Interpreting 'Because of Sex': The History of LGBT Workplace Discrimination Claims Under Title VII

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On December 3, 2014, conservative legislators in the House of Representatives blocked the Employment Non-Discrimination Act (ENDA) from what was likely its last chance at passage. ENDA would have updated Title VII of the Civil Rights Act of 1964 by making it illegal for all federal and most private employers to discriminate on the basis of sexual orientation or gender identity. The first federal bill to propose such a ban was introduced into Congress in 1973 (Pizer et al., 2012, p. 719) and ENDA itself has been under consideration by lawmakers for nearly two decades. However, many lesbian, gay, bisexual and transgender (LGBT) activists have turned their attention away from ENDA in light of the Supreme Court's recent ruling in *Burwell v. Hobby Lobby* (2014), which allows corporations to opt-out of certain provisions in the Affordable Care Act because of religious beliefs. In July of 2014, several prominent advocacy organizations, including the National Gay and Lesbian Task Force, withdrew their support from ENDA because they felt the religious exemption clause included in the bill would provide homophobic employers with a loophole and leave many LGBT people with inadequate legal protections (Ford, 2014, July 8).

Despite decades of effort from LGBT activists and increasing public support for legislation like ENDA, only eighteen states and the District of Columbia prohibit employers from discriminating based on sexual orientation and gender identity, with three additional states banning discrimination based on sexual orientation only (The Human Rights Campaign). Furthermore, data reveals that workplace discrimination against LGBT employees is widespread. "As recently as 2008, the General Social Survey found that of the nationally representative sample of [lesbian and gay] people, 37% had experienced workplace harassment in the last five years, and 12% had lost a job because of their sexual orientation" (Pizer et al., 2012, p. 721).

In 2011, the largest survey to date showed that 90% of transgender respondents had experienced harassment at work or had taken action to avoid it and "47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity" (Pizer et al., 2012, p. 721). Transgender and gender-nonconforming individuals also had double the unemployment rate of the general population, with rates for trans people of color four times the national rate. Additionally, "15% of respondents reported a household income under $10,000/year, nearly four times the rate of this category for the general population. Those who lost a job due to bias lived at this level of

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poverty at six times the rate of the general population" (Grant, Mottet, and Tanis, 2011, p. 51). Of those with jobs, 44% percent reported experiencing underemployment (Grant, Mottet, and Tanis, 2011, p. 55).

Data suggests that many transgender people are vulnerable in other facets of their lives as well. In 2011, 29% of transgender and gender-nonconforming people reported having experienced harassment or disrespect from police officers, and an astonishing 41% reported that they had attempted suicide, compared to 1.6% of survey respondents as a whole. Unemployment and low income were associated with even higher rates of suicide (Grant, Mottet, and Tanis, 2011). Thirty-percent of transgender respondents identified as having a disability that affected one or more major life activities, compared to 20% of the general U.S. population (Grant, Mottet, and Tanis, 2011, p. 23).

In sum, the need for more robust protections for transgender, lesbian, and gay people in the workplace is evident. Because the passage and implementation of new legislation has been slow, and because of ENDA's dwindling prospects, many activists have shifted their focus to the courts. Specifically, many advocates have looked to Title VII of the Civil Rights Act of 1964, which already prohibits discrimination "because of sex". Since the Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989), which determined that discrimination based on "sex-stereotypes" is actionable under Title VII, "many lower federal courts have begun to recognize the overlap between either sexual orientation or gender identity discrimination and sex stereotype discrimination. Indeed, this sound principle now governs in at least five circuits" (Pizer et al., 2012, p. 746).

The coup de grâce for transgender employees came in the 2012 case *Macy v. Holder*, when the Equal Employment Opportunity Commission (EEOC) determined in unequivocal terms, "Claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process" (p.5). This and several other rulings have given LGBT activists new hope that strong protections exist within our current legal framework and that change may not necessarily require the passage of additional laws. In this paper I will summarize the history of legal interpretations related to the "because of sex" provision in Title VII of the Civil Rights Act. I will trace the Court's increasingly broad rulings through to the EEOC's landmark decision, *Macy v. Holder*, and examine the judicial reasoning and tests employed in particular cases. Finally, I will argue that Title VII should be extended further to protect lesbian, gay, bisexual, and gender-nonconforming individuals from workplace discrimination and offer legal justifications in support of such rulings.

The Civil Rights Act of 1964 and the role of the EEOC

The Civil Rights Act of 1964 was the product of decades of work from activists who fought against the entrenched practice of racial segregation in the U.S., particularly in the South. The final law signed by President Lyndon B. Johnson was expansive, banning discrimination "in public accommodations including hotels, restaurants and food service, retail establishments, parks and recreational facilities and transportation - and in all programs and activities funded by the federal government" (Berrien, 2014). Title VII makes it "unlawful to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(1)).

The Equal Employment Opportunity Commission, a federal agency created by Title VII, is responsible for interpreting and enforcing Title VII, and has the ability to unilaterally resolve complaints filed by employees of federal agencies. In such cases the EEOC's ruling is the final word. For private sector and local and state government employees, the Commission's reach is still significant although it cannot issue decisions. In these cases EEOC staff can investigate complaints related to discrimination, issue findings, provide mediation, and file lawsuits in federal court against employers who discriminate (Transgender Law Center). Although judges are not required to follow the Commission's precedents or recommendations, the Supreme Court has noted that the EEOC's interpretations are "entitled to great deference" (*McDonald v. Santa Fe Trail Transp. Co.,* 1976, p.279).

The moral directive enshrined in the Title VII was clear: "employers should focus only on characteristics relevant to employment when making employment decisions, [rather than traits that] will almost never have any bearing on whether someone can perform a certain job" (Perkins, 2013, p.427). However, in practice discrimination "because of sex" has proved challenging to define. This task has been made all the more difficult because the word "sex" was added to the Civil Rights Act only two days before its passage, and because debate on the clause was quite limited. Some historians believe that Congressman Howard Smith, who had a long history of opposing civil rights efforts, introduced the "because of sex" provision as part of an effort to stop the entire bill from being enacted (Perkins, 2013, p.428). As the story goes, the House legislators responded to Smith's amendment with "considerable laughter" (Brauer, 1983, p.48). Thus, debates about the meaning of "because of sex" began almost immediately after the passage of the Civil Rights Act and continue to this day.

Early interpretations of the meaning of "sex"

The first courts to interpret Title VII clung to an extremely narrow reading of the statute. For instance, in *General Electric v. Gilbert* (1976), the Fourth Circuit ruled that Title VII did not protect pregnant women from discrimination. In doing so, they relied heavily on the majority opinion in *Geduldig v. Aiello* (1974), which held that California state's policy of denying insurance benefits to cover work loss due to pregnancy did not violate the Equal Protection Clause because "the program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes" (p.497).

Early lesbian, gay, and transgender plaintiffs fared equally poorly in court cases. Jurists relied on two main devices to support narrow interpretations of Title VII's scope: the "plain meaning" doctrine and Congress's intent. To illustrate, in *Voyles v. Ralph K. Davis Medical Center* (1975) a U.S. district court in California held that Title VII did not protect Charles Voyles, a transgender man who had been fired from his job after revealing his intent to transition from female to male because "employment discrimination based on one's transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII of the Civil Rights Act of 1964" (p.459). Furthermore, "even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions" (p.457).

The opinion turned next to the "plain meaning" of the text, holding that because Title VII made no explicit reference to "change of sex or sexual preference" (p.457), no such protection existed. Similarly, in *Holloway v. Arthur Andersen* (1977) the Ninth Circuit ruled that Title VII's plain meaning was to protect only "traditional notions of 'sex'" (p.16). The *Holloway* court noted that bills amending Title VII to prevent discrimination based on sexual preference had been proposed to Congress several times and always failed. They took this as a signal that Congress intended for "sex" to be construed in a narrow fashion. Under this view, Title VII's sole purpose was to "remedy the economic deprivation of women as a class... [And to place] women on equal footing with men" (*Holloway v. Arthur Andersen,* 1977, p.662). Other courts used nearly identical reasoning to rule against transgender plaintiffs in *Sommers v. Budget Marketing, Inc.* (1982) and *Ulane v. Eastern Airlines, Inc.* (1984).

Judges summarily dismissed claims brought by gay and lesbian plaintiffs as well. In *DeSantis v. Pacific Telephone & Telegraph Co.* (1979), the "Ninth

Circuit firmly shut the door to potential Title VII and Section 1985(3) protections for homosexuals" (Rieke, 1980, p. 53), again citing the statute's "plain meaning" and Congress' intent. The *DeSantis* court also rejected the argument that gay male employees who faced discrimination because of perceived effeminacy could seek relief under Title VII. In practice, this meant that lesbian and gay plaintiffs were at a marked disadvantage even when in bringing Title VII claims that were based more on gender stereotypes than sexual orientation. Guy and Fenley have shown that "in several cases, LGBTQ individuals' sexual harassment charges were not upheld because the court determined that the harassment targeted the plaintiff's sexual orientation," leaving these employees with little protection against harassment of any kind (Guy and Fenley, 2013, p. 54).

Broadening the scope of "sex"

As time went on however, courts became more willing to recognize broader interpretations of "sex." In the first Title VII case to reach the Supreme Court, *Phillips v. Martin Marietta Corp.* (1971), the justices ruled that discriminating based on "sex plus" another characteristic was prohibited by the statute. In this case Ida Phillips was rejected from a position because she was a mother with young children. Phillips then sued under Title VII, arguing successfully that Martin Marietta Corp. discriminated because of sex by hiring fathers with young children, but not mothers. In a similar case, *Sprogis v. United Air Lines, Inc.* (1971), the Seventh Circuit determined that United Air Lines Inc. could not fire female employees after they were married if they did not treat males the same way.

Additionally, the rulings against pregnant plaintiffs in *Geduldig* and *Gilbert* resulted in the passage of the Pregnancy Discrimination Act (1978), which prohibits "sex discrimination on the basis of pregnancy" in the workplace. Many judges understood this as an indication from Congress that Title VII should be interpreted more liberally. The courts subsequently extended "sex" protections even further by adopting the EEOC's position that sexual harassment should be considered a form of sex discrimination (*Doe v. City of Belleville,* 1997, p.15).

A significant victory came in the landmark Supreme Court case *Price Waterhouse v. Hopkins* (1989). Ann Hopkins, the only woman of 88 employees being considered for partnership at her accounting firm, did not receive a promotion despite having been described in reviews as intelligent and competent and having secured a $25 million contract for the company. "There were clear signs… that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho', another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school'" (p.235). The partner who notified Hopkins of the

firm's decision advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (p.235).

By ruling in favor of Hopkins, the Supreme Court signaled that narrow interpretations of Title VII were no longer appropriate. The *Price Waterhouse* decision introduced the notion that Title VII protected gender (i.e. the social roles and characteristics constructed in relation to biological sex), as well as traditional sex. Writing for the Court, Justice Brennan said: "Our interpretation of the words 'because of' also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification reasonably necessary to the normal operation of th[e] particular business or enterprise.' The only plausible inference to draw from this provision is that, in all other circumstances, *a person's gender may not be considered in making decisions that affect her*" (p.242, emphasis added).

Price Waterhouse introduced the "sex-stereotyping theory" which is summarized by the majority's conclusion: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" (p.251). Thus, courts have progressively expanded the boundaries of what constitutes sex discrimination. After *Price Waterhouse,* "the Courts' narrow interpretation of 'sex' when a plaintiff presents a claim based on his or her transgender status can in fact be seen as an exception to the broader interpretations of 'sex' that have been embraced by courts in other types of sex discrimination cases" (Kelly, 2010, p. 237).

A change in the tides: courts begin ruling in favor of transgender plaintiffs

Following *Price Waterhouse,* LGBT people and their allies began fighting employer discrimination with renewed vigor, and these efforts finally began to pay off. Based on a New York City statute, *Maffei v. Kolaeton Industries* (1995) paved the way for later cases. "The [*Maffei*] Court determined that courts such as *Ulane*, *Sommers*, and *Holloway* were flawed in their reasoning that Congressional attempts to include sexual orientation among the list of protected characteristics signaled an intent to exclude transgender individuals from protection" (Kelly, 2010, p. 232). The New York City law in question was nearly identical to Title VII, except that it also banned discrimination based on sexual orientation.[i]

In their decision, the *Maffei* Court pointed to the remedial nature of antidiscrimination statutes in general, maintaining that such laws should "be interpreted liberally to achieve their intended purposes. Our New York City law is intended to bar all forms of discrimination in the workplace and to be

broadly applied. Accordingly, I find that the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status creates discrimination based on 'sex', just as would comments based on the secondary sexual characteristics of a person" (p.556).

The *Maffei* ruling was particularly notable because it explicitly recognized important changes in scientific and cultural understandings of sex. The opinion pointed to experts who believed that at least seven characteristics determined sex, including chromosomes, gonads, hormonal secretions, internal reproductive organs, external genitalia, secondary sex characteristics, and, most crucially, self-identity (p.552). Thus, when a "plaintiff alleges that he is now a male based on his identity and outward anatomy... [Courts should recognize that] being a transsexual male he may be considered part of a subgroup of men [and] there is no reason to permit discrimination against that subgroup" (p.556).

In 2004, the Sixth Circuit followed the *Maffei* Court's example when they ruled in favor of a gender non-conforming employee, Jimmie Smith (*Smith v. City of Salem* 2004). After Smith started expressing stereotypically feminine characteristics while at work, Smith's co-workers began to criticize her mannerisms and appearance. Once she revealed to her boss her intention to transition from expressing herself as male to female, Smith's employer instituted a series of tactics aimed at forcing her to resign. When Smith refused to comply with these demands, she was fired.

The Sixth Circuit reversed a previous ruling in favor of the city and wrote: "We find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex'" (p.573). They held that the logic used to uphold cases like *Holloway* "been eviscerated by *Price Waterhouse*" (p.570) and concluded: "An employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex" (p.574).

Although this framing of the issue (i.e. the implication that Smith, as a transgender woman, is simply a man who wears dresses and makeup) is problematic, the case still represented a significant triumph for transgender people in the workplace. It was the first time a federal court had recognized that transgender employees are entitled to legal protections under Title VII.

Another important ruling for transgender individuals came in the 2008 case *Schroer v. Billington*. Here, a D.C. district judge found in favor of Diane Schroer, a transgender woman, whose job offer from the Library of Congress was rescinded after she revealed her transgender status. The judge rejected the argument that Congress' failure to enact legislation explicitly protecting gender identity was a sign that Congress did not intend for transgender employees to be protected by Title VII. He went even further than previous courts and argued that Schroer need not offer a "sex-stereotyping" argument in order to bring a successful claim. He introduced a "sex per se" argument by asserting: "Discrimination based on gender identity is literally discrimination 'because of sex'" (p.212). To clarify this assertion, the judge offered a hypothetical example: "Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that 'transsexuality' is unprotected by Title VII. In other words, courts have allowed their focus on the label 'transsexual' to blind them to the statutory language itself."

While sex-stereotyping claims may be of limited use to some transgender employees, because such suits require proof that the employer discriminated based on a gender stereotype (for example, by stating "you are too masculine to be a woman") (Kelly, 2010, p. 230), "sex per se" arguments offer much more extensive protection. The "sex per se" theory advanced in *Schroer* combined with the sex-stereotyping approach discussed in *Price Waterhouse* and *Maffei* gave transgender plaintiffs formidable tools in court. In recent years, other courts have relied on these two doctrines when deciding Title VII claims and when interpreting local anti-discrimination laws in cases brought by transgender and gender-nonconforming plaintiffs.[ii]

Additionally, many courts have affirmed that same-sex sexual harassment is actionable under Title VII, even if it is related to or based on a plaintiff's perceived sexual orientation. In *Doe v. City of Belleville* (1997), a case brought by brothers who had been called "fag" and "queer" and had been sexually harassed by their male coworkers, the Seventh Circuit asserted, "a homophobic epithet like 'fag' . . . may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation" (p.593). Such comments and behavior constitute sex discrimination under Title VII because of "the harassers'

evident belief that in wearing an earring, [the brother] did not conform to male standards" (p.575). In *Doe,* the Seventh Circuit explicitly overruled its previous holding in *Ulane* (1984), which had advanced a narrow definition of sex. The *Doe* court noted, "*Ulane* made clear that sex was not synonymous with 'sexual identity,' or 'sexual preference.' However, under the court's analysis both 'sexual identity' and 'sexual preference' would be related to and have a nexus with an 'individual's sex,' and thus would be actionable. This 'sexuality' approach to Title VII cannot be harmonized with *Ulane*" (ft. 3).

Another pivotal win came in *Oncale v. Sundowner Offshore Services, Inc.* (1998) where the Supreme Court ruled that same-sex sexual harassment was unlawful under Title VII. Justice Scalia, a committed conservative, authored the majority opinion for the unanimous court. In it he wrote: "Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements" (p.80). *Oncale* "directly undermines the holdings of *Holloway*, *Ulane*, and *Sommers*, which hold steadfast to the principal evil that Congress contemplated in passing Title VII: that there were not equal employment opportunities for men and women" (Kelly, 2010, p. 239).

Macy v. Holder

In 2012, the Equal Employment Opportunity Commission issued the strongest endorsement of transgender rights in the workplace to date in the case *Macy v. Holder*. Mia Macy, a transgender woman, had been offered a job with the Alcohol, Tobacco, Firearms, and Explosives Agency for which she was extremely qualified. Although Macy was presenting as a man during the interview process, she informed her potential employer of her intention to begin to the transition to presenting as a woman. After she revealed this information, Macy received an email from ATF stating that the position she had been had been guaranteed was no longer available due to budget cuts. After contacting an EEOC counselor, Macy learned that the position had not been eliminated but in fact had been given to someone else (*Macy v. Holder,* 2012).

The *Macy* decision, which was approved unanimously by the full five-member EEOC, stated unequivocally that transgender employees are protected from discrimination based on their gender identity and expression by Title VII. *Macy* spoke to the increasingly broad dimensions of sex that have been recognized by jurists, noting: "That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment

would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity" (p.6).

The EEOC relied heavily on *Price Waterhouse* in their ruling, emphasizing that the Supreme Court had demonstrated that gender and sex can only be considered by employers in their decision-making when these identities are "bona fide occupational qualifications." In all other circumstances, sex cannot be lawfully factored into employment decisions. The EEOC report vindicated both the "sex-stereotyping" and the "sex per se" argument as sufficient justifications for the legal protection of transgender people. The decision summarized: "When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision" (p.7).

Because the EEOC's decisions are binding on all federal agencies and contractors, *Macy* has had the substantial impact of making discrimination against federal employees based on gender identity or expression unlawful under Title VII. Although the EEOC's precedents are not binding on private employers, courts have historically given significant respect to the EEOC's interpretations of Title VII (Transgender Law Center). Additionally, some research indicates that federal agencies wield a particularly strong legal influence in cases where federal courts are unable to come to a unified consensus on a particular policy issue (Haire and Lindquist, 1997). Thus, it is likely that future courts will pay heed to the EEOC's findings in *Macy*. At the very least, *Macy* means that all transgender and gender-nonconforming individuals in the U.S. are guaranteed access to legal counsel from the EEOC if they experience discrimination or harassment based on their gender identity.

Extending Title VII to prohibit workplace discrimination based on sexual orientation

Although *Macy* was an unprecedented victory for transgender people and their allies, lesbian, gay, and bisexual people still have not been guaranteed protection from discrimination under Title VII. Many hoped that *Price*

Waterhouse would turn the tides distinctly in LGB people's favor, but this has not always been the case. Many courts have been reluctant to participate in what they view as the "bootstrapping" of sexual orientation onto Title VII's sex protection.

In *Anderson v. Napolitano* (2010), the Fifth Circuit ruled against a gay man who experienced harassment in the workplace because of his mannerisms and self-presentation. The court held that Anderson's coworkers harassed him because of the stereotype that "gay men speak with a lisp. Lisping is not a stereotype associated with women" and so the harassment in this case was due to Anderson's perceived sexual orientation, not his sex. The otherwise sympathetic Sixth Circuit ruled against a gay plaintiff for similar reasons in a Title VII case in 2006 (*Vickers v. Fairfield Medical Center*).

The determination displayed by some judges to cling to rigid definitions of sex, in the face of precedents from the Supreme Court like *Oncale* and *Price Waterhouse*, the enactment of the Pregnancy Discrimination Act, and the growing body of scholarship which supports broader understandings of these identities, has reached positively ridiculous heights in a few instances.[iii] The reasoning employed in these cases is so jumbled and flagrantly offensive to established precedent that it hardly warrants response.

A strong case can and has been made for extending Title VII to prohibit discrimination based on sexual orientation (see Hilzendeger, 2004), particularly in the wake of *Macy*. I would like to briefly outline a few main points in this debate, which future courts and litigants should emphasize. First, courts have consistently stressed the remedial nature of anti-discrimination statutes. For instance, the Seventh Court has stated strongly that "the discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group" (*Doe v. Belleville,* 1997, p.571).

As I have noted, the LGBT community continues to face pervasive discrimination in the U.S. and by any standards could be characterized a "discrete and vulnerable group." When one considers the overarching purpose guiding the Civil Rights Act of 1964, it becomes evident that the type of systemic and entrenched prejudice LGBT people confront is the very sort of discrimination legislators fought back against when they passed this law. Even the Supreme Court has endorsed this sort of Dworkinian argument by noting in *Oncale* that judges should look to the principles standing behind anti-discrimination laws rather than the particular circumstances Congress may have been focused on when the Title VII was initially passed. Furthermore, appeals to congressional intent hold no credibility in our modern era of Title VII jurisprudence. If Title VII can be used to protect men and whites from discrimination in the workplace (groups legislators certainly were not thinking about when they enacted this

legislation), it is inconsistent to exclude lesbian and gay people from protection because of Congress's original intent (Kelly, 2010, p. 232).

Additionally, many leading scholars now endorse the theory that homophobia is in fact a form of gender discrimination and can be linked to misogyny and the hatred of traditional feminine characteristics. In a footnote for their decision in *Doe,* the Seventh Circuit recognized this by observing: "There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like 'fag,' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination" (footnote 27). Therefore, a legal recognition that discrimination because of sexual orientation constitutes a form of discrimination "because of sex" would be consistent with current scholarship in this area.

This consensus, as well as the scientific findings that have demonstrated that biological sex is far more complex and multi-faceted than we understood fifty years ago, has exposed the gaping holes in the "plain meaning" doctrine. Legal adherence to over-simplified, antiquated definitions of sex as simple maleness versus femaleness runs completely contrary to scientific and sociological evidence. If recent research into sex and gender tells us anything, it is that these concepts are remarkably intricate and nuanced. There is no plain meaning of "sex."

The EEOC has already taken tentative steps towards extending Title VII protections to homosexuals in the workplace. In *Veretto v. U.S. Postal Service* (2011), the EEOC supported an appeal made by a gay postal worker named Jason Veretto who experienced a hostile work environment after his wedding announcement was printed in a local paper. The USPS originally dismissed Veretto's complaint, saying that the discrimination he faced was based on his sexual orientation (not sex) and therefore was not covered by Title VII. On appeal, the EEOC ruled the Agency had improperly dismissed Veretto's case because, although Title VII does not prohibit discrimination based on sexual orientation, it does prohibit discrimination based on sex-stereotyping. Veretto asserted that the discrimination he experienced was "motivated by the sexual stereotype that marrying a woman is an essential part of being a man" and by his coworker's "attitudes about stereotypical gender roles in marriage." Thus, the EEOC reversed the Agency's dismissal and remanded *Veretto* to the agency for processing. The EEOC reiterated these holdings a few months later in *Castello v. U.S. Postal Service* (2011) using almost indistinguishable language.

The Commission's decisions in *Veretto* and *Castello* suggest that gay and lesbian plaintiffs should be able to seek relief under Title VII if they frame the

discrimination they experience as a form of sex-stereotyping. However, the EEOC has not adopted the more comprehensive approach I have advocated for, which would acknowledge that harassment because of sexual orientation is fundamentally a form of discrimination "because of sex."

Strengthening Title VII protections for transgender and gender nonconforming people

Despite the victory in *Macy*, formidable threats still inhibit the implementation of comprehensive workplace protections for transgender and gender-nonconforming individuals. In particular, the "immutable characteristics" doctrine stands as a significant barrier to freedom of gender expression. The Fifth Circuit articulated the immutable characteristics theory in an equal protection case, *Willingham v. Macon Telegraph Publishing, Co. (*1975). Here, the court held that employers could lawfully set dress codes that dictate different standards for men and women. They reasoned, "[A] line must be drawn between distinctions grounded on fundamental rights… and those interfering with the manner in which an employer exercises his judgment… Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection" (p.1091).

Thus, employer regulations which mandate certain forms of gender expression have traditionally been upheld. In *Jespersen v. Harrah's Operating Co., Inc.* (2006), Darlene Jespersen asserted a Title VII claim because her employer's "personal best" dress code required that women wear makeup at all times which, "conflicted with [her] self image" and interfered with her ability to do her job. The Ninth Circuit ruled against Jespersen because "not every differentiation between the sexes in a grooming and appearance policy creates a 'significantly greater burden of compliance" and because, "The policy does not single out Jespersen [but] applies to all of the bartenders, male and female… [And] there is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear" (p.1112).

The thrust of immutable characteristics cases like *Jesperson* and *Willingham* is that traits like hair style and clothing apparel can be easily changed, and so employer dress codes that differentiate between the sexes should be upheld so long as they do not create a significantly greater burden on one sex over another (Clements, 2009, p.180). Similar reasoning has been used to justify workplace bans on hairstyles worn predominantly by African Americans (*Rogers v. American Airlines, Inc.,* 1981).

In order to provide LGBT people with comprehensive legal protection, allies must push for a shift away from the dominant legal perception of "gender nonconformity as only a matter of voluntary personal preference" (Clements,

2009, p. 195). Camille Gear Rich has marshaled a powerful argument against the application of the immutable characteristics standard as it is often applied to people of color, writing: "Why should a person be required to shed passively acquired racially or ethnically marked mannerisms when they have no bearing on her potential performance of the job at issue?" (Rich, 2004, p. 1163). Rich also points to the psychological harms accrued by members of oppressed groups when they are forced to abandon expressions related to deeply felt identities in order to maintain a job.

Furthermore, LGBT advocacy groups have criticized the ways in which our social institutions tend to blame gender-nonconforming individuals for "bringing discrimination and violence on themselves" (Grant, Mottet, and Tanis, 2011, p. 8). By categorizing gender expression as an inconsequential matter that gender-nonconforming people can easily change (as opposed to an "immutable characteristic"), courts participate in, or at least authorize, this type of discrimination. Gender-specific employer dress codes purposefully police the gender expression of employees, and thereby imply that gender-nonconforming people, whose identities may be assaulted by these rules, are *choosing* to flout workplace standards if they do not or cannot comply.

Therefore, legal advocates who represent transgender employees must stress the ways in which dress codes mandating gender-specific performances can violate a plaintiff's identity and serve to further oppression. Advocates must demonstrate how these dress codes are not "gender neutral" but in fact rely on and perpetuate sex stereotypes in a way that our legal framework cannot accept. For example, courts should recognize that by requiring women (and not men) to wear lipstick under a "personal best" dress code, such as the one at issue in *Jespersen*, employers reinforce the sex-based stereotype that women require make-up in order to look their best. *Price Waterhouse* emphatically declared that employers cannot lawfully force their workers to conform to sex stereotypes in order to succeed on the job.

Conclusion

Over the past fifty years enormous strides have been made in the battle for legal recognition of the rights of LGBT people. *Macy v. Holder* in particular has significantly advanced the resources available to transgender and gender-nonconforming individuals in the workplace. However, much work still needs to be done and new threats that endanger the rights of LGBT people have continued to emerge. For instance, following *Hobby Lobby,* many conservatives have actively sought to expand religious exemptions in ways that jeopardize the welfare and rights of sexual minorities. On December 4, 2014, the Michigan House of Representatives passed the Religious Freedom Restoration Act, which some legal analysts believe would permit doctors and EMTs to refuse to treat gay

or transgender patients ("License To Discriminate?", 2014). Such laws, if enacted, would likely make it even more difficult for LGBT employees to successfully assert Title VII claims.

In order to cement *Macy* and *Veretto*, decisive action must be taken. "The piecemeal approach to providing protection to transgender" individuals, through a complex patchwork of state laws, city statutes, appellate court decisions, and EEOC rulings does not provide sufficient protection (Kelly, 2010, p. 231). Because ENDA has been abandoned, the Supreme Court is the logical forum for such action. A decision from the Court ruling that Title VII prohibits discrimination based on gender identity, gender expression, and sexual orientation would create a binding precedent and standardize the legal protections for all LGBT employees in the United States. Until the Supreme Court sets down a decisive ruling to that effect, or legislation similar to ENDA is enacted, lesbian, gay, transgender, and gender-nonconforming people will struggle to receive legal relief in cases of employment discrimination.[iv]

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[i] "It shall be an unlawful discriminatory practice: "(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment." Administrative Code of the City of New York § 8-107 (1)

[ii] See *Glenn v. Brumby* (11th Cir. 2011); *Kastl v. Maricopa County Community College District* (9th Cir. 2009); *Barnes v. City of Cincinnati* (6th Cir. 2005); *Rosa v. Part West Bank & Trust Co.* (1st Cir. 2000); *Schwenk v. Hartford* (9th Cir. 2000), *Enriquez v. West Jersey Health Systems* (Superior Court NJ 2001).

[iii] *Hamm v. Weyauwega Milk Products, Inc.* (2003): "Asymmetry of response may be evidence of sex discrimination; but to equate it to sex discrimination is a mistake... If an employer refuses to hire unfeminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the *Hopkins* case. But if, as in this case, an employer *whom no woman wants to work for* (at least in the plaintiff's job classification) discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate. If this analysis is rejected, the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. ...'Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination. In most cases-emphatically so in a case such as this in which, so far as appears, there are no employees of the other sex in the relevant job classification—the "discrimination" that results from such stereotyping is discrimination among members of the same sex."

[iv] In July of 2015 the EEOC issued a decision in the case *Baldwin v. Department of Transportation* which is highly relevant to this paper. In the case a gay man (David Baldwin) alleged that he was not hired for a permanent position due to his employer's prejudice against homosexuals. The EEOC not only found in Baldwin's favor, but also made clear in their decision that discrimination based on sexual orientation is inherently discrimination based on sex. This means that the EEOC has moved away from a sex-stereotyping argument as their justification for protecting LGB persons from workplace discrimination. Thus, the position I advocated for in Part VI of this paper has been officially adopted as EEOC policy.