

# Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law

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## I. INTRODUCTION

Current federal law generally does not prohibit workplace discrimination based on sexual orientation or gender identity. For over a decade now, advocates of the gay, lesbian, bisexual and transgender (GLBT) community have sought to change this with proposed federal legislation—the Employment Non-Discrimination Act (ENDA),<sup>1</sup> which would prohibit such discrimination nationwide. Upon President Obama’s election, ENDA was widely predicted to pass finally, but today its fate remains far from clear.

In light of current law and the uncertainty of ENDA’s passage in the near future, employees and employers need to know that a narrow range of employment discrimination claims involving GLBT individuals have the potential to succeed under federal law. This Article provides a timely overview of the viability of claims related to sexual orientation and gender identity under current federal statutory law before—or without—the passage of ENDA. As this Article demonstrates, some employee advocates have found successful paths to establish claims of sexual harassment or gender stereotyping despite the lack of explicit protection for GLBT individuals. However, such claims succeed only when they fit within a very narrow set of factual circumstances.

## II. EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

Neither sexual orientation nor gender identity is currently covered by federal antidiscrimination laws. Nonetheless, GLBT plaintiffs can succeed on claims related to sexual orientation or gender identity either by utilizing their state or local laws, if applicable, or by shaping their

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1. ENDA is described more fully in Section IV below.

claims to fit within the very particular requirements of cognizable same-sex sexual harassment or gender stereotyping claims under federal law.

A. *Title VII Does Not Prohibit Discrimination Based on Sexual Orientation*

Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers on the basis of “race, color, religion, sex, or national origin.”<sup>2</sup> Title VII’s prohibition against discrimination based on “sex” does not include discrimination based on sexual orientation.<sup>3</sup>

For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the United States Court of Appeals for the Ninth Circuit found that Title VII “applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”<sup>4</sup> The court also found that the employers had discriminated against *all* homosexuals, both male and female, and, therefore, there had been no discrimination based on sex under Title VII.<sup>5</sup>

The Equal Employment Opportunity Commission (EEOC) also has concluded that Title VII’s protections do not extend to discrimination based on sexual orientation.<sup>6</sup> Although EEOC guidelines are not binding authority, the United States Supreme Court has shown a great deal of deference to them because the guidelines constitute “a body of

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2. 42 U.S.C. § 2000e-2(a)(1) (2006).

3. See, e.g., *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (“[Plaintiff] has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains noncognizable under Title VII.”); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (refusing to extend Title VII to encompass sexual orientation); *U.S. Dep’t of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (acknowledging Title VII does not prohibit discrimination on basis of sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (holding that termination based on homosexuality was not actionable under Title VII); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that Title VII does not extend to rejection of job applicant on basis of presumed sexual orientation).

4. 608 F.2d 327, 329-30 (9th Cir. 1979) (footnote omitted).

5. *Id.* at 330-31.

6. E.E.O.C. Dec. No. 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823 (E.E.O.C. Dec. 4, 1975).

experience and informed judgment to which courts . . . may properly resort for guidance.”<sup>7</sup>

*B. Many States, Local Governments, and Private Employers Do Prohibit Workplace Discrimination Based on Sexual Orientation*

Aside from federal law, many state and local laws prohibit employment discrimination based on sexual orientation. At least 181 cities and counties,<sup>8</sup> twenty-one states, and the District of Columbia<sup>9</sup> prohibit sexual orientation discrimination by statute. Other laws contain language that has been held to prohibit sexual orientation discrimination by its express prohibition of discrimination on the basis of marital status, sex, or gender. As noted in Section III below, twelve states also prohibit gender identity discrimination in the workplace.

In addition, many private employers have adopted policies prohibiting workplace sexual orientation discrimination. These protections have expanded rapidly in the past decade. In 2000, fifty-one percent of the Fortune 500 companies had such policies, and by 2008 that number had jumped to eighty-five percent, including ninety-seven percent of the Fortune 100.<sup>10</sup>

Accordingly, employee advocates who are considering GLBT-related claims that may be subject to such state, local, or company-provided protections should seriously consider whether to bring a federal claim of sexual harassment or gender stereotyping. As described below, there are only a handful of viable paths to a successful claim under Title VII, and the required evidentiary showing is often very difficult to achieve.

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7. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted).

8. SAMIR LUTHER, HUMAN RIGHTS CAMPAIGN FOUNDATION, *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2007-2008: A HUMAN RIGHTS CAMPAIGN REPORT* at 4 (revised Feb. 20, 2009), available at [http://www.hrc.org/documents/HRC\\_Foundation\\_State\\_of\\_the\\_Workplace\\_2007-2008.pdf](http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf).

9. The States with sexual orientation antidiscrimination statutes are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. HUMAN RIGHTS CAMPAIGN, *STATEWIDE EMP’T LAWS & POLICIES*, [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf) (last visited Feb. 7, 2011).

10. Luther, *supra* note 8, at 5-6.

*C. Same-Sex Sexual Harassment Claims Are Cognizable Under Title VII*

Until 1998, it was unclear whether and under what circumstances Title VII applied in cases of sexual harassment where the harasser and victim were of the same sex.<sup>11</sup> After years of divisiveness and bitterly split circuits, the Supreme Court finally decided in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment “because of sex” is actionable under Title VII.<sup>12</sup>

In *Oncale*, the plaintiff, Joseph Oncale, worked as part of an eight-man crew on an offshore oil platform in the Gulf of Mexico. On several occasions, other crew members restrained the plaintiff; “subjected [him] to sex-related, humiliating actions;” and threatened to rape him.<sup>13</sup> He complained to supervisors, but no remedial actions were taken.<sup>14</sup> Oncale eventually resigned and soon after filed suit against Sundowner, claiming quid pro quo and hostile environment sexual harassment under Title VII.<sup>15</sup> The District Court for the Eastern District of Louisiana held that Title VII did not encompass sexual harassment where the alleged harasser and the harassed employee were of the same sex,<sup>16</sup> and the United States Court of Appeals for the Fifth Circuit affirmed.<sup>17</sup>

The Supreme Court reversed the Fifth Circuit on the narrow legal question of whether a same-sex sexual harassment claim could be cognizable under Title VII. The Court held: “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”<sup>18</sup> The Court remanded the case

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11. Compare, e.g., *Doe v. City of Bellevue*, 119 F.3d 563, 576 (7th Cir. 1997) (permitting same-sex harassment claims as long as the harassment was sexual in nature), with *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (holding that same-sex sexual harassment claims were only cognizable if the harasser was homosexual), and *McWilliams Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (same) with *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that Title VII precludes claims where the victims and the harassers are the same sex).

12. 523 U.S. 75, 79 (1998).

13. *Id.* at 77.

14. *Id.*

15. *Oncale v. Sundowner Offshore Serv. Inc.*, 83 F.3d 118, 119 (5th Cir. 1996), *rev'd*, 512 U.S. 75 (1998).

16. See *Oncale v. Sundowner Offshore Serv., Inc.*, Civ. A. No. 94-1483, 1995 WL 133349 (E.D. La. Mar. 24, 1995).

17. See *Oncale*, 83 F.3d at 121.

18. *Oncale*, 523 U.S. at 79 (ellipsis in original).

back to the trial court for a determination of whether the alleged discrimination in that case was “because of sex.”<sup>19</sup>

In *Oncale*, the Court described a handful of successful routes to a valid same-sex discrimination claim under Title VII. It stated, for example, that lower courts and juries generally had no trouble finding an inference of sex discrimination when the alleged conduct involved explicit or implicit proposals of sexual activity between a man and a woman because “it is reasonable to assume those proposals would not have been made to someone of the same sex.”<sup>20</sup> The Court also noted that a similar inference of sex discrimination could be drawn where the alleged harasser was homosexual and the alleged victim was of the same sex; for example, where a male employee claims that he was harassed by his gay male supervisor.<sup>21</sup>

The *Oncale* decision also made clear, however, that sexual desire is not essential to find an inference of discrimination based on sex, including in same-sex harassment cases.<sup>22</sup> The Court reiterated that the critical inquiry in Title VII sex-discrimination claims, including those involving same-sex sexual harassment, remains “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>23</sup> The Court offered an example of such a situation not involving sexual desire: where a female victim is harassed in sex-specific and derogatory terms by another female in such a way as to make it clear that the harasser had a general hostility to the presence of women in the workplace.<sup>24</sup> The Court also stated that a plaintiff could “offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”<sup>25</sup>

Significantly, the Court in *Oncale* did not describe which evidentiary route could have been successful for *Oncale*, and none of the options it described appeared to apply, as there were no women in the workplace and there was no evidence that the alleged harassers were

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19. *Id.* at 81.

20. *Id.* at 80.

21. *Id.*

22. *Id.* (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

23. *Id.* (internal quotation marks and citation omitted).

24. *Id.*

25. *Id.* at 80-81.

motivated by sexual desire or by a general hostility toward men in the workplace. *Oncale* settled with his employer upon remand.<sup>26</sup>

*D. Valid Claims for Same-Sex Sexual Harassment Related to Sexual Orientation Require a Specific and Narrow Evidentiary Showing That Is Rarely Met*

Since *Oncale*, plaintiffs' claims of same-sex sexual harassment have had mixed success. While several courts have recognized claims for same-sex sexual harassment under Title VII,<sup>27</sup> many courts have dismissed such claims based on a lack of sufficient evidence that the alleged harassment was based on sex, rather than on sexual orientation.<sup>28</sup> These courts have invoked the Supreme Court's analysis in *Oncale* that same-sex sexual harassment can be inferred only where there is evidence of sexual desire, general hostility toward one sex, or noncompliance with gender stereotypes.<sup>29</sup> Plaintiffs have been required to provide evidence that fits squarely into one of those specific situations in order to have a viable claim.<sup>30</sup> Despite recognition that there may be other ways to establish that discrimination was "because of sex," in practice, courts have rarely gone beyond the limited examples of *Oncale*.<sup>31</sup>

For example, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, a gay male employee alleged hostile work environment sexual harassment based on the actions of a coworker.<sup>32</sup> The employee claimed the coworker assaulted him in a locker room; used a forklift to slam a load of pallets on the platform where he was standing; and yelled at the plaintiff: "everybody knows you're gay as a three dollar bill," "everybody knows you're a faggot," and "everybody knows you take it up the ass."<sup>33</sup> While

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26. Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL OF RTS. J., 913, 922 (1999).

27. See, e.g., *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1264-66 (10th Cir. 2005); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478-80 (5th Cir. 2002); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999).

28. See, e.g., *McCown v. St. John's Health Inc.*, 349 F.3d 540, 543 (8th Cir. 2003) (finding no evidence showing employer was homosexual or sexually attracted to plaintiff); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (finding no evidence that harassers were motivated by sexual desire or hostility toward men in the workplace); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001) (concluding that sex-specific conduct is not enough to establish claim for same-sex harassment if members of opposite sex are treated equally).

29. *McCown*, 349 F.3d at 543; *Bibby*, 260 F.3d at 264; *Lack*, 240 F.3d at 261.

30. *McCown*, 349 F.3d at 543; *Bibby*, 260 F.3d at 264; *Lack*, 240 F.3d at 261.

31. *McCown*, 349 F.3d at 543; *Bibby*, 260 F.3d at 264; *Lack*, 240 F.3d at 261.

32. 260 F.3d at 259.

33. *Id.* at 259-60 (internal quotation marks omitted).

acknowledging that same-sex sexual harassment claims are cognizable under Title VII, the United States Court of Appeals for the Third Circuit nonetheless held that this plaintiff had not alleged a viable claim because the evidence showed that the harassment occurred because of his sexual orientation and not because of his sex.<sup>34</sup> The court acknowledged that there may be additional ways to prove that same-sex sexual harassment occurred because of sex, but it analyzed the evidence only in light of the illustrative examples from *Oncale* and upheld the dismissal of all claims.<sup>35</sup>

Despite this narrow approach in many cases, *Oncale* did open some doors to federal claims of workplace discrimination involving GLBT individuals. The Ninth Circuit's en banc decision in *Rene v. MGM Grand Hotel, Inc.* demonstrates the broadest interpretations of these theories to date.<sup>36</sup> *Rene* involved an openly gay male hotel butler who endured workplace harassment amounting to sexual assault, as well as mockery by male coworkers and a male supervisor.<sup>37</sup> The plaintiff alleged that the harassing treatment he received had been motivated by his sexual orientation; however, he also provided evidence that much of the harassment involved issues of gender stereotyping.<sup>38</sup> The defendant argued that the claims were not cognizable under Title VII because they were based on the plaintiff's sexual orientation.<sup>39</sup>

Judge Fletcher, joined by four other judges, wrote the plurality opinion in favor of the plaintiff, holding that harassment "of a sexual nature" regardless of its motivation constitutes discrimination "because of sex" and, therefore, is actionable under Title VII.<sup>40</sup> Judge Fletcher held that "an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."<sup>41</sup> Under this analysis, sexual orientation harassment that relates to sex, including gender-related mockery or assault, contravenes Title VII.

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34. *Id.* at 264.

35. *Id.* at 264-65.

36. 305 F.3d 1061, 1066-68 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003).

37. *Id.* at 1064.

38. *Id.*

39. *Id.*

40. *Id.* at 1068.

41. *Id.* at 1063-64.

Judge Pregerson, joined by two other judges, agreed that the treatment the plaintiff suffered was sex discrimination under Title VII, but disagreed with Judge Fletcher's reasoning as to why and how.<sup>42</sup> Judge Pregerson's opinion argued that the plaintiff's treatment amounted to gender stereotyping, and that, as such, he had stated a claim for Title VII discrimination.<sup>43</sup>

The four-judge dissent, written by Judge Hug, argued that Title VII strictly requires that the harasser have a motivation based on gender as opposed to sexual orientation.<sup>44</sup> The dissent did not disagree with the Pregerson concurrence's statement of the law, but would nevertheless have rejected the claim on the grounds that the plaintiff had not raised gender stereotyping before the district court below.<sup>45</sup>

In subsequent cases, courts grappling with a harasser's motivation have been reluctant to permit claims involving conduct of a sexual nature related to sexual orientation to the extent provided in Judge Fletcher's plurality opinion.<sup>46</sup>

*E. Title VII Claims of Discrimination Based on Gender Stereotyping Related to Sexual Orientation Can Succeed*

The Supreme Court has made it clear that Title VII prohibits discrimination based on gender stereotyping.<sup>47</sup> In *Price Waterhouse*, a case where sexual orientation was not expressly at issue, the Court upheld the sex discrimination claim of a woman who had been denied partnership in an accounting firm at least in part on the basis that she was "macho," "masculine," "overcompensated for being a woman," and needed "a course at charm school."<sup>48</sup> Moreover, a partner had advised the plaintiff that to improve her chances of joining the partnership, she should "walk more femininely, . . . wear make-up, have her hair styled, and wear jewelry."<sup>49</sup> The Court held that Title VII prohibits employers from allowing gender to play a motivating part in an employment

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42. *Id.* at 1068 (Pregerson, J., concurring).

43. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (holding that an adverse employment decision of woman deemed insufficiently "lady-like" by her office partners was actionable under Title VII)); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001)).

44. *Id.* at 1078 (Hug, J., dissenting).

45. *Id.* (Hug, J., dissenting).

46. *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007).

47. *Price Waterhouse*, 490 U.S. at 295.

48. *Id.* at 235 (internal quotation marks omitted).

49. *Id.* (internal quotation marks and citation omitted).

decision and found that “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.”<sup>50</sup> The Court explicitly addressed the legal relevance of a sex-stereotyping claim:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>51</sup>

Building on *Oncale* and *Price Waterhouse*, the Ninth Circuit in *Nichols* extended Title VII protections to a gay employee based on gender stereotyping.<sup>52</sup> In *Nichols*, a waiter sued his former employer for sexual harassment and retaliation after he was subjected on a daily basis to insults and name-calling, including being referred to by male coworkers and a supervisor (in Spanish and English) as “she,” “her,” and “faggot.”<sup>53</sup> His coworkers also mocked the plaintiff for walking and carrying his serving tray “like a woman” and also derided him for not having sexual intercourse with a female waitress who was his friend.<sup>54</sup>

The district court granted summary judgment to the employer because it found that the alleged harassment was not “because of sex.”<sup>55</sup> The Ninth Circuit reversed, however, finding that the verbal abuse was closely linked to gender and therefore occurred because of sex.<sup>56</sup> The *Nichols* court expressly relied on *Price Waterhouse* in rejecting the employer’s argument that the harassment was not actionable because it was based on sexual orientation, stating: “At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act.”<sup>57</sup> The court held that an employer violates Title VII when it discriminates against an employee because that employee did not conform to gender stereotypes.<sup>58</sup>

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50. *Id.* at 250.

51. *Id.* at 251 (internal quotation marks and citations omitted).

52. 256 F.3d at 864.

53. *Id.* at 870.

54. *Id.* at 870, 874.

55. *Id.* at 871.

56. *Id.* at 874-75.

57. *Id.* at 874.

58. *Id.* at 874-75 (recognizing that a male worker’s Title VII claim of harassment by male co-workers and male supervisor that stemmed from harassers’ perception that the male worker did not behave according to stereotypes of male behavior and finding that such harassment amounted to discrimination “because of sex”).

It has proven difficult for many gay and lesbian plaintiffs to establish a claim under Title VII for discrimination based on gender stereotyping because “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”<sup>59</sup> Recognizing that a gender-stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII,” circuit courts have struggled to distinguish between discrimination based on sexual orientation and discrimination based on gender stereotyping.<sup>60</sup> In determining whether discrimination is based on a plaintiff’s nonconforming gender behavior, these courts look to *Price Waterhouse*, where the Supreme Court focused principally on characteristics that were readily demonstrable in the workplace, such as work attire, hairstyle, and one’s manner of walking and talking.<sup>61</sup> Thus, courts that have applied *Price Waterhouse* have reasoned that, for a gender-stereotyping claim to succeed, plaintiffs should be able to identify the observable, nonconforming gender behavior upon which the discrimination could be based.<sup>62</sup>

The facts necessary for a cognizable gender-stereotyping claim were demonstrated recently in the Third Circuit.<sup>63</sup> In *Prowel*, the plaintiff presented evidence of discrimination both because he was gay and because he failed to conform to gender stereotypes.<sup>64</sup>

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot ‘the way a woman would sit’; walked and carried himself in an

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59. Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004) (discussing Title IX).

60. Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

61. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

62. See Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that comments that plaintiff was “gay” or “homosexual” were based on perceived sexual orientation rather than nonconforming gender behavior); Dawson v. Bumble & Bumble, 398 F.3d 211, 221 (2d Cir. 2005) (refusing to consider gender-stereotyping claim when there was no substantial evidence that any adverse employment consequences resulted from plaintiff’s appearance); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065-66 (7th Cir. 2003) (finding that sexually explicit threats were based on plaintiff’s perceived sexual orientation because of his relationship with male co-worker, not way he dressed or behaved). Dawson v. Entek Int’l, No. 09-35844, 2011 U.S. App. LEXIS 468 (9th Cir. Jan. 10, 2011) (petition for rehearing *en banc* pending) (affirming summary judgment for employer on hostile work environment claim because plaintiff, who was harassed for being gay but did not “exhibit effeminate traits,” presented no evidence that he failed to conform to gender stereotypes).

63. See Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009).

64. *Id.* at 287.

effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the [equipment] with ‘pizzazz.’<sup>65</sup>

Based on this evidence, the district court found that the employee’s claim was simply a repackaged sexual orientation discrimination claim (and therefore not viable under Title VII).<sup>66</sup> The United States Court of Appeals for the Third Circuit reversed, however, holding that the employee had put forth sufficient evidence of harassment based on gender stereotypes to withstand summary judgment.<sup>67</sup> The court rejected the employer’s argument that because the plaintiff was gay, he was precluded from bringing a gender stereotype claim under Title VII.<sup>68</sup> The court stated, “[t]here is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.”<sup>69</sup>

The United States Court of Appeals for the Eighth Circuit also recently upheld a claim for gender stereotyping. In *Lewis v. Heartland Inns of America*,<sup>70</sup> the plaintiff was terminated for appearing “slightly more masculine” and having “an Ellen DeGeneres kind of look” instead of the preferred “Midwestern girl look.”<sup>71</sup> The plaintiff’s theory of her case was that Heartland had enforced a de facto requirement that a female employee had to conform to gender stereotypes in order to work the day shift at the hotel’s front desk.<sup>72</sup> The district court granted summary in judgment in favor of Heartland on all claims, reasoning in part that the plaintiff was required to produce evidence that she was treated differently than similarly situated males.<sup>73</sup> Relying on *Price Waterhouse*, *Oncale*, and other cases, the Eight Circuit reversed and remanded, holding that the plaintiff had offered sufficient evidence from

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65. *Id.*

66. *Id.* at 293.

67. *Id.*

68. *Id.*

69. *Id.* at 292. The court, however, dismissed Prowel’s claim of religious discrimination despite a strong evidentiary showing of religious-based bias, including coworkers leaving anonymous prayer notes on his work machine; leaving messages for him that he was “a sinner” for the way he lived his life; and leaving a note that he would “burn in hell.” *Id.* at 288. The court rejected this religious discrimination claim as not “because of” religion but “because of” his sexual orientation and, therefore, his claim was not actionable. *Id.* at 293.

70. 591 F.3d 1033 (8th Cir. 2010).

71. *Id.* at 1036.

72. *Id.* at 1037.

73. *Id.* at 1040.

which a reasonable factfinder could find that she was discriminated against because of her sex.<sup>74</sup>

In other cases, courts have avoided the issue completely by dismissing gender-stereotyping claims on discrete factual distinctions or procedural grounds. For example, in *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit dismissed a claim by a female bartender at Harrah's Casino who was fired from her job for refusing to wear makeup in violation of her employer's requirements.<sup>75</sup> In pursuit of a program aimed at enhancing its image throughout its casinos, Harrah's had imposed gender-specific standards of appearance on employees.<sup>76</sup> The standard at issue required women to wear makeup at all times, while men were prohibited from wearing cosmetics.<sup>77</sup> While upholding its earlier gender-stereotype decisions in *Nichols* and *Rene*, the *Jespersen* court distinguished this case as one of employer-appearance standards and not sexual harassment.<sup>78</sup> Because the Ninth Circuit had applied *Price Waterhouse* to sexual harassment and not to appearance and grooming cases, it declined to do so here.<sup>79</sup>

Despite this general reluctance to recognize gender-stereotyping claims by gay or lesbian plaintiffs, the circuit courts have consistently acknowledged that such claims could be viable under different facts or circumstances.<sup>80</sup> Interestingly, Sixth Circuit Judge Lawson commented in his dissent in *Vickers* that in gender stereotyping cases where factual distinctions are complicated, the circuit courts' tendency to grant summary judgment draws a "line [that] should not occur at the pleading stage of the lawsuit."<sup>81</sup>

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74. *Id.* at 1042.

75. 444 F.3d 1104, 1107-08 (9th Cir. 2006).

76. *Id.*

77. *Id.*

78. *Id.* at 1109.

79. *Id.* at 1112-13.

80. *See, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218-19 (2d Cir. 2005) (concluding that lesbian employee was fired because of her poor performance on job); *Hamm v. Weyauwega Milk Prods. Inc.*, 332 F.3d 1058, 1065 (7th Cir. 2003) (holding that sexual comments made due to work-related conflicts are not sexual harassment); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (holding that gay male plaintiff had no Title VII gender-stereotyping claim because he failed to plead that theory in his original complaint); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258-59 (1st Cir. 1999) (refusing to consider gender-stereotyping claim because it was not argued in district court).

81. 453 F.3d at 767 (Lawson, J., dissenting).

## III. EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY

Openly transgender individuals have become part of the American workplace.<sup>82</sup> Some estimates place the number of transgender Americans at nearly a quarter million.<sup>83</sup> Indeed, “[t]ransgendered people are now represented in virtually every profession—musicians, entertainers, writers, engineers, teachers, doctors, and lawyers—and are ‘coming out’ as such to their employers and coworkers in ever-increasing numbers.”<sup>84</sup> Twelve states and over 100 cities and counties prohibit gender identity discrimination by statute.<sup>85</sup> According to a 2008 study by the Human Rights Campaign, 176 of the Fortune 500 businesses have gender-identity protections at this time, including sixty-one of the Fortune 100.<sup>86</sup>

A. *Gender Identity Defined*

Although definitions vary, an article from the Human Rights Campaign defines gender identity as “a person’s innate, deeply felt psychological identification as male or female, which may or may not correspond to the person’s body or designated sex at birth (meaning what sex was originally listed on a person’s birth certificate).”<sup>87</sup> Transgenderism, also referred to as transsexuality or gender dysphoria in medical communities, is distinct from homosexuality (attraction to members of one’s own biological sex) and transvestitism or cross-dressing (dressing in clothes usually worn by those of the opposite biological sex).<sup>88</sup> Transgender individuals identify emotionally and psychologically with the opposite biological sex and usually live in the gender role opposite the one they were biologically born into or assigned. Transgender individuals do not always use surgery or medication to alter their bodies, but many do seek surgical alteration of their anatomy to

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82. See Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMPLE L. REV. 283 (1997).

83. *Id.* at 284-85.

84. *Id.* at 285.

85. Twelve states (and the District of Columbia) have laws prohibiting gender identity discrimination in public and private employment: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. LUTHER, *supra* note 8, at 3-4.

86. *Id.* at 5-6.

87. HUMAN RIGHTS CAMPAIGN, *Sexual Orientation and Gender Identity: Terminology and Definitions*, [http://www.hrc.org/issues/workplace/equal\\_opportunity/gender\\_identity\\_terms\\_definitions.asp](http://www.hrc.org/issues/workplace/equal_opportunity/gender_identity_terms_definitions.asp) (last visited Feb. 28, 2011).

88. See Holt, *supra* note 82, at 283 n.3 (citing Gender Vocabulary fact sheet distributed by Action AIDS, 1216 Arch Street, Philadelphia, PA 19107).

conform to their desired biological sex.<sup>89</sup> Before undergoing gender reassignment surgery, transgender individuals are required to undergo a period of counseling and cross-gendered living—a period that, often by necessity, includes employment.<sup>90</sup>

*B. Title VII Does Not Prohibit Discrimination Based on Gender Identity*

Federal courts have conclusively held that transgender individuals are not afforded protection under Title VII when the discrimination is based on transsexuality itself.<sup>91</sup> Generally, the physical state of the transgender individual at the time of the alleged discrimination has little influence on a court's decision to deny Title VII discrimination claims. Courts have refused to allow Title VII actions when the transgender individual has yet to undergo sex-reassignment surgery and also after the transgender individual has undergone such surgery.<sup>92</sup>

*C. Title VII Claims of Discrimination Based on Gender Stereotyping Related to Gender Identity Can Succeed*

Recently, the rationales in gender identity decisions have been shaped by application of the Supreme Court's broad interpretations of Title VII and gender stereotyping in *Price Waterhouse*. For example, in *Smith v. City of Salem, Ohio*, the United States Court of Appeals for the Sixth Circuit recognized the Title VII claim of a transgender firefighter

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89. *Id.*

90. See Eric Matusewitch, *Transsexual Rights in the Workplace*, 12 No. 5 ANDREWS EMPL. LITIG. REP. 3 (1998).

91. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.”); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act.”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”); see also *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 394 (Sup. Ct. 1995) (“The federal courts that have considered the issue at hand have unanimously held that the Title VII prohibitions do not apply to transsexuals.”).

92. See *Ulane*, 742 F.2d at 1085 (refusing to extend Title VII protections to transgender individual who was fired after undergoing sex change surgery); *Sommers*, 667 F.2d at 749-50 (holding that no actionable Title VII claim exists when transgender individual was fired after the discovery that she was male who represented herself as female but had not yet undergone sex change surgery); *Holloway*, 566 F.2d at 662 (finding Title VII inapplicable when transgender individual was fired in midst of hormonal and other treatment in preparation for sex-change surgery).

who alleged that he was fired because of his feminine mannerisms.<sup>93</sup> Relying on the reasoning in *Price Waterhouse*, the court held that an employer violates Title VII when it discriminates against an employee because that employee does not conform to gender stereotypes, regardless of the employee's status as a transgender individual.<sup>94</sup> Similarly, in *Etsitty v. Utah Transit Authority*, the United States Court of Appeals for the Tenth Circuit assumed without deciding that Title VII protected transgender individuals who are discriminated against because they do not conform to gender stereotypes.<sup>95</sup>

Also, in *Schroer v. Billington*, the plaintiff, who applied and interviewed while presenting as a man, was given an offer of employment as a terrorism research analyst with the Library of Congress.<sup>96</sup> After the plaintiff informed the organization that she was in the process of transitioning from male to female and would be working as a woman, the Library rescinded the plaintiff's employment offer.<sup>97</sup> The district court upheld Schroer's Title VII sexual-stereotype claim under *Price Waterhouse*, but also concluded that she was entitled to judgment based on the language of the statute itself, finding that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'"<sup>98</sup>

Additional federal district courts have recognized Title VII claims brought by transsexual plaintiffs under a gender stereotyping theory.<sup>99</sup> As

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93. 378 F.3d 566, 575 (6th Cir. 2004).

94. *Id.*; see also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (recognizing claim for sex discrimination under Title VII when transgender police officer alleged denial of promotion to sergeant because of nonconformance to male stereotype).

95. 502 F.3d 1215, 1224 (10th Cir. 2007) (denying Title VII claim because the defendant had a legitimate, nondiscriminatory reason for its employment decision and the plaintiff proffered no evidence that such reason was pretextual).

96. 577 F. Supp. 2d 293, 295-96 (D.D.C. 2008).

97. *Id.* at 299.

98. *Id.* at 308 (ellipsis in original).

99. See, e.g., *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 667 (S.D. Tex. 2008) (permitting Title VII claim to proceed to trial to determine whether employer relied on "impermissible sex stereotyping" in rescinding job offer to transgender applicant); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (permitting Title VII sex discrimination claim by male-to-female transgender individual to proceed under *Price Waterhouse*); *Michaels v. Akal Sec., Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954 (D. Colo. June 24, 2010) (denying motion to dismiss claim by male-to-female transgender individual claiming gender stereotyping); *Glenn v. Brumby*, 724 F. Supp. 2d 1285 (N.D. Ga. 2010) (applying Title VII analysis to claim brought under 42 U.S.C. § 1983 and granting summary judgment to biological male plaintiff who was terminated for her intention to come to work presenting as a woman).

these decisions are appealed, more circuit courts will have the opportunity to address the issue of sex discrimination against transgender employees.

#### IV. PROPOSED EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

The Employment Non-Discrimination Act, H.R. 3017, was introduced in the U.S. House of Representatives on June 24, 2009 by Barney Frank of Massachusetts, along with 137 co-sponsors. The bill was subsequently referred to the Committees on Education and Labor, House Administration, Oversight and Government Reform, and the Judiciary.

If enacted, the current version of ENDA, which closely tracks Title VII, would prohibit employment discrimination on the basis of sexual orientation and gender identity nationwide. Under ENDA, an employer that employs fifteen or more employees may not “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity,” including such actions “taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.”<sup>100</sup>

Therefore, even if an employee is not gay, lesbian, bisexual, or transgender, if his or her employer makes an adverse employment decision based on erroneous perceptions about the employee’s sexual orientation or gender identity, the employer would be in violation of ENDA. Additionally, ENDA would protect employees from adverse employment decisions based on their association with a child, parent, or friend who is of, or is perceived as having, a particular sexual orientation or gender identity. There are several major exceptions in the current version of ENDA. The proposed legislation exempts religious organizations (including educational institutions substantially controlled or supported by religious organizations),<sup>101</sup> the Armed Forces, and small businesses.<sup>102</sup> It does not apply to domestic partnership benefits<sup>103</sup> and prohibits quotas or preferential treatment based on sexual orientation.<sup>104</sup>

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100. H.R. 3017, 111th Cong. § 4(a)(1), (e) (2009).

101. *Id.* § 6.

102. *Id.* § 7.

103. *Id.* § 8(b).

104. *Id.* § 4(f).

The legislation also specifically excludes disparate impact claims and bars the EEOC from requiring the collection of statistical information on sexual orientation or gender identity.<sup>105</sup> The EEOC and the Department of Justice would enforce the law, and the relief available would be the same as under Title VII.<sup>106</sup>

As proposed, ENDA would define “sexual orientation” as meaning “homosexuality, heterosexuality, or bisexuality,”<sup>107</sup> and “gender identity” as “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.”<sup>108</sup> Thus, if enacted, ENDA will prohibit discrimination based on actual or perceived heterosexuality. ENDA also will prohibit employment discrimination against transgender individuals to the same extent it will prohibit discrimination based on sexual orientation.

## V. CONCLUSION

The inconsistent results in federal case law and the narrow protections afforded currently under Title VII establish the need for ENDA if there is to be any meaningful federal prohibition of workplace discrimination and harassment based on sexual orientation and gender identity. Nonetheless, existing federal law does, in limited circumstances, provide some potential remedies to employees who suffer gender stereotyping or sexual harassment related to their sexual orientation or gender identity.

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105. *Id.* § 9.

106. *Id.* § 10.

107. *Id.* § 3(a)(9).

108. *Id.* § 3(a)(6).