Sex is Not Enough: How Schroer Teaches Us That Transgender Employees Need Explicit Protection from Discrimination

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SEX IS NOT ENOUGH: HOW SCHROER TEACHES US THAT
TRANSGENDER EMPLOYEES NEED EXPLICIT PROTECTION
FROM DISCRIMINATION

By

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I. INTRODUCTION

On June 26, 2008, the House of Representatives Subcommittee on Health, Employment, Labor and Pensions held a hearing on transgender employment discrimination. Among the speakers was retired Colonel Diane Schroer of the United States Army. In 2004, Schroer was hired by the Library of Congress as an expert on terrorism, but when the Library found that Diane, who had applied for the job as David, would be starting as a female, they withdrew their offer. In her testimony at the subcommittee hearing, Schroer said: “I knew that whether I was David or Diane, I would provide a wealth of background knowledge and superb research support to the Congress. I truly felt that my future supervisor would feel the same way.”

Her future supervisor did not. The Library rescinded their offer and Schroer took her case to the U.S. District Court for the District of Columbia. In September of 2008, she won. Judge Robertson's opinion held, for the first time in a federal court, that discrimination against a transgender person was per se sex discrimination. But by finding that “transgender discrimination” was “sex discrimination,” Judge Robertson erased the “trans” and pushed “gender” back under the umbrella of “sex.”

The possibility of a legal cause of action for transgender or “gender identity” employment discrimination has only recently been explored, beginning in the late 1970s with Holloway v. Arthur Anderson which held that Title VII did not support a right of action for discrimination against a transgender employee. Because of the recent legal recognition of transgender plaintiffs and the relative dearth of cases (for reasons of demography and possible fear of recrimination), the case law

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2 Id., at 14 (statement of Diane Schroer).
3 42 USCS §§ 2000e et seq. (hereinafter Title VII).
4 Holloway v. Arthur Andersen and Co., 566 F.2d 659 (9th Cir. 1977).
has been spotty and largely unsympathetic.

In 1989 the Supreme Court changed the landscape of Title VII in *Price Waterhouse v. Hopkins*,\(^5\) ruling that sex-stereotyping – holding a member of one sex up to the stereotypical social standards of that sex – was impermissible.\(^6\) This reinterpretation of the statute, followed by the 1991 amendments,\(^7\) gave hope to transgender litigants by expanding Title VII to cover some gender-non-conforming employees.\(^8\) In the 2000s, the Ninth Circuit in *Schwenk v. Hartford*\(^9\) and the Sixth Circuit in *Smith\(^10\)* and *Barnes\(^11\)* expanded Title VII further to give transgender employees a right of action under “sex-stereotyping.”

In *Schroer v. Billington*,\(^12\) Judge Robertson found for Diane Schroer by holding that discrimination against a transgender employee was per se discrimination “because of . . . sex.”\(^13\) By expanding the Sixth Circuit's holdings in *Smith* and *Barnes*, Judge Robertson simplified an increasingly burdensome test that had imposed a virtual bar on successful Title VII cases brought by transgender litigants. *Schroer* is not, however, the panacea that will cure Title VII. Even if all federal circuits were to adopt Judge Robertson's interpretation, Title VII could not provide full legal protection from employment discrimination on the basis of gender identity. Title VII is unable to protect classes of employees who are not explicitly covered by its prohibition of employment discrimination.

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6. *Id.*
8. Like Hopkins herself, who was considered not feminine enough for a woman. *Price Waterhouse*, 490 U.S. 228.
13. *Id.*
Other remedies are available. State and local anti-discrimination laws can be a source of relief, but are unavailable in most jurisdictions, and are of limited use in others. Protection against discrimination on the basis of sex or gender identity in places of public accommodation, not available on the federal level, is available in a small number of states and municipalities, usually written into the anti-discrimination statutes.\(^{14}\) The proposed federal Employment Non-Discrimination Act (“ENDA”)\(^ {15}\) would create greater employment protection for many classes of litigants, but has been a strong source of Congressional controversy since its first proposal in 1994 and is unlikely to be passed in the near future without a concentrated effort by lesbian, gay, bisexual and transgender (“LGBT”) lobbyists and organizations – an effort which has proven difficult to coordinate in the past.\(^ {16}\)

This article takes a critical look at remedies for transgender employment discrimination in the wake of the *Schroer* decision. Part II defines “transgender” for the purposes of this article and illustrates some of the particular employment challenges facing transgender, transsexual, and gender-non-conforming persons. Part III discusses the history of case law leading to the 2008 decision in *Schroer v. Billington* and addresses the weaknesses of this piece-meal approach to transgender employment discrimination. Part IV looks at the partial success of the *Schroer* decision in the context of the greater confusion of transgender employment discrimination. Part V reviews other existing legal avenues for transgender employees including state and local anti-discrimination law, public accommodation doctrine, and the proposed Employment Non-Discrimination Act. Part VI concludes that because Title VII alone cannot provide the protection that transgender employees need, explicit

\(^{14}\) *See, e.g.*, Minnesota Human Rights Act, Minn. Stat. § 363A.02 (2008) (“(a) It is the public policy of this state to secure for persons in this state, freedom from discrimination . . . . in public accommodations because of race, color, creed, religion, national origin, sex, sexual orientation, and disability . . . .”)


\(^{16}\) *See infra* n. 193 regarding the Human Rights Campaign's initial support of the non-inclusive Employment Non-Discrimination Act.
federal protection through the Employment Non-Discrimination Act is necessary to protect all employees.

II. WHAT IS “TRANSGENDER?”

The term “transgender” has come to refer to many gender and sexual identities that lie outside the gender-binary system. The label can refer to persons who have completed gender reassignment surgery and to those who have no intention to do so, or it can refer to those who simply do not identify with the labels “male” or “female.” Virginia Prince, credited with making the term “transgender” main-stream, said she used it as a name for people, like herself, who “trans” the gender barrier. Importantly, “transgender” refers to one's gender identity, as opposed to the terms “lesbian,” “gay,” and “bisexual,” which refer to whom one is attracted. There are people, of course, who do not identify with the label transgender. For the purposes of this article, however, “transgender” will be used to refer to persons whose gender identity does not conform with their biological sex at birth, regardless of their desire to or phase in transition. The term “transsexual” will be used to refer to those

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17 Paisley Currah, Richard M. Juang, and Shannon Price Minter, Introduction, in TRANSGENDER RIGHTS xiii, xiv-xv (Paisley Currah et al. ed., 2006). (“As new generations of body modifiers and new social formations of gender resisters emerge, multiple usages coexist easily, sometimes with much generational or philosophical tension: transvestite, cross-dresser, trannie, trans, genderfuck, genderqueer, FTM, MtM, trans men, boyz, bois. Transgender is an expansive and complicated social category.”)

18 The term “transsexual” generally refers to those people whose biological or chromosomal sex is so at odds with their identified gender that they receive gender reassignment surgery. See, e.g., Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People, 11 Mich. J. Gender & L. 253, 268-269 (2005) (“Have you had THE surgery?”)

19 Taylor Flynn, Essay: Transforming the Debate: Why We Need To Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392(2001). (“... [Transgender] applies to persons whose appearance, behavior, or other personal characteristics differ from traditional gender norms.”)

20 Paisley Currah, Gender Pluralisms under the Transgender Umbrella, in TRANSGENDER RIGHTS supra n. 17 at 3, citing LESLIE FEINBERG, TRANSGENDER WARRIORS x (1996)

21 One’s status as a transgender person is independent of one’s sexuality. Vade, supra n. 18 at 270 (“Gender is who one is. Sexuality is to whom one is attracted. Transgender people have all sexual orientations: some transgendered people are straight, some are gay, some are bisexual, and some are queer.”) (internal citations and footnotes omitted).

22 See, e.g., Vade, supra n. 18 at 266 (discussing diversity and identity among genders).
individuals who have undergone sex reassignment surgery (“SRS”), to refer to those individuals who claim the identity, and when quoting court opinions using that term. “Gender identity” will be used where the broader scope of gender-non-conformation is implicated.

Gender Identity Disorder, or gender dysphoria, the medical diagnosis of being transgender, is a controversial subject in the transgender community. Many advocates feel that the existence of a “mental disorder” of transgenderism stigmatizes the status, while others rely on the diagnosis in

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23 Sex Reassignment Surgery is the collection of surgeries performed to physically transition someone from one sex to another.

24 Use of the term with which a person identifies or use of a descriptive non-derogatory term like “transgender” is important for allowing plaintiffs and petitioners the respect, autonomy, and agency they deserve. See, e.g. Lie v, Sky Publishing, 15 Mass. L. Rep 412 (Mass. 2002) (“Throughout its papers, the defendant refers to the plaintiff as a "cross-dresser" or "transvestite," whereas she refers to herself as a "transgendered individual" or "transsexual." As this distinction goes to the heart of at least one of the counts of the complaint, it is worth taking a moment to clarify the point.

Even though "transsexual" and "transgendered individual" are often used as interchangeable labels in everyday parlance, "transgendered individual" is also a distinct umbrella term used to describe all individuals who exhibit a gender identity that does not conform to societal expectations, including transsexuals, transvestites, and others who engage in a gender expression that is different from that associated with their biological sex.”) (internal citations and quotations omitted).


26 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (American Psychiatric Association ed., 4th ed., 2005) (2000). (Gender Identity Disorder can be diagnosed in the presence of two criteria: “There must be evidence of a strong and persistent cross-gender identification, which is the desire to the be, or the insistence that one is, of the other sex . . . . There must also be evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.”)

27 “Part of the stigma about being trans comes from the fact that “gender identity disorder” is still in the American Psychiatric Association’s catalog of mental disorders. Why hasn’t it been removed when homosexuality was removed in 1973? Because for those of us who need hormones and surgery to feel authentic in our new genders, paternalistic medical guidelines still require a GID diagnosis. Some believe that the diagnosis enables doctors to provide treatment when they might fear accusations of malpractice without it.” Joanne Herman, Transgender 101, available at http://www.joanneherman.com/.

On April 28, 2008, the American Psychiatric Association (“APA”) released a statement indicating that “the [APA] Board of Trustees ha[d] established a task force on the treatment of Gender Identity Disorders (GID) to address concerns about the relative lack of evidence-based treatment guidelines and to determine if guidelines should be developed.” APA Task Force Reviews Possible Gender Identity Disorder Treatment Guidelines, AMERICAN PSYCHIATRIC ASSOCIATION, available at http://www.psych.org/MainMenu/Newsroom/NewsReleases/2009NewsReleases/APATaskForceReviewsPossibleGenderIdentityDisorder.aspx
order qualify for sex reassignment surgery. For the purposes of this note, Gender Identity Disorder will only be referred to when immediately relevant to a case or legal remedy.

Transgender persons face unique difficulties when looking for, applying to, and starting jobs, not to mention the obstacles that transsexual employees face when transitioning while maintaining a job or between jobs. According to a 2006 survey by the Transgender Law Center of transgender San Francisco residents, only 25% of respondents were working full time. Of those respondents who were working or had worked in the past, over 57% reported experiencing some form of employment discrimination, including discrimination during the hiring process, sexual harassment, verbal harassment including the use of the employee's old name or gender, termination or denial of advancement, and denial of access to the appropriate restroom. As the San Francisco Guardian

28 The Harry Benjamin Standards of Care for Gender Identity Disorders (“SOC”) lists SRS as an appropriate form of therapy for persons diagnosed with GID. The SOC's use of the language “medically necessary” touches on another controversial topic – whether surgery should need to be deemed “medically necessary" to be covered by Medicaid, as it is currently, and if so, what “medically necessary means. The Harry Benjamin Standards of Care for Gender Identity Disorders, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, INC., available at http://www.wpath.org/publications_standards.cfm. (“In persons diagnosed with transsexualism or profound GID, sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners, is medically indicated and medically necessary. Sex reassignment is not “experimental," “investigational," “elective," “cosmetic," or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID.”) Jerry L. Dasti argues that the current narrow definition of “medically necessary" used to determine Medicaid insurance coverage of SRS has a chilling, pathologizing effect on transgender persons, for whom “completed sex-reassignment surgery is often necessary to access certain legal rights and integrate fully into society." He proposes that a broader definition of “medically necessary" be used to “enable transsexuals to seek coverage without labeling themselves as having a disorder.” Jerry L. Dasti, Note: Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid, 77 N.Y.U.L. REV. 1738, 1743 (2002).

29 See, e.g., Cole Thaler, Representing Transgender Clients, 24 GPSOLO 18, 19 (2007) (“Employment discrimination is just one of many legal minefields faced by transgender people (an umbrella term that includes those who transition from one sex to another, as well as those whose gender expression challenges traditional expectations of masculinity or femininity). But employment discrimination often triggers a spiral of other problems: Transgender employees who are terminated lose access to health insurance and must pay medical bills out of pocket or forgo care altogether. This can lead to depression, anxiety, and other negative health consequences.”)


31 Another interesting, yet little researched ramification of transitioning in the workplace is the resultant pay-disparity. Kristen Schlit and Matthew Wiswall performed a study of the pay rates of 43 employees before and after their gender transitions. The results were staggering: college-educated, mostly white transgender women lost an average of 31%
noted in its coverage of the survey,\textsuperscript{33} the data are not conclusive, being confined to a small number of anonymous participants in a discrete community in central California, but they indicate the particular and exceptional hardships facing transgender persons in employment.\textsuperscript{34} Title VII codifies the prohibition of employment discrimination at the federal level, but as the next section of this paper will show – judicial interpretation of Title VII has not been favorable to transgender employees.

III. THE WINDING ROAD OF “BECAUSE OF . . . SEX” THAT LEADS TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

A. Title VII and “because of . . . sex”

Title VII of the Civil Rights Act of 1964\textsuperscript{35} was passed to legislate the prohibition of of their earnings after transition, while college-educated, mostly white transgender men gained an average of 10% in earnings after transition. Recognizing the limitations of a study with this small a sample, the data enforce the gender disparity at play in American economics and show how gender stereotypes, coupled with transgender employment discrimination, can have serious consequences on transgender employees. Kristen Schlit and Matthew Wiswall, Before and After: Gender Transitions, Human Capital, and Workplace Experiences, 8 THE B.E. J. OF ECON. ANAL. & POL., Article 39 (2008).

\textsuperscript{32} Id. at 4-5. (“[N]early 40\% of respondents believe that they have been discriminated against when applying for work. The common examples told about this kind of discrimination range from having applications thrown in the trash as the transgender applicant leaves the business, positive phone interviews follow- up by neutral or negative in-person interviews, comments that the applicant “wouldn’t like it here” or “wouldn’t fit in with the company.”) Id. at 4.

\textsuperscript{33} The article, along with citing the results of the survey, addresses another hurdle to employment unique to transgender employees: trying to get a job without a employment history under your new name. “Giving a prospective employer a reference may seem like a fairly straightforward task, but what if your old employer knew an employee of a different gender? Do you call the old boss and announce your new identity? Even if he or she is supportive, experience can be hard to erase. Will the manager who worked with Jim be able to speak convincingly about Jeanine? And what about your work history — should you eliminate the jobs where you were known as a different gender? Most trans people can't make it through the application process without either outing themselves or lying.” Tali Woodward, Transjobless, SAN FRANCISCO BAY GUARDIAN, http://www.sfbg.com/40/24/cover_trans.html.


\textsuperscript{35} 42 USCS §§ 2000e-2 et. seq.
employment discrimination in response to the civil rights movement of the 1950s and 60s. Title VII provides a petitioner with a right to sue her employer if the employer or any employee thereof “... fail[s] or refuse[s] to hire or to discharge any individual, or otherwise to discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . .”

Title VII specifically prohibits discrimination against employees “because of race, color, religion, sex, or national origin.” “Sex” was not in the language of the original bill: it was added during the last days of deliberation by Representative Howard Smith, possibly in an effort to frustrate the passage of the act. The speed and lack of deliberation with which the word “sex” was added and approved left a lack of evidence of the congressional intent behind the meaning of “sex discrimination.” Courts have thus been left to find their own interpretations of the word and its place within the statute. Historically and until very recently, courts have held that Title VII and “sex” do not provide a right of action for employees discriminated against on the basis of gender identity.

In 1991, Congress amended Title VII with the Civil Rights Act of 1991. The amendments

36 42 USCS §§ 2000e-2(a)(1). Title VII also declares it unlawful to “... limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . .” Id.

37 42 USCS § 2000e-2(a)(1).

38 Dr. Freeman addresses this theory, pointing out that there are many other factors that contributed to the addition of “sex” to Title VII, including the work of women's rights advocates on the elusive Equal Rights Amendment and opponents of the Equal Rights Amendment. Whether the National Women's Party was able to successfully lobby for the addition of “sex” or whether Representative Smith proposed it on his own, it has forever changed the face of employment discrimination. Jo Freeman, How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 LAW AND INEQUALITY: A J. OF THEORY AND PRAC. 163 (1991).

39 See, e.g., Masako Kanazawa, NOTE: Schwenk and the Ambiguity in Federal “Sex” Discrimination Jurisprudence: Defining Sex Discrimination Dynamically under Title VII, 25 SEATTLE UNIV. L. R. 255, 278-79 (2001) (“There is no evidence that Congress intended the word "sex" in Title VII to mean "biological male or biological female" and not "sexuality or sexual orientation" in enacting the Act. The total lack of legislative history addressing the meaning of sex under Title VII as well as the fact that the word "sex" was added as a floor amendment without debate just one day before the House's approval of Title VII were used by Holloway and Ulane to support the courts' conclusion that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."”)

were the result of several landmark Supreme Court, including the seminal *Price Waterhouse v. Hopkins*. Two particular changes broadened the scope of Title VII and further smoothed the way for transgender litigants. First, Congress cemented Title VII litigants’ right to a trial by jury. Second, the amendments codified the “mixed-motive” cause of action approved by the Supreme Court in *Price Waterhouse*. Under this cause of action, a plaintiff may still prevail by showing that sex or race was a “motivating factor” in the employment decision, even if it was not the only factor.

**B. Circuit Interpretation of Transgender Employment Discrimination Under Title VII**

Circuit interpretation of Title VII cases for gender-non-conforming persons began in the 1970s, with the disappointing Ninth Circuit decision in *Holloway*. The late 1980s brought victory for some gender-non-conforming people in the form of *Price Waterhouse*, but it was not until 2000 that a federal appellate court acknowledged that Title VII could be interpreted to give transgender employees a right of action. This slow, controversial, 30-year process resulted in a jurisprudence that is confusing, largely unhelpful, highly interpretive, and unfavorable to transgender and transsexual employees.

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41 Other predictors of the 1991 amendments included: the tension between *Griggs v. Duke Power*, 401 U.S. 424 (1971) and *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) regarding the burden shifting in a disparate impact case, which resulted in Congress placing the burden of showing business necessity squarely on the employer; and the disparity between 42 U.S.C. § 1981 and Title VII, which was corrected by amending Title VII to allow for “compensatory and punitive damages.”


43 See 42 U.S.C. § 1981A(c). (“If a complaining party seeks compensatory or punitive damages under this section – (1) any party shall demand a trial by jury . . . .”)

44 *Price Waterhouse*, 490 U.S. at 252 (“As to the employer’s proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.”) (internal citations and quotations omitted).

45 See 42 U.S.C. § 2000e-2(m) (“Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice.”) If the employer can show, however, that sex was not the only factor in the decision, the prevailing employee may only be eligible for “declaratory relief, injunctive relief, and attorney’s fees and costs” and the court “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.” 42 U.S.C. § 2000e-5(g).
In 1977, the Court of Appeals for the Ninth Circuit heard the first case of Title VII discrimination against a transgender employee, *Holloway v. Arthur Anderson, Co.* The plaintiff, Ramona Holloway, had informed her supervisor of her upcoming gender transition and requested that her employee records reflect her gender and name change. Arthur Anderson granted the requested changes, but during the next annual review a company official suggested that Holloway might be more comfortable working in an environment where her identity as a transgender woman would be unknown. She was terminated five months later. The Ninth Circuit disagreed with Holloway's claim that Congress had intended a broad interpretation of the term “sex” to include “gender,” finding that Congress had not shown any special attention to the term “sex.” Without a previous holding that transgender persons are a “discrete and insular minority,” the Ninth Circuit declined to reinterpret Title VII. The door was not slammed shut on a transgender right of action forever, however: in a prescient moment of foreshadowing, the court suggested that transgender persons may have a case.

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

47 Id. at 660.

48 Id.

49 Id.

50 Id. at 663.

51 Id. at 662 (“Appellants contends that “sex” as used above is anonymous [sic] with “gender,” and gender would encompass transsexuals. Appellee claims that the term should be given the traditional definition based on anatomical characteristics.”) (internal citations and quotations omitted).

52 Id. at 663 (“Congress has not shown any intent other than to restrict the term “sex” to its original meaning.”) (internal citations and footnotes omitted).

53 United States v. Carolene Products Co., 304 U.S. 144, 149 n. 4 (1939). (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) (internal citations and quotations omitted).

54 *Holloway*, 566 F.2d at 663, 664. (“Examining the traditional indicia of suspect classification, we find that transsexuals are not necessarily a “discrete and insular minority . . . A transsexual individual's decision to undergo sex surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII.”)
under “sex discrimination,” not “transgender discrimination.”

In the early 1980s the Seventh and Eighth Circuits followed the example set in *Holloway* by also finding that Congress had not intended to protect gender identity under Title VII. In *Ulane v. Eastern Airlines*, the plaintiff was a pilot with the defendant airline, but was fired after she transitioned to female as part of her treatment for Gender Identity Disorder. The district court judge determined that Eastern Airlines had violated Title VII by firing her, reasoning that “sex” is not a “cut-and-dried matter of chromosomes, but is in part a psychological question – a question of self-perception; and in part a social matter – a question of how society perceives the individual.” The Seventh Circuit overturned the district court, holding that Title VII could not be interpreted so broadly. Like the Ninth Circuit in *Holloway*, the Seventh Circuit found that it was not Congress' intent to protect transgender employees under the umbrella of “sex discrimination.” Providing scant relief, the court said that if Congress should wish to protect transgender persons, it should change the

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55 Id. at 664. (“Pursuant to this court's construction, Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex.”)

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

57 Id. at 1083.

58 Id. at 1084. (“The district court recognized [that courts have held that sexual preference is not covered under Title VII], and agreed that homosexuals and transvestites do not enjoy Title VII protection, but distinguished transsexuals as persons who, unlike homosexuals and transvestites, have sexual identity problems; the judge agreed that the term “sex” does not comprehend “sexual preference,” but held that it does comprehend “sexual identity.””) (emphasis in original).

59 Id. at 1084. (internal quotations and footnotes omitted).

60 Id. at 1084, 1087.

61 Id. at 1085. (“... and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals... The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder... The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.”) (emphasis in the original).
language of Title VII to do so.62

The Eight Circuit similarly found, in Sommers v. Budget Marketing,63 that “the legislative history does not show any intention to include transsexualism in Title VII.”64 The court affirmed summary judgement for Budget Marketing after it had fired Audra Sommers for “misrepresent[ing] herself as an anatomical female when she applied for the job.”65 Like the Ninth and Seventh Circuits, the Eighth was not unmindful of the dilemma before it. While dismissing the case, the court proposed that perhaps the solution could be found in public accommodation doctrine, if not in Title VII.66

The Supreme Court opened Title VII to gender-non-conforming people five years later in Price Waterhouse v. Hopkins.67 Ann Hopkins sued the law firm of Price Waterhouse under Title VII for sex discrimination after she was passed over for partnership.68 In defending its decision to not promote Hopkins, the firm offered several negative staff evaluations by Price Waterhouse partners.69 When the Court examined the evaluations, however, it found that Price Waterhouse had not given enough evidence to show that the evaluations were not based on sex-stereotyping.70 While some evaluations

62 Id. at 1086.
63 Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir 1982).
64 Id. at 750.
65 Id. at 748. (“[Budget Marketing] further alleged that the misrepresentation led to a disruption of the company's work routine in that a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel.”)
66 “The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers's own use? Perhaps some reasonable accommodation could be worked out between the parties. The issue before this court is not whether such an accommodation can be reached. Rather, the issue is whether Congress intended Title VII of the Civil Rights Act to protect transsexuals from discrimination. As explained above, we hold that such discrimination is not within the ambit of the Act.” Id. at 750.
68 Id. at 231, 232.
69 Id. at 233-235.
70 Id. at 234. (“There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman.”)
were positive and praised Hopkins' drive and intelligence,\(^{71}\) other partners had clearly reacted negatively to Hopkins' “aggressiveness.”\(^ {72} \) Price Waterhouse countered that even if the evaluators had been negatively influenced by Hopkins' lack of femininity,\(^ {73} \) Title VII did not support a cause of action for “sex-stereotyping.” The Supreme Court held instead that Title VII requires an employer to either not consider sex in any part of its evaluation or to show that it would have made the same decision had sex not been a factor.\(^ {74} \) Because Price Waterhouse could not show that it would have made the same decision without the negative evaluations, the Court held that the firm's decision, based on sex stereotypes, violated Title VII.\(^ {75} \) The Civil Rights Act of 1991 incorporated Justice O'Connor's concurrence into Title VII – with some slight changes – allowing a plaintiff to succeed in a mixed-motives case even when the employer can show that other factors contributed to the adverse employment action.\(^ {76} \)

In 1998, the Supreme Court relied on *Price Waterhouse* to find that same-sex sexual harassment is actionable under Title VII.\(^ {77} \) Although *Oncale v. Sundowner* addressed sexual harassment, not disparate treatment, the case further broadened Title VII to include employees who did not conform to their employers' or coworkers' expectations of gender or sexuality. Joseph Oncale worked on an oil rig

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\(^{71}\) *Id.* at 234.

\(^{72}\) *Id.* at 234. The evaluations were along the following lines: “macho,” “overcompensat[ing] for being a woman,” “[should] take a course in charm school,” “had matured from a tough-talking, somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but more appealing ptr [sic] candidate,” “[she should] walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235.

\(^{73}\) *Id.*

\(^{74}\) *Id.* at 249.

\(^{75}\) *Id.* at 250, 258 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”)

\(^{76}\) 42 U.S.C. § 2000e-2(m).

and was subject to constant harassment from his male coworkers.\textsuperscript{78} The Fifth Circuit Court of Appeals found for Sundowner Oil, affirming the district court's holding that a petitioner could not bring a claim of sex discrimination when his harasser is of the same sex.\textsuperscript{79} The Supreme Court balked at the lower courts' conclusive dismissals of the petitioner's claim, saying “. . . it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.”\textsuperscript{80} The Court held that the government's interest in preventing harassment in the workplace extended to preventing same sex harassment,\textsuperscript{81} and specifically noted that, contrary to the respondent's arguments, sexual harassment does not need to be motivated by sexual desire to be actionable.\textsuperscript{82}

In 2000, the Ninth Circuit changed its stance on federal protection of transgender persons by relying on \textit{Price Waterhouse} and \textit{Oncale} to find that transsexual woman Crystal Schwenk was protected by the Gender Motivated Violence Act\textsuperscript{83} (“GAWA”).\textsuperscript{84} Schwenk had been incarcerated in a male facility where she had been allegedly assaulted by a guard, Robert Mitchell.\textsuperscript{85} Mitchell appealed from the district court's denial of summary judgement, claiming among other things that as a

\textsuperscript{78} \textit{Id.} at 77 (assuming the facts for the petitioner, Joseph Oncale, that his coworkers picked on him, called him names reflecting homosexuality, and verbally and sexually abused him, forcing him to eventually quit the oil rig and bring this action).

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 78 (citing \textit{Casteneda v. Partida}, 430 U.S. 482, 499 (1977)).

\textsuperscript{81} \textit{Id.} at 80.

\textsuperscript{82} \textit{Id.} (“A trier of fact, might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”)

\textsuperscript{83} 42 U.S.C. § 13981, although “[T]he Supreme Court held in \textit{United States v Morrison} (2000) 529 US 598, 146 L Ed 2d 658, 120 S Ct 1740, that neither the Commerce Clause nor § 5 of the Fourteenth Amendment gave Congress the authority to enact this section.” \textit{Id.}

\textsuperscript{84} Schwenk v. Hartford, 204 F.3d 1187 (9th Cir 2000).

\textsuperscript{85} \textit{Id.} at 1193.
transsexual woman Schwenk should not be protected by GAWA.\textsuperscript{86} The court denied the claim, finding that GAWA's prohibition against “crimes committed because of gender or on the basis of gender” was clearly intended to cover transgender persons.\textsuperscript{87} The court dismissed the distinction between “sex” and “gender” created in Holloway and found that GAWA should parallel Title VII.\textsuperscript{88} “Indeed, for purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable.”\textsuperscript{89} This optimistic view, while not entirely accurate given the case history, set the stage for the Sixth Circuit.

In 2004, the Sixth Circuit broke new ground by ruling that the City of Salem had discriminated against a transsexual when it fired Jimmie Smith.\textsuperscript{90} Smith had worked at the Salem Fire Department for seven years when she\textsuperscript{91} was diagnosed with Gender Identity Disorder and began presenting herself in a more feminine manner at work.\textsuperscript{92} Her coworkers began to make comments about her appearance, but when Smith notified her supervisor about her diagnosis and the behavior of the other fire-fighters, her supervisor initiated termination proceedings.\textsuperscript{93} Smith filed a Title VII action in federal district court.

\begin{itemize}
\item \textsuperscript{86} Id. at 1198.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id. at 1202.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
\item \textsuperscript{91} It was the author's decision to use female pronouns to refer to Jimmie Smith. The court used male pronouns, as do the majority of articles discussing this case. Without a concrete example of which pronouns Smith prefers, the author decided to err on the side of caution.
\item \textsuperscript{92} Id. at 568.
\item \textsuperscript{93} Eastek, Smith's supervisor, along with Chief Walter Greenamyer and other city officials, decided to ask Smith to undergo three psychological evaluations in the hope that Smith would voluntarily quit the fire department rather than comply. Instead, Smith filed a suit with the U.S. Equal Opportunity Commission. As a result of her suit, Smith was suspended from the department. At a hearing regarding the suspension, the Salem Civil Service Commission upheld the action. Smith then appealed to the Columbiana County Court of Common Pleas, which reversed the suspension. Finally, Smith filed a Title VII claim of sex discrimination in federal district court. This case is the appeal from that court. Id. 568, 569.
\end{itemize}
court, but her case was dismissed. In her appeal, Smith alleged that the district court erred in finding that she had failed to state a claim of sex stereotyping and in finding that Title VII does not protect transgender employees. The Sixth Circuit reversed the district court.

After finding that Smith was a member of a protected class under Title VII, the court went on to examine her claim for sex-stereotyping. Using the Supreme Court's language in Price Waterhouse, the court found that Smith's coworkers and supervisors were motivated in their actions by Smith's failure to conform to common gender stereotypes. The court reversed the district court's finding that Price Waterhouse did not hold and instead found that Price Waterhouse' theory of “sex-stereotyping” as “sex discrimination” could be applied to transgender employees. By relying on Price Waterhouse, the court deliberately rejected the previous practice of labeling a plaintiff transgender to find that, because the plaintiff was being discriminated against based on her status as a transgender person and

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94 Id. at 569.
95 Id.
96 Id. at 568.
97 “His [sic] complaint asserts that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination “because of . . . sex” protects men as well as women.” (internal citations and quotations omitted) Id. at 570.
98 “Smith contends that the [Price Waterhouse] theory of sex stereotyping applies here. His [sic] complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave.” Id. at 572. “By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.” Id. at 573.
99 Id. at 572, 573.
100 “As such, discrimination against a plaintiff who is transsexual – and thereafter fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of that cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.” Id. at 575.
not her sex, the discrimination was not barred by Title VII.101

The Sixth Circuit reaffirmed this interpretation of Title VII less than a year later when the City of Cincinnati appealed a jury award of over $300,000 to Philecia Barnes, in Barnes v. City of Cincinnati.102 Barnes was a transgender woman, working as a male and “living off-duty as a woman.”103 When she was demoted from her position as sergeant of the Cincinnati Police Department, Barnes sued the city for sex discrimination under Title VII and was awarded compensatory damages, front pay, and back pay.104 The Sixth Circuit affirmed the lower court's ruling. The circuit's holding was important in two ways: it affirmed its earlier opinion in Smith by finding that Barnes, as a transgender person, was part of a protected class105; and second, it affirmed that a jury could find the employer guilty of sex stereotyping against a transgender employee.106

Other circuits did not embrace the Sixth's reasoning: even after Smith and Barnes, the Tenth

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101 Smith, 378 F.3d at 574. See also Marvin Dunson III, Sex, Gender and Transgender: The Present and Future of Employment Discrimination Law, 22 BERKELEY J. EMP. & LAB. L. 465, 469 (“The court did this by framing the the issue before it as “whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation.” In this context, if the court found that there was discrimination by the employer, it would only be discrimination based on Holloway's decision to undergo a sex change, not based on Holloway's being male or female (sex), or even man or woman (gender). In other words, the discrimination was based on something the plaintiff did, not on something the plaintiff was. Title VII protects against the latter, but not the former.”)

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

103 Id. at 734

104 Id. at 735.

105 See id. at 737 (“Smith v. City of Salem, Ohio . . . instructs that the City's claim that Barnes was not a member of a protected class lacks merit. In Smith, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections, stating:

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination case where the victim has suffered because of his or her gender non-conformity.

By alleging that his [sic] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination Following the holding in Smith, Barnes established that he [sic] was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.”) (internal quotations and citations omitted).

106 Id. at 741.
Circuit held in *Estate v. Utah Transit Authority*107 that Congress' intent could not be stretched so far. The Tenth Circuit used *Ulane* to prevent Krystal Etsitty from even asserting a prima facie case for employment discrimination, after Etsitty was fired for beginning her transition at work.108

*Schwenk*, *Smith*, and *Barnes* are all crucial cases for transgender litigants, but they fall short of creating true federal protection. The “sex-stereotyping” cause of action creates a catch-22. On one hand, it correctly illustrates the situation in which many transgender employees find themselves: unable to fulfill the common gender stereotypes asked of either of the sexes. Under the *Price Waterhouse* interpretation of Title VII, this is actionable. But the other edge of the catch-22 is that this cause of action requires a logical step that may not be available to all transgender litigants. “Sex-stereotyping” requires that the employee show that the employer had certain gendered expectations of the employee. What remedy is available when the employer discriminates on the basis of the employee's being transgender? The District Court for the District of Columbia tried to answer that question in *Schroer v. Billington*, when it held that discrimination against a transgender employee is simply that – sex discrimination.

### IV. HOW SCHROER TRIED TO ERASE THE STEPS BETWEEN “SEX DISCRIMINATION” AND “TRANSGENDER DISCRIMINATION”

In *Schroer v. Billington*,109 the District Court for the District of Columbia, relying on the Sixth Circuit's opinions in *Smith* and *Barnes*, found that discrimination against a transgender employee was

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107 *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

108 *Id.* at 1219. (“Following their meeting with Etsitty, Shirley and Cardon placed Etsitty on administrative leave and ultimately terminated her employment. Shirley explained the reason Etsitty was terminated was the possibility of liability for UTA arising from Etsitty's restroom usage. Cardon similarly explained to Etsitty that the reason for her termination was UTA's inability to accommodate her restroom needs.”)

per se sex discrimination.\textsuperscript{110} The outcome was positive for the plaintiff, but in finding that “transgender discrimination” is merely “sex discrimination,” Judge Robertson pushed transgender employees back under the umbrella of “sex,” erasing the unique challenges facing them in the workplace. \textit{Schroer} may have been a large step forward for Title VII, but it is just another tiny step along the road toward an inclusive anti-discrimination jurisprudence.

Diane Schroer, retired Army Colonel and terrorism expert, was hired by the Library of Congress in August of 2004 for the position of Specialist in Terrorism and International Crime.\textsuperscript{111} After she was offered the position – as a male and under the name David Schroer, but before she started work at the Library – Schroer asked to speak with Charlotte Preece, the Assistant Director for Foreign Affairs, Defense and Trade.\textsuperscript{112} Schroer told Preece that she had been diagnosed with Gender Identity Disorder, would be starting work as a woman, and would be completing her sex reassignment surgery within the year.\textsuperscript{113} Preece asked Schroer a few questions about the transition process, returned to the Library, and the following day withdrew the offer of employment.\textsuperscript{114} Schroer filed a case with the federal district court, claiming that she had been discriminated against “because of . . . sex,” as prohibited by Title VII.\textsuperscript{115} The court agreed.\textsuperscript{116}

Schroer advanced two theories of Title VII discrimination.\textsuperscript{117} The first proposed that

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.} at 307-09.
  \item \textsuperscript{111} \textit{Id.} at 295.
  \item \textsuperscript{112} \textit{Id.} at 295-96.
  \item \textsuperscript{113} \textit{Id.} at 296-97
  \item \textsuperscript{114} \textit{Id.} at 299.
  \item \textsuperscript{115} \textit{Id.} at 295.
  \item \textsuperscript{116} \textit{Id.} at 307-08.
  \item \textsuperscript{117} \textit{Id.} at 302.
\end{itemize}
The discrimination against a transgender person was discrimination on the basis of sex stereotyping. The second theory proposed that discrimination against a transgender person was per se sex discrimination. It reply, the Library of Congress submitted five non-discriminatory reasons for deciding not to hire Diane Schroer, all of which the court dismissed as indicative of the Library's bias against Schroer's transgenderism and therefore pre-textual. The Library then brought a secondary defense: that a hiring decision based on transgenderism is not unlawful under Title VII. The court addressed this defense via Schroer's two theories of discrimination.

The court relied on Price Waterhouse and Smith in considering Schroer's claim of discrimination through sex-stereotyping. Schroer successfully presented direct evidence that Preece's and the Library's decision to withdraw the job offer was “infected with sex stereotypes.” Judge Robertson, writing for the court, easily found that the Library had acted under the influence of “sex-stereotyping.”

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118 Id. at 302-06.
119 Id. at 306-08.
120 These factors were: 1) Schroer's ability to maintain contacts within the military; 2) Schroer's credibility in testifying before Congress; 3) Schroer's lack of trustworthiness in not having been upfront about her upcoming transition during the interview process; 4) The possibility of the transition distracting Schroer from her job; and 5) Schroer's ability to maintain her security clearance. Id. at 297-98.
121 The court reasoned as follows: 1) Preece did not ask Schroer about her ability to maintain security clearance, nor did she ask anyone about reciprocity for transitioning persons; 2) Worrying about Schroer's credibility and her ability to maintain contacts was mere deference to other's discrimination towards transgendered persons; 3) If Preece were truly concerned about Schroer's trustworthiness and possible distraction, she would have spoken with Schroer herself about the transition process. Id. at 300-02.
122 Id. at 300.
123 Id. at 302-06.
124 Id. at 305. (“Charlotte Preece, the decision maker, admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing.”) (internal citations and quotations omitted).
125 Id. (“Ultimately, I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming [sic] transsexual. One or more of Preece's comments could be parsed in each of these
Judge Robertson conceded that the difficulty in this case arose when trying to separate the Library's discrimination based on sex stereotypes from the Library's discrimination based on Schroer's transgender status. In determining that the Library's discrimination was per se sex discrimination, the court reexamined the plain language of Title VII. Diane Schroer was hired as a man, and rejected as a woman; she was discriminated against on the very basis of her sex. The court found that it is no longer acceptable to deny that discrimination against a transgender person is sex discrimination, when it is literally discrimination against someone on the basis of the gender with which he or she identifies or the biological sex with which he or she was born. This analysis erased the logical leap between sex-stereotyping and transgender discrimination to find that if an employer is transgender and discriminated against on the basis of his or her sex, the employer has violated Title VII. But despite the inclusive language, the Schroer decision does not represent the end of the battle for advocates of transgender employees.

Schroer may seem like a strong, inclusive interpretation of Title VII, but the foundation it was written on is the shaky precedent set by the Supreme Court in Price Waterhouse and Oncale – neither of which address transgender employees – and a single forward-thinking U.S. Circuit Court of Appeals. While the District Court for the District of Columbia was able to see discrimination against a

\[\text{three ways.”}\]

\[126\text{ Id. (“Take Preece's testimony regarding Schroer's credibility before Congress. As characterized by Schroer, the Library's credibility concern was that she “would not be deemed credible by Members of Congress and their staff because people would perceive her to be a woman, and would refuse to believe that she could possibly have the credentials that she had.”) (internal citations and quotations omitted).}\]

\[127\text{ Id. at 306-07}\]

\[128\text{ Id. at 306. (“The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a man named Diane. This was discrimination “because of . . . sex.”)}\]

\[129\text{ “Even if the decisions that define the word “sex” in Title VII as referring to anatomically or chromosomal sex are still good law – after that approach “has been eviscerated by Price Waterhouse,” Smith, 378 F.3d at 573 – the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment therapy was literally discrimination “because of . . . sex.” Id. at 307-08 (emphasis in original).}\]

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transgender employee as discrimination “because of . . . sex,” the circuits’ general reluctance to do so makes it unlikely that the Supreme Court will have a chance to rule on this interpretation of Title VII in the near future.130

Although Judge Robertson's interpretation of Title VII appears to solve the question of how to fit transgender employees under the umbrella “because of . . . sex,” it is precisely that “fitting under the umbrella” that causes this difficulty in tackling transgender employment discrimination. Schroer effectively ruled that “transgender discrimination” need not exist – that transgender employees may bring claims of “sex discrimination” or “sex-stereotyping.” This analysis erases the “trans” in “transgender discrimination” and focuses the analysis on the employee's sex.

Erasing the “trans” may have two consequences: first, it may allow defendant employers to discriminate on the basis of an employee’s transgender status, as opposed to his “sex.” That is, it may allow an employer to say that he fired an employee for transitioning, not because she was now female. Second, erasing the “trans” forces employees to identify with one gender or the other. This might make it difficult for gender-non-conforming employees or employees who do not identify with either gender to raise any cause of action. These two possible consequences underline the inadequacy of using “sex” to protect transgender employees. As long as transgender persons are not explicitly protected under Title VII, employers may successfully deny that they made the decision based on sex-stereotyping or sex.

There are other flaws in using Title VII to remedy and prohibit transgender employment discrimination. In order to bring a claim of sexual harassment under Title VII, the harassment must be

130 See Leena D. Phadke, Comment: When Women Aren’t Women and Men Aren’t Men: The Problem of Transgender Sex Discrimination Under Title IX, 54 KAN. L. REV. 837, 857 (2006) (proposing two reasons that courts would not follow the decision in Smith: (1) the holding rejected the Ulane line of cases, which may be too radical a move; and (2) the court’s reliance on Price Waterhouse might not be persuasive enough).
“severe and pervasive.”¹³¹ For some transgender employees, many of whom encounter harassment frequently,¹³² this creates the choice of either staying in a workplace where a low-level of harassment is the norm or quitting and suing under Title VII. This is not a comforting decision to make.

It is unclear whether under Schroer or the Sixth Circuit a non- or -pre-operative person would be able to bring the same case for “sex discrimination” as a post-operative transsexual person.¹³³ The Sixth Circuit touches on this question in Barnes v. City of Cincinnati, holding that Barnes, a pre-operative male-to-female transgender woman was protected under Title VII, but the opinion itself seems to confuse “transgender” and “transsexual,” referring to Barnes as a “transsexual” although the opinion notes nothing of her intent to transition and continually uses male pronouns to refer to her.¹³⁴

Diane Schroer was also pre-operative when she applied for the job, was hired, informed her

¹³¹ See generally Judith J. Johnson, License to Harass Women: Requiring Hostile Environment Sexual Harassment to be “Severe or Pervasive” Discriminates Among Terms and Conditions of Employment, 62 Md. L. Rev. 85 (2003) (proposing that “unwelcomeness” be the standard for sexual harassment under Title VII, not the current standard of “severe and pervasive) and Elisabeth A. Keller & Judith B. Tracy, Hidden in Plain Sight, 15 Duke J. Gender L. & Pol’y 247, 256 (2008) (recognizing that lower courts often misapply Supreme Court precedent to the detriment of plaintiffs in Title VII sexual harassment cases).

¹³² See Good Jobs NOW, supra n. 30 (“[O]ver 24% of people reported that they had been sexually harassed at work. It is unclear from the survey if this harassment was sexual in nature or motivated by the sex of the respondent. Some common examples of both include, assumptions that transgender women are promiscuous, fascination with the sexuality of transgender men, denial of work assignments due to the employees’ gender (either their gender assigned at birth or their gender identity), and treatment. different from people who have the same gender identity (transgender women being treated differently than other women).”)

¹³³ The majority of states do require that a person have undergone irreversible sex reassignment surgery before changing her gender on official state documents. See Sources of Authority to Amend Sex Designation on Birth Certificates, LAMBDA LEGAL, available at http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html (For example, in Arizona, the state may offer a change of birth certificate to “a person who has undergone a sex change operation or has a chromosomal count that establishes the sex of the person as different than in the registered birth certificate . . . .”) and see Ellen C. Cornelius, Casenote: Gender: Male or Female: In Re Helig and the Future of Check-the-Box, 4 RRGC 411 (2004) (“[O]n remand, Heilig was granted the opportunity to provide sufficient medical evidence that he had transitioned from a male to a female. The Court found that sex reassignment surgery is essential evidence because it shows that an individual’s sex has been completely changed in order to align the external genitalia with the other determinants of gender, not to perpetrate fraud. Moreover, it is permanent and irreversible. The Court noted that, “hormonal therapy alone, which usually can be terminated or perhaps even reversed, has not, to our knowledge, been recognized as effecting either a sufficient change or a permanent one.” Sex reassignment surgery is prohibitively expensive for most individuals, yet the court requires it.”)

¹³⁴ Barnes, 401 F.3d at 733-735. (“Barnes was a male-to-female transsexual who was living as a male while on duty but often lives as a women off-duty . . . . Col. Twitty told Barnes he did not appear to be “masculine,” and that he needed to stop wearing makeup and act more masculine . . . .”)
future supervisor of her intent to transition, and fired. The court, however, used Schroer's intent to start work as post-operative female to find that she had been discriminated against “because . . . of sex.” There may have been a different outcome if Schroer had had no intention of receiving sex-reassignment surgery, yet she still would have started work as a woman. It is unclear if Judge Robertson’s analysis would have been the same.

On April 14, 2009, the Ninth Circuit released an unpublished opinion finding that Rebecca Kastl stated a prima facie case for sex-stereotyping as employment discrimination under Title VII, although ultimately the court affirmed the district court's grant of summary judgement to the employer. Maricopa County Community College District (“MCCCD”) denied Kastl, a transsexual woman, use of the women’s restroom at the College “until she could prove completion of sex reassignment surgery.” The court upheld summary judgement by finding that MCCCD’s professed non-discriminatory reason for this decision, “safety,” was non-pre-textual and that Kastl could not show that MCCCD had made an impermissible decision based on gender stereotypes. Kastl was an unfortunate decision: sex reassignment surgery can be prohibitively expensive. It is crucial that surgical status or intent to transition not be held as requirements for a cause of action under Title VII, as

135 Schroer, 577 F. Supp. 2d 293
136 Id.
137 See Dasti, supra n. 28 for a discussion of the “medically necessary” provision of Medicaid coverage of SRS, a similar issue.
138 Kastl v. Maricopa, 2009 U.S. App. LEXIS 7833 (9th Cir. 2009).
139 Id.
140 Id. at 2.
141 Id. at 3-4.
142 “The average MTF cost was about $10,400, and the average FTM surgery (including top and, for those who had it, bottom surgery) was about $17,900. MTF surgeries outnumbered FTM surgeries 740 to 430, leading to an average combined cost for SRS of $12,900.” TRANSGENDER AT WORK, The Cost of Transgender Health Benefits, available at http://www.tgender.net/taw/thbcost.html (citing a study performed between 2001 and 2008 by Mary Ann Horton, Ph.D).
it would preclude the majority of transgender employees from bringing claims.

Using “sex discrimination” to prohibit discrimination against transgender employees is a clumsy fit. Without explicit protection, transgender employees are vulnerable to the flaws of statutory interpretation. *Schroer* shows that even the most favorable interpretation of an unfavorable doctrine is still inadequate.

V. BEYOND TITLE VII: OTHER FORMS OF RELIEF

Title VII provides inadequate protection for transgender employees. It is an unsettled doctrine; the headway made towards providing a solid right of action for transgender litigants relies upon multiple factors that may not be favorable to all litigants; it only allows suits against employers who have taken adverse employment action; and may contain loopholes permitting discrimination based purely on an employee's transgenderism. In the following section, I address three alternative forms of relief for transgender employees: two currently available (state and local anti-discrimination statutes and public accommodations doctrine) and one proposed (the Employment Non-Discrimination Act).

A. State Anti-Discrimination Statutes

Driven by the inadequacy of federal protection, a small number of jurisdictions have passed their own statutes prohibiting sex-based and gender-identity based employment discrimination. According to a 2008 report by the Transgender Law and Policy Institute and the National Gay and Lesbian Task Force, 13 states and 108 jurisdictions have anti-discrimination statutes that explicitly provide protection for gender identity. A handful of other states have employment discrimination

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statutes or human rights statutes that may be interpreted to provide some support for transgender employees. These statues, especially those that explicitly bar transgender discrimination, represent a groundswell of support for inclusive employment anti-discrimination laws.

State anti-discrimination laws can be more inclusive than federal law. For example, Rhode Island law declares it unlawful “[t]o refuse to hire any applicant for employment because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin.”\(^\text{144}\) The inclusion of sexual orientation and gender identity or expression make it explicitly clear that discrimination against a transgender person is illegal. No additional judicial interpretation is necessary.

On the other hand, these states may not be able to provide transgender employees with the strong legal remedies they need. First, like much local legislation, anti-discrimination statutes are subject to local disapproval, making them unlikely to pass in poor, rural, and conservative areas, where transgender employees arguably need the most protection.\(^\text{145}\) In Montgomery County, Maryland a trans-inclusive statute that was proposed to include protective measures in places of public

\(^\text{144}\) R.I. GEN. LAWS § 28-5-7 (2009).

\(^\text{145}\) Todd Bowser addresses the trend of increasing LGBT population in conservative and rural areas of the United States by proposing that it is a matter of increased reporting and visibility, not increased movement to these areas. Mr. Bowser hypothesizes that increased visibility will lead to increased tolerance in these areas. He also addresses the oppression of the LGBT community within the court system, especially in these conservative areas: “Lesbians and gay men feel unwelcome in courts and legal institutions, and even openly gay people may prefer to be closeted there. If people believe society and institutions are hostile and that they must hide their sexuality, they will avoid engagement in activities and institutions where disclosure of that characteristic is mandatory. Informal alternative dispute resolution mechanisms might be perceived as better equipped to handle issues without bias or with a better understanding of lesbian or gay community values. Thus, lesbians and gay men may prefer that friends or peers address dissolution of relationships, or may go to counselors or mediation rather than the courts. Additionally, if gay people do not bring relationship, dissolution, visitation, and other family law issues to courts, legal doctrine has no need to evolve mechanisms to accommodate those different households. If the legal system is not seen as reflective or understanding of the realities of gay or lesbian life, people lose confidence in its institutions and their access to them. Accordingly, a circle of withdrawal and mistrust is created.” Todd Bowser, It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts, 17 AM. U.J. GENDER SOC. POL’Y & L. 1, 7-8 (2009).
accommodations was amended after strong local pressure to remove that portion of the statute.\textsuperscript{146} Second and relatedly, because local and state trans-inclusive laws are likelier to pass in jurisdictions where transgender persons, gay men, lesbians, and bisexuals already suffer less discrimination, the local statutes may be helping those who need the help less than their counterparts living in less inclusive jurisdictions.\textsuperscript{147}

State courts interpreting anti-discrimination statutes that do not explicitly prohibit discrimination on the basis of gender identity have come out on both side of the issue. In \textit{Enriquez v. West Jersey Health Systems},\textsuperscript{148} the Superior Court of New Jersey, the Appellate Division, found that the New Jersey Law Against Discrimination\textsuperscript{149} (“LAD”) could be interpreted to prohibit an employer from discrimination against an employee on the basis of her “sexual identity or gender.”\textsuperscript{150} Carla Enriquez was terminated from her job in 1997 after she was diagnosed with gender dysphoria and began her physical transition.\textsuperscript{151} Allegedly, Enriquez’ employer continually asked her to revert her appearance back to that of a male before finally terminating her without warning in October of 1997.\textsuperscript{152} The court looked at \textit{Price Waterhouse, Goins},\textsuperscript{153} and other state cases to find that “the word

\textsuperscript{146} \textit{Infra} n. 164.

\textsuperscript{147} This controversial point is addressed in a 1994 article in the Journal of Policy Analysis and Management, which examined the economic status of self-identified gay and lesbian couples living in and outside jurisdictions with anti-discrimination policies that prohibited employment discrimination on the basis of sexual orientation. The authors argue that while same-sex couples are more likely to live in areas that adopt anti-discrimination policies, all couples, heterosexual and homosexual, who live in areas with anti-discrimination statutes have higher incomes than couples living outside the areas. This belies the premise that the statutes themselves benefit same-sex couples and instead speaks to the quality of employment in areas that are also likely to pass anti-discrimination laws. Marieka M. Klawitter and Victor Flatt, \textit{The Effects of State and Local Antidiscrimination Policies on Earnings for Gays and Lesbians}, 17 J. FOR POL’Y ANALYSIS AND MGMT. 4, 658 (1998).


\textsuperscript{149} \textit{Law Against Discrimination, N.J. STAT. § 10:5-1-49.} (herinafter “LAD”)

\textsuperscript{150} \textit{Enriquez}, 542 N.J. Super at 505.

\textsuperscript{151} \textit{Id.} at 506-07.

\textsuperscript{152} \textit{Id.}
“sex” as used in the LAD should be interpreted to include gender, protecting employees from
discrimination on the basis of sex or gender.”154 Judge Lefelt movingly stated:

> It is incomprehensible to us that our Legislature would ban discrimination
against heterosexual men and women; against homosexual men and
women; against bisexual men and women; against men and women who
are perceived, presumed or identified by others as not conforming to the
stereotypical notions of how men and women behave, but would condone
discrimination against men and women who seek to change their
anatomical sex because they suffer from a gender identity disorder. We
conclude that sex discrimination under LAD includes gender
discrimination so as to protect plaintiff from gender stereotyping for
transforming herself from a man to a woman.155

In 2002, the Supreme Court of Massachusetts also looked at *Price Waterhouse* and a series of
Circuit cases156 addressing disparate treatment of male and female employees in regards to their dress
to determine that the Massachusetts Human Rights statute157 included “gender discrimination” under
its prohibition of “sex discrimination.”158 Allie Lie had brought the case against her previous
employer, Sky Publishing Corporation, after she had been asked to stop “dressing as a woman” and had
been finally terminated from the company, a move which Lie alleged was retaliation for her initiating a
discrimination suit with the Massachusetts Commission Against Discrimination but which the
defendant alleged was due to Lie’s “offensive and improper use of the E-mail system.”159 The courts'

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153 Goins v. Westgroup, 635 N.W.2d 717 (Minn. 2001) (finding that the employer did not discriminate against the
employee by requiring her to use the bathroom of her birth sex).

154 *Id.* at 515.

155 *Id.*

156 See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Gerdom v. Continental Airlines,
Inc., 692 F.2d 602 (9th Cir. 1982); Carroll v. Talman Fed. Sav. & Loan Assoc., 604 F.2d 1028 (7th Cir. 1979).

157 ALM GL ch. 151B, § 4


finding that Massachusetts's statute covered gender discrimination allowed the plaintiff's claim to survive a motion for summary judgment. Judge Lefelt's language above, quoted in the Lie opinion, sounds a note of hope for the continued expansion of state anti-discrimination statutes. State statutes, however, are few and perhaps not as helpful as they should be to those who need the help the most. Employees should not have to move to a trans-friendly state to find adequate protection. All employees should be protected from employment discrimination.

B. Public Accommodations Doctrine

Federal public accommodations doctrine is codified in Title II of the Civil Rights Act of 1964. Title II prevents discrimination in “places of public accommodation” on the “ground of race, color, religion, or national origin . . . .” Unfortunately for transgender litigants, Title II does not prohibit discrimination on the basis of sex or gender identity in places of public accommodation. Transgender plaintiffs who have been discriminated in places of public accommodation, in or out of the workplace, are thus forced to turn to state and local public accommodation laws to find relief. Many states do not prohibit discrimination on the basis of sex in places of public accommodation and of those that do, fewer explicitly protect gender identity. On the other hand, some local municipalities and states are proposing and passing public accommodation statutes that both cover transgender persons and are far more comprehensive than Title II or any proposed federal public accommodation statute.

Public accommodation doctrine is a crucial piece of the puzzle for two reasons: first, it is in their use of public accommodations that many transgender and gender-non-conforming persons

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161 42 U.S.C. § 2000a (Places of public accommodation include lodgings, gas stations, restaurants, movie theaters, other related establishments, and all facilities located therein.)

162 Id.
encounter the worst discrimination; and second, public accommodation doctrine can be used where an employee has not suffered an adverse employment action but has nonetheless encountered workplace discrimination. The lack of many successful claims for discrimination in places of public accommodation can be attributed to the trans-phobia, or irrational fear of transgender persons, that many communities stir-up when faced with public accommodations cases.

In *Goins v. West Group*, the Supreme Court of Minnesota was given the chance to interpret the Minnesota Human Rights Act (“MHRA”) to give a transgender litigant a cause of action for discrimination in a place of public accommodation. Goins, a non-operative transsexual woman, was relocated by West Group in October, 1997, to work in its Minnesota facility. During her tour of the facility before she started work, Goins used the women’s restroom and was observed doing so by several female employees, who “believing Goins to be biologically male, expressed concern to West supervisors about sharing a restroom with a male.” On the day that Goins officially began work in the Minnesota facility, she was informed that she would be required to use one of two single-occupancy restrooms.

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163 See, e.g., *Etsitty*, 502 F.3d at 1219. (“Shirley then called Bruce Cardon, the human resources generalist for Shirley’s division, and they decided to set up a meeting with Etsitty. At the meeting, Shirley and Cardon asked Etsitty where she was in the sex change process and whether she still had male genitalia. Etsitty explained she still had male genitalia because she did not have the money to complete [**6**] the sex change operation. Shirley expressed concern about the possibility of liability for UTA if a UTA employee with male genitalia was observed using the female restroom. Shirley and Cardon also expressed concern that Etsitty would switch back and forth between using male and female restrooms.”)


165 *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (holding that the employer’s bathroom use policy, based on biological sex, was not a violation of the MHRA’s prohibition against discrimination on the basis of sexual orientation in places of public accommodation).

166 Minnesota Human Rights Act, MINN. STAT. ANN. §§ 363.01 et seq. (repealed and renumbered as §§ 363A.01 et seq.) (hereinafter “MHRA”).

167 *Goins*, 635 N.W.2d at 721.

168 Id.
restrooms located on a separate floor of the building in which she worked or in an adjacent building. Goins objected, proposed a staff training on transgenderism, and continued to use the women’s restroom closest to her office. She was threatened with disciplinary action if she continued, and finally tendered her resignation in January 1998. She then sued West Group under the MHRA, citing discrimination on the basis of sexual orientation, because the MHRA did not support a cause of action for discrimination on the basis of gender identity.

Goins' argument was that West Group's policy of designating bathroom use upon biological sex was impermissible discrimination on the basis of sexual orientation. The Supreme Court of Minnesota disagreed, holding that West Group's policy was not in violation of the MHRA because the act did not prohibit discrimination on the basis of “self-image of gender.” Thus, even though Goins could prove that she, as a transsexual woman who had presented as a woman for years before she began to work at the Minnesota facility, was a member of a protected class, she did not win because she based her claim on her “self-image of gender.” Similar to courts interpreting Title VII, courts interpreting non-inclusive public accommodations statutes are unlikely to presume coverage of gender identity without explicit intent from the legislature. A federal trans-inclusive anti-discrimination bill

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169 Id.

170 Id.

171 Id.

172 The MHRA defines “sexual orientation” as “having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.” MINN. STATE. ANN. § 363A.03

173 “Goins does not argue that an employer engages in impermissible discrimination by designating the use of restrooms according to gender. Rather, her claim is that the MHRA prohibits West's policy of designating restroom use according to biological gender, and requires instead that such designation be based on self-image of gender.” Goins, 635 at 723.

174 Id. at 723.

175 Id. at 722.
would insure transgender employees a right of action for gender discrimination that would not require statutory interpretation.

C. The Shadowy Past of the Employment Non-Discrimination Act\footnote{Thank you to Dr. Jillian Weiss, Associate Professor of Law and Society at Ramapo College, for the concise history of ENDA found on her blog Transgender Workplace Diversity, available at \url{http://transworkplace.blogspot.com/2007/05/enda-history.html}.}

Legislators have been trying to remedy the lack of explicitly trans-inclusive federal employment discrimination law for more than forty years. In 1974, on the fifth anniversary of the Stonewall Rebellion,\footnote{The Stonewall Rebellion refers to the summer of 1969 that marked the rise and mainstreaming of the LGBT rights community. Leading up and during the summer of 1969, New York police raided gay bars throughout Manhattan, ending on June 27 and 28 with two violent raids on the Greenwich village bar the Stonewall Inn. The raids sparked protests throughout the city of New York, leading to marches and protests throughout the country. This is a poor summary of one of the most important events in LGBT history. For more information, see, e.g., MARTIN DUBERMAN, STONEWALL 169-212 (Plume 1994) (1993).} Representatives Bella Abzug and Ed Koch introduced H.R. 14752,\footnote{H.R. 14752, 93rd Cong. (1974).} “[a] bill to prohibit discrimination on the basis of sex, marital status, and sexual orientation . . . .”\footnote{120 Cong. Rec. 14647 (1947). As Professor Feldblum puts it: “There are still two characteristics that may generally cause an individual to be fired from a job, subjected to harassment, or passed over for a promotion and for which there is no explicit federal anti-discrimination protection: being gay or being transgendered.” Chai Feldblum, University of Maine School of Law Lecture Series: Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender, 54 ME. L. REV. 159, 179 (2002).} The proposal was never voted on. In 1994, on the twenty-fifth anniversary of Stonewall, Senator Ted Kennedy introduced the newly renamed “Employment Non-Discrimination Act”\footnote{The Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994).} to the Senate, describing it as “not about granting special rights[, but] about righting senseless wrongs.”\footnote{140 Cong. Rec. 14178 (1994).} The proposed bill would have prohibited employment discrimination on the basis of sexual orientation, but not gender identity.\footnote{Id.} The bill again failed to pass either house.

On April 24, 2007, Representative Barney Frank reintroduced the bill to the House of
Representatives.\textsuperscript{183} H.R. 2015, designed to amend Title VII “to provide a comprehensive Federal prohibition of employment discrimination . . . [and] to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation or gender identity . . .”,\textsuperscript{184} did not move beyond its introduction. The bill defined “gender identity” as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.”\textsuperscript{185} Including this definition in Title VII would remove the onus on federal judges of interpreting the word “sex” to include transgenderism and transsexuality. The combined expansion of “sex” and the explicit provision of a right of action for “gender identity” discrimination would go far in insuring transgender employees their right to sue for employment discrimination based on their status as members of a protected class.\textsuperscript{186}

After the April bill stalled in the House of Representatives, Mr. Frank introduced a second Employment Non-Discrimination Act on September 27, 2007.\textsuperscript{187} Unlike the first bill, this version of ENDA proposed only “[t]o prohibit employment discrimination on the basis of sexual orientation.”\textsuperscript{188} The language defining “gender identity” was left entirely out of this rendition of the bill and the definition of “sexual orientation” only included “homosexuality, heterosexuality, or bisexuality.”\textsuperscript{189} The September ENDA was passed by the House of Representatives on November 7, 2007 with 235

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\textsuperscript{184} Id., Sec. 1(1)-(2).
\textsuperscript{185} Id., Sec. 3(a)(6).
\textsuperscript{186} The April ENDA explicitly allowed employers to designate which bathroom facilities employees are allowed to use, based on the employer’s impression of the employee’s gender identity. Id., Sec. 8(a)(3).
\textsuperscript{188} Id.
\textsuperscript{189} Id., Sec. 3(a)(8).
\end{flushright}
members for and 184 members opposed. The bill has not been voted on in the Senate.

The passage of the latter ENDA in the House was a pyrrhic victory for long-time supporters of the bill. An amendment including sexual orientation in Title VII would be seen as a great success for the LGBT community, but not at the expense of “gender identity.” Equality Federation, a nationwide network of LGBT civil rights organizations, created United ENDA, a coalition of organizations across the country opposed to the passage of an ENDA that erases the needs of transgender employees. United ENDA released a statement on November 7, the day the House passed the non-inclusive bill:

Equality Federation remains steadfast in its opposition to this bill – not because of what it purports to do, but because of what it fails to do. This bill does not ban discrimination based on gender identity – despite the fact that transgender people experience phenomenally high unemployment rates and are the members of our community most in need of employment protections.

ENDA once again sits in front of the House and Senate. Both versions of the bill include

\[\text{United ENDA Home Page, http://www.unitedenda.com/}\]
\[\text{During 2008 there was much debate and controversy in the LGBT community surrounding the community's support of the non-inclusive ENDA. While most organizations and advocates signed on as opposed to the non-inclusive bill, the Human Rights Campaign supported it, declaring that a minor victory for LGBT civil rights was better than no victory at all. After witnessing the outrage and protests that this stance evoked in the LGBT community and the greater civil rights community, the HRC reversed its stance in March of 2009 and now supports a trans-inclusive ENDA. See, e.g., U.S. House Takes Historic Step by Passing the Employment Non-Discrimination Act, http://www.hrc.org/your_community/8190.htm (last visited April 16, 2009) (declaring that ENDA’s passage in the House was a sad victory, but a victory nonetheless for the LGBT movement); San Frans declare independence from HRC, Washington BLADE, http://www.washblade.com/blog/blog.cfm?blog_id=19557 (last visited April 16, 2009) (describing the boycott of the HRC’s annual fundraising dinner in San Francisco); and HRC Board ENDA Policy, http://www.hrc.org/issues/workplace/12346.htm (last visited April 16, 2009) (“We made a one time exception to our policy in 2007 because we strongly believed that supporting this vote would do more to advance inclusive legislation. We will not support such a strategy again.”).}\]
\[\text{Employment Non-Discrimination Act, H.R. 3017, 111th Cong. and S. 1587, 111th Cong.}\]
protections for transgender employees. The hearings held in the House of Representatives Committee on Education and Labor were markedly different than those held two years prior. While a few representatives showed concern for the cost to employers to comply with the Act and the possible explosion in litigation, the majority of the witnesses and representatives expressed a complete understanding and empathy for those employees that have experienced and do experience employment discrimination. With President Obama having signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, the first piece of federal legislation to protect transgender Americans, perhaps ENDA's passing is on the imminent horizon.

A trans-inclusive Employment Non-Discrimination Act would ensure transgender employees a right of action against discriminatory employers, especially in jurisdictions not covered by state or local non-discrimination statutes. Without ENDA, these employees must rely either on spotty local statutes or a strained federal judicial interpretation of the word “sex” to include gender identity. This meagre protection is hardly better than no protection at all.

VI. CONCLUSION

In his testimony at the Congressional Subcommittee hearing on Transgender Employment

196 Id.


198 Id.


200 Professor Feldblum again says it best: “While ENDA does not offer full equality to gay people, it does at least prohibit certain explicit forms of discrimination based on sexual orientation. Transgender people are not as lucky. Unless ENDA is amended prior to passage to prohibit discrimination based on transgender status (as it should be), transgender people will still be subject to blatant forms of discrimination, with their only recourse being existing sex discrimination laws.” Rectifying the Tilt, supra n. 179 at 180-81.
Discrimination, \(^{201}\) Shannon Minter, Legal Director of the National Center for Lesbian Rights, urged Congress to pass a trans-inclusive anti-discrimination bill, saying:

> As a logical matter, when a person is fired for changing his or her sex, a court should say that is sex discrimination, and it should be covered under Title VII. In practice, however, there is not a single Federal Court anywhere in the country that has held that Title VII prohibits discrimination against transgender workers because they are transgender. We need Congress to make clear the discrimination against transgender people because of their gender identity is against the law.\(^{202}\)

On September 19, just three months after Minter's testimony, Judge Robertson found exactly that when he declared that the Library of Congress' decision to withdraw Diane Schroer's job offer was “sex discrimination,” not “transgender discrimination.” But while Judge Robertson's finding was exactly the interpretation of Title VII that lawyers like Minter and employees that Diane Schroer requested, it does not represent the complete protection of transgender employees that Minter and Schroer intended. The decision erased transgender employees from Title VII, placing them back under the interpretation of “sex” from which they had fought to remove themselves. Title VII alone cannot provide relief for transgender employees. Nor can state laws, while sometimes more inclusive than existing federal law, provide enough protection for all employees. In order to truly protect transgender employees, Congress must pass a trans-inclusive Employee Non-Discrimination Act. With high unemployment, high instances of harassment and adverse employer action on the job, and low salaries, transgender employees cannot afford to wait any longer.


\(^{202}\) Id.