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EXTENDING TITLE VII PROTECTION TO NON-GENDER-CONFORMING MEN

By
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INTRODUCTION

Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment,[1] is generally seen as a measure intended to "remedy the economic deprivation of women" by placing them "on an equal footing with men" in the workplace.[2] While the overwhelming majority of sexual harassment complaints filed with the Equal Employment Opportunity Commission, the federal agency that enforces Title VII, are brought by women,[3] men are also victims of sex discrimination in the workplace—especially those who do not present themselves in the way their coworkers or employers believe a man should. For example, men who wear lipstick and skirts refuse to conform to social demands about the way men "ought" to look. Quietness and passivity defy the stereotype that men are generally assertive and aggressive. Men who have sexual relationships with other men challenge the heterosexist view that only male-female sexual relationships are "natural." However, federal courts have been reluctant to extend the protections afforded women under Title VII to non-gender-conforming men. An overly narrow conception of sex discrimination blinds courts to the fact that these men are also victims of sex discrimination. And in turn, the denial of protection for non-gender-conforming men directly contributes to the continued subordination of women.

discrimination against non-gender-conforming individuals is sex discrimination grounded in sex stereotyping and heterosexist expectations.

Many scholars have argued that the plain language of Title VII and the Supreme Court's interpretation of the statute in *Price Waterhouse v. Hopkins* provides a sufficient framework for protecting men who experience discrimination as a result of failing to conform to gender norms.[4] Although federal courts acknowledge that sex stereotyping is a form of sex discrimination,[5] men who do not satisfy social expectations of masculinity have had difficulty succeeding on Title VII claims. Courts often conflate effeminacy with homosexuality,[6] viewing "feminine" behavior in men as a manifestation of homosexuality (that is, a marker for one's *status*), rather than recognizing "homosexual" as a label that society places on men who engage in non-gender-conforming *conduct* (namely, having sex and/or romantic relationships with other men). Consequently, when faced with a sex discrimination claim asserted by an "effeminate" male plaintiff who is either gay or perceived to be so by his coworkers, courts typically rule against the plaintiff on the ground that Title VII does not protect people who are discriminated against on the basis of sexual orientation.

Courts have also rejected the majority of sex discrimination claims brought by transgender persons.[7] Changing genders can be seen as the ultimate form of gender nonconformity. When an individual with biologically male genitals takes female hormones and/or undergoes gender reassignment surgery, she violates the social dictate that she should present herself as a person of the gender she was assigned at birth. I. Bennett Capers, a professor of law at Hofstra Law School, suggests that gay men and lesbians, by their very existence, call into question the "complementarity" of the sexes and their respective accepted characteristics.[8] Similarly, transgender people challenge society's dichotomous concept of gender; they undermine the notion that men and women are opposites of one another and that certain traits are naturally linked to a person's biological sex.[9] Capers contends that women will continue to face subordination in the workplace as long as the concept of a binary gender system exists.[10] Accordingly, courts would best further Title VII's purpose by reading the statute as covering a "continuum of genders,"[11] including gay, lesbian, and transgender individuals.

This article surveys a number of cases and identifies three mechanisms employed by courts to deny non-gender-conforming individuals' Title VII claims. First, the majority of courts fail to distinguish between *conduct* and *status*. Individuals who self-identify or are labeled as homosexual or transgender often lose Title VII claims because courts conflate this unprotected *status* with the individuals' non-gender-conforming *conduct*. A second denial mechanism is closely related. In many cases involving homosexual or transgender plaintiffs, both sexual orientation/gender identity discrimination and sex discrimination are at work. The existence of the former, which is not prohibited under current Title VII jurisprudence, often obscures the existence of the latter. Finally, courts fail to recognize that sexual orientation and gender identity/expression discrimination are actually forms of sex discrimination. Homosexual and transgender men and women refuse to conform to the gender roles that society assigns, on the basis of biological sex.[12] This article argues that discrimination against non-gender-conforming individuals is sex discrimination grounded in sex stereotyping and heterosexist expectations.

I. EARLY CASES

Holloway v. Arthur Andersen and Co.[13] was one of the first Title VII cases brought by a transgender individual. The plaintiff, Ramona Holloway, was born a biological male. After starting female hormone treatments, Holloway informed her employer, Arthur Andersen, that she was preparing to undergo sex reassignment surgery.[14] She began wearing lipstick and nail polish to work, as well as a feminine hairstyle, clothing, and jewelry.[15] A few months later, after she requested that company records be changed to reflect her new female name, Holloway

was fired.[16]

Holloway's supervisor explained in an affidavit that Holloway was terminated because her "dress, appearance, and manner . . . were such that it was very disruptive and embarrassing to all concerned."[17] This evidence clearly indicated that Holloway was fired because her employer did not approve of her non-gender-conforming behavior.[18] Nevertheless, the Ninth Circuit concluded that Arthur Andersen had not violated Title VII by firing Holloway for initiating the process of sex transition.[19] The judges stated: "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 . . . A transsexual individual's choice to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."[20] The court further reasoned that the purpose of Title VII was "to remedy the economic deprivation of women as a class" and that Congress had not "shown any intent other than to restrict the term 'sex' to its original meaning."[21]

Circuit Judge Alfred T. Goodwin dissented, interpreting the plain language of the statute to protect Holloway.[22] Although Congress "probably never contemplated that Title VII would apply to transsexuals," he argued, Holloway had a legitimate sex discrimination claim.[23] Judge Goodwin found that because Holloway was a female on the day she was fired, she was a member of the class that Congress intended Title VII to protect.[24] He argued that the manner in which a plaintiff became a member of the protected class, whether via birth as a biological female or through gender reassignment surgery, should not matter for the purpose of a Title VII analysis.[25]

Even though Judge Goodwin would have allowed Holloway to proceed with her Title VII claim, his analysis of the case fell short. Because he stressed the fact that Holloway was a woman and therefore a member of "the disadvantaged class" that Congress intended Title VII to protect, it is doubtful that he would have similarly held in favor of a female-to-male transgender plaintiff. Moreover, Arthur Andersen did not discriminate against Holloway because she was a woman. Holloway's supervisor suggested that Holloway find a new job where her transgender identity would be unknown[26]—indicating that Holloway's femaleness was problematic only because her employer was aware that Holloway had been born a biological male and was uncomfortable with her presenting as a woman.

The Seventh Circuit Court of Appeals rejected a similar Title VII claim brought by a transgender plaintiff in *Ulane v. Eastern Airlines*.[27] Karen Ulane, born a biological male, was a pilot for Eastern Airlines when she began taking female hormones, developed breasts, and underwent sex reassignment surgery.[28] She was fired when she attempted to return to work after her surgery.[29] After Ulane sued the airline on a Title VII theory, the district court reinstated her as a pilot with full seniority, back pay, and attorneys' fees. The Seventh Circuit overturned that ruling, holding that Title VII did not protect transgender people. The appellate court reasoned that "[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."[30] The court maintained that if Congress had intended the statute to "apply to anything other than the traditional concept of sex," then "surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals."[31]

Like Holloway, Ulane suffered discrimination because she did not conform to gender stereotypes. At the time of these decisions, courts had not yet recognized that gender stereotyping is a form of sex discrimination.[32] The courts' analysis in *Holloway* and *Ulane* was similar: The plaintiffs were discriminated against because they were transgender; their *status*, rather than their non-gender-conforming *conduct*, was the basis for the discriminatory treatment. The next step in the analysis was simple: Transgender individuals are not a protected class under Title VII, so the plaintiffs' claims necessarily failed. Under early Title VII jurisprudence, it would always be legal for employers to discriminate against transgender employees.

II. The Courts' Developing Understanding of Sex Discrimination

In *Price Waterhouse v. Hopkins*, the Supreme Court broadened its concept of "sex discrimination," holding that Title VII prohibits employers from discriminating against employees who do not conform to sexual stereotypes.[33] The plaintiff, Ann Hopkins, was the only woman among eighty-eight candidates up for partnership in Price Waterhouse's Washington, D.C. office in 1982.[34] Hopkins neither made partner nor was rejected; instead, her candidacy was held over for reconsideration.[35] When Hopkins was not nominated for partnership the following year, she sued the firm under Title VII.

The district court found compelling evidence that Price Waterhouse's decision not to offer Hopkins partnership in the firm was directly tied to her sex. The court noted that "none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the [firm]."[36] Partners and clients alike praised Hopkins's work, calling her "extremely competent and intelligent," "strong and forthright, very productive, energetic, and creative."[37] Many Price Waterhouse partners, however, "reacted negatively to Hopkins's personality because she was a woman."[38] One partner called her "macho," while another felt that she "overcompensated for being a woman," and a third said that she needed to take a class at "charm school."[39] Another male partner explained that if Hopkins wanted to improve her chances of making partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[40]

Based on this evidence, the district court concluded that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."[41] The Supreme Court affirmed the lower court's holding. In his opinion for the Court, Justice Brennan declared: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 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."[42] The Court ruled that "gender must be irrelevant to employment decisions"[43] and 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."[44]

It logically follows from the *Price Waterhouse* decision

that an employer who discriminates against a male employee based on his refusal to conform to gender norms has violated Title VII. Nevertheless, for years after *Price Waterhouse*, federal courts disagreed about whether the statute prohibits discrimination against Ann Hopkins's male counterpart: the effeminate man.[45] For male plaintiffs, a significant obstacle was the tendency of courts to conflate impermissible sex stereotyping with sexual orientation discrimination, which courts have repeatedly held is not prohibited by Title VII.[46] Put differently, when considering a "feminine" male employee, courts generally assumed that he faced discrimination because he was gay or perceived to be so, rather than finding that the employer had penalized the plaintiff for not conforming to male stereotypes.

For example, in *Dillon v. Frank*,[47] plaintiff Ernest Dillon's coworkers verbally abused him, calling him a "fag" and taunting, "Dillon sucks dicks."[48] Graffiti at the work site declared "Dillon sucks dicks" and "Dillon gives head."[49] After three years of harassment, Dillon quit his job and sued his former employer under Title VII.[50] Dillon argued that his was a case of sex stereotyping, contending that he was harassed because he was not "macho" enough in his coworkers' eyes.[51] While the Sixth Circuit acknowledged that the harassment Dillon suffered "was clearly sexual in nature,"[52] the court held that Dillon was subjected to a hostile work environment because his coworkers believed he was gay; therefore, their actions constituted sexual orientation discrimination not prohibited by Title VII.[53] The court found there was no evidence of sex stereotyping and affirmed the district court's dismissal of Dillon's lawsuit.[54]

Dillon offers an example of how federal courts often treat male and female Title VII plaintiffs differently. In cases of male-on-female sexual harassment, courts tend to take an "I-know-it-when-I-see it" approach.[55] Had Dillon been a woman, he would have had a quintessentially actionable sex discrimination case, and the court almost certainly would have come out in his favor. But when it comes to male plaintiffs harassed by other men, courts set the bar much higher.[56]

Why did the *Dillon* court get it wrong? First, the possibility that the plaintiff was a victim of sexual orientation discrimination, as suggested by the "fag" epithet, obscured the sex discrimination at work in the case. No evidence existed in the record indicating why Dillon's coworkers believed he was gay; presumably there was something about Dillon's appearance or mannerisms, as he argued, that his coworkers believed was not "macho" or "masculine" enough.[57] The court's second error was its failure to distinguish between non-gender conforming conduct and homosexual orientation. Dillon's coworkers harassed him by referring to sexual acts that Dillon allegedly performed with other men; the discrimination centered on Dillon's perceived *conduct*. The court, however, found that Dillon was discriminated against because of his perceived homosexual *status*. This reasoning was problematic because even if Congress amended Title VII to prohibit sexual orientation discrimination, effeminate men—both gay and straight—might remain unprotected.[58] That is, while it would be impermissible to fire a gay man because of his homosexuality, it might be lawful to fire him for being a man who acts too much like a woman.

This case helps illustrate that discrimination against men who are gay, or perceived to be so, is a form of sex stereotyping. Discrimination against homosexual men is grounded in heterosexist expectations that "real" men should date and have sex with women and not other men.[59] Dillon's coworkers mocked him by suggesting that he took the submissive, stereotypically "female" role in fellatio. Mary Ann Case, a professor of law at the University of Chicago Law School, has suggested that the harassment of gay men for their receptive role in sexual activity is a form of discrimination against the feminine, since it is based on the assumption that "real men . . . always tak[e] the active/masculine role in bed and elsewhere."[60] Thus, the subordination of both gay men and women is closely linked.

Courts may be more inclined to protect female victims of sex stereotyping, like Ann Hopkins, than effeminate men because "masculine" qualities in a woman are typically far less socially problematic than "feminine" behavior in a man.[61] Furthermore, male employees do not find themselves in a Hopkins-like bind because characteristics typically labeled as feminine are not as valued in the workplace as those characteristics deemed masculine. Consider, for instance, a 2004 incident in which California governor, Arnold Schwarzenegger, criticized his political opponents by calling them "girlie men."[62] Schwarzenegger did not mean to suggest that the lawmakers in question were homosexual or effeminate; instead, he was accusing them of being weak or ineffective. A spokesperson for the governor even explained that the term was "an effective way to convey wimpiness."[63] Schwarzenegger's statement implies that the only people who belong in positions of power are "real" men, who are physically strong, macho, and aggressive.[64] The underlying assumption is that women – and men who are too much like women – cannot perform effective work. Case has argued that this "disfavoring of characteristics gendered feminine may work to the systematic detriment of women and thus should be analyzed as a form of sex discrimination."[65] Interpreting Title VII to protect men who "act like women" is thus absolutely crucial to ending discrimination against women in the workplace. "If women [are] protected for being masculine but men [can] be penalized for being effeminate, this. . . would send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued although masculine qualities may not."[66]

Discrimination against homosexual men is grounded in stereotypes that "real" men should date and have sex with women and not other men.

In 1997, the Seventh Circuit became one of the first courts to recognize that discrimination against a man who does not satisfy social expectations of masculinity is sex discrimination. The sixteen-year-old male plaintiff in *Doe v. City of Belleville*[67] was dubbed a "fag" and "queer" by his coworkers because he wore an earring.[68] One coworker asked if the plaintiff was a boy or a girl, called the plaintiff his "bitch," and repeatedly threatened to take him out into the woods and "get [him] up the ass."[69] He also grabbed the plaintiff's testicles to "find out if [he was] a girl or a guy."[70]

Fearing that he would be sexually assaulted, Doe quit his job and sued his former employer for violating Title VII.

The district court dismissed Doe's complaint, holding that the plaintiff could not show that he was harassed on the basis of sex because his coworkers were also heterosexual men.[71] However, the Seventh Circuit rejected the notion that a straight male plaintiff could not be sexually harassed in violation of Title VII by another straight male. The appellate court pointed out that if the plaintiff had been a woman and her breasts had been grabbed, most courts would accept this as prima facie evidence of sex discrimination. The motivation for the harassment is beyond the point, the court said: "When a male employee's testicles are grabbed . . . the point is that he experiences that harassment as a man, not just as a worker."[72] It further reasoned:

> "[i]f [the plaintiff] were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example – something her harassers might perceive to be masculine just as they apparently believed [the plaintiff's] decision to wear an earring to be feminine – the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex."[73]

The circuit courts remained divided over whether same-sex harassment was actionable under Title VII until the Supreme Court answered in the affirmative in *Oncale v. Sundowner Offshore Services, Inc.*[74] The plaintiff, Joseph Oncale, was part of an all-male crew on an offshore oil rig.[75] He was apparently targeted for being slender, longhaired, and wearing an earring.[76] Oncale's coworkers threatened to rape him, and one held Oncale down while another pushed a bar of soap into his anus.[77] Oncale quit soon after the assault in the shower, scared that he would be raped on the job.[78]

The Supreme Court unanimously reversed the Fifth Circuit's decision that Oncale could not bring a Title VII claim against his (male) harassers. Writing for the Court, Justice Scalia noted: "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principle concerns of our legislators by which we are governed."[79]

Justice Scalia emphasized, however, that not all sexual harassment violates Title VII. A plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex."[80] The Court held that when the harasser and the victim are of the opposite sex, there is a reasonable inference that the harasser was acting 'because of' sex.[81] A similar inference can be drawn when the harasser is homosexual and the victim is of the same sex.[82] When such an inference is not available, however, a same-sex victim must offer evidence that the harasser either treated men and women differently, or was motivated by hostility to the presence of a particular sex in the workplace.[83]

Although *Oncale* acknowledged that men could sexually harass other men, the three evidentiary paths to a same-sex Title VII claim that the Court laid out did not represent a significant broadening of the Court's understanding of sex discrimination. Justice Scalia failed to cut through the gender dichotomy and merely incorporated same-sex relations into the mix.[84] Notably absent from his analysis was a discussion of male sex stereotyping or non-gender-conforming behavior. In fact, the opinion did not mention Oncale's appearance, which might have been insufficiently "masculine" for his coworkers and thus an impetus for the discrimination. Justice Scalia did not even cite the Court's holding in *Price Waterhouse*, which had been decided only nine years earlier. The concept of a man who wore lipstick or walked and talked in an overly "feminine" way does not seem to have crossed the Justices' minds.

III. THE COURTS' CONTINUING FAILURE TO PROTECT NON-GENDER-CONFORMING MEN

Even after *Price Waterhouse* and *Oncale*, homosexual and transgender Title VII plaintiffs continued to face an uphill battle. In theory, under the mixed motives doctrine, if the evidence suggests that an employer's decision was partly motivated by sexual orientation or gender identity discrimination (both of which are not prohibited by Title VII), a plaintiff is still protected by Title VII if he or she was also discriminated against for non-gender-conforming behavior.[85] Yet in reality, in the majority of cases where both sexual orientation discrimination and sex discrimination occur, the existence of the former blinds courts to the plaintiff's cognizable Title VII claim.[86]

For example, in *Bibby v. Coca-Cola*,[87] a coworker repeatedly called the male plaintiff a "sissy" and yelled, "everybody knows you take it up the ass."[88] The court granted summary judgment for the employer on the plaintiff's Title VII action, finding that the plaintiff, who was gay, was harassed because of his sexual orientation and not because of sex (that is, his failure to adhere to gender norms).[89] The court overlooked the fact that "sissy" is an insult reserved for boys and men who are not perceived as sufficiently masculine.[90] A New York district court similarly disposed of a gay male plaintiff's sex discrimination claims in *Martin v. Department of Correctional Services*.[91] The plaintiff's coworkers left sexually explicit photos in his work area and drew sexually explicit graffiti on the restroom walls, yard booths, and the plaintiff's time card and interoffice mail.[92] They also harassed him with derogatory language, like "cocksucker" and "fucking faggot."[93] But because the court found no evidence that Martin acted in an effeminate manner,[94] it granted the defendant's motion for summary judgment.[95] It ruled that in order to ensure that plaintiffs do not bootstrap sexual orientation claims under Title VII, "a plaintiff must demonstrate that he does not, or at the very least is not perceived to, act masculine"[96] in order to make out an actionable case of sex discrimination.

While not all gay men are effeminate, and not all straight men are "macho," *Martin* illuminates the troubling necessity for a homosexual plaintiff to emphasize his "femininity" in his complaint in order to convince the court that sex discrimination, not sexual orientation discrimination, was the root of his harassment. As one commentator has put it: "[E]ntitlement to Title VII protection ultimately depends on spurious factors such as whether the particular words and actions used by harassers

are sufficiently 'sexual,' whether the victim is an 'effeminate' or 'masculine' homosexual, and whether the victim pleads his claim in language sanctioned by the courts that downplays or does not mention if the plaintiff is gay."[97] Under this jurisprudence, Title VII will protect the stereotypically effeminate gay man, but not the gay man who "acts straight," or passes as stereotypically masculine. This also presents a problem for the male plaintiff who is deemed to be too feminine by his coworkers, but not quite feminine enough for the court to find that he was a victim of sex stereotyping.

Heterosexual men who are perceived as gay have also had difficulty establishing Title VII claims. For example, in *Hamm v. Weyauwega Milk Products, Inc.*,[98] coworkers called Michael Hamm, a straight male, a "faggot" and a "Girl Scout."[99] There were rumors that Hamm had a relationship with another male employee, and coworkers often asked him whether he had a girlfriend and why he was not married.[100] After Hamm complained of sexual harassment, he was fired. Hamm then sued his former employer under Title VII. Concluding that the term "Girl Scout" was unrelated to gender, the court found that Hamm was not a victim of sex discrimination; rather, he was harassed because of his perceived homosexuality.

In this case, the gender nonconformity suggested by the term "Girl Scout" was hidden behind the "faggot" epithet. Hamm suggested to the court that "when a heterosexual male is harassed and the basis offered for the harassment is 'perceived homosexuality,' then it is likely and reasonable to infer that gender stereotyping is present and is the real basis for the harassment."[101] The court rejected this argument, insisting that "courts have never focused on the sexuality of the parties involved when determining whether sexual harassment occurred." *Hamm* offers another example of how courts fail to distinguish conduct and status. Ironically, the court defined Hamm's heterosexual status as irrelevant and at the same time made his status as a perceived homosexual determinative.

Hamm also illustrates that discrimination based on sexual orientation, or perceived homosexuality, is in itself a form of sex discrimination. Social norms prescribe that men should be sexually attracted only to women, should date only women, and ultimately should marry women. "It is essential to the maintenance of heterosexism that these two genders are interpreted as . . . being 'naturally' attracted to one another."[102] Deviation from this pattern of normative behavior arouses suspicion. Hamm's coworkers discriminated against Hamm because he was unmarried and may not have had a girlfriend. This case is an example of how courts have declined "to recognize that sanctions levied on individuals for behaving or presenting themselves in a fashion commonly associated with homosexual orientation or transgender status are themselves a function of community disapproval of the plaintiff's refusal or failure to adhere to gendered notions about appearance, attire, as well as sexual and nonsexual behavior."[103]

In *Oiler v. Winn-Dixie Louisiana, Inc.*,[104] the court held that an employer had not engaged in sex discrimination when it fired the male plaintiff for presenting himself as a woman outside of work. In his off time, Peter Oiler, a truck driver for Winn-Dixie, occasionally adopted a female name, Donna, and wore makeup, skirts, nail polish, a bra, and silicone prostheses to enlarge his breasts.[105] After the president of Winn-Dixie learned that Oiler sometimes appeared in public as Donna, Oiler was fired.[106] At trial, Oiler's supervisor testified that crossdressing was "unacceptable" in the area where Oiler worked, indicating there was "a large customer base there that have various beliefs, be it religion or a morality or family values or people that just don't want to associate with that type of behavior . . ."[107]

Winn-Dixie contended that Oiler had not been terminated for refusing to adhere to masculine stereotypes, but instead because he was a man who publicly pretended to be a woman.[108] The district court accepted this distinction and agreed that Oiler was not a victim of sex discrimination. The court distinguished the case from *Price Waterhouse*, maintaining that "the plaintiff [in *Price Waterhouse*] may not have behaved as the partners thought a woman should behave, but she never pretended to be a man [n]or adopted a masculine persona."[109]

Oiler is yet another example of the courts' insistence on maintaining a gender dichotomy. In Oiler's own words: "[T]oo many people don't see the middle ground between black and white. And that's where people in my situation really are. People hadn't even heard the word transgender. There are a whole bunch of people in the middle."[110] So long as courts refuse to recognize that gender identity discrimination and sex discrimination are parts of the same whole, individuals like Oiler, who identify as male, but also want to express female parts of their identity, will remain vulnerable to discrimination in the workplace.

IV. Recent Exceptions to the Rule

There is some reason for optimism, however. Several non-gender-conforming plaintiffs have recently succeeded on sex discrimination claims. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, plaintiff Antonio Sanchez alleged that he was verbally harassed for not adhering to social demands of masculinity.[111] Coworkers used feminine pronouns to refer to Sanchez and mocked him for walking and carrying his serving tray "like a woman."[112] The Ninth Circuit held that the evidence that other employees referred to Sanchez using female gender pronouns and taunted him for behaving like a woman amounted to actionable gender stereotyping.

In *Rene v. MGM Grand Hotel, Inc.*, Medina Rene, an openly gay man, worked as part of an all-male butler staff.[113] Rene was constantly harassed by his coworkers, who called him "sweetheart," "muñeca," and "fucking female whore."[114] They told crude jokes, gave him sexually oriented 'gifts,' and forced him to look at pornography.[115] Rene was also repeatedly sexually assaulted; his coworkers touched him "like they would to a woman," grabbed his crotch, and poked their fingers in his anus.[116]

The district court dismissed Rene's Title VII suit, finding that Rene was targeted because he was gay,[117] but the Ninth Circuit reversed. The appellate court found that since the assaults targeted sexual body parts, Rene had been harassed "because . . . of sex,"[118] and whatever else may have motivated the attacks was of no legal consequence. The court cited *Oncale*, noting that the plaintiff "did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men*."[119] However, the court's decision in favor of Rene relied heavily on the severity of the offensive sexual contact; had Rene not been sexually assaulted, or had the touching been less egregious, the court may not have ruled in his favor.[120]

Although the majority ignored the fact that Rene's coworkers called Rene "sweetheart," "muñeca," and "fucking female whore," and missed the logical conclusion that Rene was

targeted because his coworkers did not find him to be masculine enough, three concurring judges found that this was a case of actionable gender stereotyping.[121] Circuit Judge Harry Pregerson pointed to the evidence that Rene's coworkers touched him and spoke to him "like a woman."[122] "There would be no reason for Rene's coworkers to whistle at Rene 'like a woman,' unless they perceived him to be not enough like a man and too much like a woman," Pregerson wrote.[123] "This is gender stereotyping, and that is what Rene meant when he said he was discriminated against because he was *openly* gay."[124] Thus, some judges are beginning to understand that men who are harassed for being gay are targeted because they do not conform to their coworkers' expectations of what a 'real man' is like, and that this is sex discrimination.

In two recent cases, the Sixth Circuit concluded that Title VII prohibits employment discrimination against individuals who do not present themselves as members of the gender they were assigned on the basis of biological sex. In *Smith v. City of Salem*,[125] plaintiff Jimmie Smith was a lieutenant in the City Fire Department. When Smith started "expressing a more feminine appearance" at work, his coworkers commented on Smith's appearance and told him that he was not acting "masculine enough."[126] After Smith informed his supervisor that he intended to transition into living as a woman, the department planned to fire Smith.[127]

The district court dismissed Smith's sex discrimination claim, ruling that Title VII does not prohibit discrimination against transgender people.[128] The Sixth Circuit reversed, reasoning that:

> "[a]fter *Price Waterhouse*, 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."[129]

Smith alleged that his conduct and mannerisms did not conform to his employers' and coworkers' ideas of how a man should look and behave.[130] The court agreed that if this were the basis for his termination, Smith had an actionable sex discrimination claim: "Discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's non-gender conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim . . . "[131]

Sex stereotyping based on a person's non-gender conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim . . . "

In *Barnes v. City of Cincinnati*,[132] the plaintiff, Philecea Barnes, had been an officer in the Cincinnati Police Department for seventeen years. Barnes presented himself as a man while on-duty, and as a woman while off-duty. He had a French manicure, arched eyebrows, and occasionally came to work wearing makeup.[133] After Barnes was promoted to sergeant,[134] he was the only sergeant subjected to extra supervision during the probationary period.[135] Rumors circulated through the police department that Barnes was either homosexual or bisexual.[136] One of Barnes' supervisors told him that he did not appear to be "masculine" and needed to stop wearing makeup.[137] Another supervisor told Barnes that he was going to fail probation because he was not "acting masculine enough."[138] Although his scores were above the minimum for passing, and even higher than at least one other sergeant who passed the probationary period, Barnes failed.[139] According to several other officers, Barnes lacked "command presence" and did not have the respect of his subordinates.[140] Barnes was the only person to fail probation between 1993 and 2000.[141]

At trial, Barnes successfully claimed that his demotion from sergeant violated Title VII, and the jury found in his favor.[142] Barnes argued that he was discriminated against because he failed to conform to sex stereotypes.[143] The Sixth Circuit upheld the judgment on appeal, holding that Barnes had produced evidence sufficient to support his claim of sex discrimination. The court relied on the comments made by his superior officers and noted that Barnes was singled out for intense scrutiny. It also found that Barnes's "ambiguous sexuality" and his practice of dressing as a woman outside of work were well-known within the CPD.[144]

One of the most recent cases involving a transgender plaintiff was *Schroer v. Billington*.[145] Diane Schroer was born a biological male. Before she legally changed her name or began presenting herself as a woman, she applied for job at the Library of Congress. She interviewed as "David," her legal name at the time, and wore traditional male clothing. After she was hired, Schroer told the interviewer that she was transgender, would be transitioning from male to female, and would begin work as Diane. The next day, Schroer was informed that she was "not a good fit," and the job offer was retracted. Schroer then brought a Title VII suit against the Library of Congress.[146]

The court granted summary judgment in favor of Schroer, finding that she was a victim of sex discrimination. District Judge James Robertson observed that the Library may have perceived Schroer as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently non-gender-conforming individual" and that each of the three amounted to impermissible sex stereotyping.[147] The court also agreed with Schroer's argument that "because gender identity is a component of sex, discrimination on the basis of gender identity is sex discrimination."[148] It determined that the Library had violated Title VII's plain language prohibiting discrimination "because of . . . sex" when it revoked its offer upon learning that Schroer, a biological male, intended to become "legally, culturally, and physically, a woman named Diane."[149] The court noted, critically, that other courts "have allowed their focus on the *label* 'transsexual' to blind them to the statutory language

itself."[150]

The *Schroer* decision indicates that federal courts are beginning to acknowledge that discrimination based on sexual orientation, gender identity, and gender expression are all forms of sex discrimination. Individuals like Peter Oiler, Diane Schroer, and Medina Rene experienced discrimination because they did not conform to their employers' expectations of masculinity. Demanding that a person behave or present himself or herself in a certain way at work because of the gender that society assigned to that person based on his or her genitals is sex discrimination. The Supreme Court has held already that sex stereotyping violates Title VII; breaking down the socially-constructed gender dichotomy may go past the Court's analysis in *Price Waterhouse*, but it is the logical next step. Moreover, analyzing Title VII claims would be far easier for courts if they stopped trying to maintain a gender divide that has become increasingly non-credible.[151]

V. TITLE VII AND CONGRESSIONAL INTENT

The remaining question is whether a broadened conception of sex discrimination conflicts with congressional intent. Many courts have refused to extend Title VII's protections to homosexual or transsexual plaintiffs on the grounds that doing so would contravene the purpose of Title VII. For instance, in *Ulane*, the Seventh Circuit declared, "[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended this 1964 legislation to apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals."[152]

Courts and commentators who express this view ignore the fact that the Supreme Court left the legislative history of Title VII behind with *Price Waterhouse*. And in *Oncale*, where the Court acknowledged that same-sex harassment is actionable under Title VII, Justice Scalia – a strict textualist[153] and one of the most conservative Justices – wrote: "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed."[154] In light of courts' gradually broadening interpretation of Title VII, their refusal to extend the statute's protections to transgender and homosexual persons based on legislative history seems disingenuous. The court in *Schroer v. Billington* agreed, stating, "[t]he decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of 'judge-supported legislative intent over clear statutory text.'"[155]

Some commentators who oppose an expanded reading of Title VII have pointed out that Congress has rejected proposals to amend Title VII to prohibit sexual orientation and gender identity discrimination.[156] They argue that this shows that Congress did not intend the statute to protect homosexual and transgender people. However, the *Schroer* Court expressly rejected such an argument, stating that the Supreme Court has cautioned against using legislative history in this way:

> Subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.
>
> Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.[157]

The *Schroer* Court suggested that Congress may have rejected the passage of bills that would amend Title VII to expressly prohibit gender identity discrimination because the statute already forbids it. Thus, the legislative "non-history" of Title VII may demonstrate that "some Members of Congress believe that the *Ulane* court and others have interpreted 'sex' in an unduly narrow manner . . . and that the statute requires, not amendment, but only correct interpretation."[158] Joel Friedman, a professor of law at Tulane Law School, has argued that interpreting discrimination on the basis of "sex" to encompass sexual orientation and gender identity discrimination would not circumvent congressional intent.[159] He points out that Congress often paints "in broad remedial strokes," leaving the work of interpretation up to the courts.[160]

Moreover, the courts' narrow interpretation of Title VII frustrates the statute's broad remedial purpose.[161] By refusing to protect gay men, lesbians, bisexual, and transgender people who face discrimination because they do not conform to a binary gender system, "courts perpetuate the very subordination that Title VII was designed to eliminate."[162] Courts' insistence on maintaining a strict gender dichotomy reinforces the notion that women and men "are" and "should be" a certain way. If employers are allowed to demand that men not act "like women," this sends a message to all people that being "feminine" is not a very good way to be – reinforcing patriarchy in the workplace and society as a whole. This result is antithetical to the statute's goal of "plac[ing] women on equal footing with men."[163]

CONCLUSION

"[T]he world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well."[164] The refusal of courts to recognize gender nonconformity discrimination as sex discrimination legitimizes social devaluation of the feminine. Instead of breaking down barriers in the workplace, as Title VII was intended to do, courts are actually reinforcing stereotypes about men and women when they allow employers to discriminate against non-gender-conforming men. In *Price Waterhouse*, the Supreme Court declared that "gender must be irrelevant to employment decisions."[165] To give proper effect to Title VII, courts must recognize sexual orientation, gender identity, and gender expression discrimination as sex discrimination and interpret the statute so as to protect individuals no matter where they fall along the gender continuum.

ENDNOTES

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[1] Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. (providing that "it shall be an unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . . . sex[.]").

[2] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

[3] In 2006, approximately eighty-five percent of the sexual harassment complaints under Title VII were brought by women. Equal Employment Opportunity Commission, *Sexual Harassment Charges: EEOC & FEPAs Combined, FY 1997 – FY 2006*,http://www.eeoc.gov/stats/harass.html (last visited Oct. 16, 2008). Of course, this means that more than one in seven Title VII claims is brought by a man – a far from insignificant number.

[4] *See, e.g.*, Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007); Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001) (agreeing that "on a theoretical level," transgender individuals are protected by existing sex discrimination laws, but arguing that "on a practical level," the category "gender identity" should be added to employment discrimination statutes to ensure transgender people are protected); *cf.* Nailah A. Jaffree, Note, *Halfway Out of the Closet: Oncale's Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799 (2002).

[5] Friedman, *supra* note 4, at 205.

[6] *See, e.g.*, Case, *supra* note 4.

[7] "Transgender" refers to individuals whose gender identity or expression does not conform to that typically associated with their sex. "Gender identity," in turn, refers to one's innate sense of being male or female. "Gender expression" is the manifestation of one's feeling masculine or feminine through clothing, behavior, or grooming. Gender Public Advocacy Commission (GPAC), *Definition of Terms*, http://www.gpac.org/workplace/terms.html (last visited Oct. 17, 2008).

[8] I. Bennett Capers, *Sex(ual) Orientation and Title VII*, 91 COLUM. L. REV. 1158, 1166-67 (1991) ("When lesbians and gays question a society that denies them the right to adopt children, they question a society that says it is a woman's place to raise children, a man's place to be the breadwinner, and both are needed to constitute a family. When lesbians and gays questions a society that denies them the right to express their love physically, they question a society that says a woman's body is not her own, but is still the subject of government control. And lastly, when lesbians and gays question a society that denies them basic employment rights, they question a society that says, more than a quarter of a century after Title VII's enactment, a woman is worth only seventy cents for every dollar made by a man").

[9] *Cf. id.* at 1160, 1166. Capers actually makes these arguments about homosexual relationships, but I believe they apply equally to transgender individuals.

[10] *See id.* at 1170.

[11] *Id.*

[12] *See* Dunson, *supra* note 4, at 499 ("Transgenders, by definition, challenge sex stereotypes (namely, the stereotype that if one has a vagina, one must present as a woman)").

[13] Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).

[14] *Id.* at 661.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 661 n.1.

[18] Dunson, *supra* note 4, at 470.

[19] 566 F.2d at 663.

[20] *Id.* at 664.

[21] *Id.* at 662-63.

[22] *Id* at 664.

[23] *Id.* (Goodwin, J., dissenting).

[24] *Id.* at 664.

[25] 566 F.2d at 664.

[26] *Id.* at 661.

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

[28] *Id.* at 1083.

[29] *Id.*

[30] *Id.* at 1085.

[31] *Id.*

[32] The Supreme Court held that gender stereotyping is impermissible sex discrimination in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[33] *Id.* at 250-51 (plurality opinion).

[34] *Id.* at 233.

[35] *Id.*

[36] *Id.* at 234.

[37] *Id.* at 234.

[38] Price Waterhouse, 490 U.S. at 235.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 237.

[42] *Id.* at 251 (internal punctuation omitted).

[43] *Id.* at 240.

[44] Price Waterhouse, 490 U.S. at 250.

[45] Case, *supra* note 4, at 46-70 (arguing that if masculine women were protected but effeminate men could be legally discriminated against, "this would send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued . . . ."); Capers, *supra* note 8, at 1180-81.

[46] Case, *supra* note 4, at 54-58. Case suggests that "even if it is not permissible to fire [an effeminate man] for his effeminacy, it may be permissible to fire him for the sexual orientation that is presumed and may in fact go with it." *See also* Jaffree, *supra* note 4, at 807 ("A woman who 'acts like a man' is unreservedly protected, in recognition of the unjust Catch-22 of an ambitious woman working in a 'man's world,' while men who 'act like women' are labeled homosexual, a class repeatedly not protected under Title VII").

[47] Dillon v. Frank, 1992 U.S. App. LEXIS 766 (1992).

[48] *Id.* at *2.

[49] *Id.* at *3.

[50] *Id.* at *3-4.

[51] *Id.* at *15.

[52] *Id.* at *18.

[53] Dillon, 199 U.S. App. LEXIS at *22.

[54] *Id.* at *28-30.

[55] "[I]t is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against 'because of' sex." Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997). Courts assume that male harassers who target women are either motivated by sexual desire or hostility to women in the workplace; consequently, pre-*Oncale*, they generally ignored, or took as a given, the "because of . . . sex" causal requirement in Title VII. Andrea Meryl Kirshenbaum, "'*Because of . . . Sex': Rethinking the Protections Afforded Under Title VII in the Post*-Oncale *World*, 69 ALB. L. REV. 139, 148 (2005).

[56] Doe, 119 F.3d at 575 (criticizing other federal courts for demanding "proof, above and beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of sex"). The Seventh Circuit pointed out that the fact that a plaintiff is male "should not make for an entirely different analysis, particularly for purposes of a statute that forbids sex discrimination." *See also* Andrews v. Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (suggesting that sexual propositions, innuendo, pornographic materials, and sexual derogatory language should be accepted as evidence of an intent to discriminate on the basis of sex); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) ("[S]exual harassment is *ordinarily* based on sex. What else could it be based on?"); David S. Schwartz, *When is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

[57] *Id.* at 575.

[58] Case, *supra* note 4, at 57.

[59] Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

[60] Case, *supra* note 4, at 60.

[61] Indeed, non-gender-conforming biological males – including youth – are frequently bullied and beaten, even killed. In a 2004 California study, fifty-four percent of young people reported that their school was unsafe for guys who aren't as masculine as other guys. GENDER PUBLIC ADVOCACY COMMISSION (GPAC), 50 UNDER 30: MASCULINITY AND THE WAR ON AMERICA'S YOUTH (2006), *available at* http://www.gpac.org/50under30/50u30.pdf. GPAC examined fifty murders of non-gender-conforming youth that occurred between 1996 and 2005. Ninety-two percent of the victims were biologically male but not presenting masculinely. *Id.* at 4. Almost all of the victims were killed with extreme violence, suggesting that the attacks were motivated by "intense rage and loathing." *Id.* at 5. *See also*, Case, *supra* note 4, at 26 ("Tomboys are far more acceptable and unproblematic today than are sissies . . . .").

[62] Peter Nicholas, *Gov. Criticizes Legislators as "Girlie Men"*, L.A. TIMES, July 18, 2004, at B1.
[63] Joanna Grossman & Linda McClain, *The "Girlie Men" Slur and Other Insults*, FINDLAW'S WRIT, Sep. 21, 2004, http://writ.news.findlaw.com/commentary/20040921_mcclain.html (last visited Oct. 18, 2008).
[64] *Id*.
[65] Case, *supra* note 4, at 29. Case contends that now, it may be better to be seen as a "masculine" woman than a "feminine" one. "[I]n the employment market and the law, the axis of comparative desirability may have shifted from one favoring gender conformity to one favoring masculinity pure and simple, whether manifested by men or women." *Id*. at 31. She cites research which shows that as women have moved into the work force and into positions of authority over the past fifty years, the pitch of their speaking voices has dropped considerably. "[W]omen in this society are, as a descriptive matter, moving closer to a masculine standard and, as a normative matter, are rewarded for so doing." *Id*. at 29.
[66] *Id*. at 47.
[67] Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).
[68] *Id*. at 566.
[69] *Id*. at 567.
[70] *Id*.
[71] *Id.* at 566. This case predated *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), in which the Supreme Court held that same-sex harassment is actionable under Title VII.
[72] *Id*. at 578. The following year, however, the Supreme Court remanded *Doe* for reconsideration in light of its decision in *Oncale*. It is unknown how *Doe* came out upon remand; given the restrictive guidelines the *Oncale* Court laid out for proving same-sex harassment claims, the *Doe* plaintiff may very well have lost.
[73] 119 F.3d at 568.
[74] 523 U.S. 75 (1998).
[75] *Id*. at 77.
[76] GPAC, *Frequently Asked Questions*, http://www.gpac.org/workplace/faq.html (last visited Oct. 19, 2008). These details about Oncale's appearance did not appear in the Supreme Court's opinion.
[77] 523 U.S. at 79.
[78] *Id*. at 77.
[79] *Id*. at 79.
[80] *Id*. at 81.
[81] *Id.* at 80.
[82] Oncale, 523 U.S. at 80.
[83] 523 U.S. at 80-81.
[84] *Id*. at 82. Justice Scalia made room in his sparse analysis to remind courts that common sense tells us that "simple teasing or roughhousing among members of the same sex" does not amount to actionable sexual harassment. "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads into the field . . . ." This part of his opinion seems to me to be tinged with homophobia – Scalia seems to be tripping over himself in his eagerness to point out that most male-on-male contact is purely "straight." After all, the "presumptively heterosexual" football player and coach, Jane Halley, *Sexuality Harassment, in* LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown and Jane Halley eds., 2002), represent the epitome of "manliness."
[85] Friedman, *supra* note 4, at 222.
[86] A class discussion in Professor Christine Littleton's Sex Discrimination seminar at UCLA Law School in Spring 2007 brought this point to my attention.
[87] Bibby v. Coca-Cola, 260 F.3d 257 (3d Cir. 2001).
[88] *Id*. at 260. Sexual graffiti including the plaintiff's name also appeared on the bathroom walls.
[89] *Id*.
[90] Case, *supra* note 4, at 26-27, points out, "Tomboys are far more acceptable and unproblematic today than are sissies, who, it is still feared, are at a high risk of growing up to be homosexual or transsexual and for whom clinical treatment is more often prescribed. This is further evidence of the disproportionate pull of gender – masculinity in a girl is approved while femininity in a boy is not only troublesome, but a marker for homosexual orientation."
[91] Martin v. Dep't of Correctional Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).
[92] *Id.* at 441.
[93] *Id*.
[94] *Id*. at 446.
[95] *Id*. at 447.
[96] *Id*.
[97] Jaffree, *supra* note 4, at 816-17.
[98] Hamm v. Weyauwega Milk Products, Inc., 199 F. Supp. 2d 878 (E.D. Wis. 2002).
[99] *Id*. at 882.
[100] *Id*.
[101] *Id*. at 894.
[102] Capers, *supra* note 8, at 1160.
[103] Friedman, *supra* note 4, at 238.
[104] Oiler v. Winn-Dixie Louisiana, Inc., 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).
[105] *Id*. at *6.
[106] *Id*. at *8-9.
[107] *Id.* at *8-9.
[108] *Id*. at *28.
[109] *Id*. at *29.
[110] GPAC, *GenderPAC National News Interviews Peter Oiler*, Feb. 20, 2001, http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0275 (last visited Oct. 19, 2008).
[111] Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864 (9th Cir. 2001).
[112] *Id*. at 870.
[113] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002).
[114] *Id.* "Muñeca" is Spanish for "doll."
[115] *Id.*
[116] *Id.*
[117] *Id*. at 1066.
[118] *Id.* at 1066.
[119] MGM Grand Hotel, Inc., 305 F.3d at 1067.
[120] *Id*. at 1068 ("In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive physical conduct of a sexual nature when that conduct is sufficiently severe or pervasive." (internal citation omitted)).
[121] *Id*. at 1068 (Pregerson, concurring).
[122] *Id*.
[123] *Id.* at 1069 n.2.
[124] *Id*.
[125] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[126] *Id.* at 568.
[127] *Id.*
[128] The district court accused Smith of "invoke[ing] the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,' as an end run around his 'real' claim, which . . . was based upon his transsexuality." *Id.* at 571.
[129] *Id*. at 574.
[130] *Id.* at 574.
[131] Smith, 378 F.3d at 575.
[132] Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).
[133] *Id.* at 734.
[134] Barnes placed eighteenth out of 105 officers who sat for the promotional exam. *Id* at 733.
[135] "The purpose of the probationary period is to allow superior officers to observe the individual to determine whether the person should remain in the position." *Id.* at 733. Barnes was told not to go into the field alone, was required to wear a microphone at all times, and had to ride in a car with a video camera during the final weeks of his probation. No other sergeants were evaluated in this manner. *Id*. at 734. One of the officers responsible for evaluating Barnes testified that Barnes had been placed in the special program "to target him for failure." *Id.* at 735.
[136] Barnes, 401 F.3d at 733.
[137] *Id.* at 735.
[138] *Id.*
[139] *Id.* Barnes's scores on the sergeant evaluation tests were higher than at least one other probationary sergeant.
[140] *Id.* at 734. Nearly every officer asked to evaluate Barnes's "command presence" defined the term differently. Barnes's expert testified that "employers who use subjective factors, like 'command presence,' to evaluate an employee are engaging in stereotyping."
[141] *Id.* at 735.
[142] Barnes, 401 F.3d at 735.
[143] *Id.* at 737.
[144] *Id.* at 738.
[145] Schroer v. Billington, 424 F. Supp. 2d 203 (D.C. 2006).
[146] *Id.*
[147] *Id.* at 210.
[148] *Id.* at 207.
[149] *Id.*

[150] *Id.*
[151] Eight states and eighty cities and local governments have adopted laws forbidding workplace discrimination based on gender identity/expression, and 193 major corporations have adopted gender identity/expression nondiscrimination policies. GPAC, *Statistics*, http://www.gpac.org/workplace/statistics.html (last visited Oct. 19, 2008). GPAC believes that a tipping point has been reached, "with major corporations adding gender rights protections at an increasing rate." GPAC, GENDER RIGHTS: THE NEW EDGE OF WORKPLACE FAIRNESS (2006), *available at* http://www.gpac.org/workplace/GenderRights.pdf. GPAC notes that, encouragingly, some powerhouse companies in traditionally conservative industries, like finance and insurance, have adopted such policies. *Id.*
[152] Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).
[153] Scalia believes that when judges interpret laws, they should be "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time." Amy Gutmann, Introduction to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW vii (Amy Gutmann, ed. 1998). Typically, Scalia looks only to the text of the law itself, eschewing investigation into legislative history.
[154] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[155] Schroer v. Billington, No. 05-cv-01090 (D.D.C. Sept. 19, 2008) (citing Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting).
[156] *See, e.g.*, H.R. 2015, 110 Cong., 1st Sess. (2007); H.R. 3685, 110 Cong., 1st Sess. (2007), H.R. 3686, 110 Cong., 1st Sess. (2007); *see also* Oiler v. Winn-Dixie Louisiana, Inc., 2002 U.S. Dist. LEXIS 17417, *22 (collecting bills).
[157] Schroer v. Billington, No. 05-cv-01090 (D.D.C. Sept. 19, 2008) (citing Pension Ben Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).
[158] Schroer v. Billington, No. 05-cv-01090 (D.D.C. Sept. 19, 2008).
[159] Friedman, *supra* note 4, at 226. Friedman points out that Congress is "fully ready, willing, and able to overturn the Court's interpretations of its handiwork," but there is no "evidence of Congressional dissatisfaction with, or repudiation of, the Court's articulation of a sex-stereotype based model of sex-based discrimination." *Id.* at 227.
[160] Friedman, *supra* note 4, at 227.
[161] Capers, *supra* note 8, at 1169 (discussing broad purpose that courts have read into Title VII).
[162] *Id.* at 1170.
[163] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).
[164] Case, *supra* note 4, at 68.
[165] Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (plurality opinion).

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