appearance standards on men and women so long as they do not impose an unequal burden and do not unreasonably stereotype a particular group. *See*, *e.g*., Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[91] *See* Price Waterhouse, 490 U.S. at 235, 250.
[92] *Id*. at 272 (O'Connor, J., concurring) (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).
[93] *Id*. at 251 (internal citations omitted). *See also* Bellaver v. Quanex, 200 F.3d 485 (7th Cir. 2000) (reversing district court's grant of summary judgment because a reasonable jury could conclude that the defendant discharged the plaintiff because of sex stereotyping where there was evidence that she was aggressive but that men who were aggressive were not discharged).

resulting from an employee's failure to adhere to sex stereotypes is discrimination because of sex. In essence, discrimination because of sex also includes discrimination based on gender role or expression.

Perhaps more than any other recent case, *Price Waterhouse* has the potential to change the gender landscape of the workplace. After *Price Waterhouse*, women are protected from discrimination caused by their failure to act or dress according to feminine gender stereotypes. Price Waterhouse, therefore, could not legally refuse to make Ann Hopkins a partner in the firm based on her masculine appearance or behavior. Moreover, although some courts do not agree,[94] others conclude that it is illegal to discriminate against men because of their effeminate dress or behavior. [95] The case, however, can also be read narrowly and limited to its facts. For example, Judge Posner has argued that *Price Waterhouse* does not protect effeminate men in all-male workplaces because these workplaces do not generally discriminate against men in employment. [96]

Even with a liberal reading of *Price Waterhouse*, cases will fall through the gaps if their facts do not establish that sex stereotyping was a motivating factor in the employment decision. For example, while there might be a cause of action for feminine men and masculine women,, the plaintiff will prevail only if there is evidence that feminine behavior or dress for men or masculine behavior or dress for women caused the discrimination. In some cases, this evidence may be difficult to establish. Homosexual and bisexual plaintiffs who exhibit gender expressions that comport with societal

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[94] Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L. J. 1, 18, 33, 47 (1995) (discussing how courts treat effeminate men differently from masculine women); Willborn v. Formosa Plastics Corp. of Texas, 2005 WL 1797022 (Ct. App. Tex. 2005) (refusing to recognize a sex stereotyping cause of action under federal law for a male plaintiff who alleged he was harassed by his coworkers because the plaintiffs had not demonstrated any United States Supreme Court cases that recognizes sex stereotyping can be cognizable, and declaring no cause of action under Texas law).

[95] *See infra* Part III.C.1.and 3.

[96] *See* Hamm v. Weyauwega Milk Products, Inc., 332 F.3d at 1066-8 (Posner, J., concurring).

expectations for their biological sex may have difficulty proving their cases. Moreover, in harassment cases, courts have found it difficult to distinguish between harassment that is motivated by sexual orientation (which is not forbidden by Title VII) and harassment motivated by an individual's failure to conform to gender norms (which is forbidden). [97] In transgender cases, often the problem arises concerning which rest room the transgender individual will use. Without a reasonable accommodation requirement in the case of pre-operative MTF transsexuals, the individual may not be protected by the *Price Waterhouse* stereotyping doctrine. Finally, jurisprudence concerning reasonable dress and appearance regulation may create some exceptions to the *Price Waterhouse* stereotyping doctrine.[98] All of these potential limitations on *Price Waterhouse* will be discussed in full below.

The second case that may open the way to broad protections of sexual minorities is *Oncale v. Sundowner Offshore Services, Inc.*[99] *Oncale* involved egregious male-on-male sexual harassment. Joseph Oncale, a roustabout on a Texas oil rig alleged that co-workers and supervisors restrained him while one placed his penis on Oncale's neck and arm, threatened to rape him and used force to "push a bar of soap into Oncale's anus" while he was in the shower.[100] Oncale testified at his deposition that he quit his job because he was afraid that he would be raped.[101] Lower courts had split as to whether there existed a cause of action under Title VII for same-sex harassment, and if so, under what conditions a plaintiff would prevail. The Supreme Court held that Title VII creates a

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[97] *See infra* notes 115-28.
[98] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).
[99] 523 U.S. at 77.
[100] Oncale v. Sundowner Offshore Servs., 83 F.3d 118, 118–119 (5th Cir. 1996), *rev'd and remanded*, 523 U.S. 75 (1998).
[101] *See Oncale*, 523 U.S. at 77.

cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment created is hostile because of the victim's sex.[102] The mere fact that the perpetrator and the victim are of the same sex is not a bar to a Title VII sexual harassment cause of action.

The Court noted that in male-on-female sexual harassment cases, it is relatively easy to draw the inference that the behavior occurred because of sex. Because the behavior is often explicitly sexual in nature, a reasonable fact finder may conclude that the behavior would likely not have occurred had the victim been of the same sex as the perpetrator. The Court also stated that a same sex harassment plaintiff may take advantage of the same chain of inference with proof of the homosexuality of the perpetrator. However, the Court recognized that harassment can occur because of one's sex for reasons unrelated to the perpetrator's romantic or sexual interest in the victim. It suggested three means of proving that the behavior occurred because of sex in same sex environments. First, the plaintiff may prove that the defendant's employee was homosexual and harbored sexual desire for the plaintiff.[103] Second, the plaintiff may prove that the harasser or harassers objected to persons of his or her sex in the workplace.[104] Third, the plaintiff may demonstrate that there was differential treatment at work of men and women.[105] While there is debate concerning whether these are the exclusive means of proving that the behavior occurs because of sex,[106] the *Oncale* Court

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[102] *See id*. at 80. State courts generally followed this holding in applying their own state statutes. *See*, *e.g*, Barbour v. Dep't Social Servs., 198 Mich. App. 183 (1993) (holding that although the state anti-discrimination act does not proscribe discrimination based on sexual harassment, there is a cause of action for same sex discrimination occurring because of sex).
[103] *See* 523 U.S. at 80.
[104] *See id*.
[105] *See id*. at 80–81.
[106] Some courts have held or assumed that these are the exclusive means of proving that the harassment occurs because of sex.

offered these means of proof as illustrative, rather than exclusive.[107] Therefore, it should be clear that plaintiffs may prove that same sex harassment occurs because of sex by other means. Nonetheless, the Court emphasized that its decision did not turn Title VII into a general civility code. It noted that Title VII does not prohibit all verbal or physical harassment in the workplace. Even between men and women behavior is not automatically discrimination because of sex "merely because the words used have sexual content or connotations."[108] Moreover, the Court noted that Title VII requires that the behavior be sufficiently severe or pervasive from an objective perspective to alter the terms and conditions of employment. Simple and innocuous intersex flirtation or male-on-male horseplay would not meet this standard.[109] In determining whether the behavior meets the "severe or pervasive" test, the Court stated that the fact finder should consider "a constellation of surrounding circumstances, expectations, and relationships,"[110] and a common sense sensibility to social context to determine whether the behavior is merely simple teasing, or roughhousing, or severely hostile or abusive.

Proving that gender or sexual harassment occurs because of sex [111] has become increasingly complex since *Oncale*. Where the harassing behavior is sexual in nature, courts have little difficulty finding in a case of male on female harassment that the harassment occurred "because of sex," automatically drawing the inference that the man's sexual advances, touches, or jokes are related to the sex of the victim.[112] Courts

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[107] *See Oncale*, 523 U.S. at 80–81.
[108] *Id*. at 80.
[109] *Id*. at 81.
[110] *Id*. at 82.
[111] *See id*. at 78 (1998).
[112] *See id.* at 80 (stating that "courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume that those proposals would not have been made to someone of the same sex."); *see also* Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997),

draw this inference because they generally assume that the purpose for the sexual behavior is to forward the romantic interests of the perpetrator. The courts reason that the perpetrator, presumably a heterosexual in a male-on-female harassment case, would not have behaved the same way with a person of his own sex. Courts have had greater problems concluding that same sex harassment occurs "because of sex," especially where there is no evidence that the harasser is gay or lesbian.[113]

Since *Oncale*, plaintiffs in same sex hostile environment cases, with varying degree of success, have used the sex stereotyping doctrine of *Price Waterhouse* to prove that their harassment occurred "because of sex." Male plaintiffs alleging harassment by other men compare their situation to that of Ann Hopkins, who was denied partner status because she did not live up to the ideals of femininity held by the partners. Male coworkers and supervisors harassed male plaintiffs, they argue, because they do not live up to the traditional ideal of masculinity. Transgender individuals, especially transwomen,[114] have also adopted the *Price Waterhouse* doctrine to argue that they have suffered discrimination because they do not live up to the masculine stereotypes that accompany their birth sex, or because, despite having transitioned to women, they do not conform to prescribed norms of female beauty.

1. *Protecting Gays and Lesbians Through Price Waterhouse*

vacated by, remanded by 523 U.S. 1001 (1998) (noting "it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against 'because of' her sex").

[113] *See* Doe v. City of Belleville, 119 F.3d 563, 575 (7th Cir. 1997), *vacated by, remanded by* 523 U.S. 1001 (1998).

[114] Transsexuals who are born male but transition to female.

Many post-*Oncale* courts accept that *Price Waterhouse's* stereotyping doctrine applies to hostile work environment harassment cases,[115] but they struggle with the question of whether the hostile work environment is due to sex stereotyping which would create a cause of action under Title VII, [116] or to the alleged victim's sexual orientation (or perceived sexual orientation), which courts hold is not covered by Title VII. [117]

The cases demonstrate that drawing this line is virtually impossible. [118] Since *Oncale,* the courts of appeals have dealt with the issue in a number of cases; a number concluded that the plaintiff made out a cause of action [119] for sex stereotyping; with

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[115] *See, e.g.*, Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1064 (7th Cir. 2003) (accepting the use of the *Hopkins* sex stereotyping theory where applicable but concluding that the plaintiff's case was not a sex stereotyping case as a matter of law); Spearman v. Ford Motor Company, 231 F.3d 1080, 1085 (7th Cir. 2000) (affirming lower court's grant of summary judgment because evidence shows that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 n.4 (1st Cir. 1999) (concluding that Price Waterhouse creates a cause of action for men who suffer discrimination because of their lack of masculinity); EEOC v. Grief Bros. Corp., 2004 WL 2202641 (W.D.N.Y. 2004) (denying defendant's motion for summary judgment and stating that it was a question of fact whether the defendant harassed him because he was not sufficiently masculine where the plaintiff did not tell the coworkers he was gay and there was no evidence that they thought he was gay even though the comments they directed at him were "homo" and "faggot"). *But see* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1743 (concluding that *Oncale* does not stand for the proposition that harassment based on non-conformity to gender norms is sex discrimination).

[116] *See* Nichols v. Sanchez, 256 F.3d 864, 874 (9th Cir. 2001) (holding that the plaintiff, an "effeminate man" had a cause of action under Title VII, using the *Price Waterhouse* sex-stereotyping theory, for same-sex hostile work environment harassment where his co-workers subjected him to taunts). *Compare* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (where three judges concluded that Rene, a homosexual who had endured attacks and taunts in a same-sex environment had a cause of action under the sex-stereotyping theory of *Price Waterhouse*).

[117] *See, e.g.*, Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (affirming the district court's grant of summary judgment in Title VII case alleging same sex hostile work environment because the evidence supported only work performance conflicts or harassment based on perceived sexual orientation, not sexual stereotyping); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (affirming lower court's grant of summary judgment because evidence shows that plaintiff was harassed because of his apparent homosexuality, and not sexual stereotyping).

[118] One court states that such a claim "requires us to navigate the tricky legal waters of male-on-male sex harassment." *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d at 1062.

[119] *See* Miller v. City of New York, 2006 WL 1116094 (2d Cir. 2006) (overturning district court's grant of summary judgment to the defendant where the plaintiff, a small man with a disability, produced evidence that he was given more difficult work and treated worse because he was not manly enough); Rene v MGM Grand Hotel, Inc., 305 F.3d 1061, 1068-69 (9th Cir 2002) (en banc) (plurality decision reversing the district court's grant of summary judgment to the defendant, and three judges concluding that Rene had preserved his case of sex stereotyping for appeal where the plaintiff was openly gay and his coworkers had teased him about the way he walked, whistled at him, caressed his buttocks, blew kisses at him, touched his body and

nearly identical facts, others held that the plaintiff did not. In the latter, the courts held that, as a matter of law, the plaintiff was harassed because of his sexual orientation or "perceived homosexuality" rather than for his failure to conform to sex stereotypes.[120]

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his face, called him "muneca" or doll); Nichols v. Sanchez, 256 F.3d 864 (9th Cir. 2001) (holding that the district court improperly granted judgment in a bench trial to the defendant where throughout plaintiff's employment his male coworkers and a supervisor subjected him to name-calling such as "her" and "she", mocked him for carrying a tray "like a woman," and for not having sex with a waitress who was his friend, called him "faggot" and "fucking female whore," and directed "the most vulgar name-calling ...cast in female terms."); Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (holding that the lower court improperly granted a motion to dismiss a heterosexual male's claim alleging that his coworkers harassed him, calling him a "homo" and "jerk off," unbuttoned his clothing, patted him on the buttocks, asked to perform sexual acts, scratched his crotch and humped his door frame, concluding that "simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation"); McMullen v. Southern Cal. Edison, 2008 WL 4948664 (C.D. Cal. 2008) (denying defendant's motion to dismiss where the plaintiff alleged he was a gay man and that the defendant discriminated against him for his failure to adhere to sex stereotypes); Rhea v. Collar Tree Stores, Inc., 2005 WL 2600213 (W.D. Tenn. 2005) (denying defendant's motion for summary judgment even though the plaintiff stated that he believed he was discriminated against because of his sexual orientation because the issue is whether the defendant viewed him as too effeminate, not whether he believed they did); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Ore. 2002) (denying summary judgment to defendant where there was sufficient evidence that lesbian was harassed because she failed to adhere to feminine stereotypes); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (denying summary judgment where the plaintiff, a gay man, presented evidence that the employer harassed and retaliated against him because of his failure to adhere to masculine stereotypes; even though the evidence can also show that he was discriminated against because of his sexual orientation, this evidence is not a bar to his recovery). *Compare* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated by, remanded by*, 523 U.S. 1001 (1998) (holding before *Oncale* that the plaintiffs had made out a cause of action for sex stereotyping where coworkers subjected two 16 year old boys to relentless harassment, called them "fat boy" "fag" "queer", "bitch," asked them "[A]re you a boy or a girl," threatened to take them "out to the woods" and grabbed their testicles). While *Doe v. City of Belleville* was vacated by the Supreme Court in light of *Oncale*, *Doe's* alternative holding based on sex stereotyping is probably still good law. *See* Hamm, 332 F.3d at 1063 (citing to Doe for sex stereotyping holding and distinguishing it on its facts); Bibby v. Philadelphia Coca Cola Bottling Co., Inc., 260 F.3d 257, 263 n.5 (3d Cir. 2001) (concluding that the *Doe* holding concerning sex stereotyping is still good law).

[120] *See* Kiley v. American Society for Prevention of Cruelty to Animals, 2008 WL 4442468 (2d Cir. 2008) (dismissing complaint of pro se litigant stating that she may not use sex stereotyping to "bootstrap" a sexual orientation discrimination case into a violation of Title VII); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058 (7th Cir. 2003) (affirming grant of summary judgment to the defendant because no reasonable jury could conclude that the harassment plaintiff suffered was sex stereotyping rather than caused by his work performance or his perceived homosexuality where coworkers regularly threatened plaintiff in vulgar terms, called him "faggot" "bisexual" and "girl scout," passed rumors that he was gay, warning others not to bend over in front of him); Kay v. Independence Blue Cross, 2005 WL 1678816 (3d Cir. 2005) (upholding summary judgment grant to the defendant because court concluded that facts show discrimination based on sexual orientation and not based on gender stereotypes); Bibby v. Philadelphia Coca Cola Bottling Company, Inc., 260 F.3d 257 (3d Cir. 2001) (affirming district court's grant of summary judgment because the plaintiff did not present sufficient evidence that the harassment was because of sex where the plaintiff, a gay man was assaulted at work, told by his assaulter, "everybody knows you're a faggot," and "everybody knows you take it up the ass," called "sissy," mistreated by his

Although decided differently by the courts, the cases are indistinguishable. Typically, the cases arise in an all male or virtually all male environment. Co-workers and/or supervisors use vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim, to harass him. Moreover, the taunts invariably include comments questioning the victim's masculinity and his sexual orientation. Terms such as "bitch," "fag," "queer," "homo," and "sissy," actions such as grabbing of testicles, questions asking whether a person is male or female or "takes it up the ass," and threats of rape are common. It would be impossible for the courts, the juries, the victims, or even the perpetrators to distinguish between behavior that is motivated by the victim's failure to conform to gender stereotypes and behavior motivated by the victim's sexual orientation.[121]

For example, in *Nichols v. Sanchez* [122] the Ninth Circuit held that the plaintiff had a cause of action because his co-workers harassed him because of his effeminate behavior, behavior that did not comport with the masculine expectations of a man. Mr. Nichols' male coworkers and supervisor subjected him to name-calling such as "her" and "she," mocked him for carrying a tray "like a woman," and for not having sex with a

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supervisors, and alleged he was discriminated against because of his sexual orientation); Spearman v. Ford Motor Co., 231 F.3d 1080, 1082-83 (7th Cir. 2000) (affirming lower court's grant of summary judgment and concluding that the harassment was because of plaintiff's perceived sexual orientation where coworkers called plaintiff "little bitch," "cheap ass bitch," "[y]ou f—ing jack-off, pussy – ass" threatened to "f— [his] gay faggot ass up," wrote graffiti on the bulletin board stating, "Aids kills faggots dead ... RuPaul, RuSpearman" (after RuPaul, a black male drag queen); EEOC v. Family Dollar Stores, Inc., 2008 WL 4098723 (N.D. Ga. 2008) (granting summary judgment to the defendant because evidence points to discrimination based on perceived sexual orientation rather than stereotyping); Prowel v. Wise Business Forms, Inc., 2007 WL 2702664 (W.D. Pa. 2007) (granting summary judgment to the defendant where the evidence points to sexual orientation discrimination); Martin v. New York State Dept. Correctional Serv., 224 F. Supp. 2d 341 (N.D.N.Y. 2002) (granting summary judgment to defendant on sex stereotyping claim, concluding that all evidence showed discrimination based on sexual orientation).

[121] For an interesting discussion of male feminism, male and heterosexual privilege and the fear heterosexual men have of being portrayed as not heterosexual, see Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 97-104, 108-11 (2000).

[122] 256 F.3d 864 (9th Cir. 2001).

waitress who was his friend, called him “faggot” and “fucking female whore,” and directed at him “the most vulgar name-calling ...cast in female terms.”

The court’s treatment of *Nichols* contrasts to that of *Prowel v. Wise Business Forms*. [123] In *Prowel*, the plaintiff suffered repeated comments and mocking of his effeminate mannerisms and appearance, name calling such as “Rosebud,” “Princess” and “faggot” offensive phone calls, and graffiti in the men’s room about AIDS. The court held that as a matter of law the facts alleged demonstrated discrimination motivated by sexual orientation rather than sex stereotyping, and refused to permit the plaintiff to “bootstrap” a sexual orientation claim under Title VII in the name of a sex stereotyping claim.

In *Rene v. MGM Grand Hotel, Inc*, [124] the plaintiff, a butler on the top floor of the hotel, worked with other male butlers and a male supervisor. He alleged that over the course of two years, his co-workers subjected him to name-calling such as “muneca” (“doll” in Spanish), poking and prodding, including putting their fingers in his anus through his clothing. The defense conceded that the environment was severe or pervasive, but challenged whether the behavior occurred because of sex. A majority of the en banc court concluded, in two opinions with different rationales, that Rene had presented sufficient evidence of a Title VII violation to go to a jury. The plurality concluded that the plaintiff’s sexual orientation was not relevant in the inquiry and a reasonable jury could conclude, based on the sexual nature of the behavior,that the harassment occurred because of sex. This opinion contravenes most other appellate opinions that hold that sexual behavior alone is insufficient to satisfy the “because of sex”

[123] 2007 WL 2702664 (W.D.Pa. 2007).
[124] 305 F.3d 1061 (9th Cir. 2002)(en banc).

requirement. The concurrence concluded that there was sufficient evidence that the co-workers harassed the plaintiff because he did not live up to the sexual stereotype of how a man should act and appear.

Judge Proctor Hug dissented, joined by three other members of the court, and concluded that the mere fact that the harassment is sexual in nature does not prove that it occurred because of sex. Moreover, the dissent concluded, there was no cause of action for sex stereotyping in this case because the plaintiff did not raise sex stereotyping at the trial court level, and the plaintiff stated unequivocally and repeatedly in his deposition that the reason his co-workers abused him was because of his sexual orientation. Judge Hug distinguished *Nichols* because Nichols was discriminated against based on his effeminate behavior at work, whereas Rene was discriminated against based on his sexual orientation – behavior that occurred outside of work.[125]

Judge Hug's dissent seems to make a distinction between sexual orientation and gender identity or expression. He sees expression of gender identity at work as protected behavior, but characterizes sexual orientation as unprotected behavior occurring outside of the workplace. The court in *Vickers v. Fairfield Medical Center* [126] reaches a similar conclusion. It upholds the lower court's grant of the defendant's motion to dismiss because the gender non-conforming behavior alleged to support the sex stereotyping claim was not behavior observed at work or affecting job performance. Rather than sex discrimination for failure to conform to gender expectations, the alleged harassment, such as teasing for sexual practices, more likely occurred because of the plaintiff's perceived

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[125] 305 F.3d at 1072, 1077 (Hug, J., dissenting).
[126] 453 F.3d 757 (6th Cir. 2006).

homosexuality. [127] While theoretically it is possible to draw a line between sexual orientation and gender expression at work, as demonstrated above, it is very difficult to separate motivations of the perpetrators who harass a homosexual co-worker whose dress or behavior do not conform to gender stereotypes. In the case of the homosexual co-worker the question becomes whether the discrimination occurs because of his homosexuality or because of his gender expression that does not conform to sex stereotypes. Because of these practical difficulties, Judge Hug's distinction may amount to a conclusion that heterosexuals may bring sex stereotyping claims, but homosexuals may not. This distinction would deny rights to a whole class of persons, and would lead to intrusions into the privacy of individuals. Moreover, some courts have already concluded that Title VII does not forbid the creation of a hostile work environment based on an individual's "perceived homosexuality." In these cases, even heterosexuals (who are perceived as homosexuals) would suffer harassment without recourse.

A concurrence by Judge Richard Posner in *Hamm v. Weyauwega Milk Products, Inc*.[128] raises similar questions about the stereotyping doctrine. He concludes that harassing a man because he is effeminate in an all male workplace is not discrimination because of sex because such harassment would discriminate only against a particular sub-class of men – those who are effeminate. Judge Posner reaches this odd conclusion despite the Supreme Court's decision in *Phillips v. Martin Marietta* that is it sex

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[127] *Id*. at 763. *See also* Oiler v. Winn-Dixie Louisiana, Inc., 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (holding that male cross-dresser who cross-dresses outside of work did not have a sex stereotyping discrimination claim when he was fired because he was discriminated against not because he was effeminate but because he assumed the role of a woman outside of work). *But see* Dipiano v. Atlantic County, et.al, 2005 U.S.Dist. LEXIS 20250 (D. N.J. Sept 2, 2005) (concluding that there is a cause of action under the New Jersey Law Against Discrimination, applying *Price Waterhouse* where the plaintiff was ridiculed and harassed for cross-dressing outside of work).
[128] 332 F.3d at 1066-68 (Posner, J., concurring).

discrimination to discriminate against a subclass of women who are mothers.[129] He argues that in a traditionally male workplace such as Price Waterhouse, sex stereotyping of a woman is evidence of sex discrimination, and evidence that an employer refused to hire or promote a woman because she is masculine likely shows discrimination against women as a class. This is particularly true, he argues, in traditionally masculine jobs such as firefighting because those jobs require masculine characteristics and women with masculine traits are those who would qualify for the position. Eliminating women with masculine characteristics may eliminate most women who are interested in or capable of acting as firefighters. But in an all-male workplace, Posner argues, discrimination against a man because he is effeminate is not sex discrimination against men. It is merely discrimination against effeminate men. [130] This argument misses the point, however, that permitting discrimination against effeminate men is a means of enforcing the masculinity of the job which, in turn, creates barriers not only to effeminate men, but also to women who would be interested in the job.

Moreover, in his discussion of how courts apply the *Price Waterhouse* stereotyping doctrine, Judge Posner assumes that if courts distinguish between discrimination based on failure to meet sex stereotypes and discrimination based on homosexuality, effeminate heterosexual men would be protected, but effeminate homosexual men would not. Other courts reaching this question are in clear disagreement with Posner. According to these courts, the sexual orientation of the plaintiff is irrelevant

[129] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
[130] 332 F.3d at 1067 (Posner, J., concurring).

in deciding whether the discrimination occurs because of sex.[131] In other words, it is necessary to consider whether the discrimination occurred because of the plaintiff's failure to conform to sex stereotypes, whether or not the plaintiff is heterosexual or homosexual. If it does, then the plaintiff has a cause of action.

Theoretically these courts are correct. It is possible, as a theoretical matter, to distinguish between discrimination based on sexual orientation and discrimination based on gender identity and expression. But practically speaking, Judge Posner has a point. The cases demonstrate that it is nearly impossible to distinguish between sexual stereotyping discrimination and sexual orientation discrimination because the means used to discriminate or harass are virtually identical, and even the harassers are likely unaware of their exact motivations.

2. *Protecting Bisexuals*

Before discussing discrimination against bisexuals, it is necessary to define what I mean by bisexual. There are three current definitions of bisexual. The first is a person who is neither male nor female but actually has physical characteristics of both men and women.[132] The second is a person who has psychological characteristics of both men and women. The third definition, which is the one commonly understood and that I use here, is a sexual orientation toward both men and women.[133] While this definition may appear simple, it, like other designations of sexual orientation, becomes problematic for persons like transsexuals whose gender identity may differ from outward appearances or

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[131] *See Rene v MGM Grand Hotel, Inc*., 305 F.3d 1061, 1068 (9th Cir 2002) (Fletcher, W., J., for four members of the court); Bibby v. Philadelphia Coca Cola Bottling Co., Inc., 260 F.3d 257, 264 (3d Cir. 2001).

[132] This is the historic meaning of the term. *See* Joanne Meyerowitz, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 102-111 (2002).

[133] CLARE HEMMINGS, BISEXUAL SPACES: A GEOGRAPHY OF SEXUALITY AND GENDER 22 (2002).

expression. For example, a transwoman who has been married for 30 years to a woman and begins to transition to a woman but does not have sex reassignment surgery sees herself as a woman. Others, however, may consider her a man. Even after sex reassignment surgery, some may not regard the transwoman as a woman. If she continues her relationship with her spouse, the question arises as to whether the transwoman is a lesbian, a bisexual or a heterosexual. Moreover, the question about the spouse's sexual orientation is also unclear. She could be considered a lesbian because her husband has now transitioned to female and she continues her relationship with her spouse. Or she could be considered bisexual because she once was married to a man and now is married to a woman. In answering these questions about the spouse's sexual orientation, there is debate about whether the society should consider whether the transperson has opted for sex reassignment surgery or not. Furthermore, the question arises as to how much the individual transperson and/or the spouse should define their relationship and their sexual orientation. The questions are virtually endless. What if the transsexual, after taking female hormones, begins to find men attractive, but does not act on her sexual attraction to men because of her relationship with her spouse? Is she now heterosexual? Bisexual? Lesbian? What if she never makes the transition, but firmly believes she is a woman? Does that make her a lesbian? What if one member of a lesbian couple transitions to male? Does that make the other member of the couple a heterosexual? A bisexual? [134]

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[134] *See* Matthew Kailey, *Steering Queer of LGBTI Identity Politics, Walking Through Walls: An Immodest Proposal for Trans-cending Sexual Orientation*, 257, 261-63 *in* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage, eds., 2003) (demonstrating the difficulty in categorizing sexual orientation when the participants are transsexuals or their partners); Jonathan Alexander, *"There Are Different Points in Your Life Where You Can Go Either Way": Discussing Transsexuality and Bisexuality with Some Women of CrossPort*, 140 -50 *in* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage, eds., 2003) (interviewing transwomen and their partners about their sexual orientation).

What about a transman who has "top" surgery but not "bottom" surgery who has a sexual relationship with a man. Are they heterosexual? Gay? Bisexual?

Because of the changing definitions of sex and gender as well as the possibility that others may attribute gender to a person that contradicts chromosomes or genitalia, these examples demonstrate how problematic the categories for sexual orientation can be. Nonetheless, the most recent version of ENDA protects an employee or applicant from discrimination based on sexual orientation. Sexual orientation is defined to include heterosexuality, homosexuality and bisexuality. Some states that protect against sexual orientation discrimination use a similar definition.[135] Other, however, define "sexual orientation" in broader terms that also protects persons based on gender identity. [136] So, at least under ENDA, the question becomes, what is discrimination based on bisexuality? What is a bisexual?

While I have located "bisexuals" under the category "sexual orientation," and ENDA categorizes bisexuality as a sexual orientation that is covered, bisexuality is not exactly a sexual orientation. Rather it is a view of gender and sexuality that rejects barriers and strict limitations imposed by heterosexuality or homosexuality. It sees sexuality as an identity, but more fluid, changeable and expressive than any fixed identity would be.

Like homosexuals, bisexuals suffer discrimination because of their sexual affiliation with same-sex partners, but they also suffer discrimination that does not affect

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[135] *See, e.g.*, Cal. Gov. Code Sec. 12926 (q) (2005); D.C. St. Sec. 2-1401.02 (28) (2008); HI. Rev. Stat. Sec. 378-1 (2002); Iowa Code Sec. 216.2 (14) (2007); MD. Code, Art. 49B, Sec. 15 (2001); Mass. Gen. Laws 151B Sec. 3 (6), (9) (2003); Nev. Rev. Stat. 613.310 6. (2008); N.H. Rev. Stat. Sec. 21:49 (1998); N.M. Stat. Sec. 28-1-2 (P) (2007); McKinney's Exec. Law Sec. 292 (27) (2007); R.I. Gen. Laws Sec. 28-5-6 (15) (2002); 1 V.S.A. Sec. 143 (2008); W.S.A. 111.32 (2007).

[136] *See, e.g.*, Colo. Rev. Stat. Sec. 2-4-401 (7.5) (2008); 775 Ill. Comp. Stat. 5/1-103 (0-1) (2008); 5 ME. Rev. Stat. Sec. 4553 9-C (2007); Minn. Stat. Sec. 363A.03 subd. 44 (2004); OR. Rev. Stat. Sec. 174.100 (6) (2008); West's RCWA 49.60.040 (15) (2007).

lesbians and gays. This is discrimination based on their bisexuality "because [bisexuals] upset the dichotomies in a polarized world."[137] There are no reported cases, federal or state, that deal with discrimination in employment based on an individual's bisexuality. But if a new version of ENDA is enacted into law that prohibits sexual orientation discrimination and defines sexual orientation to include bisexuality, there will likely be cases brought alleging discrimination based on bisexuality. Bisexuality may present the courts with difficulties similar to the line-drawing between sexual orientation and sex stereotyping in which the courts engage today. To the extent that the bisexual individual suffers discrimination or harassment because of the sex of her partners, courts will likely consider the discrimination illegal under ENDA if the Congress chooses to reintroduce it and the bill is enacted into law. But, given that some bisexuals see their identities as working against sexual barriers, and some engage in a more fluid sexuality including pansexuality and polyamory, [138] it may be that courts will be unwilling to interpret the law to protect bisexual persons who engage in these practices. Courts will likely conclude that this is behavior rather than identity and is not protected by ENDA or that this behavior is part of gender identity which is not covered by the statute. This analysis would be reminiscent of Judge Hug's in *Rene* and of the court in *Vickers*. If, however, we are to protect sexual minorities, the courts should not distinguish between behavior occurring of the worksite and gender identity or status.

3. *Recognizing Transgender Individuals and Transsexuals*

a) Background on Transgender Status

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[137] Jillian Todd Weiss, *GL vs. BT: The Archeology of Biphobia and Transphobia within the U.S. Gay and Lesbian Community*, 34 *in* BISEXUALITY AND TRANSGENDERISM:INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage, eds. 2003)..

[138] Pansexuality is the "openness to all forms of sexuality" and polyamory is engagement in sexual relations with multiple partners. *Id*.

Approximately two to five per cent of persons are transgender, defined as a person who experiences some gender dysphoria.[139] Recently, the term "transgender" in political discourse has nearly completely replaced the term "transsexual."[140] I use the term "transsexual" to refer to persons who live permanently in a gender into which they were not born. "Transgender" is a broader term. It includes transsexuals and other individuals. Male to female (MTF) transsexuals or "transwomen" are individuals born male who transition to women. Female to male (FTM) transsexuals or "transmen" are individuals born female who transition to men.[141] Transgender individuals who are not transsexuals include cross-dressers who wear the clothing of the "opposite" biological sex for emotional purposes, and transvestites who dress in the "opposite" sex's clothing for sexual reasons,[142] androgynous, bigendered and gendered queer people.[143] These last three groups generally include a mixed or alternating identity, but exact definitions vary from person to person. Moreover, many of these people find the gender categories themselves restrictive.[144] Finally, while the medical definition of persons with gender identity disorder excludes intersex individuals, some intersex persons may be considered transgender by the transgender community.

While it is difficult to estimate the incidence of transsexualism, some estimate that approximately 1 in 10,000 biological males are transsexuals and 1 in 30,000

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139 http://www.transgenderlaw.org/resources/transfactsheet.pdf

140 KRISTEN ROSE SCHILT, JUST ONE OF THE GUYS?: HOW FEMALE-TO-MALE TRANSMEN MAKE GENDER INEQUALITY AT WORK VISIBLE, 20, PhD dissertation, Department of Sociology, UCLA, Los Angeles, CA (unpublished manuscript on file with the author) (2006).

141 The terms "transmen" and "transwomen" come from SCHILT, *supra* note 140 at x, 9.

142 *See id*. at 18.

143 There are other groups of persons whose gender identity and expression are more ambiguous or fluid. *See* Candace Moore & Kristen Schilt, *Is She Man Enough?: Female Masculinities on The L Word*, *in* READING THE L. WORD: OUTING CONTEMPORARY TELEVISION 159 (Kim Akass, ed. 2006) (discussing the different types of female masculinity missing from the television show).

144 *See* Sexuality http://apa.org/topics/transgender.html (last visited Oct. 7, 2008).

biological females are transsexuals.[145] Others estimate that the number of transsexuals is about 1 in 50,000 for both male and female populations.[146] These estimates have been challenged, however, by the community of transsexuals who claim that the numbers are much higher. The estimates, according to the community, undercount because they refer only to those who seek genital surgery, but many transsexuals do not choose surgery. Moreover, community estimates place the numbers of MTF and FTM transsexuals as approximately equal.[147] In large part because the sex reassignment surgery for FTM transmen is less successful than for MTF transwomen, far fewer transmen have such surgery. [148]

There is a debate about whether transsexuality is caused by a mental disorder. *The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) and International Classification of Diseases 10 (ICD-10)* recognize Gender Identity Disorder (GID) when a person experiences extreme gender dysphoria. A diagnosis of GID requires a showing of a "strong and persistent … desire to be or insistence that one is of the other sex," and of a "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." [149] One important part of the medical diagnosis is that the individual not be born intersex. That is, a person with a GID diagnosis must have been classified at birth as female or male. Persons born with

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[145] DSM-IV (1994). See also http://www.transgenderlaw.org/resources/transfactsheet.pdf (stating that statistics from the Netherlands demonstrated that 1 in 12,000 men undergo sex reassignment surgery and 1 in 34,000 women undergo sex reassignment surgery.

[146] *See* SCHILT, *supra* note 140 at 3..

[147] Kristen Schilt and Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. ECON. ANAL. & POL'Y *1, *1 n. 2 (2008), available at http://.bepress.com/bejeap/vol8/iss1/art39

[148] *See infra* notes 216-7 & accompanying text.

[149] What is Gender Identity Disorder? Definition form the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), American Psychiatric Association, http://abcnews.go.com/story?id=3074520&page=1
See also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576 (4th ed., text revision 2000) (hereinafter DSM-IV-TR).

ambiguous genitalia or genitalia that differ from their chromosomes or other intersex conditions are not diagnosed as having a mental disorder if they experience gender dysphoria because there are physical reasons for their condition.

The diagnosis of GID as a purely psychiatric disorder, however, even in the case of a person who has a clear biological sex as male or female at birth, has come under attack because there is recent evidence that the physiological causes may be associated with gender identity.[150] Many members of the transsexual community believe that there is a biological cause of their gender identity – their self concept that they are the "opposite" sex, and that their gender expression is a response to socially constituted definitions of gender.[151] Related to the debate of whether gender dysphoria is a mental disorder, there is disagreement about the relationship between intersex individuals and transsexuals.

There are numerous voices in the debate about the causes of transsexuality. [152] The medical community is split between those who see transsexuality as a mental disorder and those who do not. Those who prefer to remove transsexuality from the DSM-IV remind those who believe it is a mental disorder that until 1973 homosexuality was categorized as a mental disorder in the DSM. Others believe that transsexuality has biological roots. Still others see transsexuality as a normal gender identity that flows from biological causes or a combination of psychological and biological causes. This

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[150] *See* Ghosh & Walker, *supra* note 2.
[151] See, e.g., CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 69 (1998).
[152] *See, e.g.*, GID Reform Advocates, http://www.transgender.org/gidr/index.html (concern about stigma and access to surgery); Linda Ames Nicolosi, "Should These Conditions Be Normalized?" APA Symposium Debates Whether Pedophilia, Gender-Identity Disorder, Sexual Sadism Should Remain Mental Illnesses, http://www.narth.com/docs/symposium.html (arguments for and against removing GID from DSM); Justin Cascio, Bias in Writings on Gender Identity Disorder, http://www.trans-health.com/displayarticle.php?aid=49 (same); The Politics of Gender Identity Disorder, http;//drivitelli.typepad.com/providential/2008/06/the-politics-of-gender-identity-disorder.html (different views in preparation for revision of DSM in 2012).

group blames the society's rigid view of appropriate gender roles, not the condition itself, as causing the problem. The debate carries high stakes and transgender persons themselves are divided as to whether it will benefit them as a group to remove GID from the DSM. This is because the diagnosis of GID stigmatizes transsexuals, but they fear that without the diagnosis they will lose access to sex reassignment surgery. Even with the GID diagnoses, transsexuals who undergo sex reassignment surgery have difficulty getting insurance coverage.

Despite the causes of transsexuality, individuals who are transsexuals are increasingly visible in our workforce, and the law must consider how to deal with transsexuals who experience discrimination in the workplace. Moreover, transgender person who are not transsexuals appear to have almost no legal protections. While the *Price Waterhouse* stereotyping doctrine may be interpreted to protect cross-dressers and gender queer individuals as well as transsexuals, to date there is only one case, decided under state law, that uses the *Price Waterhouse* theory to protect from discrimination a man who cross-dresses outside of work. In *DiPiano v. Atlantic County, et al.*,[153] the court held that the New Jersey Law Against Discrimination prohibited discrimination against a male prison guard who cross-dressed outside of work.

Statistics demonstrate that transgender individuals suffer discrimination in the workplace. A written statement of testimony presented to Congress by The Transgender Law Center in San Francisco noted that a 2006 survey conducted of 194 transgender persons in San Francisco demonstrated that 60% of those surveyed earned less than $15,300 per year and only 8% earned more than $45,900. Moreover, only 25% worked

[153] 2005 U.S. Dist. LEXIS 20250 (D. N.J. Sept. 2, 2005).

full time with 9% having no income. Finally, 57% stated that they had experienced employment discrimination, but only 12% took any action about the discrimination.[154]

Furthermore, a recent study by sociologists Kristen Schilt and Matthew Wiswall examined the pay of transsexuals who were employed before and after transitioning from one sex to another. The study found that there is a large transgender penalty in pay for both MTF and FTM transsexuals.[155] MTF transsexuals ("transwomen"), however, suffered substantially more in both pay reductions and in terms and conditions of employment than their FTM ("transmen") counterparts.[156] Transwomen lost approximately one third of their income by becoming female while transmen actually gained slightly when they transitioned to men (but still made less than their male colleagues at work). Moreover, an earlier study showed that transwomen experienced harassment and termination once they began transition, with some of the most virulent harassment occurring in blue collar workplaces.[157] This harassment occurred even though the transwomen reported that as men they fit into the masculine workplace culture before transitioning to women. Transmen, in contrast, experienced fewer obstacles than their MTF counterparts, often gaining increased authority, pay, and respect at work when they began to work as men, even when they occupied the same jobs that they did as women.[158]

Anecdotal evidence produced in Schilt's study also supported these conclusions. Five transmen praised their workplaces for their tolerance and acceptance while two

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[154] *See* Written Statement of The Transgender Law Center to the Subcommittee on Health Employment, Labor and Pensions Committee on Education and Labor, U.S. House of Representatives, "An Examination of Discrimination Against Transgender Americans in the Workplace," at 2 (June 26, 2008).
[155] *See* Schilt and Wiswall, *supra* note 147 at 14.
[156] *Id*. at 13, 16-17, 19.
[157] *Id*. at 16-17, citing SCHILT, *supra* note 140.
[158] *Id*. at 17.

transwomen emphasized workplace problems. One transwoman received notes on her desk telling her to quit, and found the women's restroom "booby trapped;" another was laid off as soon as she began to present as a female.[159] Ben Barres, a transman neurobiology professor at Stanford University explains that when he was a woman others constantly questioned him and undermined his work. Now that he has transitioned to a man, audiences who are unaware of his gender transition tell him that his research is much better than that of his "sister." [160]

From the empirical data, the interviews, and the anecdotes, Schilt and Wiswall conclude that the "male gender carries a workplace benefit that cannot be carried over in a gender transition."[161] Schilt found in an earlier study that transmen experience an easier transition in the workplace than transwomen.[162] This transition can be attributed to a number of factors. First, transmen pass much more quickly because male hormones have a swift masculinizing effect on women's bodies.[163] Second, transmen face much less scrutiny than transwomen. As soon as transmen begin to grow beards, people who do not know they are transgender do not question their male credentials. Even when transmen are open about the transition, their colleagues seem to understand and approve (or at least, not disapprove) of the transition. When transwomen transition into women, in contrast, their colleagues question why a man would want to become a woman.[164] These reactions demonstrate how gender stereotypes "privilege masculinity and discredit

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[159] *Id*. at 16.
[160] *Id*. at 19.
[161] *Id*.
[162] SCHILT, *supra* note 140.
[163] *Id*. at 5.
[164] *Id*. at 5-6.

femininity".[165] Dr. Schilt discusses the differences in workplace acceptance between transwomen and transmen:

> Transwomen report a wide array of workplace barriers in open transition, including charges that they are mentally unstable, they lack command presence, they are disruptive to productivity, and, if they work with children, that they are threats to children's gender identities. While transmen face some gender harassment, particularly in blue-collar occupations – occupational contexts that often foster sexism and homophobia – they more often are welcomed into being one of the guys at work. [166]

Moreover, by studying both stealth transmen (those whom their co-workers did not know were transmen) and open transmen who transition while at the same workplace, Schilt was able to describe the dynamics of how gender was enacted at the workplace. As outsiders who have crossed the gender divide, stealth transmen can recognize the benefits they receive and how men discredit women at work and promote homosociality.[167] Transmen who openly transition at work describe how co-workers demonstrate support by "doing gender" with open transmen and by treating them like one of the guys at work.[168]

But perhaps even more notable is the interaction of race, sexual orientation, class and height with gender to create barriers or open doors to employees in the workplace. The study of transsexuals has illuminated this variation because only transgender individuals have lived on both sides of the gender divide. Schilt found that stealth and open transmen were treated better than they were as women by co-workers, bosses and customers. All attributed more authority, respect and privilege to the transmen after the transition than the woman received before the transition. And, transmen who are white,

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[165] *Id*. at 6.
[166] *Id*. at 13.
[167] *Id*. at 7.
[168] *Id*.

tall and heterosexual were given many more benefits in workplaces than those who were short, racial minorities or did not pass as men.[169]

These facts demonstrate a clear but unequal discrimination against persons based on their transgender status in combination with race, sexuality and height, and raise the question of whether the law protects persons who are transgender from employment discrimination. The answer is that the results are mixed.

b) *Title VII and Transgender Individuals*

There is a split in the courts as to whether Title VII protects persons who are transsexual or transgendered. The early cases concluded that discrimination occurred, not because of the person's sex, but because the person was transgender or transsexual. Therefore, according to the early cases, there was no cause of action under Title VII. Many cases still reach the same conclusion. Under *Price Waterhouse*, however, a growing number of courts conclude that although transgender persons are not a protected class, an employer violates Title VII if it discriminates against a transgender person because of his or her failure to comply with sexual or gender stereotypes. Thus, like homosexuals and bisexuals, transgender persons may enjoy partial coverage by the statute, but their method of proof is difficult and their efforts are often unsuccessful. More remarkable, a recent federal district court case broke with the early cases and concluded that discrimination because of an individual's status as transsexual is discrimination because of sex. [170]

Title VII forbids discrimination because of an individual's sex. The legislative history of the statute demonstrates that the Congress thought little about the definition of

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[169] *Id*. at 14-15.
[170] *See* Schroer v. Billington, *infra* note 187 .

"sex". In fact, legislators supporting Title VII focused primarily on eliminating race discrimination in employment. "Sex" was added as a forbidden category by opponents of Title VII in an attempt to defeat the bill. Ironically, the bill passed. There is no legislative history that explains what "sex" means, but there is little doubt that in 1963 Congress had no interest in reaching discrimination based on gender identity or expression. Those who voted for the bill with the "sex" amendment most likely considered "sex" to mean biological male and biological female.

Courts deciding early cases brought by transsexuals relied on this legislative history to conclude that the statute does not protect transsexuals against employment discrimination.[171] There has been, however, a recent increase in court cases alleging employment discrimination against transsexuals and a significant change in Title VII law as applied to employment discrimination against transsexuals.

1) *Using Price Waterhouse to Protect Rights of Transgender Workers*

Soon after *Price Waterhouse* was decided, transsexual plaintiffs brought Title VII cases alleging that their employers discriminated against them because of their failure to meet stereotyped gender expectations. While a few courts dismissed the complaints as not adequately pleading sex stereotyping, other courts were receptive to the argument, at least in response to motions to dismiss and motions for summary judgment.[172]

In *Smith v. Salem*,[173] the Sixth Circuit held that a transsexual plaintiff who alleged that she was discriminated and retaliated against because of her failure to

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[171] *See supra* note 5.
[172] *See also* Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (holding in a case brought under the Equal Credit Opportunity Act that the lower court erroneously dismissed a complaint of sex discrimination against the defendant bank which refused to give a loan to a biological man who presented at the bank in female clothing, and told the plaintiff that if he wanted a loan he would have to return in men's clothing).
[173] 378 F.3d 566 (6th Cir. 2004).

conform to sex stereotypes had a cause of action under Title VII. The plaintiff alleged that she was a MTF transsexual firefighter who had worked for the department for seven years before she was diagnosed with Gender Identity Disorder (GID). As a man, the plaintiff had no negative incidents with the department. When she was diagnosed, she began to express a more feminine appearance in accordance with the medical protocols for treating GID, and told her boss about her treatment. Soon thereafter, the plaintiff's superiors decided that they would require the plaintiff to undergo three psychological evaluations with physicians of the City's choice in order to encourage the plaintiff to resign. If she refused to comply, the defendants planned to terminate her on the grounds of insubordination. Two days later, Smith's counsel advised the defendants of Smith's legal representation and the potential ramifications if the City continued to follow its plan. The plaintiff filed a charge with the EEOC and received a right to sue letter. Within four days, Smith was suspended based on an alleged infraction of a little-known policy.

The federal district court granted the defendant's Motion for Judgment on the Pleadings, concluding that the complaint amounted to a claim for discrimination because the plaintiff was a transsexual. The Sixth Circuit overturned the federal district court, holding that *Price Waterhouse* enabled the plaintiff to prove that she was discriminated against because her appearance and behavior did not conform to the sex stereotypes that the defendants had of a man. The court noted that the plaintiff alleged that she was fired soon after she began to assume a feminine appearance and dress, and noted that her co-workers began commenting on the plaintiff's appearance and mannerisms as not sufficiently masculine.[174]

[174] *Id*. at 572.

In *Barnes v. Cincinnati*, [175] the Sixth Circuit upheld a jury verdict in favor of the plaintiff, a pre-operative MTF transsexual police officer. The plaintiff was living as a pre-operative MTF transsexual when she failed the probationary period required for a promotion to sergeant. Barnes worked as a police officer for 17 years as a man, but at the time that she took the test for the promotion to sergeant, she was living as a woman outside of work and working as a man while on duty.[176] Barnes had a reputation as a homosexual, bisexual or a cross-dresser in the police department. Barnes did well on the sergeant's test, but the defendant concluded that she had failed the probationary period, even though no other officer had ever failed probation. During the probationary period for her promotion to sergeant, the plaintiff began to express herself at work in a more feminine manner, at times appearing at work with lipstick or make-up.[177] She was placed in a training program that required daily evaluation. No other sergeants were evaluated in this manner. Moreover, the Colonel who submitted the report recommending that the plaintiff failed probation, had told the plaintiff that she did not appear to be "masculine" and that she should stop wearing makeup and act more masculine.[178] Others rated the plaintiff as lacking "command presence," a category that they defined in various ways, some seeming to judge masculinity.[179] The court upheld the jury verdict in Barnes' favor, and concluded that there was sufficient evidence from which a reasonable jury could conclude that the defendant failed the plaintiff in her probationary period because she did

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[175] 401 F.3d 729 (6th Cir. 2005).
[176] *Id*. at 733-4.
[177] *Id*. at 734.
[178] *Id*. at 735.
[179] *Id*.

not live up to the masculine stereotype.[180] Thus, there was sufficient evidence of a violation of Title VII under *Price Waterhouse*.

In *Schwenk v. Hartford*, [181] a case brought by a transgender prisoner under 42 U.S.C. Section 1983, the complaint alleged that a prison guard violated the Eighth Amendment prohibition of "cruel and unusual punishment" and the Gender Motivated Violence Act.[182] The plaintiff alleged that the defendant demanded that the plaintiff perform oral sex upon him and when the plaintiff refused, shoved him against the wall and forced his penis against the plaintiff's buttocks. The Ninth Circuit noted the reasoning in *Holloway* and *Ulane*, which concluded that transsexuals were not protected by Title VII, but concluded that *Price Waterhouse* had overruled those earlier cases, by holding that Title VII barred discrimination against a person because of his or her failure to adhere to gender stereotypes.[183] *Schwenk* held that the plaintiff had made out a cause of action for gender discrimination based on *Price Waterhouse* doctrine because the prison guard may have acted based on his belief that the plaintiff was effeminate and did not conform to the gender expectations of a man. In a particularly insightful opinion that apparently understood masculinity theory and the psychological literature supporting it, the court characterized all prison rape as occurring because of sex and explained the role of masculinity and femininity in prison rapes:

> [Y]oung, slight, physically weak male inmates, particularly those with "feminine" physical characteristics, are routinely raped, often by groups of men… The victims of these attacks are frequently called female names and terms indicative of gender animus like "pussy" and "bitch" during the assaults and thereafter…. After they are raped, victims are consigned to "passive" female sexual and social roles within the prison. … In contrast,

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[180] *Id*. at 738.
[181] 204 F.3d 1187 (9th Cir. 2000).
[182] *Id*. at 1192.
[183] *Id*. at 1201-02.

> prison rapists commit assaults in part to establish and maintain a masculine gender. According to the psychological literature… prison rapists strongly resist the characterization of their activities as homosexual. Instead, they conceive their sexual partners as female members of the prison social order. Thus, as with rape in general, all prison rape occurs "because of" gender – both that of the rapist and that of his victim.[184]

The concept that rape and other severe harassment perpetrated by men on men occurs because of sex is not limited to prisons. In workplaces, too, men harass other men in order to prove their own masculinity and to police the masculinity of the job. This behavior necessarily occurs because of sex or gender, both of the harasser and of the victim.[185]

Federal district courts and some state courts have also used *Price Waterhouse* to find a cause of action for transgender individuals.[186] In *Schroer v. Billington* [187] the United States District Court for the District of Columbia found illegal gender

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[184] *Id*. at 1203, n. 14. (citations omitted).

[185] Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO L. REV. 1151, 1229 (2008).

[186] *See* Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008)(concluding that transsexuals may bring sex discrimination claims under *Price Waterhouse* for sex stereotyping); Creed v. Family Express Corp., 2007 U.S. Dist. LEXIS 57680 (N.D. Ind. Aug. 3, 2007)(holding that a cause of action exits for sex stereotyping of an MTF transsexual who wore nail polish, and her hair in a feminine way); Mitchell v. Axcan Scandipharm, Inc., 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 21, 2006)(relying on *Price Waterhouse* in refusing to dismiss plaintiff's complaint that alleged sexual harassment and discriminatory discharge because he was a transsexual); Dipiano v. Atlantic County, et.al, 2005 U.S.Dist. LEXIS 20250 (D. N.J. Sept 2, 2005)(concluding that under the New Jersey Law Against Discrimination a cause of action exists for a cross-dresser who is harassed and discriminated against for failure to conform to gender stereotypes); Sturchio v. Ridge, 2004 U.S. Dist. LEXIS 27345 (E.D. Wash. Dec. 20, 2004) (holding that plaintiff, a MTF transsexual who had undergone sex reassignment surgery, had stated a cause of action for sexual harassment in violation of Title VII in her complaint); Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 U.S.Dist. LEXIS 23757 (W.D. N.Y. Sept. 26, 2003) (holding that the plaintiff, an MTF transsexual, had a cause of action for harassment because of sex under the stereotyping doctrine); Lie v. Sky Publ. Corp., 15 Mass. L. Rptr 412 (Mass. Sup. Ct. 2002) (holding that Massachusetts law prohibiting sex discrimination forbids employer from firing a transwoman for refusing to wear men's clothes to work). *But see* Johnson v. Fresh Mark, Inc., 337 F.Supp. 2d 996 (N.D. Ohio 2003)(holding that the plaintiff had not made out a cause of action because the defendant merely required her to use the men's room in light of her male driver's license and did not react to her physical appearance).

[187] 577 F.Supp. 2d 293 (D. D.C. 2008).

discrimination based on sex stereotyping, but also broke with the earlier cases and found that the plain language of the statute prohibits discrimination against transsexuals. In *Schroer*, the plaintiff, an MTF transsexual, alleged that before she had changed her sexual identity, she had applied for a position of Specialist in Terrorism and International Crime with the Congressional Research Service. She was well-qualified for the job. She had graduated from the National War College and the Army Command and General Staff College, had advanced degrees and twenty-five years of service in the United States Armed Forces, and a Special Operations Command, a job for which she analyzed many classified operations and regularly briefed senior military officials. At the time of her application for the terrorism specialist position, she had begun to work with a clinical social worker to develop a plan for transitioning from male to female, a transition that was guided by treatment protocols. [188]

Schroer was interviewed for the job as a male and received the highest score of all the interviewees.[189] After submitting additional written materials, Schroer was selected unanimously by the committee for the position. She was offered the job and she accepted.[190] Before the paper work was completed, Schroer told Charlotte Preece, a member of the selection committee staff, that she was transgender and that she planned to transition from male to female.[191] Preece, who seemed surprised and a bit alarmed, raised issues about Schroer's security clearance. Schroer tried to reassure her that there should be no security problem as Schroer had a number of friends who had retained their clearances while transitioning. Schroer showed Preece a number of photographs of

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[188] *Id*. at 295.
[189] *Id*. at 296.
[190] *Id*.
[191] *Id*.

herself in women's attire.[192] After speaking to a number of persons in the office, but without calling Schroer to ask for more information, Preece told Schroer that she was withdrawing the offer. Schroer filed suit alleging sex discrimination under Title VII.[193]

In a bench trial, the court concluded that the defendant had discriminated against Schroer because of sex in violation of Title VII. The court based its decision on two alternative theories. First, it concluded that under the *Price Waterhouse* sex stereotyping theory, the plaintiff proved that the defendant had violated Title VII by refusing to hire her because of her failure to conform to the sex stereotype of a man. The court noted that Preece testified that when she looked at the photographs of the plaintiff dressed as a woman, she looked like a man in women's clothing. Moreover, Preece stated that she did not understand why the plaintiff would become a woman especially in light of her special operations training.[194] The court inferred from Preece's statement that men with special operations in their background are especially masculine and it made Preece uncomfortable that the plaintiff did not live up to the masculine image.[195] Finally the court stated that it did not matter whether the defendant withdrew its offer of employment because it perceived Schroer as an "insufficiently masculine man, an insufficiently feminine woman or an inherently gender-nonconforming transsexual."[196] The facts could be parsed to support any of these three conclusions.

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[192] *Id*. at 297.
[193] *Id*. at 299.
[194] *Id*. at 305.
[195] *Id*.
[196] *Id*. State courts have followed the use of *Price Waterhouse* to create a cause of action under state statutes for transsexuals who do not conform to sex stereotypes. *See, e.g*., Lie v. Sky Publishing Corp., 15 Mass. L. Rptr. 412 (Mass. Super. Oct. 7, 2002) (holding that transsexuals are covered by the sex stereotyping theory of *Price Waterhouse*); Enriquez v. West Jersey Health Systems, 342 N.J. Super. 501 (2001) (holding that transsexual individual not covered by sexual orientation provision of the statute, but was covered by prohibition of gender discrimination based on *Price Waterhouse*).

Second, and perhaps more notable than the first conclusion because it departs from the other cases, *Schroer* concluded that under the plain language of the statute the refusal to hire the plaintiff occurred illegally "because of sex." The court disagreed with the courts that have decided that Title VII does not forbid discrimination because of a person's transsexuality.[197] Instead of looking at the plain language of the statute, these courts improperly consider the Congressional intent at the time that the statute was enacted.[198] On its face, the statute simply forbids discrimination because of sex. This language clearly forbids discrimination against a transsexual because discrimination occurs because of the plaintiff's sex.[199] Furthermore, it did not trouble the court that Congress would not have anticipated at the time of its passage that Title VII would apply to discrimination against transsexuals because Title VII has been interpreted numerous times in ways that go beyond the intent of the enacting Congress.[200] For example in *Oncale*, Justice Scalia noted that while same-sex harassment was not the principal evil that Congress sought to condemn in Title VII, statutory prohibitions often go beyond the principal evil.[201] Finally, the court questioned whether the decisions holding that Title VII's prohibition of discrimination "because of sex" is limited to biological or anatomical sex are still good law after *Price Waterhouse*. Even if they are still good law, the court held that the defendant's refusal to hire Schroer because she is changing her anatomy is literally discrimination because of sex.[202]

2) *Problems and Limitations with* Price Waterhouse

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[197] 577 F.Supp. 2d at 307.
[198] *Id*.
[199] *Id*. at 308.
[200] *Id*. at 307.
[201] *Id*. at 307.
[202] *Id*. at 308.

The cases of transsexuals alleging that their employers violated Title VII by discriminating against them often hang by a thread and, as in the sexual orientation cases, *Price Waterhouse* does not always guarantee a fair result. In *Etsitty v. Utah Transit Authority*, [203] for example, the plaintiff, a pre-operative transwoman began living as a woman in preparation for sex reassignment surgery. After successfully completing her training as a bus driver while dressed as a man, she informed her supervisor that she would begin to appear more female at work and that she would eventually change her sex.[204] The defendant fired the plaintiff because it was concerned that while on the road Etsitty, who still had male genitalia, would use the women's restrooms, behavior that the employer feared may lead to liability. It stated on the record of her termination that the plaintiff would be eligible for rehire once she completed the sex reassignment surgery.[205] The lower court granted the defendant's motion for summary judgment.

On appeal, the Tenth Circuit Court of Appeals affirmed. It concluded, like other courts before it, that Title VII does not protect transsexuals from discrimination based on their transsexuality.[206] While recognizing that other courts have concluded that *Price Waterhouse* creates a cause of action for transsexuals under Title VII if the reason for the discrimination is the failure of the plaintiff to conform to sexual stereotypes, the court refused to reach the question of whether it would apply *Price Waterhouse* in a transsexual's case. It concluded that an employer has a legitimate non-discriminatory reason for firing an employee who has male genitals and uses the women's bathroom. The court rejected the plaintiff's argument that discriminating based on which bathroom

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[203] 502 F.3d 1215 (10th Cir. 2007).
[204] *Id*. at 1218-9.
[205] *Id*. at 1219.
[206] *Id*. at 1222.

she planned to use was based on the sex stereotype that her behavior should conform to the behavior of others who have male genitalia. The court concluded that the plaintiff's argument was merely that the employer discriminated against her because of her status as a transsexual, a status that is not covered by the statute.[207]

The court concluded that *Price Waterhouse* does not reach so far as to protect from discrimination biological males with male genitalia who seek to use women's restrooms. Finally, the court held that as a matter of law the plaintiff had not proved that the reason proffered by the defendant was a pretext for discrimination based on the plaintiff's failure to conform to sex stereotypes. Even though there was testimony in the record that management fired Etsitty because it was concerned about its image or impropriety in the public, the court concluded that this testimony was insufficient to send the case to the jury.

Even if we are to accept the court's reasoning about the reach of *Price Waterhouse*, the court's conclusion that there was no genuine issue of fact to go to the jury seems wrong. While a reasonable fact finder could find, based on this evidence, that the defendant fired Etsitty because she would have used the women's restroom, the evidence is also sufficient to conclude that the defendant fired the plaintiff at least in part because of its fear of a poor public image based on Etsitty's appearance. Even if one were to conclude that the employer had a legitimate concern about the restroom, there appeared to be sufficient evidence that Etsitty's appearance or possible future appearance, besides her restroom use, may have motivated her firing. Moreover, given the reality of the lives of transwomen, they will not enjoy equal protection under the employment

[207] *Id*. at 1223-4.

discrimination laws until there is an accommodation to their restroom needs. I discuss this issue more fully below.

Another limitation on the *Price Waterhouse* doctrine is a conclusion that the defendant did not discriminate against the plaintiff because of a failure to conform to sex stereotypes at work, but legally discharged the plaintiff for behavior, such as cross-dressing, outside of work. In *Oiler v. Winn-Dixie Louisiana*, Inc.,[208] for example, the court rejected the plaintiff's stereotyping claim because there was no evidence of harassment or discharge because of a lack of masculinity at work; rather the evidence demonstrated that the defendant fired the plaintiff because he assumed the role of a woman outside of work. These cases stress "behavior" outside of work over an identity or presentation that fails to conform to gender stereotypes. This interpretation also appears, as mentioned above, in some of the cases in which the courts conclude that the discrimination occurred because of sexual orientation defined as behavior outside of work, rather than an effeminate presentation in the workplace.[209] But masculinities research makes the motivation for the discriminatory behavior clear. Men at work are uncomfortable with other men who display feminine or non-masculine characteristics, dress or behavior, whether the display occurs at work or outside of work. This strong revulsion is linked to the men's need to prove that they themselves are not feminine and are therefore masculine. What better way to prove one's masculinity than to eliminate from the workplace those who do not meet the society's masculine norms?

3) *Restrooms and Reasonable Accommodation*

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[208] 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).
[209] *See supra* notes 125-6 & accompanying text.

As *Etsitty* demonstrates, for the transsexual cases, there is another issue in play that goes beyond those in the sexual orientation cases. In a number of the cases, the defendants have successfully defended by arguing that they did not discriminate against MTF transsexuals when they refused to allow transwomen workers to use the women's restroom. In *Etsitty*, for example, the employer defended by stating that it fired the employee or refused to hire her because of theconcern that the women in the workplace would be uncomfortable with a pre-operative MTF transsexual using the women's restroom because she still has male genitalia.[210] In *Goins v. West Group*,[211] the defendant threatened to discipline Goins because she insisted on using the women's restroom near her work station. Goins, a transwoman who had not had reconstructive surgery, was told to use a single restroom in another part of the facility. When the employer threatened discipline, she quit and sued for discrimination under the Minnesota Human Rights Law which banned discrimination based on gender identity and gender self-image. Despite the explicit language protecting against discrimination based on gender identity, the Minnesota Supreme Court held that the defendant had the right to insist that employees use the restroom in accordance with their biological sex, and that such requirement did not constitute illegal discrimination against the plaintiff. [212]

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[210] Some employers may argue that they will not offer the opportunity for a pre-operative MTF transsexual to use the women's restroom because they fear suit by another woman. This fear is likely groundless. In fact, in *Cruzan v. Spec. Sch. Dist. #1*, 294 F.3d 981 (8th Cir. 2002), the court ruled that the defendant did not create a hostile work environment for a woman employee when it permitted a MTF transsexual who still had male genitalia to use the women's restroom because the MTF transsexual merely used the restroom and did not engage in misconduct.

[211] 635 N.W. 717 (Minn. 2001).

[212]*See also* Johnson v. Fresh Mark, Inc., 337 F.Supp. 2d 996 (N.D. Ohio 2003)(holding that the plaintiff had not made out a cause of action because the defendant merely required her to use the men's room in light of her male driver's license and did not react to her physical appearance); *But see* Kastl v. Maricopa County Community College Dist., 2004 U.S.Dist. LEXIS 29825 (D. Az. June 3, 2004) (holding that the plaintiff had stated a cause of action when the employer refused to allow her, an MTF transsexual, to use the women's restroom).

Etsitty and *Goins* present the problems encountered by many transsexuals, especially the MTF transsexuals, who suffer discrimination in the workplace. In *Etsitty*, it was difficult to prove that the discrimination occurred because of the individual's failure to live up to gender stereotypes. *Goins* demonstrates that even where there is specific protection in the statute, the restroom issue raises issues for the courts. In *Goins*, despite the statutory protection of gender identity and self-image, the Court still refused to require the employer to permit the plaintiff, who still had male genitals, to use the women's restroom.

These cases demonstrate a surprising lack of interest in or understanding of the lived reality of transwomen. The hard fact is that the years of transition from male to female gender are extremely dangerous for the transwoman. This is because the likelihood of violent attack from men who find them threatening or repulsive is highest at this time. A transsexual MTF needs to avoid using the men's restroom because it is dangerous to use the men's room.[213] This is consistent with the masculinities literature. It posits that the transwoman, like the gay man, is an affront to the masculinity of the other men in the restroom. The transwoman openly displays feminine dress and traits that are threatening to men who need to differentiate themselves from women in order to prove their masculinity. Often this confrontation results in violence against the gender non-conforming male. Women who may be expected to share the women's restroom react negatively to the transwoman's use of the women's room because they are concerned that the transsexual who still has male genitalia will attack or rape them in the restroom. But the bathroom problem should not create needless difficulties for employers. Nor should it create an excuse for failure to hire or for discharging an employee.

[213] *See* DEIDRE MCCLOSKY, CROSSING: A MEMOIR 38-39(1999).

Under Title VII law, an argument could be made that a policy requiring transsexuals who are in transition to use the restroom that accords with their biological sex and their genitals has a disparate effect on men because of the dangers of an MTF's use of the men's restroom far exceeds the dangers that an FTM encounters using the women's restroom. With proper documentation of the dangers encountered by MTF transsexuals, some courts might agree that a Title VII case exists if this proof is available because transwomen as a group would be disadvantaged in comparison with transmen as a group. But disparate impact litigation is difficult and the courts may be unwilling to accept evidence that MTF transsexuals in general encounter dangers in male restrooms. Courts may insist on statistical evidence of dangers in the particular workplace, evidence that would likely be unavailable or at least insufficient to prove a statistical disparate impact case. Furthermore, even if the legislature were to reinsert gender identity as a protected class in ENDA, there may be continuing difficulty for transgender individuals who seek to use the restrooms of their gender expressed identity because ENDA does not create a cause of action for disparate impact. And, even where gender identity is explicitly protected, the courts may refuse to require the employer to treat the employee in accordance with his or her gender identity when it comes to restroom use.

One practical solution to the restroom problem would be to require a reasonable accommodation to the transgender person. One accommodation for an employer who compels the transwoman worker to use the men's room would require the employer to guarantee her safety from physical harm and sexual harassment. But even this response is not satisfactory because the transwoman is living as a woman and views herself as a woman. Forcing a woman to use the men's restroom even in the absence of physical danger seems an inappropriate affront to personal dignity, and perhaps, psychologically harmful. The better solution would be employer education of its female employees that would dispel their discomfort with sharing the restroom with a female person with male genitals. If education is insufficient to make the women comfortable, the employer should be required to make a reasonable accommodation to the bathroom needs of the individual. The courts have interpreted Title VII to require reasonable accommodation in religious discrimination cases. [214] Such a requirement need not be onerous. *Goins* demonstrates that permitting the transsexual employee to use an individual bathroom if one exists in the workplace is one option that may not be welcome to the transsexual employee. Nonetheless some transsexual employees may be comfortable with this option.[215]

In evaluating the effectiveness of a reasonable accommodation, it is important to recognize that many transgendered individuals do not have sex reassignment surgery, either because they lack the resources to pay for the surgery or because they choose not to have the surgery for other reasons. It is more common for transwomen than transmen to have surgery for three reasons. First, transwomen have difficulty passing as women if the transition takes place after puberty because it is nearly impossible to reverse the effects of the male hormones. Even after taking female hormones, transwomen continue to grow beards.[216] Moreover, taking female hormones does not reduce foot size or height, so often transwomen are larger than what ordinarily would be expected of a woman. Many

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[214] *See, e.g.*, Ansonia Bd. of Educ. V. Philbrook, 479 U.S. 60 (1986).
[215] Another option would be to hang a sign on the door of the women's restroom that transsexual employees manipulate to demonstrate that they are in the restroom so that others may decide whether or not they want to enter the restroom. This simple solution is employed in college dormitories occupied by women when male visitors use the women's restroom.
[216] See CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 37 (1998) (explaining the need for MTF transsexuals for electrolysis to remove facial hair).

transwomen constantly fear that they will not pass as women. This situation contrasts with that of transmen who after only a few months have little trouble passing as men. Because of this differential, there is more incentive for transwomen than transmen to have gender reassignment surgery in order to accomplish a more authentic transition.[217]

Second, and perhaps even more important, sex reassignment surgery is more successful for transwomen than for transmen. While surgeons can create a vagina by means of vaginoplasty that would fool gynecologists into believing it is natural from birth, the results of phalloplasty – surgery creating a penis -- are less authentic, especially because the functioning of the new penis is not ideal.[218] Finally, phalloplasty is much more expensive than vaginoplasty, approximately three of four times more expensive. Many transmen, therefore, opt to have breast surgery and to take male hormones, but not to have phalloplasty. While the clitoris grows from the male hormones and becomes erect upon stimulation, it does not appear as a penis, but it does allow for orgasm. Many FTM transmen wear artificial penises so that they appear to be men through their clothes.[219]

These facts are important in considering the employer's reactions to a transgender employee's request to use the restroom consistent with gender identity and expression. An employer like Utah Transit Authority that conditioned Etsitty's rehiring and use of the women's restroom on proof that the plaintiff has completed sex reassignment surgery will needlessly treat some transgender individuals who have had sex reassignment surgery better than those who have either not yet finished the transition or who have chosen to forego surgery altogether. While employers may argue that this distinction is legitimate

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[217] *Id*. at 81-90.
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[219] *Id*.

because their policy is that they attribute gender based on the individual's genitalia, these policies do not comport with the world of transgender persons who doctors advise to wait for surgery until after they have lived as the sex to which they are transitioning for at least a year. Nor do they respect the legitimate decisions of transgender individuals who change their attributed gender, but fail to undergo sex reassignment surgery. Distinguishing among these individuals, granting benefits to some but not to others, clearly is discrimination based on sex and gender.

There is an interesting tension between the social construction of gender espoused by masculinities and feminist theory and the lived experience of many transsexuals. In some ways, transsexuals' experiences support the masculinities and feminist theorists' views that gender and sex are not fixed phenomena. Many transsexuals consciously perform gender in a way that evokes the other sex, dressing bodies with male anatomy with exaggerated feminine dress such as makeup and dresses, or binding one's female breasts so as to pass as males. Many transsexuals, however, view the solution to their problems as a permanent transition to the other sex. Some transsexuals tell compelling tales about their gender identity. They do not see their transitions as a choice, but as a coming out of the closet to reveal their true identities.[220] If the transsexual believes ardently, as many do, that she or he inhabits the wrong body, and ingests hormones and has surgery to effect a sex change, it appears that the transsexual believes in a biological component of sex and gender. By concluding that they do not fit into the bodies into which they were born, transgender individuals who live as transsexuals reinforce the idea that there are only two genders.

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[220] *See* MCCLOSKEY, *supra* note (stating throughout that he was not making a decision to change but he was expressing his identity).

The story is, however, more complicated. As noted above, there is considerable variation among transgender individuals concerning how they transition. Some take hormones and go through sex reassignment surgery as well as other surgeries to make less visible secondary sex characteristics. Others, as mentioned above, may have hormone therapy and live in a transitioned gender, but opt not to have sex reassignment surgery. Furthermore, even when transgender individuals opt for sex reassignment surgery, the physical transition is only part of the story. Besides the physical changes accomplished through electrolysis, hormones and surgery, acquiring a true identity involves significant performative changes, and transsexuals are keenly aware of the need to perform their newly adopted gender. Transwomen are particularly conscious about gender performances because they have more difficulty passing as women than transmen have passing as men. Kristen Schilt notes that there is a differential in the amount of scrutiny women suffer.[221] In addition to the physical differences in passing, it is likely that the additional scrutiny of women's appearances creates more problems for men who are transitioning to women.

When transitioning, many transwomen consciously adopt female mannerisms, methods of speech, and ways of developing relationships. Deirdre McClosky, a transwoman economics professor at the University of Iowa, for example, explains in her memoir that she studied how women performed their gender – how they helped one another, their speech patterns, and their willingness not to be the center of attention in group discussions – and she worked to emulate women's styles.[222] She also observed that there were differences between the way women relate to one another in American and

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[222] McClosky, *supra* note 213 at 33, 77, 82, 83, 155-56, 159-60, 209-10,264.

Dutch cultures.[223] She observes that many transwomen receive coaching from a speech therapist. She believes that it is necessary not only because women's voices are higher in tone but also because women speak differently from men. She opines that women use fewer and less expressive gestures with their hands and keep their hands closer to the body when they speak. She notes that women speak with more modulation, but also more softly and often end phrases or sentences with an upward lilt. Another transwoman posits that women use more facial expressions when they speak, smile more frequently and look more directly into another's eyes when they speak. [224] Transmen must be aware of similar issues, but Schilt's research demonstrates that transmen experience more acceptance from their male colleagues when openly transitioning than transwomen do. Because the transmen adopt male gender role or expression, they present as masculine and less threatening to the masculinity of their male coworkers. Because masculine women are less threatening than feminine men, transmen have often adopted masculine dress, appearance and behaviors even before making the transition.[225]

Transwomen's lives demonstrate that the feminine gender expressions do not automatically follow physical and hormonal changes because they are social, not biological, in origin. Thus, although transsexuals tend to reinforce the concept of the binary of two sexes, transsexuals' lived reality is that the physical changes are only a minor part of their transition. Furthermore, the transgender community consists of a diversity of gender and sexual expressions that is not limited to the binary definitions of male and female, masculine and feminine. There is the post-modern concept of

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[223] *Id*.
[224] GRIGGS, *supra* note 216 at 9 (1998).
[225] Schilt

transsexuals as living “outside the boundaries of gender” rather than conforming with a particular or “opposite” gender. [226]

> This idea points to the position of trans people as located somewhere outside the spaces customarily offered to men and women, as people who are beyond the laws of gender. So the assumption that there are only two (opposite) genders, with their corresponding “masculinities” and “femininities,” is opened up to scrutiny. Instead, it is suggested that there is a possibility of a “third” space outside the gender dichotomy. This idea refers not simply to the addition of another category; it is conceived as “a space for society to articulate and make sense of all its various gendered identities.”[227]

4. *Protecting Intersex Individuals*

Intersex or DSD individuals constitute another category of persons whose status under Title VII is ambiguous. To date, there are no reported cases brought by intersex individuals, but if they suffer discrimination as a result of their sexual ambiguity, intersex individuals should have a cause of action under Title VII. Discrimination against intersex individuals because of their ambiguous genitalia or conflict between genitalia and chromosomes would appear to be prohibited by Title VII’s clear language that bans discrimination because of the individual’s sex. But as we have seen, courts have made distinctions between sex stereotyping and sexual orientation and between sex stereotyping and gender identity discrimination. It is not inconceivable that they would draw boundaries between sex discrimination and discrimination because a person is intersex. Such line drawing in the case of an intersex person would operate in contradiction of the clear language of the statute that prohibits discrimination because of sex. Although intersex persons may not necessarily be categorized as male or female, they do have a sex. And, even if courts conclude that they are not protected under the

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[226] Elkins, *supra* note 62 at 389, citing S. Stone, *The Empire Strikes Back: A Post-transsexual Manifesto in* BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY (K. Straub & J. Epstein, eds. 1991).
[227] *Id*., citing Z.I. NATAF, LESBIANS TALK TRANSGENDER at 57 (1996).

clear language of Title VII it is possible that *Price Waterhouse* may be used to protect intersex individuals from discrimination. But it is also possible that intersex individuals would fall into the gap and not receive protection of the sex stereotyping doctrine. Another possibility open to intersex individuals, but not to transgender persons is protection under the Americans with Disabilities Act against workplace discrimination. While the ADA expressly excludes transgender persons from the definition of disability, it makes no exclusion for intersex individuals. [228]

IV. MASCULINITIES: IMPROVING THEORY AND RESULTS IN TITLE VII CASES

Masculinities theory teaches us that men as a group prove their masculinity and police the masculinity of the job by engaging in discriminatory behavior toward men who do not live up to masculine norms. It may be that femininity or perceived femininity of gay or transgendered individuals causes the abusive behavior they often suffer at work.

Masculinities researchers conclude that the exaggerated and socially constituted differences between two polar opposites – male and female – maintain the power structure that privileges men over women.[229] The bipolarity of opposites between homosexuality and heterosexuality, like the bipolarity of men and women, male and female, reinforces the superiority of men over women, and gender conforming men over gender non-conforming men. [230] Robert Connell notes that hegemonic masculinity subordinates gay men and gay masculinity, conflating it with femininity. He states:

> Gayness, in patriarchal ideology, is the repository of whatever is symbolically expelled from hegemonic masculinity.... Hence, from the point of view of hegemonic masculinity, gayness is easily assimilated to

[228] 42 U.S.C. Sec. 12208, 12211.
[229] *See supra* note 12 , Lorber, *Beyond the Binaries*, at 153-5.
[230] *Id*. at 146-147.

> femininity. And hence – in the view of some gay theorists – the ferocity of homophobic attacks. [231]

Concepts of masculinity and sexual orientation are inextricably intertwined. Connell notes that in this society hegemonic masculinity is defined exclusively as heterosexual. Even the most aggressive, competitive and masculine gay men are considered not masculine, merely because of the identity of their sex partners. [232] Connell explains:

> Patriarchal culture has a simple interpretation of gay men: they lack masculinity. This idea is expressed in an extraordinary variety of ways, ranging from stale humour of the limp-wrist, panty-waist variety, to sophisticated psychiatric investigations of the 'aetiology' of homosexuality in childhood. The interpretation is obviously linked to the assumption our culture generally makes about the mystery of sexuality, that opposites attract. If someone is attracted to the masculine, then that person must be feminine – if not in body, then somehow in mind. [233]

Moreover, experience shows that men in predominately male work environments often denigrate women, and other males who do not conform to gender norms, using gender specific language that equates inferiority with being female or feminine.[234] The

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[231] *See* R.C. CONNELL, MASCULINITIES 78 (2d ed. 2005).
[232] *See id.* at 162.
[233] *Id*. at 143.
[234] *See, e.g.*, Sharon R. Bird, *Welcome to the Men's Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 GENDER & SOC'Y 120, 122, 125-129 (1996) (concluding from her study of heterosexual males that homosociality – the attraction of men in non-sexual ways to one another – is used to reinforce meanings of hegemonic masculinity and differentiation from that which is feminine; when heterosexual men associated with each other they constantly reinforced the hegemonic masculine behaviors of emotional detachment, competition, and sexual objectification of women and encouraged suppression of "feminine" characteristics such as expressing one's feelings); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L. J. 68, 68-69 (2002) (describing the hostile treatment of Shannon Faulkner, the first woman to integrate The Citadel, a military college in South Carolina; the male students screamed obscenities at Shannon, addressed death threats to her, scrawled on the bathroom wall "Let her in – then fuck her to death."). This behavior begins early. Boys attack other boys as being "girls" or "sissies" in the playground in elementary school. *See* BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 115-118 (1999) (noting the prevalent use of "sissy" as a derogatory term to refer to boys who like to do "girl things," as opposed to the term "tomboy," to refer to girls who are athletic or like comfortable clothing, in a relatively positive vein) [hereinafter THORNE, GENDER PLAY].

greatest insults lodged against other men, whether heterosexual, homosexual or transgender, challenge their masculinity. These insults include clear references to the gender of the victim, referring to him in feminine terms such as "bitch." They give him characteristics of women, such as "pussy" or "milquetoast." They conflate a lack of masculinity with homosexuality. This behavior, which Robert Connell identifies as a "symbolic blurring with femininity," [235] maintains the superiority of the masculine over the feminine, of men over women. This behavior represents an attempt to preserve the job in question as masculine and the exclusive domain of men.[236] It reinforces the hegemonic masculinities from which men achieve a patriarchal dividend, an increase in income merely because they are male.

Masculinities studies demonstrate that the very methods used to harass non-conforming men are based on the superiority of men over women, the masculine over the feminine. [237] If permitted by law, the conflation of certain types of work with men, and men with hegemonic masculinities privileges gender-conforming men over women and gender non-conforming men. It also privileges white middle-class men over men of

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[235] *See* R.C. CONNELL, MASCULINITIES 79 (1995).

[236] *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L. J. 1683,1687 (1998); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 77-79 (2000); Patricia Yancey Martin, *Gender, Interaction, and Inequality in Organizations in* GENDER, INTERACTION AND INEQUALITY 217 (Cecilia L. Ridgeway, ed. 1991) (men attempt to exclude women peers because they fear that women's presence will undermine the masculinity requirements of the job leading to lower status and pay); James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 314 (1998) (finding that predominately male environments are more physically hostile and threatening to women and men are more likely to mark their work environments with symbols of the sexual objectification of women). *Compare* Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777, 793-96 ("hypermasculinity," including aggression and violence in police work is a means of maintaining masculine identity of the job and the men in the job) [hereinafter Harris, *Gender, Violence, Race and Criminal Justice*]. Interestingly, sociologist Barrie Thorne has found that boys who are good athletes, popular and masculine can more easily "cross over" to play with the girls in elementary school without harming their reputations. *See* THORNE, GENDER PLAY, *supra* note 234 at 122-23.

[237] *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L. J. 1, 18, 33, 47 (1995) (noting that many cases interpret *Hopkins* not to apply to the feminine male and arguing that this devaluation of the feminine harms not only the individual effeminate male, but also women as a group).

color. It leads to environments that are abusive to women and gender non-conforming men because of their sex, and it creates a whole class of jobs that exclude all but the most daring women and gender non-conforming men. By not recognizing that this behavior discriminates because of a person's sex, in violation of Title VII, courts reinforce the hegemonic masculinities, the superiority of masculine men and the inferiority of women, and the gender differences in pay and experience. These methods, if permitted to continue, confirm that women (and non-conforming men) do not belong in many workplaces that are predominately male. Without desegregating these workplaces, and breaking down the gender identification of the job, it is virtually impossible to achieve equality for women, many men, and sexual minorities.

Masculinities research, along with identity performance theory may help the courts see that discrimination based on bisexuality is discrimination because of gender. Masculinities research eschews the binary of feminine and masculine/heterosexuality and homosexuality as harmful to those who do not fit into one or the other extremes. Identity performance theory explains that in the workplace outsiders, such as bisexuals, have to perform their identities in order to gain acceptance at work.[238] These performances take a toll on the individual because they entail significant extra work, and include negotiations with the self about what performances are acceptable.

Likewise, the transgender cases raise significant issues concerning masculinity. First, it is notable that all of the reported decisions on transsexuals deal with transwomen. Moreover, many of the decisions involve MTF transsexuals who work in jobs that have a male gender identity: bus driver, firefighter, police officer, terrorism specialist. All of these jobs, especially those of police officer, firefighter and terrorism specialist are

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[238] *See* Carbado & Gulati, *supra* note 50.

perceived as requiring masculine characteristics. In light of Schilt and Wiswall's research demonstrating that transwomen experience serious pay disadvantage as well as less acceptance in their transitions than their transmen counterparts, masculinities research is especially relevant to understanding discrimination against transsexuals. Masculinities scholars note that men in jobs that are predominately male experience a need to prove their masculinity to other men. They construct their masculine identities through interaction with other persons in the workplace. In the transsexual cases, the male workers' behavior toward the transsexual plaintiffs protects the job from devaluation due to an association with femininity, and helps the male employees to define their masculinity at work. These behaviors, we have seen, also occur in sexual harassment cases where the plaintiff is either homosexual or a man who does not otherwise live up to the norms of masculinity. Transwomen may be even more threatening to the masculinity of the male workers than women or gays in the workplace. Any man who would reject his masculinity to the extreme of taking hormones or having his male organs surgically removed may be perceived as a serious danger to masculinity. Because masculinity is defined as that which is not feminine, a decision to purposefully express oneself as feminine is anathema to male coworkers who need to prove their masculinity to one another.

A recent empirical study on the masculine overcompensation thesis supports this view. The researcher, Robb Willer, gave tests to men and women that purportedly reported how they performed on a femininity/masculinity scale. He then reported false scores to the men and women. Half received a score that fell in the mid-range for their sex and half received a score that fell into the range of the other sex. After giving those scores to the participants, Dr. Willer tested the participants to see if their reported false scores would affect their responses on questionnaires that measured their homophobia, their support of the Bush Administration's war in Iraq and their interest in an SUV, all male-identified behaviors. He also administered an emotions test to all participants. The results showed that although the women who were told that they scored in the masculine range did not differ in their responses on the subsequent questionnaire from women who were told they scored in the feminine range, men who were told that they scored in the feminine range demonstrated on the subsequent questionnaire more homophobia, greater support for the Iraq war and more interest and willingness to pay a higher amount for an SUV than the men who were told that they scored in the mid range of masculinity. Moreover, the emotions test demonstrated that men who were told they were somewhat feminine demonstrated more guilt, shame, upset and hostility than the control group of men. This experiment demonstrates that men respond to a threat to their masculinity by attempts to prove their masculinity.[239] These attempts may include mistreatment of those persons in the workplace who threaten the masculinity of the workers and the jobs – women, men perceived as insufficiently masculine, gays and transgender individuals.

V. CONCLUSION

Sexual minorities deserve protection under Title VII. To date, that protection is elusive and fragmented. Although many courts recognize a cause of action under *Price Waterhouse* for discrimination based on a person's failure to conform to gender stereotypes, Title VII has been uniformly interpreted not to prohibit discrimination based on sexual orientation and, except for one case, not to prohibit discrimination based on

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[239] Robb Willer, *Overdoing Gender: A Test of the Masculine Overcompensation Thesis* (2008) (manuscript on file with the author).

transgender identity. The distinction between prohibited discrimination based on gender stereotypes and permissible discrimination based on sexual orientation has created judicial attempts at line-drawing to establish the motivations of perpetrators. Similar line-drawing occurs in transgender cases when courts attempt to decide whether the employer was motivated by the plaintiff's transgender status or her failure to conform to gender stereotypes. Masculinities theory demonstrates that distinguishing between these two sets of motivations is inadvisable and impossible. When combined with Schilt's empirical work, masculinities theory can help explain why the vast majority of the sexual orientation cases are brought by men in traditionally male workplaces and all of the transgender cases are brought by transwomen. In both cases, the harassment or other discriminatory behavior occurs because the plaintiff, who is identified by the perpetrators as a man, threatens the definition and concept of masculinity. Homosexual orientation is associated with femininity, an inferior gender status. Male to female transgenderism may be even more threatening than homosexuality because it rejects the superiority of masculinity in the most graphic of terms. The transgender individual dresses and behaves like a woman, and may even have reconstructive surgery to remove his male sexual organs.

Passage of ENDA, especially if it includes protection for gender identity and accommodation to the needs of transgender individuals, may ameliorate some of the problems because courts should not engage in the boundary-drawing between the motivations for the behavior. If, however, ENDA includes bisexuality in the definition of sexual orientation, the statute may create more line-drawing problems. Judges will most likely be uncomfortable concluding that discrimination against an individual because of her engagement outside of work in varying sexual behaviors is discrimination based on bisexuality.

This leaves intersex individuals. While it would make sense to assume that discrimination against a person because she is intersex or has a development sex disorder (DSD), violates Title VII because the discrimination would occur because of the sex of the individual, it is unclear whether courts will conclude that the statute forbids discrimination based on DSD. While discrimination based on DSD may also be prohibited by the Americans with Disabilities Act (ADA), judges interpreting Title VII and the ADA may see DSD as the same as sexual orientation or gender identity discrimination, or may conclude that because the individual was born as "third sex" the discrimination against the individual does not occur because of sex.

An amendment to Title VII or passage of a new Act such as ENDA to protect against discrimination based on sexual orientation, gender identity and intersex conditions would further the interests of LGBTI individuals. Nonetheless, passage of an amendment or a new act may not resolve the problems raised by the line-drawing debate over sex stereotyping and sexual orientation discrimination. Courts may continue to draw lines, this time between discrimination based on bisexuality and discrimination based on behavior outside of the workplace and between discrimination based on transgender identity and based on an employee's failure to use the proper restroom.

Even in the absence of statutory amendment or a new statute, Title VII should protect against discrimination based on sexual orientation, intersex conditions and gender identity and should provide reasonable accommodation, where necessary, to allow sexual minorities to live and work with dignity and security. Masculinities research such as the theoretical work done by R.C. Connell and the empirical work done by Kristen Schilt will advance the understanding of the victims of discrimination and of the causes of discriminatory behaviors which are often rooted in a need to prove masculinity. With an understanding of sexual minorities and the reasons why discrimination occurs, Title VII's prohibition of discrimination "because of sex" should be sufficient, if interpreted broadly, to grant sexual minorities workplace rights.