

APRIL 19, 2016

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DISABILITY LAWS & LGBT RIGHTS IN THE WORKPLACE

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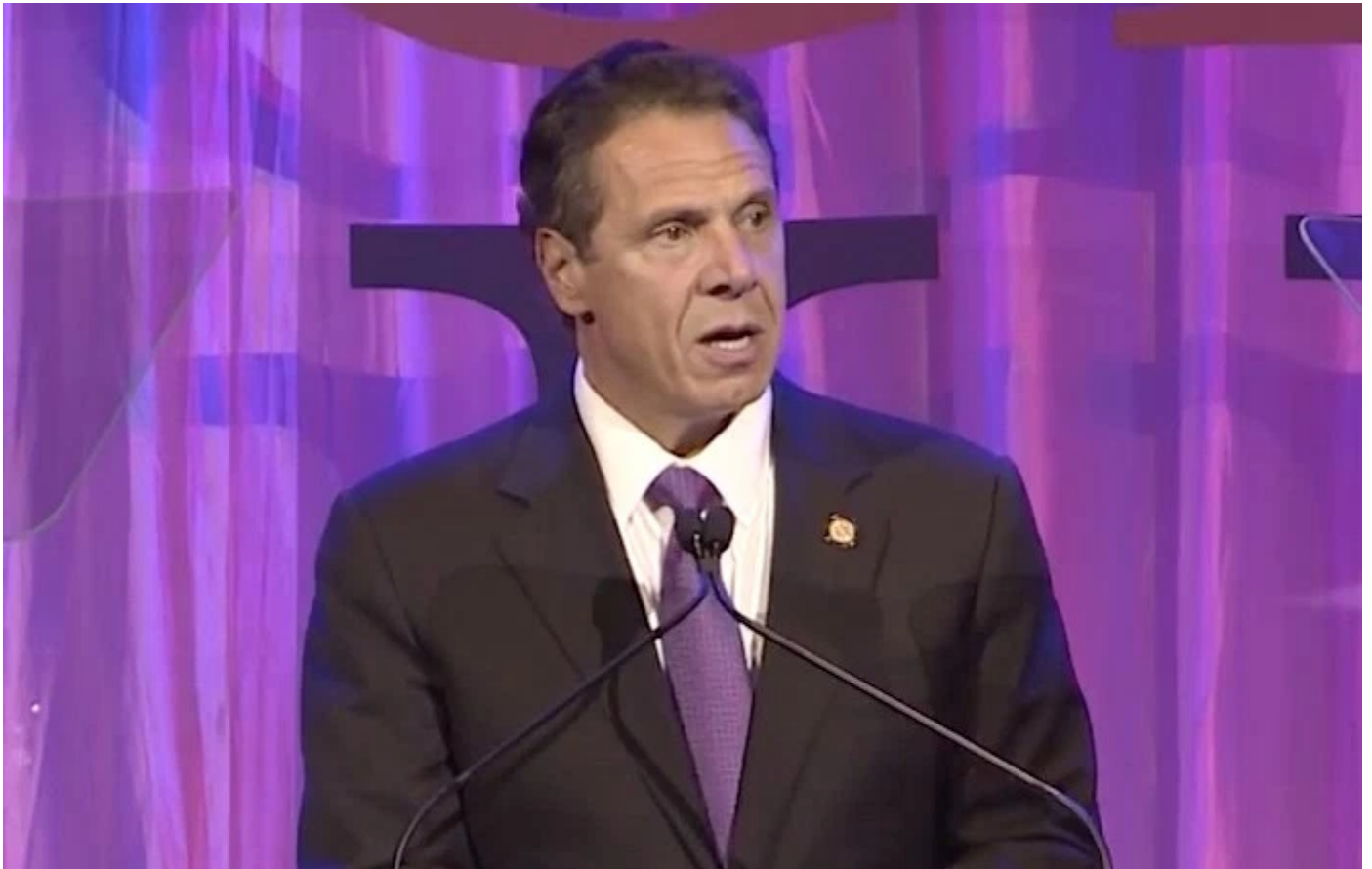
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New York Governor Andrew Cuomo Bans Travel to Mississippi Over Anti-LGBT 'Religious Freedom' Law

by **Andy Towle**
April 5, 2016 | 7:37pm



New York Governor Andrew Cuomo [has banned non-essential trips by state workers to Mississippi](#) over the anti-LGBT 'religious freedom' bill signed into law by Governor Phil Bryant today.

The ban, which takes effect immediately, follows Mississippi's enactment of a discriminatory law that allows business and non-profit groups to refuse service to people on the basis of their sexual orientation or gender identity.

"Discrimination is not a New York value. We believe our diversity is our greatest strength, and we will continue to reject the politics of division and exclusion," **said Governor Cuomo**. "This Mississippi law is a sad, hateful injustice against the LGBT community, and I will not allow any non-essential official travel to that state until it is repealed."

Last month, Governor Cuomo also **banned** non-essential state travel to North Carolina, following that state's enactment of a law which bars transgender individuals from using restrooms appropriate for their gender identities, excludes sexual orientation and gender identity from state anti-discrimination protections, and prohibits municipalities from extending those protections to LGBT citizens.

The ban "requires all New York State agencies, departments, boards and commissions to immediately review all requests for state funded or state sponsored travel to the state of Mississippi."

New York Whole Foods staff accused of referring to transgender employee as 'it'



When Victor King began working at a Whole Foods supermarket in New York City's traditionally LGBT-friendly Chelsea neighborhood, he did it with the assurance that his being transgender would not be an issue.

Over the course of the six months that the 21-year-old worked there, however, he was allegedly subjected to repeated instances of transphobic harassment (<http://www.grubstreet.com/2016/04/transgender-whole-foods-chelsea-discrimination.html>) that prompted him get in contact with Whole Foods' upper-level human resources representatives.

According to a lawsuit recently filed by King (<http://www.law360.com/articles/779743/whole-foods-staff-called-transgender-man-it-suit-says>), his coworkers made a habit of referring to him using inappropriate pronouns like "she," "her," and "it." King also alleges that his manager, Quadry Scott, told him that he knew that King was "not a guy," and that he was "not going to refer to you as a guy."

Despite voicing his concerns about his toxic work environment, King says that Whole Foods ignored his requests for help. It wasn't until King got in contact with the Ali Forney Center, an LGBT outreach organization that had gotten King the job, that the store's employees were required to take workplace harassment courses. Instead of inspiring his colleagues to treat him with respect, though, King says that abuse only got worse.

Rather than sitting on his hands and waiting for Whole Foods to hold its employees accountable for their behavior, King's taking his fight to court. In his suit, King argues that Whole Foods' employees were in direct violation of the New York City Human Rights (<http://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender>) legislation that provides workplace protections for LGBT people. King insists that suing is the only method of recourse he has left.

"After all, if the Whole Foods in Chelsea was this hostile, why would any other be more inviting?" King's suit reads. "It is also a terrible solution to punish the only innocent person in order to avoid addressing the offending staff and managers."

Michael Sinatra, a Whole Foods spokesperson, insisted to Gothamist that it had only just received word of King's lawsuit (http://gothamist.com/2016/04/05/whole_foods_chelsea.php) and that it was going over his accusations.

"As a company, we have long celebrated diversity and acceptance and have zero tolerance for discrimination," Sinatra said. "Our diverse and inclusive culture is reflected in our team member base, including our leadership, as well as in community partnerships here in New York City."

Voices

PayPal is pulling out of North Carolina for its anti-LGBT laws. More companies should show such courage

PayPal is willing to place paramount importance on the safety of its LGBT staff in a state that puts their lives at risk

Lee Williscroft-Ferris | Wednesday 6 April 2016



North Carolina passed the Public Facilities Privacy & Security Act. The bill represents a grave attack on LGBTQ+ equality

PayPal's decision to abandon plans for a brand new \$3.6m global operation centre in North Carolina is bad news for the state's economy. With 400 potential jobs and a significant boost to local wages at stake, PayPal's move is symbolic of the battle-lines being redrawn in the fight for full LGBTQ+ equality.

In truth, PayPal's change of heart is a principled one, a direct response to the passage of the Public Facilities Privacy & Security Act. The bill represents a grave attack on LGBTQ+ equality, providing for the prohibition of local equality ordinances and the requirement that trans people use the toilets corresponding to the gender on their birth certificate. This puts

LGB people in the situation whereby they may marry, yet possibly face unfettered discrimination in the workplace. On the menu for trans people is the threat of humiliation, misgendering, even violence each time nature calls when not at home.

The fact that a well-known global entity such as PayPal is willing to place paramount importance on the wellbeing and safety of its employees is to be celebrated. Economic activism can, and indeed should, form an integral strand of our regrettable, yet all too real, ongoing struggle for full equality in all areas of life. Where authorities legislate in favour of discriminatory practices, policies and procedures, companies must refuse to pay in. To act otherwise amounts to a betrayal of LGBTQ+ employees and the community at large. The sad truth is that PayPal is highly likely to be an exception to the rule in its seizure of the moral high-ground.

Ultimately, the pull of the Pink Pound remains undiminished. Those of us with a semblance of critical thought are tuned into the disingenuous way in which LGBTQ+ people are often courted in an attempt to persuade them to part with their cash. It is precisely for this reason that activists must diversify their strategy to attack governments where it hurts, in the areas of job growth and maintenance of a stable tax base, particularly in this era of almost constant economic instability.

Only then will those in power fully appreciate the consequences of their actions and the devastating impact their law-making can have on the lives of LGBTQ+ people.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Tamara Lusardi,
Complainant,

v.

John M. McHugh,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120133395
Agency No. ARREDSTON11SEP05574

DECISION

On September 23, 2013, Complainant filed an appeal from the Agency's September 5, 2013, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant proved that she was subjected to disparate treatment and harassment based on sex when the Agency restricted her from using the common female restroom, and a team leader (S3) intentionally and repeatedly referred to her by male pronouns and made hostile remarks.

BACKGROUND¹

This case concerns allegations of disparate treatment on the basis of sex in the terms and conditions of Complainant's employment and allegations that harassment based on sex subjected Complainant to a hostile work environment. Although Complainant was hired as a civilian employee with the U.S. Army Aviation and Missile Research Development and

¹ The factual background as laid out here is not exhaustive. Two comprehensive reports of the facts relevant to this case have already been compiled: the EEO Report of Investigation and the Agency's Final Agency Decision (FAD). We have considered those documents as well as the Complainant's Brief in Support of Appeal and the extensive transcript from the Fact-Finding Conference conducted on October 17-18, 2012. The facts pertinent to the legal analysis necessary are largely not in dispute.

Engineering Center ("AMRDEC") at Redstone Arsenal in Huntsville, Alabama in 2004, the allegations in this complaint relate only to the period from October 2010 to August 2011 (the "relevant time period"). Complainant was employed at the AMRDEC Software Engineering Directorate ("SED") under the supervision of S1, the Quality Division Chief. During the relevant time period, however, Complainant was co-located in a separate unit – the Project Management Office, Aircraft Survivability Equipment ("ASE") where she worked as a Software Quality Assurance Lead under the direction of S3, the Software Engineering Lead, who was in turn supervised by S2, the Technical Chief. In August 2011, Complainant returned to her primary job at SED.

Complainant's Transition and Bathroom Access

Complainant is a transgender woman. Although Complainant had discussed her gender identity with S1 as early as 2007, she began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court changing her name from one commonly associated with men to one commonly associated with women. At that time, she also requested that the government change her name and sex on all personnel records. The Office of Personnel Management ("OPM") effected those changes on October 13, 2010. This caused Complainant's work e-mail address to reflect her new name.

On October 26, 2010, at the request of S2, Complainant met with S2 and S1 to discuss the process of transitioning from presenting herself as a man to living and working, in conformance with her gender identity, as a woman. At that meeting, Complainant and her supervisors discussed how Complainant would explain her transition to colleagues and the estimated timeline for any medical procedures.

As part of that meeting, they also discussed which bathrooms Complainant would use when she began presenting as a woman. The plan, written in the form of a memorandum from Complainant to management, indicated that Complainant would use a single-user restroom referred to as the "executive restroom" or the "single shot rest room" rather than the multi-user "common women's restroom" until Complainant had undergone an undefined surgery.

S2 testified that in his recollection no one "insisted" that Complainant utilize only the executive restroom but that the plan was mutually crafted by himself, S1, and Complainant. Report of Investigation (ROI), Volume (Vol.) 1, 2323; Transcript of Fact-Finding Conference (TR) 123. According to Complainant, "We agreed up front in order to allow people to become accustomed to me and not feel uncomfortable that I would use the front bathroom for a period of time." ROI Vol. 1, 2223; TR 23. She testified that she agreed to use the executive bathroom for the initial period "[b]ecause I have a good heart and I did believe there were people who might have issues with it and the ability for them to grow comfortable with who I was . . . would have provided it." ROI Vol.1, 2223-2224; TR 23-24. S1 expressed at the time that it was her belief, after consulting with Human Resources, that because Complainant

was a woman, she was free to use whichever women's restroom she wanted. ROI Vol. 1, 2224, 2389; TR24, 189.

Regardless of the motivations behind the creation of the transition plan, it apparently had to be "approved" by higher level management. The Deputy Program Manager of the Program Executive Office testified that he made the final decision as to which bathroom Complainant would use. ROI Vol. 1, 2451; TR 251. He stated:

I made the decision based on the fact that I have a significant number of women in my building who would probably be extremely uncomfortable having an individual, despite the fact that she is conducting herself as a female, is still basically a male, physically.

And that would cause as many problems if more problems [sic] than having the individuals use a private bathroom. I also thought that under the circumstances, a male restroom would be inappropriate. So, that was left [sic] to use the single use bathrooms.

ROI Vol. 1, 2452; TR 252. Additionally, a Lieutenant who supervised S2 testified that Complainant's bathroom access was conditioned on a medical procedure:

[W]e all agreed back then that there was a procedure, operation that was to take place that would essentially signify a complete transformation to a female. . . And that procedure would be the point of where all the bathrooms would be on limits for or within limits for [the Complainant] to use for that point.

ROI Vol. 1, 2491; TR 291.

The transition plan was given final approval by the Deputy Program Manager in early November 2010. Complainant e-mailed the entire staff on November 22, 2010, explaining her situation and indicating that for an initial period, she would use the executive restroom. She began presenting as a woman at work following the Thanksgiving holiday. Complainant regularly used the executive restroom except on three occasions in early 2011. On one occasion, the executive restroom was out of order for several days. On another occasion, the executive restroom was being cleaned. In these incidents, Complainant felt that her only options were to leave the facility to locate a restroom off-site, use the common women's restroom, or use the common men's restroom. She chose to use the restroom associated with her gender. After each incident, Complainant was confronted by S2 who told her she'd been observed using the common women's restroom, that she was making people uncomfortable, and that she had to use the executive restroom until she could show proof of having undergone the "final surgery." ROI Vol. 1, 2245; TR 45.

Complainant testified that in January 2011 when S2 confronted her about using the common women's restroom, she responded, "I am legally female. I used it." ROI Vol. 1, 2229; TR 29.

Harassment

During the relevant time period, S3 repeatedly referred to Complainant by her former male name, by male pronouns, and as "sir." Complainant testified that S3 referred to her using these male signifiers on at least seven occasions when he did not correct himself, on four additional occasions when he did correct himself, and, specifically, in a July 2011 e-mail exchange. Complainant stated that S3 referred to her using male signifiers during heated discussions and meetings. S3 made these comments in front of coworkers and contractors and sometimes in front of people who had no prior knowledge of her transition. Complainant did not correct S3 because she did not want to question her supervisor in front of other people. Additionally, Complainant did not correct S3 in private because she felt she "was in enough hot water" and "anything else ... would have gotten [her] kicked out of there." ROI Vol. 1, 2264; TR 64.

S3 admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition, but attempted to excuse his behavior by saying it was not meant in a malicious way and was merely a "slip of the tongue." ROI Vol. 1, 2299-2300; TR 99-100. Complainant acknowledged that there were occasions when S3's usage of male signifiers was merely a "slip of the tongue," but Complainant also believes there were occasions when S3 intentionally used male pronouns to refer to Complainant in order to elicit a response from her. ROI Vol.1, 2299, 285; TR 85. Complainant testified that she could tell S3 used male signifiers during heated discussions or moments of anger because "[h]is veins were popping out of his forehead, his face was red, and he was quite agitated." ROI Vol.1, 2286; TR 86. Complainant also stated that during these exchanges S3's demeanor and body language were "representative of a negative connotation." ROI Vol. 1, 2275; TR 75.

In July 2011 Complainant and S3 exchanged a series of e-mails regarding Complainant's belief that her team members did not treat her as an equal. In a July 26, 2011 e-mail, in response to Complainant's statement that S3 was on the side of other employees who do not treat her as an equal, S3 responded to Complainant, "Sir, not on anyone's side." ROI Vol. 1, 488. Complainant testified that S3 wrote "sir" in this e-mail out of anger because during their "verbal conversation that ensued after that e-mail ... he was fairly agitated." ROI Vol. 1, 2268; TR 68.

Witness testimony corroborates that during the relevant time period S3 intentionally referred to Complainant by her former male name and as "sir" well after Complainant's November 2010 letter notifying her colleagues of her transition. ROI Vol. 1, 2531; TR 331. Specifically, a witness stated that S3 smirked and giggled in front of others while joking, "What is this, [Complainant's former male name] or [Complainant's name]?" Vol. 1, 2534; TR 334. This witness also testified that Complainant stated she was working in a hostile or uncomfortable environment.

After Complainant's e-mail address changed to reflect her name, but before she began presenting as female, curious coworkers questioned Complainant about the situation. As a result of the questions S2 asked Complainant to "hold down the chatter with people that were inquiring" about her transition. ROI Vol.1, 2222; TR 22.

Complainant testified that, although she did not inform management that she felt she was being subjected to a hostile work environment, she did tell Colonel 2 that there were "some issues." ROI Vol. 1, 2269, TR 69.

EEO Investigation and Final Agency Decision

Complainant initiated EEO counselor contact on September 6, 2011, and filed a formal complaint on March 14, 2012, alleging that the Agency subjected her to disparate treatment and a hostile work environment based on sex when the Agency restricted her from using the common female restroom and a team leader (S3) repeatedly referred to her by her former male name and called her "sir." The Agency accepted the complaint and conducted an investigation, including a fact-finding conference. The Agency issued Complainant a copy of the investigative file and a notice of right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision (FAD). Complainant elected an immediate FAD, which the Agency issued on September 5, 2013.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged. Specifically, the Agency concluded that it had provided legitimate, non-discriminatory reasons for its requirement that she use the executive restroom, and that Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency determined that, during a meeting with management, Complainant agreed to use the "single shot" executive restroom until she "had surgery," and that testimony and e-mails between Complainant and management reflected that management was supportive of Complainant and "committed to ensuring [Complainant] would be treated with dignity and respect." Additionally, the Agency concluded that Complainant had not shown that she was subjected to disparate treatment based on sex because Complainant did not tell management that the amenities in the executive restroom were inadequate compared to the common female restroom facility and, therefore, management did not deny her access to equal facilities.

The Agency further determined that, although S2 reminded Complainant about the bathroom access plan she had with management, the comments were not sufficiently severe or pervasive to constitute harassment.

With respect to Complainant's claim that S3 referred to her by male pronouns, names, and titles, the Agency concluded that these were isolated incidents that were not sufficiently severe or pervasive to constitute a hostile work environment.

On September 23, 2013, Complainant filed this appeal of the agency's final decision.

CONTENTIONS ON APPEAL

Complainant contends that the Agency erred when it found that she failed to show that she was subjected to sex discrimination and harassment. Complainant contends that, by restricting her to the single stall restroom because she is transgender, the Agency changed the terms and conditions of her employment solely based on her sex, in violation of Title VII. Complainant also reiterates her claim that the Agency subjected her to a hostile work environment by allowing S3 to refer to her by a male name and pronouns. Complainant contends that, although S3 claimed that his use of incorrect gender pronouns and names was a "slip of the tongue," S3 only did this in heated exchanges or group settings and in a manner that communicated a derogatory connotation. Complainant maintains that "these daily humiliations and reminders that the Agency did not accept her gender identity created a hostile work environment." Complainant's Brief, p. 10.

In its reply, the Agency requests that we affirm its final decision. The Agency maintains that, taking into account the concerns of Complainant's female co-workers who had known her as male for years, management asked Complainant to use the single-stall restroom in the executive suite, and she agreed to do so until her surgery was "complete." The Agency maintains that there is no law that mandates that agencies allow transgender individuals to use restrooms that are consistent with their gender identity. The Agency further maintains that, if it had been aware of Complainant's concerns about the restroom facilities, arrangements could have been made to accommodate her needs, but it is unclear whether her inability to use a restroom with equivalent amenities constitutes an adverse action. The Agency contends that the record reflects that it was "very supportive of the complainant's transition from male to female," and that Complainant was grateful for her managers' and co-workers' support. Agency Brief, p. 7. The Agency concludes that, in the absence of legal precedent, management worked out a "fair solution" that took into account the concerns of all employees. Id.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Nov. 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

Disparate Treatment: Restroom Facilities

Title VII states that “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1), (2) (making it unlawful for a covered employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” because of sex).

To establish a claim of disparate treatment on the basis of sex, a complainant must show the agency took an adverse employment action against the complainant because of the complainant’s sex. This can be shown through either direct or indirect evidence.

“Direct evidence” is either written or verbal evidence that, on its face, demonstrates bias and is linked to an adverse action. Pomerantz v. Dep’t of Veterans Affairs, EEOC Appeal No. 01990534 (Sept. 13, 2002). Where there is direct evidence of discrimination, there is no need to prove a prima facie case or facts from which an inference of discrimination can be drawn. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Moreover, where the trier of fact finds that there is direct evidence of discrimination, liability is established. Guidance on Recent Developments in Disparate Treatment Theory, No. 915.002, July 14, 1992, Section III; EEOC Compliance Manual § 604.3, “Proof of Disparate Treatment,” at 6-7 (June 1, 2006).

Complainant is a transgender individual. “Transgender” is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. American Psychological Association, Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression, p. 1 (2011)²; see also Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”). “Gender identity” refers to a person’s internal sense of being male or female (or, in some instances, both or neither); “gender expression” refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. Id. In this case, Complainant identified as female and has consistently presented herself as female since at least November 2010.

² Available online at <http://www.apa.org/topics/sexuality/transgender.pdf>.

Complainant alleges that the Agency subjected her to sex discrimination when it treated her differently than other employees because she is transgender. In Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012), the Commission held that discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination violates Title VII, absent a valid defense. We stated :

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.” See Schwenk, 204 F.3d [1187] at 1202. 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.” Price Waterhouse, 490 U.S. at 244.

Macy, EEOC Appeal No. 0120120821.

Here, the Agency acknowledges that Complainant’s transgender status was *the* motivation for its decision to prevent Complainant from using the common women’s restroom. The Deputy Program Manager testified that the restriction was imposed due to the Agency’s belief that a significant number of women in the building would be “extremely uncomfortable having an individual [use the common female restroom because], despite the fact that she is conducting herself as a female, [the individual] is still basically a male, physically.” Likewise, the Agency acknowledges that it restricted Complainant from the common women’s restroom because of concerns about employee reaction to Complainant as a transgender individual. S1, for example, testified that management limited Complainant to the front executive restroom because it otherwise would have been a “real shocker for everyone in the workplace.” This constitutes direct evidence of discrimination on the basis of sex.

The Agency defends its actions in part by pointing out that the Complainant agreed to use the “single shot” restroom while other employees adjusted to her transition. In this case, the “agreement” in question was a one-page memorandum from the Complainant to the management team. It outlined the reasons for Complainant’s transition and a tentative list of next steps under the heading “Path Forward.” The first step, starting in mid-November, was for Complainant to start dressing consistent with her gender identity. During this time, her plan said she would “use [the] single shot restroom.” The next step, set to occur about a month later, was for Complainant to undergo an undefined “Surgical Procedure” and then put in a request to use the common facility. In accordance with her plan, Complainant used the single-shot restroom in the period following her change in dress. She apparently did not

undergo a surgical procedure in December and did not submit a formal request to use the common facility exclusively. On two occasions, however, she found that the single-shot restroom was out-of-order or closed and decided to use the common facility. She was confronted by S2 after each time she used the common facility. He told her that she could not use those facilities until she had undergone “final surgery.” Complainant asserted in response that she was “legally female” and entitled to use the women’s restroom if needed.

This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities – or to other terms, conditions, or privileges of employment – on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.³

On this record, there is no cause to question that Complainant – who was assigned the sex of male at birth but identifies as female – *is* female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women’s restrooms. This “real life experience” often is crucial to a transgender employee’s transition. As OPM points out:

[C]ommencement of the real life experience [i]s often the most important stage of transition, and, for a significant number of people, the last step necessary for

³ Gender reassignment surgery is in no way a fundamental element of a transition. Transitions vary according to individual needs and many do not involve surgery at all. As the Office of Personnel Management has explained:

Some individuals will find it necessary to transition from living and working as one gender to another. These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some individuals, however, will not pursue some (or any) forms of medical treatment because of their age, medical condition, lack of funds, or other personal circumstances. Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.

Office of Personnel Management (OPM), Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, (OPM Transgender Guidance), available online at <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.

them to complete a healthy gender transition. As the name suggests, the real life experience is designed to allow the transgender individual to experience living full-time in the gender role to which he or she is transitioning. . . . [O]nce [a transitioning employee] has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. . . . [T]ransitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender.

OPM Transgender Guidance.

Agencies are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions. For a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one. See id.

Circumstances can change, however and an employee is never in a position to prospectively waive Title VII rights. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (“[W]e think it clear that there can be no prospective waiver of an employee’s rights under Title VII.”); see also Vigil v. Dep’t of the Army, EEOC Request No. 05960521 (June 22, 1998) (“ . . . [an] agreement that waives prospective Title VII rights is invalid as violative of public policy.”) Agencies should, as the OPM Guidance suggests, view any plan with a transitioning employee related to facility access as a “temporary compromise” and understand that the employee retains the right under Title VII to use the facility consistent with his or her gender. OPM Transgender Guidance.⁴

The Agency states that it would not allow Complainant to use the common female restroom because co-workers would feel uncomfortable with this approach. We recognize that certain employees may object – some vigorously – to allowing a transgender individual to use the restroom consistent with his or her gender identity. Some, like the Agency decision makers in this case, may not believe a transgender woman is truly female, and thus entitled or eligible to use a female bathroom, unless she has had gender reassignment surgery. Some co-workers

⁴ This is not to say that plans have no place in the transition process. Properly developed, transition plans ensure that a transitioning employee is treated with dignity and respect. The process of developing a plan also opens important channels of communication between the transitioning employee and management. The plans should not, however, be used as a means for restricting a transitioning employee. Rather, they should serve as tools for enabling the employee to complete his or her transition in an open and welcoming way.

may be confused or uncertain about what it means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker.

But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. See Macy, EEOC Appeal No. 0120120821; see also Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants). Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome.⁵ See Diaz, 442 F.2d at 389 ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large, extent, these very prejudices the Act was meant to overcome."); Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999); cf. Cruzan v. Special Sch. Dist., No.1, 294 F.3d 981 (8th Cir. 2002) (school's policy of allowing transgender women to use women's faculty restroom did not create a hostile work environment for other employees).⁶

⁵ Thus, for instance, employers may not prohibit a transgender female worker from using the female bathroom based on speculation or stereotypes that such workers are somehow inherently dangerous or prone to violence, any more than a sheriff's office can exclude men from supervisory positions in female inmate housing based on unsubstantiated concerns that substantially all male deputies are likely to engage in sexual misconduct. See Ambat v. City & County of San Francisco, 757 F.3d 1017, 1029 (9th Cir. July 14, 2014) (concluding the assumption that "'all or substantially all' male deputies are likely to perpetrate sexual misconduct [against female inmates]" without evidence to support it "amount[s] to 'the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII'"). Of course, if a transgender woman using a common female restroom were to assault a co-worker using the same restroom, then the matter could and should be dealt with like any other workplace conduct violation – just as it would be if any other woman using a common female restroom assaulted a co-worker.

⁶ For this reason, the Commission disagrees with the holdings of cases like Kastl v. Maricopa County Cmty. College Dist., 325 Fed. Appx. 492 (9th Cir. 2009), and Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In Kastl, the employer contended "that it banned Kastl from using the women's restroom for safety reasons." Id. at 494. In Etsitty, the employer claimed that it did so out of fear of being sued for allowing one of its employees to use the "wrong" restroom. In both cases, the courts found that these respective explanations were legitimate, non-discriminatory reasons under the circumstantial evidentiary framework

Finally, the Agency maintains that it is unclear whether restricting Complainant from using the common restrooms is even an adverse employment action. The Commission has long held that an employee is aggrieved for purposes of Title VII if she has suffered a harm or loss with respect to a term, condition, or privilege of employment. Diaz v. Dep't of Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). Equal access to restrooms is a significant, basic condition of employment. See e.g., OSHA, Interpretation of 20 C.F.R. 1910.141 § (c)(1)(i): Toilet Facilities (Apr. 4, 1998) (requiring that employers provide access to toilet facilities so that all employees can use them when they need to do so). Here the Agency refused to allow the Complainant to use a restroom that other persons of her gender were freely permitted to

from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the transgender employee had not proven that the proffered reason was pretextual. Kastl, at 493-94; Etsitty, 502 F.3d at 1224. The Commission finds the rationale of these cases unpersuasive. First, an employee need not use the McDonnell Douglas framework when there is direct evidence that an adverse employment action has been taken on the basis of a sex-based consideration such as an employee's transgender status. Second, where an employer proffers an explanation inextricably linked to the protected trait – such as admitting that it refused to allow a transgender worker to use a restroom consistent with the worker's gender identity because of a belief that the worker's transgender status might raise safety or liability issues – that rationale is not non-discriminatory. Instead, that proffered justification is indistinguishable from the protected trait at issue and thus cannot serve as a “legitimate” explanation. Cf. Johnson v. State of NY, 49 F. 3d 75, 80 (2nd Cir. 1995) (holding that a policy requiring active membership in an organization where membership was automatically rescinded at age 60 was not neutral; it was, instead, “inextricably linked” with age). Indeed, the Etsitty Court itself acknowledged that: “It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual.” However, as the Etsitty court went on to explain, it had already concluded that “Etsitty may not claim protection under Title VII based upon her transexuality *per se*” and thus Etsitty's claim had to “rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes.” Etsitty at 1224. In light of that fact, the Etsitty court concluded that “[h]owever far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms.” Id. Of course, as noted previously, the Commission in Macy has held that discrimination on the basis of transgender status is *per se* sex discrimination, finding that a plaintiff need not have specific evidence of gender stereotyping by the employer because “consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual.” Id., 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012).

use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment.⁷

But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a "single shot" restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect Cf. 42 U.S.C. § 2000e-2(a)(2) (making it unlawful to "segregate" employees in any way that deprives or tends to deprive them of equal employment opportunities); Religious Garb and Grooming in the Workplace: Rights and Responsibilities, Q. 8 and Ex. 8 (limiting employees who wear religious attire that might make customers uncomfortable to "back room" positions constitutes religious segregation and violates Title VII). The Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse.⁸

In sum, we find that the Agency's decision to restrict Complainant's access to the common women's restroom on account of her gender identity violated Title VII. We further find that the record contains direct evidence that the decision was based on the gender identity of the Complainant. The Agency, therefore, erred when it found that Complainant was not subjected to sex-based disparate treatment.

⁷ In this case, the Agency's restroom policy also deprived Complainant of the use of common locker and shower facilities that non-transgender employees could use, which also constituted a material employment disadvantage for Complainant.

⁸ Cf. John Doe, et al. v. Regional School Unit, 86 A.3d 600 (2014) (where it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the Maine Human Rights Act); Mathis v. Fountain-Fort Carson School District 8, Colo. Dep't of Regulatory Agencies, Div. of Civil Rights, Charge No. P20130034X, Determination available at <http://www.transgenderlegal.org/media/uploads/doc 529.pdf> (June 18, 2013) (restroom restriction placed on female transgender student created "an exclusionary environment which tended to ostracize the [student]."); Statement of Interest of the United States in Tooley v. Van Buren Public Schools, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015)(citing Doe and Mathis).

Harassment: Gender Pronouns, Titles, and Access to Facilities

To establish a claim of hostile work environment harassment, Complainant must show (1) that she was subjected to harassment in the form of unwelcome verbal or physical conduct because of a statutorily protected basis and (2) that the harassment had the purpose or effect of unreasonably interfering with the work environment and/or created an intimidating, hostile, or offensive work environment. See Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

In this case, Complainant contends that she was subjected to a hostile work environment because management restricted her from using the common women's restroom even after Complainant made clear that she no longer agreed with the initial plan restricting her to the executive bathroom facility, and S3 engaged in demeaning behavior toward her by refusing to refer to her correct name and gender.⁹

Complainant testified that S3 called her male names and "sir" in moments of anger or in group settings, and that his body language reflected a negative connotation and intentional conduct when he did so. Complainant testified that S3 called her "sir" on approximately seven occasions, including in an e-mail in which he engaged Complainant in a heated discussion about work matters. Complainant is not the only witness to testify that S3 intentionally referred to Complainant with male names. We note that one witness testified that he thought that S3 intentionally referred to Complainant as "sir" and by her former male name well after Complainant announced her transition to co-workers in November 2010. The witness further testified that S3 also smirked and giggled and said to her, "Oh well, do we call her [by her male or female name]?" Further, the record contains a copy of e-mail correspondence between Complainant and S3 on July 26, 2011. The e-mails reveal that, after Complainant wrote that S3 was on the side of other employees who do not treat her as an equal, S3 responded, "No Sir, not on anyone's side." The e-mails also reflect that this exchange occurred in the context of heated exchanges about work activities between Complainant and S3. S3 maintains that calling Complainant "sir" or referring to her with a male name was "just a slip of the tongue and only occurred twice.

After reviewing witness testimony and the e-mail exchanges between Complainant and S3, we are persuaded that S3's use of "sir" in this and several other situations was intentional. The e-mail exchanges reflect that S3 sometimes used male names and pronouns to insult Complainant or to convey sarcasm. Additionally, witness testimony indicates that S3 sometimes laughed and smiled when mentioning Complainant in groups and would say her feminine name with a smirk. Further, Complainant testified in detail about S3's agitated demeanor when referring to

⁹ Complainant did not avail herself of a hearing. Therefore, we must assess the credibility of witnesses on the record, without the assistance of a neutral EEOC AJ's personal observations of witness demeanor and tone. Wagner v. Dep't of Transp., EEOC Request No. 0120101568 (Aug. 23, 2010). We note, however, that the Agency conducted a fact-finding conference at which witnesses other than the Complainant gave testimony.

her with male pronouns and names and another witness spoke of S3's "general feeling of hostility" toward Complainant and the snide comments S3 made that pertained to Complainant's transition and clothing. Complainant also testified that S3 seemed to especially call her male names when in the presence of other employees as a way to reveal that Complainant is transgender, as well as to ridicule and embarrass her.

The Commission has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee. See Jameson v. U.S. Postal Serv., EEOC Appeal No. 0120130992 (May 21, 2013). Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when "judged from the perspective of a reasonable person in the employee's position. See Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 (1998); see also Jameson, EEOC Appeal No. 0120130992; OPM Transgender Guidance ("Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.").

In this case, Complainant had clearly communicated to management and employees that her gender identity is female and her personnel records reflected the same. Yet S3 continued to frequently and repeatedly refer to Complainant by a male name and male pronouns. While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.

Moreover, in determining whether actionable harassment occurred, S3's actions must be considered in the context of the Agency's actions related to Complainant's restroom access. As we note above, even after Complainant indicated that she no longer wished to abide by her initial plan regarding bathroom use, the Agency refused to allow Complainant to use the restroom consistent with her gender identity. It publicly segregated and isolated Complainant from other employees of her gender and communicated that she was not equal to those other employees because she is transgender. S3's comments compounded that discrimination and sent the message that Complainant was unworthy of basic respect and dignity because she is a transgender individual. Additionally, S3 was a team leader and his actions sometimes occurred in the presence of other employees and during meetings, signaling that such conduct was endorsed by Agency leadership.

Considering all these circumstances as we must, we find that these actions were sufficiently severe or pervasive to subject Complainant to a hostile work environment based on her sex.

Because Complainant established that she was subjected to a level of severe or pervasive sex-based harassment that meets the Title VII standard for liability, the final element of our analysis is whether the Agency itself is liable for that harassment.

An agency may be vicariously liable for unlawful harassment by an employee when the agency has empowered that employee to take tangible employment actions against the victim – i.e., the harassing employee is a supervisor of the victim. Vance v. Ball State University, 570 U.S. ___, 133 S.Ct. 2434 (2013). In cases where the harassing employee (or employees) is a co-worker of the victim, an agency is responsible for acts of harassment in the workplace when the agency was “negligent in permitting the harassment to occur.” *Id.* at 2451. Negligence in permitting harassment to occur can take many forms. An assessment of whether an Agency is liable under this standard depends on the facts and circumstances of each case and the unique context of each workplace. *See id.* at 2451 (discussing “variety of situations” that a negligence standard can address).

In her appeal, the Complainant alleged that the Agency was liable under the negligence theory. We therefore analyze her claim under that standard.¹⁰

In this case, Complainant did not report S3’s harassment to management. However, we note that S3’s conduct sometimes occurred in groups or in the presence of other employees. For example, a witness testified that she witnessed S3 among a group of employees in which he would laugh and smile when Complainant’s name was mentioned, and the group would laugh. Another witness testified that S3 would openly refer to Complainant by her former masculine name in the presence of other employees and smirk and giggle about it, well after he was aware of Complainant’s gender identity as female. This witness testimony reflects that S3’s conduct was pervasive, well-known, and openly practiced in the workplace. Consequently, we find that the Agency knew or should have known about S3’s harassment. *See Mayer v. Dep’t of Homeland Security*, EEOC Appeal No. 0120071846 (May 15, 2009) (Agency had constructive knowledge of sexual harassment because employees were aware that harasser was harassing Complainant); *Taylor v. Dep’t of the Air Force*, EEOC Request No. 05920194 (July 8, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees). There is no evidence that the Agency took prompt and effective corrective action to address the harassment. In fact, the only Agency actions we find in the record are when Complainant’s supervisors chastised her for using a facility consistent with her gender and for discussing her

¹⁰ Given that the decision to restrict Complainant from the common restrooms consistent with her gender was instituted by management, there is an argument to be made that the supervisor liability standard is appropriate. We do not need to reach this issue, however, because Complainant has invoked the negligence liability standard and we find that she has met her burden under that analysis. *See Wilson v. Tulsa Junior College*, 164 F. 3d 534, 540 n. 4 (10th Cir. 1998) (“The Supreme Court recognized in [Faragher] and Ellerth the continuing validity of negligence as a separate basis for employer liability”).

transition with other employees. Consequently, we find that the Agency was negligent in permitting the harassment to occur and is therefore liable.

In summary, we find that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant's gender identity was female.

Decision of the Office of Special Counsel

Complainant filed a prohibited personnel practice complaint against the Agency with the U.S. Office of Special Counsel (OSC) based on the events described above. On August 29, 2014, OSC issued a report finding that the Agency had discriminated against Complainant based on conduct not adverse to work performance, in violation of 5 U.S.C. §2302(b)(10). U.S. Office of Special Counsel, Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (August 28, 2014) (the "OSC Report"). The report's findings were based, in part, on OSC's interpretation of Title VII requirements. OSC explained that, while it was not making any explicit findings related to sex discrimination, "EEO law and federal policies relating to discrimination based on sex, including gender identity and expression, . . . circumscribes the permissible considerations that an agency may make when determining whether conduct adversely affects work performance for purposes of section 2302(b)(10)." OSC Report at 1. Specifically, OSC found that "the Agency unlawfully discriminated against [Complainant] on the basis of gender identity, including her gender transition from man to a woman—conduct which did not adversely affect her performance or the performance of others." *Id.* at 5.

OSC recommended that the Agency provide appropriate lesbian, gay, bisexual, and transgender (LGBT) diversity and sensitivity training to AMRDEC employees at Redstone Arsenal. OSC further recommended that appropriate remedial training regarding prohibited personnel practices, especially as they relate to transgender employees, be given to AMRDEC supervisors at Redstone Arsenal. OSC also found that Complainant did not suffer any economic harm that would require back pay, and that Complainant was ineligible to collect compensatory damages because the facts of this case arose before Congress created a compensatory damages remedy under section 107(b) of the Whistleblower Protection Enhancement Act of 2012; that provision is not retroactive.¹¹ OSC noted that it made no finding regarding Complainant's ability to recover damages under Title VII.¹²

¹¹ See *King v. Dep't of the Air Force*, 119 M.S.P.R. 663, 668 (2013).

¹² We address the matter of compensatory damages under Title VII in our Order, below.

The OSC report does not moot the claim before the Commission. OSC addressed whether the Agency's actions violated U.S. government personnel practices. The answer to that question was affected, but not settled, by Title VII principles. Our decision today addresses the Agency's actions in light of the sex discrimination provisions in Title VII. However, in the Order below, we take notice of the remedies already prescribed by OSC in order to avoid duplicative actions by the Agency.

CONCLUSION

Consequently, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission **REVERSES** the Agency's final decision. We **REMAND** this matter to the Agency to take remedial actions in accordance with this decision and the **ORDER** below.

ORDER (E0610)

The Agency is **ORDERED** to undertake the following actions:

1. The Agency shall immediately grant Complainant equal and full access to the common female facilities.
2. The Agency shall immediately take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct directed at Complainant, and ensure that Complainant is not subjected to retaliation because of her EEO activity.
3. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford her an opportunity to establish a causal relationship between the hostile work environment to which she was subjected and her pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
4. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least eight hours of EEO training to all civilian personnel and contractors working at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. Additionally, the training shall inform employees about the EEO process and how to

report harassment in their workplace organization. The Agency may count the diversity and sensitivity training ordered by OSC towards the eight hours required by this Order

5. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least 16 hours of in-person BEO training to all management officials at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office, regarding their responsibilities to ensure equal employment opportunities and the elimination of discrimination in the federal workplace. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. The Commission does not consider training to be disciplinary action. The Agency may count in-person diversity and sensitivity training ordered by OSC towards the sixteen hours required by this Order.
6. The Agency shall consider taking appropriate disciplinary action against S2 and S3 and report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S2 or S3 have left the Agency's employ, the Agency shall furnish documentation of the departure date.
7. The Agency shall post the notice referenced in the paragraph below entitled, "Posting Order."
8. The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation and evidence that the corrective action has been implemented.

POSTING ORDER (G0610)

The Agency is ordered to post at its Redstone Arsenal, Alabama, and the Huntsville, Alabama, Project Management Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within**

twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

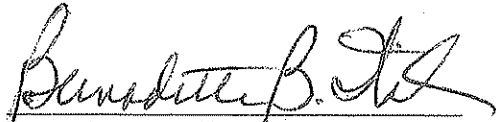
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and

the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

A handwritten signature in cursive script, appearing to read "Bernadette B. Wilson".

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

April 1, 2015
Date

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v.

Case No. 14-13710

R.G. & G.R. Harris Funeral Homes, Inc.,

Sean F. Cox

United States District Court Judge

Defendant.

OPINION & ORDER
DENYING DEFENDANT’S MOTION TO DISMISS

The United States Equal Employment Opportunity Commission (the “EEOC”) brought this employment discrimination action against R.G. & G.R. Harris Funeral Home, Inc. (“the Funeral Home”) asserting two claims against the Funeral Home. First, it asserts a Title VII claim on behalf of the Funeral Home’s former Funeral Director/Embalmer Stephens, who is transgender and is transitioning from male to female. The EEOC asserts that the Funeral Home’s decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens is transgender, because of Stephens’s transition from male to female, and/or because Stephens did not conform to the defendant employer’s sex- or gender-based preferences, expectations, or stereotypes. Second, the EEOC asserts that the Funeral Home engaged in an unlawful employment practice in violation of Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex. This second claim appears to be brought on behalf of an unidentified class of female employees of the Funeral Home.

The Funeral Home filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). The parties fully briefed the issues and the Court heard oral argument on April 16, 2015. For the reasons that follow, the Court shall DENY the Funeral Home's Motion to Dismiss.

The pending motion does not challenge the EEOC's claim based on the alleged disparate treatment in relation to a clothing allowance and, therefore, that claim remains.

This Court also concludes that the EEOC's complaint states a Title VII claim against the Funeral Home on behalf of Stephens. As explained below, transgender status is not a protected class under Title VII. Thus, if the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII. But the EEOC's complaint also asserts that the Funeral Home fired Stephens "because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15). And binding Sixth Circuit precedent establishes that any person without regard to labels such as transgender can assert a sex-stereotyping gender-discrimination claim under Title VII, under a *Price Waterhouse* theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination. This Court therefore concludes that the EEOC's complaint states a claim as to Stephens's termination.

Finally, the remaining arguments in the Funeral Home's motion are without merit or are improperly raised in a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6).

BACKGROUND

On September 25, 2014, the EEOC filed this action against the Funeral Home. The EEOC's complaint describes the nature of this action as follows:

This is an action under Title VII of the Civil Rights Act of 1964 to correct unlawful employment practices on the basis of sex and to provide appropriate relief to Amiee Stephens who was adversely affected by such practices. As alleged with greater particularity in paragraphs 8 through 16 below, Defendant R.G. & G.R. Harris Funeral Home, Inc., fired Stephens, a transgender woman, because of sex. Additionally, as alleged in paragraphs 12 and 17 below, Defendant discriminated against female employees by not providing them work clothing while providing work clothing to male employees.

(Compl. at 1). The EEOC.'s complaint alleges as follows in its "Statement of Facts" section:

8. Amiee Stephens had been employed by Defendant as a Funeral Director/Embalmer since October 2007.
9. Stephens adequately performed the duties of her position.
10. Stephens is a transgender woman. On or about July 31, 2013, Stephens informed Defendant Employer and her co-workers in a letter that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire at work as a woman from then on, asking for their support and understanding.
11. On or about August 15, 2013, Defendant Employer's owner fired Stephens, telling her that what she was "proposing to do" was unacceptable.
12. Since at least September 13, 2011, the Defendant Employer has provided a clothing allowance to male employees but not female employees. Defendant Employer provides work clothes to male employees but provides no such assistance to female employees.

(*Id.* at 3-4). The EEOC's complaint alleges as follows in its "Statement of Claims" section:

13. Paragraphs 8 through 12 are fully incorporated herein.
14. Defendant engaged in unlawful employment practices at its Garden City, Michigan facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), by terminating Stephens because of sex.
15. Defendant Employer's decision to fire Stephens was motivated by sex-based considerations. Specifically, *Defendant Employer fired Stephens because Stephens is transgender*, because of Stephens's transition from male to female, *and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.*

16. The effect of the practices complained of in paragraphs 8 through 11 and 14 through 15 above has been to deprive Stephens of equal employment opportunities and otherwise adversely affect her status as an employee because of her sex.
17. Defendant engaged in unlawful employment practices at its Garden City, Michigan facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex.
18. The effect of the practices complained of in paragraphs 12 and 17 above has been to deprive a class of female employees of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.
19. The unlawful employment practices complained of in paragraphs 8 through 18 above were intentional.
20. The unlawful employment practices complained of in paragraphs 8 through 18 above were done with malice or with reckless indifference to the federally protected rights of Stephens and a class of female employees.

(*Id.* at 4-5) (emphasis added). The prayer for relief in the EEOC's complaint states as follows:

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

- A. Grant a permanent injunction enjoining Defendant Employer, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in any unlawful practice which discriminates against an employee or applicant because of their sex, including on the basis of gender identity.
- B. Order Defendant Employer to institute and carry out policies, practices, and programs which provide equal employment opportunities regardless of sex (including gender identity), and which eradicate the effects of its past and present unlawful employment practices.
- C. Order Defendant Employer to make Stephens whole by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to front pay for Stephens.

- D. Order Defendant Employer to make Stephens and a class of female employees whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraphs 8 through 18 above, including medical losses, job search expenses, and lost clothing allowances, in amounts to be determined at trial.
- E. Order Defendant Employer to make Stephens and a class of female employees whole by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraphs 8 through 18 above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.
- F. Order Defendant Employer to pay Stephens and a class of female employees punitive damages for its malicious or recklessly indifferent conduct described in paragraphs 8 through 18 above, in amounts to be determined at trial.
- G. Grant such further relief as the Court deems necessary and proper in the public interest.
- H. Award the Commission its costs of this action.

(*Id.* at 6-8).

On November 19, 2014, the Funeral Home filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). The motion has been fully briefed and the Court heard oral argument on April 16, 2015.

STANDARD OF DECISION

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must construe the complaint in a light most favorable to the plaintiff and accept all the well-pleaded factual allegations as true. *Evans-Marshall v. Board of Educ.*, 428 F.3d 223, 228 (6th Cir. 2005). Although a heightened fact pleading of specifics is not required, the plaintiff must bring forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007).

ANALYSIS

I. The Funeral Home's Motion Does Not Challenge The EEOC's Claims Based On The Alleged Disparate Treatment In Relation To Clothing Allowances For Male And Female Employees.

The EEOC's complaint in this action asserts two different types of claims against the Funeral Home.

First, the EEOC asserts that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.

Second, the EEOC asserts that the Funeral Home engaged in an unlawful employment practice in violation of Title VII by "providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex." (Compl. at ¶ 17). This second type of claim appears to be brought on behalf of an unidentified class of female employees of the Funeral Home.

Although the Funeral Home's motion is titled a "Motion to Dismiss" and asks the Court to dismiss the EEOC's "complaint," (Def.'s Motion at 1), the motion does not include any challenges to the EEOC's second claim. As such, that claim would remain even if the Court found the Funeral Home's challenges to the first claim to have merit.

II. The EEOC's Complaint States A Title VII Claim Against The Funeral Home On Behalf Of Stephens.

Again, as to its first claim, the EEOC asserts that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.

A. Transgender Status Is Not A Protected Class Under Title VII.

If the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint would fail to state a claim under Title VII. That is because, like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII. *See, e.g., Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (Stating that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (Concluding that "transsexuals are not a protected class under Title VII", rejecting the plaintiff's argument for "a more expansive interpretation of sex that would include transsexuals as a protected class," and noting that "[e]ven the Sixth Circuit, which extended protection to transsexuals under the *Price Waterhouse* theory" "explained that an individual's status as a transsexual should be irrelevant to the availability of Title VII protection.").

But the EEOC's complaint does not allege that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person. The EEOC's complaint also asserts that the Funeral Home fired Stephens "because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15).

In its brief, however, the EEOC appears to seek a more expansive interpretation of sex under Title VII that would include transgender persons as a protected class. (Pl.’s Br. at 8) (Arguing that the EEOC’s “complaint states a claim of sex discrimination under Title VII because Stephens is transgender and [the Funeral Home] fired her for that reason.”). There is no Sixth Circuit or Supreme Court authority to support the EEOC’s position that transgender status is a protected class under Title VII.

B. A Transgender Person – Just Like Anyone Else – Can Bring A Sex Stereotyping Gender-Discrimination Claim Under Title VII.

Even though transgender/transsexual status is currently not a protected class under Title VII, Title VII nevertheless “protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.” *Myers v. Cuyahoga Cnty, Ohio*, 183 F. A’ppx 510, (6th Cir. 2006) (Citing *Smith v. City Of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)).

The seminal Sixth Circuit case on this issue is *Smith v. City of Salem*. The plaintiff in *Smith* was born a male and had been employed by the Salem Fire Department for seven years without any negative incidents. After being diagnosed with Gender Identity Disorder, Smith began expressing a more feminine appearance on a full-time basis, including while at work. *Smith*, 378 F.3d at 568. Smith’s co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not “masculine enough.” *Id.* Smith then advised his supervisor about his Gender Identity Disorder diagnosis and informed him that his treatment would eventually include “complete physical transformation from male to female.” *Id.* The news was not well-received by Smith’s employer. Smith’s superiors met to devise a plan to terminate Smith, which included requiring him to undergo three separate psychological

evaluations in the hope that he would quit.

Smith ultimately filed suit and his claims against the city included a Title VII claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court dismissed Smith's sex-stereotyping claim under Title VII but the Sixth Circuit reversed.

The Sixth Circuit began its analysis by looking at the Supreme Court's decision in *Price Waterhouse*:

In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping—that is, discrimination because she failed to act like a woman. *Id.* at 250–51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof).

Smith, 378 F.3d at 571-72. The *Smith* court further explained that:

The Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S.Ct. 1775.

Id. The *Smith* court concluded that Smith had stated a Title VII claim for relief, pursuant to *Price Waterhouse's* prohibition of sex stereotyping, based on his gender non-conforming

behavior and appearance. The court noted that:

His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Id. at 572.

The *Smith* court explained that “[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.” *Id.*

The *Smith* court went on to explain 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.’” *Id.* (citations omitted). In that “earlier jurisprudence, male-to-

female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*) as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity were denied Title VII protection by courts because they were considered victims of ‘gender’ rather than ‘sex’ discrimination.” *Smith*, 378 F.3d at 573.

The *Smith* court held that the approach in those cases, and the district court’s position below, “has been eviscerated¹ by *Price Waterhouse*.” *Id.* “By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *See Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775.” *Id.*

Thus, “[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.” *Smith*, 378 F.3d at 574 (emphasis added).

The Sixth Circuit then rejected the position that, because a person is transgender, that person is somehow less worthy of protection under Title VII as to a sex-stereotyping claim:

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in

¹Notably, the Funeral Home’s motion and brief rely on some of the very same cases that the Sixth Circuit stated were eviscerated by *Price Waterhouse*.

ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of ... sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. *See, e.g., Dillon v. Frank*, No. 90 2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants’ discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith’s well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith’s status as a transsexual, which the district court held precluded Smith from Title VII protection.

Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, 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 gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

Smith, 378 F.3d at 574-75. “Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination.” *Id.*

In *Barnes v. City of Cincinnati*, the Sixth Circuit concluded that the transsexual plaintiff in that case had also sufficiently pleaded a Title VII sex discrimination claim under a *Price Waterhouse* theory. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005). The plaintiff in that case, Barnes, was employed by the Cincinnati Police Department. Barnes “was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty.

Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser.” *Id.* at 733.

Following a promotion to sergeant, Barnes was assigned to District One for a probationary period. During that probationary period, Barnes “was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions.” *Id.* at 734.

After Barnes was demoted from sergeant, he filed suit and asserted a claim under Title VII. After a jury verdict in Barnes’s favor, the City appealed. Among other things, the City asserted that Barnes did not sufficiently plead or prove a sex discrimination claim under Title VII. The Sixth Circuit rejected that argument, explaining as follows:

In this case, Barnes claims that the City intentionally discriminated against him because of his failure to conform to sex stereotypes. The City claims that Barnes failed to establish the first and the fourth elements of a *prima facie* case, because he was not a member of a protected class and he failed to identify a similarly situated employee who passed probation.

Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004), instructs that the City’s claim that Barnes was not a member of a protected class lacks merit. In *Smith*, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections, stating:

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

Id. at 575. By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant’s actions, Smith stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination. *Id.* at 573, 575. Following the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.

Barnes, 401 F.3d at 737.

Accordingly, *Smith* and *Barnes* establish that a transgender person just like anyone else can bring a sex-stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse* theory.

Here, the EEOC's complaint alleges that Stephens informed the Funeral Home that Stephens "was undergoing a gender transition from male to female and intended to dress in appropriate business attire at work as a woman from then on," and that the Funeral Home responded by firing Stephens and stating that what Stephens "was 'proposing to do' was unacceptable." (Compl. at ¶¶ 10 & 11). The complaint further alleges that the Funeral Home's "decision to fire Stephens was motivated by sex-based considerations," and that the Funeral Home fired Stephens because Stephens "did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15).

This Court concludes that, having alleged that Stephens's failure to conform to sex stereotypes was the driving force behind the Funeral Home's decision to fire Stephens, the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.

C. The Funeral Home's Remaining Arguments Are Without Merit Or Are Improperly Raised In A Motion To Dismiss Under Fed. R. Civ. P. 12(b)(6).

The Funeral Home's Motion to Dismiss makes numerous arguments. As stated above, this Court concludes that the EEOC has sufficiently pleaded a Title VII claim on behalf of Stephens. Below, the Court addresses challenges made by the Funeral Home that are not encompassed in the above analysis.

1. The Funeral Home's "Gender Identity Disorder" Arguments Are Irrelevant.

In the pending motion, the Funeral Home asserts that “[t]o the extent the EEOC’s claim is that [Stephens] was terminated due to his gender identity disorder, the claim must be dismissed.” (Def.’s Br. at 11). In making this argument, the Funeral Home also asserts that Gender Identity Disorder is not a protected class under Title VII. (*Id.* at 3).

The EEOC’s complaint never uses the term Gender Identity Disorder; nor does it assert that Gender Identity Disorder is a protected class under Title VII. Moreover, to the extent that the EEOC asks this Court to rule that transgender status is a protected class under Title VII, this Court declines to do so, as set forth in Section II. A. of this Opinion.

2. The Court Rejects The Funeral Home’s *Ultra Vires* Arguments.

The Funeral Home also asserts that “Title VII does not extend its protections to ‘gender identity disorder’” and then takes the position that the EEOC’s prosecution of this case is an *ultra vires* act. The Court rejects this argument. As stated above, the Court concludes that, having alleged that Stephens’s failure to conform to sex stereotypes was the driving force behind the Funeral Home’s decision to fire Stephens, the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.

3. The Funeral Home’s Defenses Based Upon Its Enforcement Of An Alleged Dress Code Are Not Properly Before The Court On A Motion Brought Under Fed. R. Civ. P. 12(b)(6).

In its motion, the Funeral Home also asserts that “the Complainant [Stephens] was terminated for refusing to comply with the employer’s dress and grooming code” and therefore the claim fails. (Def.’s Br. at 19). It then cites cases that involved plaintiffs who filed suit alleging that their employer’s dress codes violated Title VII.

Here, however, the EEOC’s complaint does not assert any claims based upon a dress

code and it does not contain any allegations as to a dress code at the Funeral Home.

To the extent that the Funeral Home seeks to proffer a defense to the Title VII claim asserted on behalf of Stephen based upon its alleged dress code, this Court agrees with the EEOC that such a defense has no place in the context of a motion brought pursuant to Fed. R. Civ. P. 12(b)(6):

Essentially, Defendant is injecting a defense into a 12(b)(6) motion and asking the court to accept the defense as true in order to find the complaint legally deficient. This is not the proper use of a motion to challenge a complaint. As noted above, a 12(b)(6) motion is not a vehicle “to resolv[e] . . . the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). Instead, Rule 12(b)(6) by its terms provides for a defendant to move to dismiss a complaint for “failure to state a claim upon which relief can be granted.”

(Pl.’s Br. at 14).²

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that Defendant’s Motion to Dismiss is DENIED.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: April 21, 2015

²The Court also notes that although the Funeral Home makes assertions as to it having a dress code, and assertions as to what it entails (*see* Def.’s Br. at 6-7), the Funeral Home did not submit any evidence as to its purported dress code. Thus, even if the Court wished to convert this motion to dismiss into a summary judgment motion, under Fed. R. Civ. P. 12(d), and consider matters outside of the pleadings, there would be no basis for it to do so here.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v.

Case No. 14-13710

R.G. & G.R. Harris Funeral Homes, Inc.,

Sean F. Cox

United States District Court Judge

Defendant.

_____ /

PROOF OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel of record
on April 21, 2015, by electronic and/or ordinary mail.

S/Jennifer McCoy

Case Manager

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANE J. SCHROER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 05-1090 (JR)
	:	
JAMES H. BILLINGTON, Librarian	:	
of Congress,	:	
	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Diane Schroer claims that she was denied employment by the Librarian of Congress because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Evidence was taken in a bench trial on August 19-22, 2008.

Facts

Diane Schroer is a male-to-female transsexual. Although born male, Schroer has a female gender identity -- an internal, psychological sense of herself as a woman. Tr. at 37. In August 2004, before she changed her legal name or began presenting as a woman, Schroer applied for the position of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress. The terrorism specialist provides expert policy analysis to congressional committees, members of Congress and their staffs. Pl. Ex. 1. The position requires a security clearance.

Schroer was well qualified for the job. She is a graduate of both the National War College and the Army Command and General Staff College, and she holds masters degrees in history and international relations. During Schroer's twenty-five years of service in the U.S. Armed Forces, she held important command and staff positions in the Armored Calvary, Airborne, Special Forces and Special Operations Units, and in combat operations in Haiti and Rwanda. Tr. at 22-31. Pl. Ex. 9. Before her retirement from the military in January 2004, Schroer was a Colonel assigned to the U.S. Special Operations Command, serving as the director of a 120-person classified organization that tracked and targeted high-threat international terrorist organizations. In this position, Colonel Schroer analyzed sensitive intelligence reports, planned a range of classified and conventional operations, and regularly briefed senior military and government officials, including the Vice President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. Tr. 32-33. At the time of her military retirement, Schroer held a Top Secret, Sensitive Compartmented Information security clearance, and had done so on a continuous basis since 1987. Tr. at 33. After her retirement, Schroer joined a private consulting firm, Benchmark International, where, when she applied for the CRS position, she was working as a program manager on an

infrastructure security project for the National Guard. Tr. at 36.

When Schroer applied for the terrorism specialist position, she had been diagnosed with gender identity disorder and was working with a licensed clinical social worker, Martha Harris, to develop a medically appropriate plan for transitioning from male to female. Tr. at 36-38. The transitioning process was guided by a set of treatment protocols formulated by the leading organization for the study and treatment of gender identity disorders, the Harry Benjamin International Gender Dysphoria Association. Pl. Ex. 45; Tr. at 193. Because she had not yet begun presenting herself as a woman on a full-time basis, however, she applied for the position as "David J. Schroer," her legal name at the time. In October 2004, two months after submitting her application, Schroer was invited to interview with three members of the CRS staff -- Charlotte Preece, Steve Bowman, and Francis Miko. Preece, the Assistant Director for Foreign Affairs, Defense and Trade, was the selecting official for the position. Tr. at 103. Schroer attended the interview dressed in traditionally masculine attire -- a sport coat and slacks with a shirt and tie. Tr. at 45.

Schroer received the highest interview score of all eighteen candidates. Pl. Ex. 18. In early December, Preece called Schroer, told her that she was on the shortlist of

applicants still in the running, and asked for several writing samples and an updated list of references. Tr. at 49. After receiving these updated materials, the members of the selection committee unanimously recommended that Schroer be offered the job. Tr. at 105. In mid-December, Preece called Schroer, offered her the job, and asked, before she processed the administrative paper work, whether Schroer would accept it. Tr. at 108. Schroer replied that she was very interested but needed to know whether she would be paid a salary comparable to the one she was currently receiving in the private sector. The next day, after Preece confirmed that the Library would be able to offer comparable pay, Schroer accepted the offer, and Preece began to fill out the paperwork necessary to finalize the hire. Id.

Before Preece had completed and submitted these documents, Schroer asked her to lunch on December 20, 2004. Schroer's intention was to tell Preece about her transsexuality. She was about to begin the phase of her gender transition during which she would be dressing in traditionally feminine clothing and presenting as a woman on a full-time basis. She believed that starting work at CRS as a woman would be less disruptive than if she started as a man and later began presenting as a woman. Tr. at 53.

When Schroer went to the Library for this lunch date, she was dressed in traditionally masculine attire. Before

leaving to walk to a nearby restaurant, Preece introduced her to other staff members as the new hire who would soon be coming aboard. Preece also gave Schroer a short tour of the office, explaining where her new colleagues' offices were and describing Schroer's job responsibilities. Tr. at 56. As they were sitting down to lunch, Preece stated that they were excited to have Schroer join CRS because she was "significantly better than the other candidates." Id. Schroer asked why that was so, and Preece explained that her skills, her operational experience, her ability creatively to answer questions, and her contacts in the military and in defense industries made her application superior. Tr. at 56; 110.

About a half hour into their lunch, Schroer told Preece that she needed to discuss a "personal matter." Tr. at 57. She began by asking Preece if she knew what "transgender" meant. Preece responded that she did, and Schroer went on to explain that she was transgender, that she would be transitioning from male to female, and that she would be starting work as "Diane." Preece's first reaction was to ask, "Why in the world would you want to do that?" Tr. at 57, 110. Schroer explained that she did not see being transgender as a choice and that it was something she had lived with her entire life. Preece then asked her a series of questions, starting with whether she needed to change Schroer's name on the hiring documentation. Schroer

responded that she did not because her legal name, at that point, was still David. Schroer went on to explain the Harry Benjamin Standards of Care and her own medical process for transitioning. She told Preece that she planned to have facial feminization surgery in early January and assured her that recovery from this surgery was quick and would pose no problem for a mid-January start date. In the context of explaining the Benjamin Standards of Care, Schroer explained that she would be living full-time as a woman for at least a year before having sex reassignment surgery. Such surgery, Schroer explained, could normally be accomplished during a two-week vacation period and would not interfere with the requirements of the job. Tr. at 59.

Preece then raised the issue of Schroer's security clearance, asking what name ought to appear on hiring documents. Schroer responded that she had several transgender friends who had retained their clearances while transitioning and said that she did not think it would be an issue in her case. Schroer also mentioned that her therapist would be available to answer any questions or provide additional background as needed. Tr. at 60. Because Schroer expected that there might be some concern about her appearance when presenting as a woman, she showed Preece three photographs of herself, wearing traditionally feminine professional attire. Although Preece did not say it to Schroer, her reaction on seeing these photos was that Schroer looked like

"a man dressed in women's clothing." Tr. at 112. Preece did not ask Schroer whether she had told her references or anyone at Benchmark of her transition.

Although Schroer initially thought that her conversation with Preece had gone well, she thought it "ominous" that Preece ended it by stating "Well, you've given me a lot to think about. I'll be in touch." Tr. at 63.

Preece did not finish Schroer's hiring memorandum when she returned to the Library after lunch. See Pl. Ex. 23.¹ Instead, she went to speak with Cynthia Wilkins, the personnel security officer for the Library of Congress. Preece told Wilkins that she had just learned that the candidate she had planned to recommend for the terrorism specialist position would be transitioning from male to female and asked what impact that might have on the candidate's ability to get a security

¹ Her partial, draft memorandum had begun:

I recommend Mr. David Schroer for the position of Specialist in Terrorism and International Crime in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service. His qualifications and experience make[] him the best qualified candidate from among the other 8 applicants on the final referral list.

Mr. Schroer has extensive experience as a practitioner and strategic planner in counterterrorism. Since 1986 he was involved in leading counterterrorism and counter-insurgency operations around the world.

clearance. Tr. at 120. Wilkins did not know and said that she would have to look into the applicable regulations. Preece told Wilkins that the candidate was a 25-year military veteran. She did not recall whether or not she mentioned that Schroer currently held a security clearance. Preece did not provide, and Wilkins did not ask for, the sort of information -- such as Schroer's full name and social security number -- that would have allowed Wilkins access to information on Schroer's clearance history. Had Preece requested her to do so, Wilkins had the ability to access Schroer's complete investigative file through a centralized federal database. Tr. at 272, 279-82.

Preece testified that at this point, without waiting to hear more from Wilkins, she was leaning against hiring Schroer. Tr. at 121-22. She said that Schroer's transition raised five concerns for her. First, she was concerned about Schroer's ability to maintain her contacts within the military. Specifically, Preece thought that some of Schroer's contacts would no longer want to associate with her because she is transgender. Tr. at 113. At no point after learning of Schroer's transition, however, did Preece discuss the continuing viability of her contacts with Schroer, nor did she raise this concern with any of Schroer's references, all of whom in fact knew that she was transitioning. Tr. at 51, 114. Second, Preece was concerned with Schroer's credibility when testifying before

Congress. When CRS specialists testify before Congress, they typically provide Members with brief biographical statements to give them credibility. Preece was concerned "that everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114. Preece thought that this would be an obstacle to Schroer's effectiveness. Tr. at 115. Third, Preece testified that she was concerned with Schroer's trustworthiness because she had not been up front about her transition from the beginning of the interview process. Tr. at 117. Preece did not, however, raise this concern to Schroer during their lunch. Fourth, Preece thought that Schroer's transition might distract her from her job. Although Preece seems to have connected this concern to Schroer's surgeries, she did not ask for additional information about them or otherwise discuss the issue further with Schroer. Tr. at 118. Finally, Preece was concerned with Schroer's ability to maintain her security clearance. In Preece's mind, "David Schroer" had a security clearance, but "Diane Schroer" did not. Even before speaking with Wilkins, Preece "strongly suspected" that David's clearance simply would not apply to Diane. Tr. at 117. She had this concern, but she did not ask Schroer for any information on the people she knew who had undergone gender transitions while retaining their clearances. Id.

After her lunch with Schroer, Preece also relayed the details of her conversation to a number of other officials at CRS, including Daniel Mulholland, the Director of CRS, and Gary Pagliano, one of the defense section heads, whose reaction was to ask Preece if she had a good second candidate for the job. Later the same afternoon, Preece received an email from one of the Library's lawyers, setting up a meeting for the next morning to discuss the terrorism specialist position. Tr. at 123. That evening, as Preece thought about the issue, she was puzzled by the idea that "someone [could] go[] through the experience of Special Forces [and] decide that he wants to become a woman." Tr. at 124. Schroer's background in the Special Forces made it harder for Preece to think of Schroer as undergoing a gender transition. Id.

The next morning, on December 21, 2004, at nine o'clock, Preece met with Kent Ronhovde, the Director of the Library of Congress, Wilkins, and two other members of the CRS staff from workforce development. Tr. at 124. Preece described her lunch conversation with Schroer and stated that Schroer had been, but no longer was, her first choice for the position. Tr. at 126. As Preece recalls the meeting, Wilkins stated that she was unable to say one way or another whether Diane Schroer would be able to get a security clearance. Id. at 126. Preece testified that Wilkins proposed that Schroer would have to a have

a "psychological fitness for duty examination," after which the Library would have to decide whether to initiate a full background investigation. Wilkins testified that she was not familiar with such an "examination" and likely would not have used such a phrase, Tr. at 290-91, but she confirmed that she told the meeting that she would not approve a waiver for Schroer so that she could start working before the clearance process was complete. Wilkins made this decision without having viewed Schroer's application, her resume, or her clearance status and history. Tr. at 127. Preece understood the substance of Wilkins' comments to be that David's security clearance was not relevant to Diane, and that Diane would need a separate clearance. She assumed that that process could take up to a year.

At no point during the meeting did Preece express a continuing interest in hiring Schroer. She did not suggest that Wilkins pull and review David Schroer's security file to confirm her own assumption that the security clearance process would be a lengthy one. No one in the meeting asked whether the organization currently holding Schroer's clearance knew of her transition. There was no discussion of whether anyone else at the Library had dealt with a similar situation. Tr. at 128-29.

By the end of the meeting, Preece had made up her mind that she no longer wanted to recommend Schroer for the terrorism

specialist position. Tr. at 131. Preece testified that the security clearance was the critical, deciding factor because of "how long it would take." She also testified, however, that she would have leaned against hiring Schroer even if she had no concerns regarding the security clearance, because her second candidate, John Rollins, presented "fewer complications" -- because, unlike Schroer, he was not transitioning from male to female. Tr. at 133-34.

Later that day, Preece circulated a draft of what she proposed to tell Schroer to those who had participated in the meeting. The email stated:

David. I'm calling to let you know that I am not going forward with my recommendation to hire you for the terrorism position. In light of what you told me yesterday, I feel that you are putting me and CRS in an awkward position for a number of reasons as you go through this transition period. I am primarily concerned that you could not likely be brought on in a timeframe that is needed for me to fill the position. Our Personnel Security Office has told me that the background investigation process that will be required for you to start work could be lengthy. I am also concerned that the past contacts I had counted on you to bring to the position may not now be as fruitful as they were in the past. Finally I have concerns that the transition that you are in the process of might divert your full attention away from the mission of CRS.

I could be wrong on any one of these complicated factors, but taken together I do not have a high enough degree of confidence to recommend you for the position. Having said that, I very much appreciate your candor and your courage. I wish you the best and want to let you know that you

should feel free to[] apply for future positions at the Library.

Pl. Ex. 19. Preece was then called into the General Counsel's office for a meeting at eleven o'clock. Afterward, Preece circulated a revised email with the header "Draft per discussion with General Coun[sel]." Pl. Ex. 20. It read:

David, Given the level and the complexities of the position, I don't think this is a good fit. This has been a difficult decision, but given the immediate needs of Congress, I've decided not to go forward with the recommendation.

(Listen. If needed say) That's all I'm prepared to say at this time.

Id. Later that same afternoon, Preece called Schroer to rescind the job offer. She said, "Well, after a long and sleepless night, based on our conversation yesterday, I've determined that you are not a good fit, not what we want." Tr. at 63. Schroer replied that she was very disappointed. Preece ended the conversation by thanking Schroer for her honesty. Tr. at 64; 138. Preece then called John Rollins, who had a lower total interview score than Schroer, see Pl. Ex. 18, and offered him the position. He accepted.

Since January 2005, Schroer has lived full-time as a woman. Tr. at 66. She has changed her legal name to Diane Schroer and obtained a Virginia driver's license and a United States Uniformed Services card reflecting her name change and gender transition. Pl. Ex. 7.

Analysis

It is unlawful for an employer "to fail or 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 "ultimate question" in every Title VII case is whether the plaintiff has proved that the defendant intentionally discriminated against her because of a protected characteristic. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). The Library argues that it had a number of non-discriminatory reasons for refusing to hire Schroer, including concerns about her ability to maintain or timely receive a security clearance, her trustworthiness, and the potential that her transition would distract her from her job. The Library also argues that a hiring decision based on transsexuality is not unlawful discrimination under Title VII.

After hearing the evidence presented at trial, I conclude that Schroer was discriminated against because of sex in violation of Title VII. The reasons for that conclusion are set forth below, in two parts. First, I explain why, as a factual matter, several of the Library's stated reasons for refusing to hire Schroer were not its "true reasons, but were . . . pretext[s] for discrimination," Tex. Dep't of Cmty. Affairs v.

Burdine, 450 U.S. 248, 253 (1981). Second, I explain why the Library's conduct, whether viewed as sex stereotyping or as discrimination literally "because of . . . sex," violated Title VII.

I.

None of the five assertedly legitimate reasons that the Library has given for refusing to hire Schroer withstands scrutiny.

A. Security clearance concerns were pretextual

Preece has claimed that her primary concern was Schroer's ability to receive a security clearance in a timely manner. It is uncontested that the ability to maintain or receive security clearance is a requirement for the terrorism specialist position. In light of the inquiry that the Library actually made into Schroer's clearance history and the specific facts affecting her case, however, I conclude that this issue was a pretext for discrimination.

Kenneth Lopez, the Library's Director of Security and Emergency Preparedness, and Wilkins' supervisor, testified about the clearance process for new employees. Lopez explained that, in appropriate circumstances, the Library recognizes as a matter of reciprocity the security clearance held by an individual at a prior government agency. Tr. at 247. The three general requirements for reciprocity are that the previous investigation

was undertaken in a timely manner, that the investigation had an adequate scope,² and that there has not been a significant break in service. When new information that might raise security concerns about a candidate otherwise eligible for reciprocity is raised, the Library evaluates that information before making a decision as to whether to grant reciprocity. Tr. at 251. That there is new information does not necessarily mean that a new, full-scale investigation is needed. Tr. at 285.

When the candidate does not have a valid, prior clearance, the Library may nonetheless grant a waiver so that the person may start work, conditionally employed, before the security investigation has been completed. A waiver is not needed for someone holding a current clearance of appropriate scope. Tr. at 256.

Although Preece knew that Schroer held a security clearance, she did not provide Wilkins with any of the information that might have been needed to see whether reciprocity would apply. Wilkins had the ability to access Schroer's entire security file, but she did not do so -- because she was not asked to.

² "Scope" goes to the thoroughness of the prior investigation based on the level of clearance. Someone who holds only a "Secret" level clearance will not have had as thorough an investigation as someone holding a "Top Secret" clearance. Tr. at 254-55.

Without any specific information about Schroer -- including whether she might have already addressed any issues arising out of her gender transition with the current holder of her security clearance (Benchmark) -- Wilkins performed the most general kind of research. She looked into the Adjudication Guidelines and the Adjudication Desk Reference for information about transsexuality and found two potentially relevant guidelines.³ The first was the sexual behavior guideline, which provides that sexual behavior that causes an individual to be vulnerable to blackmail or coercion may be cause for a security concern. Tr. at 276. Wilkins acknowledged, however, that an individual who has disclosed her transsexuality would not present blackmail concerns. Tr. at 277. The other potentially relevant guideline deals with security concerns raised by emotional, mental or personality disorders. Psychological disorders, including gender identity disorder, are not per se disqualifying but are to be evaluated as part of the person's entire background. Tr. at 257. Lopez testified when an employee discloses such a disorder, the proper procedure is for the personnel security officer to consult with the Library's Health Services. After interviewing the candidate and, potentially, his

³ Wilkins testified that these guidelines and reference materials implement Executive Order 10450, 18 Fed. Reg. 2489 (1953), and Executive Order 12968, 60 Fed. Reg. 40245 (1995). Tr. at 263.

or her mental health providers, a Health Services officer determines whether or not the information raises a security concern. For an individual already holding a clearance, if Health Services is satisfied that the disorder raises no security concerns, the personnel security office proceeds to grant reciprocity. Tr. at 253.

The Library made no effort to determine whether Schroer's previous clearance would receive reciprocal recognition or to determine whether the agency previously holding Schroer's clearance already knew of, and had already investigated any concerns related to Schroer's gender identity disorder. Wilkins stated that she would not approve a waiver without determining whether reciprocity might apply, and therefore without determining whether a waiver actually would have been required. Without being given a concrete time frame by Wilkins, and without speaking to anyone in Health Services, Preece simply "assumed" that it would take a year before Schroer would be fully cleared. This assumption was connected to no specific information about Schroer or her clearance history, and was not informed by the Library's own procedures for adjudicating possible security issues arising from a psychological disorder.⁴

⁴ The Library has never argued that Title VII's jurisdictional exemption regarding security clearances, 42 U.S.C. § 2000e-2(g), applies in this case, and, unlike in Egan v. Department of Navy, 484 U.S. 518 (1988), Schroer is not challenging the denial of a security clearance. She asserts,

The Library's statements about the time pressures that they were operating under to fill the position with someone with a full security clearance, as opposed to a provisional waiver, are not credible. The terrorism specialist opening was first posted in August. Schroer was not interviewed until October and did not receive an offer until mid-December. The person who previously held the job, Audrey Cronin, worked for six months during 2003 before receiving her clearance. Tr. at 438; Pl. Ex. 64. Cronin's first performance evaluation, completed after eight months on the job, in no way reflected that her work had been impaired by the fact that she had lacked a clearance during three quarters of the period under evaluation. Pl. Ex. 65. John Rollins, who ultimately filled the position denied to Schroer, did not receive his final clearance until "several months" after he began working at CRS. Tr. at 304.

B. Trustworthiness and distraction concerns were pretextual

The Library's professed concerns with Schroer's trustworthiness and ability to focus on the job were also pretextual. At trial, the Library conceded as undisputed that Schroer "had no other co-morbidities or stressors that would have prevented her from performing the duties of the terrorism specialist, or that would have presented any issue regarding her

rather, that the Library's failure to follow its own procedures establishes pretext.

stability, judgment, reliability or ability to safeguard classified information." Tr. at 349. Preece's stated concern with Schroer's trustworthiness was belied by the fact that she thanked Schroer for her honesty in the course of rescinding the job offer. If Preece had really been concerned with Schroer's ability to focus on her work responsibilities, she could have raised the matter directly and asked Schroer additional questions about her planned surgeries, asked her current employer and references about Schroer's ability to focus, or spoken with Schroer's therapist, as Schroer had offered. Preece did none of those things.

C. Credibility and contacts concerns were facially discriminatory

The Library's final two proffered legitimate nondiscriminatory reasons -- that Schroer might lack credibility with Members of Congress, and that she might be unable to maintain contacts in the military -- were explicitly based on her gender non-conformity and her transition from male to female and are facially discriminatory as a matter of law. Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices. See Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1270 (8th Cir. 1981) (firing employee in response to racially charged, unverified customer complaint is direct evidence of racial discrimination by employer); cf. Fernandez v. Wynn Oil Co., 653

F.2d 1273, 1276 (9th Cir. 1981) ("stereotypic impressions of male and female roles do not qualify gender as a [bona fide occupational qualification]"); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (same). In any event, the Library made no effort to discern if its concern was actually a reasonable one, as it easily could have done by contacting any of the high-ranking military officials that Schroer listed as references. Pl. Ex. 5.

II.

Schroer contends that the Library's decision not to hire her is sex discrimination banned by Title VII, advancing two legal theories. The first is unlawful discrimination based on her failure to conform with sex stereotypes. The second is that discrimination on the basis of gender identity is literally discrimination "because of . . . sex."

A. Sex stereotyping

Plaintiff's sex stereotyping theory is grounded in the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). In that case, a female senior manager was denied partnership in a large accounting firm in part because she was perceived to be too "macho" for a woman. Id. at 235. Her employer advised that she would improve her chances at partnership if she would "take 'a course at charm school'" and would "'walk more femininely, talk more femininely, dress more

femininely, wear make-up, have her hair styled, and wear jewelry.'" Id. Justice Brennan observed that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." Id. at 255. In ruling for the plaintiff, the Court held that Title VII reaches claims of discrimination based on "sex stereotyping." Id. at 250-51 (plurality opinion); id. at 258-261 (White, J., concurring); id. at 272-73 (O'Connor, J., concurring). "In the specific context of sex stereotyping," the Court explained, "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." Id. at 250.

After Price Waterhouse, numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII. See, e.g., Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) ("[A] plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes."); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (Title VII claim is stated when "the harasser was acting to punish the victim's noncompliance with

gender stereotypes"); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (male plaintiff stated a Title VII claim where he was harassed "for walking and carrying his tray 'like a woman' -- i.e., for having feminine mannerisms"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."); Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997) ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

Following this line of cases, the Sixth Circuit has held that discrimination against transsexuals is a form of sex stereotyping prohibited by Price Waterhouse itself:

After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination that 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 discrimination, because the discrimination would not occur but for the victim's sex.

. . .

[D]iscrimination against a plaintiff who is 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 gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.

Smith v. Salem, 378 F.3d 566, 574-75 (6th Cir. 2004); see also

Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005).

In my 2006 memorandum denying the Library's motion to dismiss, in this case, I expressed reservations about the Sixth Circuit's broad reading of Price Waterhouse. I explained that "[n]either the logic nor the language of Price Waterhouse establishes a cause of action for sex discrimination in every case of sex stereotyping." Schroer v. Billington, 424 F. Supp. 2d 203, 208 (D.D.C. 2006). I held that what Price Waterhouse actually recognized was a Title VII action for disparate treatment, as between men and women, based on sex stereotyping. Accordingly, I concluded that "[a]dverse action taken on the basis of an employer's gender stereotype that does not impose unequal burdens on men and women does not state a claim under Title VII." Id. at 209. While I agreed with the Sixth Circuit that a plaintiff's transsexuality is not a bar to a sex stereotyping claim, I took the position that "such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical

perceptions.” Id. at 211. In other words, “a Price-Waterhouse claim could not be supported by facts showing that [an adverse employment action] resulted solely from [the plaintiff’s] disclosure of her gender dysphoria.” Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007).

That was before the development of the factual record that is now before me.

My conclusion about a disparate treatment requirement relied heavily on the panel decision in Jespersen v. Harrah Operating Co., 392 F.3d 1076 (9th Cir. 2004). That decision was later affirmed en banc. Jespersen v. Harrah Operating Co., 444 F.3d 1104, 1109 (9th Cir. 2006). The defendant in Jespersen had instituted a company-wide “Personal Best” grooming policy, which, in addition to gender-neutral standards of fitness and professionalism, required women to wear stockings and colored nail polish, to wear their hair “teased, curled, or styled,” and to wear make-up. 392 F.3d at 1077. The policy also prohibited men from wearing makeup, nail polish, or long hair. Plaintiff Darlene Jespersen was fired for refusing to wear makeup, which she testified made “her feel sick, degraded, exposed and violated,” “forced [] to be feminine,” and “dolled up” like a sexual object. Id. Despite the subjective, gender-related toll that the policy exacted from Jespersen, the Ninth Circuit held that firing her for non-compliance with the policy did not

violate Title VII, since, in that court's judgment, the "Personal Best" policy imposed equally burdensome, although gender-differentiated, standards on men and women.

In her post-trial briefing, Schroer convincingly argues that Jespersen's disparate treatment requirement ought not apply in this case. Unlike Jesperson, this case does not involve a generally applicable, gender-specific policy, requiring proof that the policy itself imposed unequal burdens on men and women. Instead, Schroer argues that her direct evidence that the Library's hiring decision was motivated by sex stereotypical views renders proof of disparate treatment unnecessary.⁵

Schroer's case indeed rests on direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes. Charlotte Preece, the decision-maker, admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing. Tr. at 112-13. In conversations Preece had with colleagues at the Library after her

⁵ For example, in Oncale v. Sundowner Offshore Services, Inc., the male plaintiff complaining of sexual harassment in violation of Title VII had been "forcibly subjected to sex-related, humiliating actions" and had been "physically assaulted . . . in a sexual manner" by other male co-workers. 523 U.S. 75, 77 (1998). The Supreme Court did not require Oncale to show that he had been treated worse than women would have been treated, but only that "he suffered discrimination in comparison to other men." Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (emphasis in original).

lunch with Schroer, she repeatedly mentioned these photographs. Tr. at 120-21, 172-73. Preece testified that her difficulty comprehending Schroer's decision to undergo a gender transition was heightened because she viewed David Schroer not just as a man, but, in light of her Special Forces background, as a particularly masculine kind of man. Tr. at 124. Preece's perception of David Schroer as especially masculine made it all the more difficult for her to visualize Diane Schroer as anyone other than a man in a dress. Id. Preece admitted that she believed that others at CRS, as well as Members of Congress and their staffs, would not take Diane Schroer seriously because they, too, would view her as a man in women's clothing. Tr. at 112-15, 132-34.

What makes Schroer's sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII. See Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977); Doe v. U.S. Postal Service, 1985 U.S. Dist. LEXIS 18959, 1985 WL 9446, *2 (D.D.C. 1985). Take Preece's testimony regarding

Schroer's credibility before Congress. As characterized by Schroer, the Library's credibility concern was that she "would not be deemed credible by Members of Congress and their staff because people would perceive her to be a woman, and would refuse to believe that she could possibly have the credentials that she had." [Dkt. 67 at 7]. Plaintiff argues that this is "quintessential sex stereotyping" because Diane Schroer is a woman and does have such a background. Id.⁶ But Preece did not testify that she was concerned that Members of Congress would perceive Schroer simply to be a woman. Instead, she testified that "everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114.

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. One or more of Preece's comments could be parsed in each of these three ways. While I would therefore conclude that Schroer is entitled to judgment based on a Price Waterhouse-type claim for sex stereotyping, I

⁶ Plaintiff also presented the testimony of Dr. Kalev Sepp, Deputy Assistant Secretary of Defense for Special Operations, that women have served in the Special Forces since the 1970s. Id. at 98-99.

also conclude that she is entitled to judgment based on the language of the statute itself.

B. Discrimination because of sex

Schroer's second legal theory is that, because gender identity is a component of sex, discrimination on the basis of gender identity is sex discrimination. In support of this contention, Schroer adduced the testimony of Dr. Walter Bockting, a tenured associate professor at the University of Minnesota Medical School who specializes in gender identity disorders. Dr. Bockting testified that it has long been accepted in the relevant scientific community that there are nine factors that constitute a person's sex. One of these factors is gender identity, which Dr. Bockting defined as one's personal sense of being male or female.⁷ Tr. at 210.

The Library adduced the testimony of Dr. Chester Schmidt, a professor of psychiatry at the Johns Hopkins University School of Medicine and also an expert in gender identity disorders. Dr. Schmidt disagreed with Dr. Bockting's view of the prevailing scientific consensus and testified that he and his colleagues regard gender identity as a component of "sexuality" rather than "sex." According to Dr. Schmidt, "sex"

⁷ The other eight factors, according to Dr. Bockting, are chromosomal sex, hypothalamic sex, fetal hormonal sex, pubertal hormonal sex, sex of assignment and rearing, internal morphological sex, external morphological sex, and gonads.

is made up of a number of facets, each of which has a determined biologic etiology. Dr. Schmidt does not believe that gender identity has a single, fixed etiology. Tr. at 372, 400-04.

The testimony of both experts -- on the science of gender identity and the relationship between intersex conditions and transsexuality -- was impressive. Resolving the dispute between Dr. Schmidt and Dr. Bockting as to the proper scientific definition of sex, however, is not within this Court's competence. More importantly (because courts render opinions about scientific controversies with some regularity), deciding whether Dr. Bokting or Dr. Schmidt is right turns out to be unnecessary.

The evidence establishes that the Library was enthusiastic about hiring David Schroer -- until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination "because of . . . sex."

Analysis "must begin . . . with the language of the statute itself" and "[i]n this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., 489 U.S. 235,

241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

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.

In Ulane v. Eastern Airlines, the Seventh Circuit held that discrimination based on sex means only that "it is unlawful to discriminate against women because they are women and against men because they are men." The Court reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." 742 F.2d 1081, 1085 (7th

Cir. 1981). The Ninth Circuit took a similar approach, holding that Title VII did not extend protection to transsexuals because Congress's "manifest purpose" in enacting the statute was only "to ensure that men and women are treated equally." Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977). More recently, the Tenth Circuit has also held that because "sex" under Title VII means nothing more than "male and female," the statute only extends protection to transsexual employees "if they are discriminated against because they are male or because they are female." Etsitty v. Utah Transit Authority, 502 F.2d 1215, 1222 (10th Cir. 2005).

The 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-supposed legislative intent over clear statutory text." Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting).⁸ In their holdings that discrimination based on changing one's sex is not discrimination because of sex, Ulane, Holloway, and Etsitty essentially reason "that a thing may be within the letter of the

⁸ Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or based on friendships that cross racial lines. See, e.g., McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir. 2004).

statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). This is no longer a tenable approach to statutory construction. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring). Supreme Court decisions subsequent to Ulane and Holloway have applied Title VII in ways Congress could not have contemplated. As Justice Scalia wrote for a unanimous court:

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 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.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

For Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII. Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law -- after that approach "has been eviscerated by Price Waterhouse," Smith, 378 F.3d at 573 -- the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex

reassignment surgery was literally discrimination "because of . . . sex."

In 2007, a bill that would have banned employment discrimination on the basis of sexual orientation and gender identity was introduced in the House of Representatives. See H.R. 2015, 110 Cong., 1st Sess. (2007). Two alternate bills were later introduced: one that banned discrimination only on the basis of sexual orientation, H.R. 3685, 110 Cong., 1st Sess. (2007), and another that banned only gender identity discrimination, H.R. 3686, 110 Cong., 1st Sess. (2007). None of those bills was enacted.

The Library asserts that the introduction and non-passage of H.R. 2015 and H.R. 3686 shows that transsexuals are not currently covered by Title VII and also that Congress is content with the status quo. However, as Schroer points out, another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the Ulane court and others have interpreted "sex" in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation. As the Supreme Court has explained,

[S]ubsequent 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.

Pension Ben Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)

(internal citations and quotation marks omitted).

Conclusion

In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.

The Clerk is directed to set a conference to discuss and schedule the remedial phase of this case.

JAMES ROBERTSON
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PETER J. TERVEER,

Plaintiff,

v.

JAMES H. BILLINGTON, Librarian,
Library of Congress

Defendant.

Civil Action No. 12-1290 (CKK)

MEMORANDUM OPINION

(March 31, 2014)

Plaintiff Peter J. Terveer filed suit on March 7, 2013, against his employer, Defendant James H. Billington, Librarian for the Library of Congress, alleging Defendant created a hostile work environment, denied him a within grade salary increase, and constructively discharged him on the basis of sex and religion and in retaliation for his protected activities in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* See Pl.’s Am. Compl. ¶¶ 55-87, ECF No. [26]. Plaintiff also alleges an independent claim of constructive discharge. *Id.* ¶¶ 88-92. In addition, Plaintiff alleges that Defendant’s discriminatory acts violated his rights under the Due Process and Equal Protection clauses of the Fifth Amendment, the Library of Congress Act, 2 U.S.C. § 140, and various Library of Congress policies and regulations prohibiting harassment and retaliation based on religion and sexual orientation. See *id.* ¶¶ 93-114. Presently before the Court is Defendant’s Motion to Dismiss all eight counts of Plaintiff’s Complaint. See Def.’s Mot. to Dismiss, ECF No. [27]. Upon consideration of the pleadings,¹ the relevant legal

¹ Defendant’s Motion to Dismiss (“Def.’s Mot.”), ECF No. [27]; Plaintiff’s Opposition to

authorities, and the record for purposes of a motion to dismiss, the Court finds that Plaintiff has sufficiently pled sex discrimination, religious discrimination, and retaliation claims under Title VII. However, to the extent Plaintiff's claims are based on his constructive discharge, they must be dismissed because Plaintiff failed to exhaust these claims. By contrast, the Court finds that Defendant has waived any exhaustion defense as to Plaintiff's discrimination and retaliation claims based on the denial of his within-grade salary increase. Finally, as Title VII is the exclusive remedy for federal government employees' claims of employment discrimination and the Court finds on the present record that Plaintiff has pled claims cognizable under Title VII, the Court dismisses without prejudice Plaintiff's constitutional claims, as well as Plaintiff's claims under the Library of Congress Act and Library of Congress policies and regulations. Accordingly, for the reasons stated below, Defendant's Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

A. Factual Background

For the purposes of Defendant's Motion to Dismiss, the Court presumes the following facts pled in Plaintiffs' Amended Complaint to be true, as required when considering a motion to dismiss. In February 2008, Plaintiff was hired as a Management Analyst in the Auditing Division of the Library of Congress Office of the Inspector General ("OIG"). *Id.* ¶ 1. Plaintiff's first-level supervisor was John Mech ("Mech"), a religious man who was accustomed to making his faith known in the workplace. *Id.* ¶¶ 1, 8. On June 24, 2009, Mech told Plaintiff that "putting you . . . closer to God is my effort to encourage you to save your worldly behind." *Id.* ¶

Defendant's Motion to Dismiss ("Pl.'s Opp'n."), ECF No. [28]; Defendant's Reply in Support of Defendant's Motion to Dismiss ("Def.'s Reply"), ECF No. [32]; Amicus Brief by Lambda Legal Defense & Education Fund, ECF No. [29].

8. Plaintiff became close with Mech and Mech's family, including his daughter. *Id.* ¶¶ 9-10. In August 2009, Mech's daughter learned that Plaintiff is homosexual. *Id.* ¶¶ 10-11. Shortly thereafter, Plaintiff received an email from Mech mentioning his daughter and containing photographs of assault weapons along with the tagline "Diversity: Let's Celebrate It." *Id.* ¶ 12. Mech also began engaging in religious lectures "at the beginning of almost every work-related conversation" "to the point where it became clear that Mech was targeting [Plaintiff] by imposing his conservative Catholic beliefs on [Plaintiff] throughout the workday." *Id.* Plaintiff further alleges that after learning that Plaintiff was homosexual, Mech no longer gave Plaintiff detailed instructions for assignments, but would instead give Plaintiff ambiguous instructions without clear communication of what Mech or OIG management expected. *Id.* ¶ 13. In December 2009, Mech began assigning Plaintiff assignments related to a large audit project that Plaintiff alleges were beyond his experience level. *Id.* ¶ 16. Normally, Plaintiff alleges, a project of such size and complexity would be staffed with six employees, take more than a year to complete, and be initiated by a New Project Memorandum. *Id.* Instead, Mech held a brief meeting to discuss the format of the project and assigned Plaintiff as the sole employee on the project. *Id.* Mech also began assigning Plaintiff more work in addition to the audit project. *Id.* ¶ 17.

On June 21, 2010, Mech called an unscheduled meeting, lasting more than an hour, for the stated purpose of "educating [Plaintiff] on Hell and that it is a sin to be a homosexual . . . [, that] homosexuality was wrong[,] and that [Plaintiff] would be going to Hell." *Id.* ¶ 18. Mech began reciting Bible verses to Plaintiff and told Plaintiff "I hope you repent because the Bible is very clear about what God does to homosexuals." *Id.* Four days later, on June 25, 2010, Plaintiff received his annual review from Mech. *Id.* ¶ 20. Plaintiff found the review did not

accurately reflect the quality of his work and believed the review was motivated by Mech's religious beliefs and sexual stereotyping. *Id.* That day, Plaintiff confronted Mech regarding the purpose of his religious lecturing and "the unfair treatment that began after Mech learned [Plaintiff] was homosexual." *Id.* Mech was greatly angered by Plaintiff's questioning, vehemently denied that Plaintiff's homosexuality and personal religious views had impacted his impartiality with regard to Plaintiff's work and performance, and accused Plaintiff of trying to "bring down the library." *Id.* ¶ 21.

On June 29, 2010, Plaintiff met with Nicholas Christopher ("Christopher"), Mech's immediate supervisor, and told Christopher that "Mech had been lecturing him about religion and that he believed he was the victim of discrimination in the workplace because his sexual orientation did not conform to Mr. Mech's religious beliefs." *Id.* ¶ 24. Christopher told Plaintiff that, in his opinion, employees do not have rights. *Id.* ¶ 25. Christopher did not take any remedial action, did not contact the Library's Equal Employment Opportunity Office—the Office of Opportunity Inclusiveness and Compliance ("OIC")—and did not advise Plaintiff of appropriate complaint procedures. *Id.*

Plaintiff alleges that in response to his allegations of discrimination, Mech placed Plaintiff directly under his supervision for the audit project and informed Plaintiff that he would be subjected to heightened scrutiny. *Id.* ¶ 26. Mech also began verbally assaulting Plaintiff whenever Plaintiff sought clarification on his work assignments. *Id.* In December 2010, Mech prepared an evaluation of the audit project, which Plaintiff alleges broke with standard operating procedure because the project was not complete. *Id.* ¶ 27. Mech's review of the project was "extremely negative in every category." *Id.* Plaintiff discussed the review with Mech and asked Mech if he continued to refuse to accept Plaintiff's homosexuality. *Id.* In response, Plaintiff

alleges Mech stated: “I don’t care, I had a conversation with you—that is my business—but this has put you in a position where you are under a closer watch, and you are not to question me—this is how it is. Regardless, you do not question management.” *Id.* Plaintiff further alleges that Mech stated that he was “damn angry” at Plaintiff for threatening to bring a claim for wrongful discrimination and harassment and said to Plaintiff: “You were going to string me out to dry, made accusations, put me in a position risked (sic) my job and position, and now this is the result. You are to do as you are told and not question me or management in this office. You do not have rights, this is a dictatorship.” *Id.*

In February 2011, Mech issued another negative performance evaluation based upon allegedly incorrect facts and mischaracterizations. *Id.* ¶ 29. On March 9, 2011, Mech notified Plaintiff that he was being placed on a “90-day written warning.” *Id.* ¶ 31. A negative report following the review period would result in a denial of Plaintiff’s level GS-11 within-grade-increase. *Id.* On March 16, 2011, Plaintiff met with Naomi Earp (“Earp”), Director of the OIC, and initiated the Equal Employment Opportunity (“EEO”) complaint process. *Id.* ¶ 34. Earp, who was familiar with Plaintiff’s work, believed Plaintiff would benefit from a transfer from his current office, OIG, to the OIC. *Id.* ¶ 35. Earp asked Christopher if OIG would approve the transfer, but Christopher responded that Plaintiff was on track to be terminated within six months and that he would not approve the transfer. *Id.* Plaintiff does not now claim this denial of transfer as an adverse employment action. *See* Pl.’s Opp’n. at 14 n.1.

On June 24, 2011, Mech submitted his report following the 90-day written warning period finding Plaintiff’s work to be only minimally successful and denied his within-grade-increase. *Id.* ¶ 36. Plaintiff informed Christopher, who in turn informed Mech, that Plaintiff was intending to appeal Mech’s denial of his within-grade-increase. *Id.* ¶ 37. Shortly thereafter,

Mech convened a meeting with Plaintiff and his co-workers and demanded that Plaintiff disclose to his co-workers that he intended to appeal the denial of his within-grade-increase, subjecting Plaintiff to a “hostile and abusive interrogation” until Plaintiff disclosed the details regarding his intent to appeal. *Id.* Plaintiff’s appeal of the denial of his within-grade-increase was subsequently denied by Christopher on July 21, 2011. *Id.* ¶ 38; Def.’s Ex. B (Plaintiff’s Formal Complaint of Discrimination), at 10.

Plaintiff alleges that the stress of his work environment caused him to require medical assistance and counseling. *Id.* ¶ 39. Plaintiff took paid sick leave from August 19, 2011, to September 23, 2011. *Id.* On September 28, 2011, upon returning to work, Plaintiff filed an informal complaint of discrimination with the OIC Office. *Id.* ¶ 40. On Plaintiff’s informal complaint, Plaintiff marked “sex” and “reprisal” as the basis of the alleged discrimination. Def.’s Ex. A (Plaintiff’s Informal Complaint of Discrimination). Plaintiff alleges that following the filing of his discrimination complaint, Mech and Christopher prevented Plaintiff’s access to documents and other data, and continued to “harass, intimidate, and retaliate” against Plaintiff. *Id.* ¶ 41. Specifically, Plaintiff was criticized and penalized at work for taking time to prosecute his administrative action. *Id.* Christopher also demanded that Plaintiff request permission from the supervisors against whom he had filed his complaint before working on his administrative action during the workday. *Id.* ¶ 42. In addition, Plaintiff alleges that “on numerous occasions, Christopher followed and/or filmed [Plaintiff] while he was off-duty and away from the [Library of Congress].” *Id.* ¶ 43.

On October 12, 2011, Plaintiff took additional leave to continue medical treatment “to deal with the emotional stress created by Mech and Christopher’s discriminatory treatment.” *Id.* ¶ 44. Plaintiff filed his formal complaint alleging discrimination with the OIC on November 9,

2011. *Id.* ¶ 47. Plaintiff's formal complaint alleged discrimination based on religion, sex, sexual harassment, and reprisal. Def.'s Ex. B (Plaintiff's Formal Complaint of Discrimination). Plaintiff qualified for Family Medical Leave from October 12, 2011, to January 3, 2012. *Id.* ¶¶ 44, 48. Shortly after January 3, 2012, Plaintiff received a letter from Christopher declaring Plaintiff to be Absent Without Leave from work and directing him to return to duty. *Id.* ¶ 48. Christopher's letter stated: ". . . regardless of any health-related issue that you may be experiencing, your prolonged absence has had a negative impact on the Office of Inspector General Therefore, you are directed to immediately report for duty or contact me immediately to discuss your return to duty status. You are also advised that any further request for LWOP (leave without pay) will not be considered at this time." *Id.* ¶ 48. Plaintiff responded to Christopher that he would follow up with his doctors regarding his medical status. *Id.* ¶ 49. On March 29, 2012, Library of Congress Inspector General Karl Schornagel informed Plaintiff that he was considered Absent Without Leave and would be terminated from the Library of Congress on April 6, 2012, due to his failure to return to duty. *Id.* ¶ 51. Plaintiff alleges he was constructively terminated on April 4, 2012, because he was unable to return to a workplace where he had to confront constant discriminatory treatment from Mech and Christopher. *Id.* ¶ 54. On April 5, 2012, Plaintiff appealed through the Library of Congress's Adverse Actions appeals process Defendant's decision to terminate him. *Id.* ¶ 52. Plaintiff, however, does not now plead his actual termination by Defendant as an adverse employment action under Title VII, only his constructive termination. *See* Pl.'s Opp'n. at 18 n.5.

B. Procedural Background

On May 8, 2012, the Library of Congress issued its final agency decision denying Plaintiff's claims of discrimination. *Id.* ¶ 53. On August 3, 2012, Plaintiff filed the present

lawsuit alleging eight counts against Defendant. Counts I through III allege, respectively, that Defendant violated Title VII by discriminating against Plaintiff based on sex, religion, and in retaliation for Plaintiff's protected activities. Specifically, Plaintiff alleges that Defendant subjected him to "harsh and discriminatory working conditions" and "constructively terminated" him from his position because Plaintiff, "as a homosexual male[,] did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC." *Id.* ¶¶ 57-59. In Count II, Plaintiff's religious discrimination claim, Plaintiff alleges that Defendant subjected him to "harsh and discriminatory working conditions" and "constructively terminated" him from his position by discriminating against him for holding "religious beliefs that could not be reconciled with [Mech's] fundamentalist religious beliefs that refuse to embrace LGBT individuals." *Id.* ¶¶ 65-66, 68. Finally, in Count III, Plaintiff alleges that he was constructively terminated and subjected to a hostile work environment in retaliation for confronting Mech about discriminating against him "based upon his sexual orientation and religious beliefs." *Id.* ¶¶ 72, 84. Plaintiff also pleads an independent claim of constructive discharge (Count IV). *Id.* ¶¶ 88-92.

Counts V and VI present constitutional claims. In Count V, Plaintiff alleges that Defendant violated the Fifth Amendment's Due Process clause by "purposefully and intentionally discriminating against [Plaintiff]" because of Defendant's "prejudice towards homosexuals and/or persons whom do not conform to sex stereotypes recognized by the Defendant." *Id.* ¶ 96. Count VI, which Plaintiff pleads as an alternative to his Title VII sex discrimination claim, alleges that Defendant "engaged in impermissible sex discrimination in violation of the equal protection component of the Fifth Amendment's Due Process Clause." *Id.* ¶ 99. Specifically, Plaintiff alleges that Defendant "intentionally discriminated against [him]

because his identity as a homosexual male represents a departure from sex stereotypes recognized by the Defendant.” *Id.* ¶ 101.

Plaintiffs’ last two counts allege violations of the Library of Congress Act and Library of Congress policies and regulations. In Count VII, Plaintiff alleges that Defendant violated the Library of Congress Act, 2 U.S.C. § 140, because under the Act, Plaintiff was “entitled to have decisions related to his employment considered ‘solely with reference to [his] fitness for [the] particular duties’ of the Management Analyst position” yet Plaintiff was terminated from his employment “for reasons wholly unrelated to his fitness for the particular duties of the Management Analyst position.” *Id.* ¶¶ 105, 107. In Count VIII, Plaintiff alleges that Defendant violated Library of Congress Special Announcements 10-5 and 11-02 and Library of Congress Regulations LCR 2010-2, 2023-1, and 2023-2 by precluding Plaintiff from “a work environment free from harassment of any kind, including harassment on the basis of religion or sexual orientation.” *Id.* ¶ 111.

Defendant now moves the Court to dismiss all eight Counts of Plaintiff’s Complaint. First, Defendant argues that to the extent Plaintiff’s claims are based on his constructive discharge and the denial of his within-grade salary increase, these claims should be dismissed because Plaintiff failed to timely exhaust his administrative remedies as to these discrete employment actions. Second, Defendant contends that Plaintiff’s sex and religious discrimination and retaliation claims under Title VII should be dismissed for failure to state a claim. Third, Defendant moves the Court to dismiss Plaintiff’s constitutional claims because they are preempted by Title VII. Lastly, Defendant contends that Plaintiff cannot sue the Library of Congress for violations of the Library of Congress Act or the Library’s internal policies or regulations because there is no express waiver of sovereign immunity for such claims.

II. LEGAL STANDARD

A. Dismissal for Failure to Exhaust Administrative Remedies

Defendant moves under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction Plaintiff's constructive discharge and denial of promotion claims. However, "[m]otions to dismiss for failure to exhaust administrative remedies are . . . appropriately analyzed under Rule 12(b)(6)" for failure to state a claim for which relief can be granted. *Hairston v. Tapella*, 664 F.Supp.2d 106, 110 (D.D.C. 2009) (quoting *Hopkins v. Whipple*, 630 F.Supp.2d 33, 40 (D.D.C. 2009)); see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on [the statute's] coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."); *Douglas v. Donovan*, 559 F.3d 549, 556 n. 4 (D.C. Cir. 2009) ("[T]he exhaustion requirement [under Title VII] though mandatory, is not jurisdictional[.]"). In deciding a motion brought under Rule 12(b)(6),

a court does not consider matters outside the pleadings, but a court may consider on a motion to dismiss the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.

Ward v. D.C. Dep't of Youth Rehab. Serv's., 768 F.Supp.2d 117, 119 (internal quotations and citations omitted). As Plaintiff's Complaint references the informal complaint of discrimination Plaintiff submitted on September 28, 2011, the formal complaint he made on November 9, 2011, and the final agency decision, and Defendant has attached each of these documents to its Motion to Dismiss, the Court shall consider these documents in analyzing whether Plaintiff has timely exhausted his claims of discrimination.

B. Dismissal for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) provides that a party may challenge the

sufficiency of a complaint on the grounds that it “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “[A] complaint [does not] suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

III. DISCUSSION

A. *Failure to Exhaust Administrative Remedies*

Plaintiff’s Title VII sex and religious discrimination and retaliation claims each allege that Defendant subjected Plaintiff to a hostile work environment and constructively discharged Plaintiff for discriminatory or retaliatory reasons. Plaintiff also pleads an independent count of constructive discharge. In its Motion to Dismiss, Defendant contends that Plaintiff’s constructive discharge claims must be dismissed because Plaintiff has failed to exhaust these claims through the Library’s EEO process.² Defendant also argues that Plaintiff failed to exhaust his claim that he was denied a promotion in the form of a within-grade salary increase based on discrimination and/or retaliation.³

² Defendant also argues that Plaintiff cannot state a claim for constructive discharge because he was *actually* terminated and did not resign or retire. Def.’s Mot. at 9-11. The Court need not address this argument as the Court finds that even if Plaintiff properly stated a claim of constructive discharge, Plaintiff did not exhaust that claim and, accordingly, it must be dismissed.

³ The Court notes that Plaintiff only discusses the denial of his within-grade-increase in the fact section of his Complaint. Plaintiff does not identify the denial of his within-grade-

Federal employees may file a civil action only after exhausting their administrative remedies before the concerned federal agency. 42 U.S.C. § 2000e–16(c). Under rulemaking authority delegated by Title VII, *see* 42 U.S.C. § 2000e–16(b), the Librarian of Congress exercises authority granted to the Equal Employment Opportunity Commission. In accordance with that statute, the Library of Congress promulgated Library of Congress Regulation (“LCR”) 2010–3.1 on April 20, 1983—“Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Relations Under the Equal Employment Opportunity Program.” Pursuant to Section 4(A) of LCR 2010–3.1 (“Precomplaint Procedures”), “[a] staff member, or qualified applicant, who believes that he/she has been, or is being, discriminated against, and who wishes to resolve the matter, shall notify and consult with a Counselor not later than 20 workdays after the date of the alleged discriminatory matter.” *Id.*

Compliance with these procedures and time limits is mandatory. “Complainants must timely exhaust these administrative remedies before bringing their claims to court.” *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997); *Bayer v. Dep’t of Treasury*, 956 F.2d 330, 332 (D.C. Cir. 1992); *Williams v. Munoz*, 106 F.Supp.2d 40, 42 (D.D.C. 2000) (“timely administrative charge is a prerequisite to initiation of a Title VII action”). “Because untimely exhaustion of administrative remedies is an affirmative defense, the defendant bears the

increase as an adverse employment action under any of his counts of discrimination, even though he does specifically identify his constructive discharge as an adverse employment action. Defendant interprets Plaintiff’s Complaint as alleging the denial of Plaintiff’s within-grade-increase as a discriminatory and/or retaliatory adverse employment action. In his Opposition, Plaintiff appears to agree with this interpretation, arguing that the denial of his within-grade-increase satisfies the “adverse employment action” element of both a *prima facie* case of discrimination and retaliation. *See* Pl.’s Opp’n. at 29, 50. Accordingly, despite the lack of clarity in Plaintiff’s Complaint, the Court shall also treat Plaintiff’s Complaint as alleging the denial of Plaintiff’s within-grade-increase as a discriminatory and/or retaliatory adverse employment action.

responsibility of pleading and proving it.” *Bowden*, 106 F.3d at 437 (citing *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985)). Importantly, however, the administrative deadlines imposed by this scheme are not jurisdictional in nature: “they function like a statute of limitations and like a statute of limitations, are subject to waiver, estoppel, and equitable tolling.” *Marsh*, 777 F.2d at 14 (citations and internal quotation marks omitted).

The Court shall address Defendant’s two exhaustion arguments in turn.

i. Constructive Discharge

Plaintiff concedes that he did not contact the Library of Congress’s OIC Office regarding his constructive discharge claim, nor did he seek to amend his November 9, 2011, formal administrative EEO complaint to include this claim. Pl.’s Opp’n. at 15. Plaintiff argues, however, that while the claims he may bring in a lawsuit before a federal court are limited to those claims asserted in his administrative complaint, courts have also allowed plaintiffs to present unexhausted claims that are “like or reasonably related to the allegations of the administrative EEO complaint and growing out of such allegations.” *Ponce v. Billington*, 652 F.Supp.2d 71, 74 (D.D.C. 2009). Plaintiff contends that his constructive discharge claim is reasonably related to his EEO complaint because the same facts that support his claims of sexual harassment and hostile work environment support his claim that he was constructively discharged due to intolerable working conditions.⁴ Plaintiff effectively urges the Court to piggy-back his constructive discharge claim onto his hostile work environment claim for which

⁴ Plaintiff also seems to suggest that he exhausted his constructive discharge claim when he filed an Appeal of Adverse Action on April 5, 2012, as he was instructed he could do in the the March 29, 2012, correspondence from the Library of Congress informing him that he would be terminated on April 6, 2012. See Pl.’s Opp’n. at 15-16. However, Plaintiff’s Appeal of Adverse Action appealed his actual termination, not his constructive discharge.

Plaintiff did satisfy exhaustion requirements. In the alternative, Plaintiff urges this Court to employ ancillary jurisdiction over his constructive discharge claim. Plaintiff contends that “ancillary claims that grow out of the original charge may be proper[ly] before the federal court where the charge was only filed for the initial claim.” Pl.’s Opp’n. at 18. Plaintiff relies on *Gupta v. East Texas State University*, where the Fifth Circuit employed ancillary jurisdiction to provide a jurisdictional basis for Plaintiff’s unexhausted retaliatory-discharge claim because it “gr[ew] out of an [earlier] administrative charge properly before the court.” 654 F.2d 411, 414 (5th Cir. 1981).

In 2002, the Supreme Court in *National Railroad Passenger Corporation v. Morgan*, “rejected the so-called continuing violation doctrines that allowed plaintiffs to recover for discrete acts of discrimination or retaliation that had not been separately exhausted but were ‘sufficiently related’ to a properly exhausted claim.” *Romero-Ostolaza v. Ridge*, 370 F.Supp.2d 139, 148 (D.D.C. 2005) (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002)). The *Morgan* Court was emphatic that “strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law,” *Morgan*, 536 U.S. at 108 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)), and that recovery was precluded “for discrete acts of discrimination or retaliation that occur outside the statutory time period,” *id.* at 105. Since *Morgan*, courts in the District of Columbia Circuit have largely refused to take jurisdiction over unexhausted claims of discrete discriminatory acts, such as terminations that occur following the filing of an administrative charge.⁵ See, e.g., *Coleman-Adebayo v. Leavitt*, 326 F.Supp.2d 132, 137-38 (D.D.C. 2004); *Romero-Ostolaza*, 370 F.Supp.2d

⁵ The Court of Appeals for the District of Columbia Circuit, however, has declined to decide whether *Morgan* did in fact overtake the “reasonably related to” line of cases. *Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010).

at 149; *Payne v. Salazar*, 628 F.Supp.2d 42, 51 (D.D.C. 2009), *rev'd on other grounds*, 619 F.3d 56 (D.C. Cir. 2010).

The key to determining whether a claim must meet the procedural hurdles of the exhaustion requirement itself, or whether it can piggy-back on another claim that has satisfied those requirements, is whether the claim is of a “discrete” act of discrimination or retaliation or, instead, of a hostile work environment. “Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire” are individual acts that “occur” at a fixed time Accordingly, plaintiffs alleging such discriminatory action must exhaust the administrative process regardless of any relationship that may exist between those discrete claims and any others.

Coleman-Adebayo, 326 F.Supp.2d at 137-38 (quoting *Morgan*, 536 U.S. at 114). Indeed, courts in this Circuit have specifically rejected attempts, like Plaintiff’s, to piggy-back termination claims that are the “culmination” of plaintiffs’ properly exhausted hostile work environment or discrimination claims. *See Graham v. Gonzales*, 2005 WL 3276180, *5 (D.D.C. Sept. 30, 2005) (rejecting plaintiff’s argument that the court had jurisdiction over his constructive discharge claims because they were the “culmination of, and part of, the continuing hostile work environment claim as to which [Plaintiff] did exhaust administrative remedies”); *Camp v. District of Columbia*, 2006 WL 667956, *8 (D.D.C. March 14, 2006) (“While her retaliatory termination claims may be the “culmination” of her sexual harassment/gender discrimination claims, pursuant to *Morgan*, Plaintiff is required to exhaust her administrative remedies for her termination/retaliation claim, which is a separate discrete act.”). Accordingly, the Court finds that Plaintiff has failed to exhaust his constructive discharge claim and declines to take jurisdiction over this discrete claim of discrimination under either the “reasonably related to” line of cases or ancillary jurisdiction. Therefore, the Court grants Defendant’s Motion to Dismiss Plaintiff’s discrimination claims to the extent they are based on his alleged constructive discharge and Plaintiff’s independent count of constructive discharge (Count IV).

ii. Within-Grade-Increase

Defendant also argues that Plaintiff's allegation that he was discriminatorily denied a promotion in the form of a within-grade-increase was not timely exhausted and thus should be dismissed.⁶ Mech denied Plaintiff's within-grade-increase on June 24, 2011. Am. Compl. ¶ 36. On June 30, 2011, Plaintiff asked Christopher to reconsider the evaluation which led to the denial of Plaintiff's within-grade-increase. *Id.* ¶ 38. On July 21, 2011, Christopher informed Plaintiff that he would not change Plaintiff's performance evaluation. Def.'s Ex. B (Plaintiff's Formal Complaint of Discrimination). Defendant argues that even assuming the time to contact the Library of Congress' OIC Office began on July 21, 2011, Plaintiff did not contact the OIC until September 28, 2011, several weeks after the 20-day deadline for notifying a counselor of a discriminatory matter. Accordingly, Defendant argues, Plaintiff's claims related to the denial of his within-grade-increase should be dismissed as untimely.

As the Court previously explained, if a plaintiff does not exhaust his administrative remedies before filing a lawsuit under Title VII, he is precluded from bringing suit in federal court. *See Bowden*, 106 F.3d at 437. Failure to exhaust is an affirmative defense and defendants bear the burden of pleading and proving it. *Id.* However, administrative deadlines are subject

⁶ The Court notes that Plaintiff only discusses the denial of his within-grade-increase in the fact section of his Complaint. Plaintiff does not identify the denial of his within-grade-increase as an adverse employment action under any of his counts of discrimination, even though he does specifically identify his constructive discharge as an adverse employment action. Defendant interprets Plaintiff's Complaint as alleging the denial of Plaintiff's within-grade-increase as a discriminatory and/or retaliatory adverse employment action. In his Opposition, Plaintiff appears to agree with this interpretation, arguing that the denial of his within-grade-increase satisfies the "adverse employment action" element of both a *prima facie* case of discrimination and retaliation. *See* Pl.'s Opp'n. at 29, 50. Accordingly, despite the lack of clarity in Plaintiff's Complaint, the Court shall also treat Plaintiff's Complaint as alleging the denial of Plaintiff's within-grade-increase as a discriminatory and/or retaliatory adverse employment action.

“to waiver, estoppel, and equitable tolling.” *Marsh*, 777 F.2d at 14 (citations omitted). If defendants meet their burden, plaintiffs bear the burden of pleading and proving facts supporting equitable avoidance of the defense. *Bowden*, 106 F.3d at 437.

Plaintiff’s primary argument in response to Defendant’s contentions is that he “followed all appropriate administrative procedures with regard to his discrimination claims.” Pl.’s Opp’n. at 14. Plaintiff explains that he initiated the EEO process on March 16, 2011, by meeting with an EEO Counselor and that this meeting was timely as it was only eight days after the discriminatory event of Mech’s issuance of the 90-day written warning informing Plaintiff that he would be denied his within-grade-increase if he received a negative review at the end of the 90-day period. Even if the Court were to very liberally interpret Plaintiff’s Complaint and treat the date of the denial of Plaintiff’s within-grade-increase as March 9, 2011—the date when Plaintiff received the 90-day written warning—Plaintiff provides no record and makes no allegation indicating that he discussed the (potential) denial of his within-grade-increase during his meeting with the EEO Counselor on March 16, 2011. Plaintiff only vaguely alleges in his Complaint that, during the meeting, he “detailed the discrimination he was enduring.” Am. Compl. ¶ 34. The informal complaint Plaintiff submitted to the OIC Office on September 28, 2011, does, by contrast, clearly discuss the denial of Plaintiff’s within-grade-increase. *See* Def.’s Ex. A (Plaintiff’s Informal Complaint of Discrimination). This informal complaint, however, was submitted to the OIC Office well outside the twenty-day window for notifying the OIC Office of an alleged discriminatory event. Accordingly, there is nothing in the record before the Court indicating that Plaintiff discussed the allegedly discriminatory denial of his within-grade-increase earlier than September 28, 2011, making his exhaustion of this claim untimely.

As Plaintiff does not acknowledge that he failed to timely exhaust the denial of his

within-grade-increase, Plaintiff's Opposition is void of any argument supporting equitable avoidance of this specific untimeliness defense.⁷ However, in Plaintiff's discussion of his *constructive discharge* claim, Plaintiff notes that his "formal complaint does in fact discuss the facts surrounding the issue of failure to promote and provide a within-grade increase, . . . which is reflected in the LOC's Notice of Receipt and Acceptance of Formal Complaint of Discrimination ("LOC Receipt and Acceptance Notice"). The LOC's Receipt and Acceptance Notice does not state that any claims were rejected, and demonstrates that all of Plaintiff's claims were in fact accepted." Pl.'s Opp'n. at 15. Courts in this Circuit have held that "when a complaint has proceeded through administrative channels prior to arriving at the federal courthouse, and the agency has accepted, investigated and decided that complaint on its merits without raising the exhaustion issue, the exhaustion defense may be found to have been waived." *Johnson v. Billington*, 404 F.Supp.2d 157, 162 (D.D.C. 2005) (citing *Bowden*, 106 F.3d at 438–39); *see also Kriesch v. Johanns*, 486 F.Supp.2d 183, 187 (D.D.C. 2007) (finding waiver where USDA accepted for investigation, investigated fully, and decided on the merits all of Ms. Kriesch's EEO complaints and never raised untimeliness during the administrative process). "W]hen an agency is able to investigate a case in a timely fashion, before evidence is stale or lost and before expectations about the consequences of the actions at issue are settled, '[the agency]

⁷ It appears from Plaintiff's Opposition that he did not fully recognize that Defendant is challenging the timeliness of his administrative exhaustion of his within-grade-increase claim. In a footnote in his Opposition, Plaintiff states: "Defendant has not argued that Plaintiff failed (sic) exhaust administrative procedures with regard to his discrimination claims. Defendant solely argued that Plaintiff failed to exhaust administrative procedures with regard to his claims of constructive termination and failure to transfer." Pl.'s Opp'n. at 14 n.1. However, Defendant's memorandum supporting his Motion to Dismiss clearly includes a paragraph arguing that Plaintiff's "allegation that he was denied a promotion in the form of a within-grade-salary increase, Am. Compl. ¶ 36, was not timely exhausted and should be dismissed." Def.'s Mot. at 15. Therefore, Plaintiff was fully on notice of this particular exhaustion argument.

has no legitimate reason to complain about a judicial decision on the merits.” *Johnson*, 404 F.Supp.2d at 162 (citing *Bowden*, 106 F.3d at 438–39). Here, the agency accepted Plaintiff’s within-grade-increase claim despite its apparent untimeliness, and Defendant does not now argue that Plaintiff’s claim was stale at the time the agency proceeded. *See* Def.’s Ex. D (Final Agency Decision). The Library fully investigated Plaintiff’s within-grade-increase claim and has adjudicated the merits of the claim. Moreover, “litigation of this case on the merits [does not] unsettle expectations.” *Id.* at 163.

Although Plaintiff’s argument that Defendant accepted, investigated, and adjudicated Plaintiff’s within-grade-increase claim is confusingly located within an argument regarding the exhaustion of an entirely different claim, at the motion to dismiss stage, the Court is inclined to liberally construe Plaintiff’s pleadings—which are far from a model of clarity—and hold that Plaintiff has met his burden of pleading and proving facts supporting equitable avoidance of Defendant’s untimeliness defense. Accordingly, the Court finds Defendant has waived its untimely exhaustion defense as to Plaintiff’s within-grade-increase claim and denies Defendant’s Motion to Dismiss Plaintiff’s discrimination claims to the extent they are based on the denial of Plaintiff’s within-grade-increase.

B. Failure to State a Claim

Defendant’s second overarching argument is that Plaintiff’s three Title VII claims—sex discrimination, religious discrimination, and retaliation—should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court shall address each Title VII claim in turn.

i. Title VII: Sex Discrimination

Defendant moves the Court to dismiss Plaintiff’s sex discrimination claim because

Plaintiff has insufficiently pled that he was the victim of sex stereotyping, a form of sex discrimination recognized as cognizable under Title VII by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Defendant contends that “courts have generally required plaintiffs [alleging sex stereotyping] to set forth specific allegations regarding the particular ways in which an employee failed to conform to such stereotypes – and allegations to support the claim that this non-conformity negatively influenced the employer’s decision.” Def.’s Mot. at 18. Plaintiff’s Complaint, Defendant argues, falls short of this pleading standard because it does not indicate that his “supervisor’s conduct was motivated by judgments about plaintiff’s behavior, demeanor or appearance, and there are no facts to support an allegation that the employer was motivated by his views about Plaintiff’s conformity (or lack thereof) with sex stereotypes.” *Id.* at 19.

Courts in this Circuit have emphasized that a plaintiff alleging employment discrimination faces a “relatively low hurdle at the motion to dismiss stage.” *Jones v. Bernanke*, 685 F.Supp.2d 31, 40 (D.D.C. 2010); *see also Rouse v. Berry*, 680 F.Supp.2d 233, 236 (D.D.C. 2010) (“In the context of a fairly straightforward employment discrimination complaint, plaintiffs traditionally have not been subject to a heightened pleading standard.”). Indeed, the Court of Appeals for the District of Columbia has held that to survive a motion to dismiss under Rule 12(b)(6), all a complaint need state is: ‘I was turned down for a job because of my race.’ *Potts v. Howard Univ. Hosp.*, 258 Fed.Appx. 346, 347 (D.C. Cir. 2007) (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000)).

Title VII prohibits an employer from discriminating “against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). Under Title VII, allegations that an employer is discriminating against an employee based on the employee’s non-conformity with

sex stereotypes are sufficient to establish a viable sex discrimination claim. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). Here, Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,” Am. Compl. ¶ 55, that his “status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under Mech’s supervision or at the LOC,” *id.* ¶ 59, and that “his orientation as homosexual had removed him from Mech’s preconceived definition of male,” *id.* ¶ 13. As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief” as required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies Defendant’s Motion to Dismiss Plaintiff’s sex discrimination claim (Count I) for failure to state a claim.

ii. Title VII: Religious Discrimination

Defendant next argues that Plaintiff’s religious discrimination claim must be dismissed because it is no more than a recasting of Plaintiff’s sex discrimination claim. Defendant relies on *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009), in which the Third Circuit held that a plaintiff who alleged that he failed to conform to his employer’s religious beliefs by virtue of his status as a gay man had not pled a religious discrimination claim because “he was harassed not ‘because of religion,’ but because of his sexual orientation.” *Id.* at 293. Defendant contends that, likewise, the allegations in Plaintiff’s Complaint only show a supervisor taking issue with Plaintiff’s sexual orientation, not his religious beliefs. Def.’s Mot. at 19-20.

Plaintiff responds that he sufficiently pled a claim of religious discrimination because he alleged facts showing that he was discriminated against because he failed to live up to his supervisor's religious expectations. The Court agrees with Plaintiff. Title VII seeks to protect employees not only from discrimination on the basis of their religious beliefs, but also from forced religious conformity or adverse treatment because they do "not hold or follow [their] employer's religious beliefs." *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1038 (10th Cir. 1993); *see also Johnson v. Dong Moon Joo*, 2006 WL 627154, *22 (D.D.C. March 12, 2006) (following *Shapolia* analysis); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) (adopting *Shapolia* analysis and holding that plaintiff "need only show that her perceived religious shortcomings (her unwillingness to strive for salvation as Ives understood it, for example) played a motivating role in her discharge."). In order to establish a *prima facie* case in actions where the plaintiff claims that he was discriminated against because he did not share certain religious beliefs held by his supervisors, the plaintiff must show

(1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (3) *some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs.*

Shapolia, 992 F.2d at 1038 (emphasis added). In light of the "low hurdle" a plaintiff alleging employment discrimination must overcome at the motion to dismiss stage, the Court finds that Plaintiff has alleged sufficient facts to establish a claim of religious discrimination for failure to follow his employer's religious beliefs. In his Complaint, Plaintiff alleges that prior to learning of Plaintiff's sexual orientation, Mech told Plaintiff that "putting you . . . closer to God is my effort to encourage you to save your worldly behind." *Id.* ¶ 8. Plaintiff further alleges that after Mech's daughter learned of Plaintiff's sexual orientation, "at the beginning of almost every

work-related conversation [with Plaintiff], Mech would engage in a religious lecture to the point where it became clear that Mech was targeting [Plaintiff] by imposing his conservative Catholic beliefs on [Plaintiff] throughout the workday.” *Id.* ¶ 12. Plaintiff also alleges that “Mech confronted [Plaintiff] directly regarding his homosexuality and its non-conformance with Mech’s conservative religious beliefs.” *Id.* ¶¶ 18, 19. The Court finds that Plaintiff has sufficiently pled facts suggesting that the religious harassment he endured was not due exclusively to his homosexual status. Plaintiff’s allegations show that Mech’s religious proselytizing began before Mech learned of Plaintiff’s sexual orientation. Moreover, a fact finder could infer from Plaintiff’s allegation that Mech repeatedly engaged in religious lectures targeted at imposing Mech’s “conservative Catholic beliefs” on Plaintiff that religion (and not simply homosexuality) played a role in Defendant’s employment decisions regarding Plaintiff and contributed to the hostility of the work environment. As a result, at this stage, this case is distinguishable from *Prowel* where the plaintiff alleged religious proselytizing focused exclusively on the plaintiff’s sexual orientation.

In any event, *Prowel*’s holding is not controlling in this Circuit. Courts in other circuits have found that plaintiffs state a claim of religious discrimination in situations where employers have fired or otherwise punished an employee because the employee’s personal activities or status—for example, divorcing or having an extramarital affair—failed to conform to the employer’s religious beliefs. *See, e.g., Henegar v. Sears Roebuck and Co.*, 965 F.Supp. 833, 838 (N.D.W.Va. 1997) (living with a man while divorcing her husband); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455, *4 (D.Minn. 2005) (extramarital affair). The Court sees no reason to create an exception to these cases for employees who are targeted for religious harassment due to their status as a homosexual individual. Accordingly, looking at the allegations in Plaintiff’s

Complaint, the Court concludes that Plaintiff has alleged a set of facts that would entitle Plaintiff to relief. The Court denies Defendant's Motion to Dismiss Plaintiff's religious discrimination claim (Count II) for failure to state a claim.

iii. Title VII: Retaliation and Retaliatory Hostile Work Environment

Finally, Defendant moves the Court to dismiss Plaintiff's retaliation and retaliatory hostile work environment claims. Although Plaintiff alleges only one count of "Retaliation" (Count III), within that count, Plaintiff alleges both that Defendant took discrete adverse employment actions in retaliation for Plaintiff's protected activity and that Defendant created a retaliatory hostile work environment. Am. Compl. ¶ 84. As to both claims, Defendant challenges Plaintiff's allegation that he engaged in "protected activity" on June 25, 2010, when Plaintiff confronted Mech about his discriminatory treatment of Plaintiff. As to Plaintiff's retaliation claim, Defendant argues that Plaintiff has failed to establish a causal link between his protected activity and any allegedly adverse action. Finally, as to Plaintiff's retaliatory hostile work environment claim, Defendant contends that Plaintiff's allegations of harassment and mistreatment are not severe or pervasive enough to constitute a retaliatory hostile work environment. The Court shall address Defendant's arguments in turn.

Title VII's anti-retaliation provision makes it unlawful for an employer "to discriminate against [an] employee . . . because he has opposed any practice" made an unlawful employment practice by [Title VII]." *King v. Jackson*, 487 F.3d 970, 971 (D.C. Cir. 2007) (quoting 42 U.S.C. § 2000e-3(a)). "[A]n employee seeking the protection of the opposition clause [must] demonstrate a good faith, reasonable belief that the challenged practice violates Title VII." *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981). Defendant contends that since Plaintiff failed to put forth any factual allegations that would support his claim of sex or

religious discrimination prohibited by Title VII, Plaintiff's opposition to Defendant's allegedly discriminatory conduct on June 25, 2010, is not sufficient to support a retaliation claim. Def.'s Mot. at 21. However, the Court found that Plaintiff's Complaint alleges facts sufficient to state a claim of sex-stereotyping and religious discrimination cognizable under Title VII. Consequently, the Court now finds that Plaintiff's June 25, 2010, meeting with Mech in which Plaintiff confronted Mech about his belief that Mech was discriminating against him based on "his religious beliefs and sexual stereotyping" constituted protected opposition conduct under Title VII.

Defendant next argues that Plaintiff's retaliation claim must be dismissed because Plaintiff has failed to connect his protected activity to the denial of his within-grade-increase on June 24, 2011.⁸ In making this argument, Defendant only recognizes Plaintiff's March 16, 2011, meeting with an EEO counselor as protected activity since, as discussed above, Defendant does not believe Plaintiff's June 25, 2010, opposition conduct was protected by Title VII. Proceeding on this understanding, Defendant argues that the denial of Plaintiff's within-grade-increase cannot be evidence of retaliatory motive because, on March 9, 2011, *before* Plaintiff engaged in protected activity, Defendant gave Plaintiff a 90-day written warning that a negative report following the 90-day review period would result in the denial of Plaintiff's within-grade-increase. In other words, since Defendant contemplated taking an adverse action against Plaintiff before Plaintiff engaged in protected activity, the adverse action following the protected activity cannot be viewed as retaliatory. Defendant is correct that an adverse employment action that was already contemplated before a plaintiff engaged in protected activity cannot be evidence

⁸ Defendant is correct that the only retaliatory adverse action Plaintiff can claim is the denial of his within-grade-increase since, as was previously established, Plaintiff failed to exhaust his constructive discharge claim.

of retaliation. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (“Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.”). However, the Court has found that Plaintiff also engaged in protected activity on June 25, 2010. Thus, the denial of Plaintiff’s within-grade-increase—which took place entirely *after* the June 25, 2010 protected activity—remains a viable retaliatory adverse action. Of course, the temporal proximity between Plaintiff’s June 25, 2010, protected activity and the date on which Defendant began contemplating the denial of Plaintiff’s within-grade-increase—March 9, 2011—is substantial, undermining an inference of causation. *See Harris v. D.C. Water and Sewer Auth.*, 922 F.Supp.2d 30, 35 (D.D.C. 2013) (“this Circuit has . . . found that a two- or three-month lag between the protected activity and the adverse employment action generally does not establish the temporal proximity needed to prove causation”). However, “a close temporal connection is not the only way to prove causation. ‘A plaintiff may also put forward direct evidence and disregard the presumption and its time limitations.’” *Beckham v. Nat’l R.R. Passenger Corp.*, 590 F.Supp.2d 82, 89 (D.D.C. 2008) (quoting *Vance v. Chao*, 496 F.Supp.2d 182, 186 (D.D.C. 2007)). Here, Plaintiff has alleged that in December 2010, when Plaintiff confronted Mech about a negative evaluation that he prepared of Plaintiff, Mech responded that he was “‘damn angry’ at [Plaintiff] for threatening to bring a claim for wrongful discrimination and harassment” and stated: “[Y]ou were going to string me out to dry, made accusations, put me in a position risked (sic) my job and position, and now this is the result You are to do as you are told and not question me or management in this office. You do not have rights, this is a dictatorship.” Am. Compl. ¶ 27. These statements are strongly probative of retaliation. On February 2011, Plaintiff alleges he received another negative

performance evaluation based upon incorrect facts and mischaracterizations. *Id.* ¶ 29. Then on March 9, 2011, Mech notified Plaintiff that he was being placed on a 90-day “written warning” period at the end of which he would be denied his within-grade-increase if he received a negative review. *Id.* ¶ 31. On June 24, 2011, Mech submitted yet another negative evaluation of Plaintiff and denied Plaintiff’s within-grade-increase. *Id.* ¶ 36. The Court finds that from Mech’s probative statements and the series of negative reviews that followed, a fact finder could infer that Defendant denied Plaintiff’s within-grade-increase in retaliation for Plaintiff’s protected activity. Accordingly, in light of the “low hurdle” retaliation plaintiffs must overcome at the motion to dismiss stage, the Court denies Defendant’s Motion to Dismiss Plaintiff’s retaliation claim (Count III) for failure to state a claim. *Jones v. Bernanke*, 685 F.Supp.2d 31, 40 (D.D.C. 2010).

As for Plaintiff’s retaliatory hostile work environment claim, Defendant argues that this claim must be dismissed because Plaintiff has not pled sufficient facts showing that Defendant subjected him to “discriminatory intimidation, ridicule, and insult of such sever[ity] or pervasive[ness] [as] to alter the conditions of [his] employment and create an abusive working environment.” Def.’s Mot. at 22 (citing *Hussain v. Nicholson*, 435 F.3d 359, 366 (D.C. Cir. 2006)). However, in analyzing Plaintiff’s hostile work environment allegations, Defendant only relies on allegations relating to actions Defendant took after March 16, 2011, the date Plaintiff first contacted the OIC Director to discuss his discrimination claims since Defendant disagrees that Plaintiff’s June 25, 2010, confrontation with Mech constitutes protected activity. As the Court has found the June 25, 2010, confrontation constitutes protected opposition activity, the Court shall consider all of the alleged hostile actions Defendant took after that date.

Title VII prohibits an employer from creating or condoning a hostile or abusive work

environment that is discriminatory. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–65 (1986). As Defendant noted, a workplace becomes “hostile” for purposes of Title VII only if the allegedly offensive conduct “permeate[s] [the workplace] with ‘discriminatory [or retaliatory] intimidation, ridicule, and insult,’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.’” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB*, 477 U.S. at 57, 65, 67 (1986)). This standard, occasionally referred to as the *Meritor–Harris* standard, has an objective component and a subjective component: the environment must be one that a reasonable person in the plaintiff's position would find hostile or abusive, and the plaintiff must actually perceive the environment to be hostile or abusive. *Id.* While the subjective test may be readily satisfied in employment discrimination claims, the objective test requires examination of the “the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance.” *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).

The Court finds that Defendant's alleged actions following Plaintiff's June 25, 2010, protected opposition activity are sufficient to support a claim of a retaliatory hostile work environment. Among other things, Plaintiff alleges that after he confronted Mech, Mech informed Plaintiff that he would be subject to heightened scrutiny, verbally assaulted Plaintiff whenever Plaintiff sought clarification on his work assignments, prepared an “extremely negative” evaluation of Plaintiff's work on a project before the project was complete in contravention of standard operating procedure, created another negative performance evaluation based upon incorrect facts and mischaracterizations, placed Plaintiff on a 90-day written

warning, and subjected Plaintiff to a “hostile and abusive interrogation” in front of his co-workers. Am. Compl. ¶¶ 26-27, 29, 31, 36-37. Plaintiff also alleges that once he filed an informal complaint with the Library of Congress OIC Office on September 28, 2011, Christopher and Mech “prevented [Plaintiff’s] access to documents and other data, while continuing to harass, intimidate, and retaliate against [Plaintiff],” and “criticized and penalized [Plaintiff] at work for taking time . . . to prosecute his administrative action.” *Id.* ¶ 41. Plaintiff alleges that the stress of this work environment required him to seek medical assistance and counseling and take two leaves of absence from work. *Id.* ¶¶ 39, 44.

Courts in this Circuit have held that “a motion to dismiss is not the appropriate vehicle for evaluating the character or consequences of acts alleged to create a hostile work environment.” *Perry v. Snowbarger*, 590 F.Supp.2d 90, 92 (D.D.C. 2008); *see also Holmes–Martin v. Leavitt*, 569 F.Supp.2d 184, 193 (D.D.C. 2008) (denying the defendant’s motion to dismiss the plaintiff’s hostile work environment claim because notice pleading only requires that the plaintiff plead facts that “support” a claim, not those that “establish” it). In *Holmes–Martin*, the district court denied a motion to dismiss a hostile work environment claim where the plaintiff alleged her employer created a hostile work environment through “isolation, subjection to public ridicule and harmful treatment that was so severe it caused psychological illness [including changing the locks on plaintiff’s office, manipulating performance reviews, and hostile emails]” and that this treatment became “more hostile and hurtful” after the plaintiff filed her first formal EEO complaint. 569 F.Supp.2d at 193. The Court finds that the facts alleged in the present case are substantially similar to those the district court found sufficient to survive a motion to dismiss in *Holmes–Martin*. Accordingly, the Court denies Defendant’s Motion to Dismiss Plaintiff’s retaliatory hostile work environment claim (Count III) because Plaintiff has pled facts that would

plausibly entitle him to relief.

C. Constitutional Claims

As an alternative to his Title VII sex discrimination claim,⁹ Plaintiff also brings two counts alleging Defendant violated the Due Process clause and the Equal Protection clause of the Fifth Amendment by sex stereotyping Plaintiff. Defendant argues that these constitutional claims must be dismissed because the Supreme Court in *Brown v. General Services Administration*, 425 U.S. 820 (1976) held that Title VII “provides the exclusive judicial remedy for claims of discrimination in federal employment.” Def.’s Mot. at 24 (citing *Brown*, 425 U.S. at 835 (1976)). The Court agrees. Here, Plaintiff is seeking to bring “parallel actions under both Title VII and other provisions of federal law to redress the same basic injury.” *Ethnic Emps. of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1415 (D.C. Cir. 1985). This Circuit has specifically held that *Brown* preclusion applies when a federal employee seeks, as Plaintiff does, to bring *constitutional* claims that could be brought by federal employees under Title VII. *See Kizas v. Webster*, 707 F.2d 524, 541-543 (D.C. Cir. 1983) (holding that plaintiffs were precluded from pursuing sex and race discrimination claims directly under the Fifth Amendment because Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment). As the Court has found on the present record that Plaintiff has presented a cognizable Title VII claim of sex stereotyping and is permitting Plaintiff’s sex stereotyping claim

⁹ In Plaintiff’s Complaint, Plaintiff only labels Count VI, his Fifth Amendment Equal Protection claim, as pled in the alternative to his Title VII sex discrimination claim. However, in the Court’s review of Plaintiff’s Complaint, the Court finds that Count V, Plaintiff’s Fifth Amendment Due Process claim, is also a restatement of his sex discrimination claim. In this count, Plaintiff alleges that Defendant created a hostile work environment and constructively discharged Plaintiff because of his “prejudice towards homosexuals and/or persons whom do not conform to sex stereotypes recognized by the Defendant.” Am. Comp. ¶ 95. Accordingly, the Court shall treat both counts as pled in the alternative to Plaintiff’s Title VII sex discrimination claim.

to proceed under Title VII, the Court dismisses without prejudice Plaintiff's constitutional claims.

D. Library of Congress Act and Library of Congress Policies and Regulations

Finally, Defendant moves the Court to dismiss Counts VII and VIII of Plaintiff's Complaint alleging Defendant violated the Library of Congress Act and various Library of Congress policies and regulations. Specifically, in Count VII, Plaintiff alleges that his termination violated the Library of Congress Act, 2 U.S.C. § 140, which provides that "all persons employed in and about said Library of Congress under the Librarian shall be appointed solely with reference to their fitness for their particular duties." Am. Compl. ¶ 105. In Count VIII, Plaintiff alleges that Defendant violated Library of Congress policies and regulations prohibiting harassment based on religious beliefs or sexual orientation. *Id.* ¶ 110. Defendant moves the Court to dismiss Count VII because the Library of Congress Act refers only to "appointments" and Plaintiff's claim relates to his *termination* from his position. Def.'s Mot. at 25 n.7. Defendant also argues that the Library of Congress has not waived its sovereign immunity as to claims under either the Library of Congress Act or Library of Congress regulations and policies. Def.'s Mot. at 28.

The Court agrees with Defendant that the Library of Congress Act, by its plain language, is inapplicable to Plaintiff's claim because the Act only applies to the "appointment" of individuals. *See* 2 U.S.C. § 140. Indeed, the few cases in which plaintiffs have invoked the Library of Congress Act, and courts have analyzed the Act, have all occurred in the context of initial appointments to the Library of Congress or promotions to entirely new positions within the Library. *See Schroer v. Billington*, 525 F. Supp. 2d 58, 60 (D.D.C. 2007) (initial appointment); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (promotion to

new position); *Boston v. Mumford*, 1976 WL 556, *2, *4 (D.D.C. April 26, 1976) (promotion to new position). Here, by contrast, Plaintiff is alleging that Defendant violated the Library of Congress Act by *terminating* him from his position. Plaintiff's invocation of the Library of Congress Act is thus inapposite.

Moreover, the Library of Congress Act does not create a private cause of action for its violation. *Schroer*, 525 F.Supp.2d at 65. As to the Library of Congress policies and regulations, it is unclear to the Court whether Plaintiff is citing these policies and regulations as evidence that the Library of Congress does not tolerate the harassment that Plaintiff has alleged or whether Plaintiff is claiming their violation as a separate cause of action. Plaintiff cites no law and provides no explanation as to how these policies and regulations provide him with a cause of action that is not subsumed under other statutory provisions.¹⁰ Nor does Plaintiff argue that these policies are part of a contract between Plaintiff and the Library of Congress that Defendant has breached. Furthermore, the Library of Congress has not clearly waived its sovereign immunity as to the Act or the Library's policies and regulations.¹¹

Nevertheless, even if a statutory cause of action is lacking, "judicial review is available when an agency acts *ultra vires*." *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) (quoting

¹⁰ The Court notes that the actions of the Library of Congress are not reviewable under the Administrative Procedures Act ("APA") because the judicial review provisions of the APA only permit review of actions taken by an "agency" and the Library of Congress is not an agency as defined in APA §§ 551(1) and 701(b). See *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 145 (1980); *Clark*, 750 F.2d at 102.

¹¹ Plaintiff concedes that neither the Library of Congress Act nor the Library's regulations and policies waive sovereign immunity for monetary damages against the Library. Pl.'s Opp'n. at 55. However, Plaintiff also seeks declaratory relief and an injunction reinstating Plaintiff in his position and an order restraining Defendant from engaging in further discriminatory conduct. *Id.* at 54. Plaintiff contends that sovereign immunity does not bar him from seeking this non-monetary relief. *Id.* at 55.

Aid Ass'n for Lutherans v. United States Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003). Similarly, “sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority.” *Clark*, 750 F.2d at 102 (citing *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963) and *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682, 689-91 (1949)). These doctrines, however, are doctrines of “last resort” “intended to be of extremely limited scope.” *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 493 (D.C. Cir. 1988); *see also Larson*, 337 U.S. at 701-02 (“the action of an officer of the sovereign . . . can be regarded as so ‘illegal’ as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.”). Both doctrines have been held not to apply “where the injury the plaintiff alleges may be fully remedied under a statutorily provided cause of action” such as Title VII. *Schroer*, 525 F.Supp.2d at 65; *see also Block v. North Dakota*, 461 U.S. 273, 285 (1983). As the Court has found on the present record that Plaintiff has presented employment discrimination and harassment claims cognizable under Title VII, the Court dismisses without prejudice Count VII and VIII of Plaintiff’s Complaint.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES IN PART AND GRANTS IN PART Defendant’s Motion to Dismiss. The Court DENIES Defendant’s Motion to Dismiss Plaintiff’s sex and religious discrimination and retaliation claims under Title VII for failure to state a claim. However, to the extent these claims are based on Plaintiff’s alleged constructive discharge, the Court GRANTS Defendant’s motion to dismiss these claims, as they have not been timely exhausted. For the same reason, the Court GRANTS Defendant’s motion to dismiss Plaintiff’s

independent constructive discharge claim, Count IV. The Court, however, DENIES Defendant's motion to dismiss Plaintiff's claims to the extent they are based on the denial of Plaintiff's within-grade-increase, as Defendant has waived any exhaustion defense for this claim. Finally, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's Fifth Amendment claims—Count V and VI—and Plaintiff's claims under the Library of Congress Act and Library of Congress policies and regulations—Count VII and VIII. At this juncture, the Court dismisses these claims without prejudice since they parallel Plaintiff's Title VII sex-stereotyping, religious discrimination, and retaliation claims and Title VII is the exclusive remedy for employment discrimination claims brought by federal government employees. An appropriate Order accompanies this Memorandum Opinion.

/s/

COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

LABORDAYS

Supreme Court Refuses to Review \$188M Class Action Verdict Against Wal-Mart Based Upon “Trial by Formula”


By Barbara E. Hoey and James B. Saylor on April 5, 2016
Posted in Class Actions, Wage and Hour

Wal-Mart may have felt the first aftershock of the Supreme Court’s March 2016 opinion in *Tyson Foods, Inc. v. Bouaphakeo*, which undercut overbroad interpretations of its landmark 2011 *Wal-Mart v. Dukes* decision and found that representative sampling of absent class members is not a *per se* improper method of establishing class-wide liability or damages.

On April 4, 2016, the Supreme Court denied a Petition for Writ of Certiorari by Wal-Mart Stores, Inc. arising out of a December 2014 ruling by the Pennsylvania Supreme Court. The Pennsylvania high court’s decision in *Braun v. Wal-Mart Stores Inc.*, 47 A.3d 1174 (Pa. 2012), affirmed a nearly \$188M judgment against the national retailer for 187,979 class member employees allegedly forced to work through meal and rest breaks mandated by state law and Wal-Mart policy. The Plaintiffs in *Braun* relied on expert reports that analyzed 24,000 individual employee work shifts in twelve Pennsylvania Wal-Mart stores and concluded that some 40% of hourly workers had not received the number or duration of rest breaks to which they were entitled. The Plaintiffs argued that this finding squared with the results of a prior audit conducted by Wal-Mart.

As [we previously reported](#), the Supreme Court’s *Tyson* decision came as a surprise to many who had come to rely on *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* for the broad proposition that liability in class actions could not be satisfied through representative sampling because such proof failed the commonality and/or predominance requirements under the Federal Rules of Civil Procedure. The *Tyson* decision did not overrule *Wal-Mart* or *Comcast*, but it weakened these decisions and sent a strong signal that SCOTUS never intended to say that representative sampling can never be used for a damages model in class actions, even where the plaintiffs had some individual experiences.

The Supreme Court’s refusal to review the Pennsylvania high court’s decision in *Braun* solidifies the *Tyson* opinion, and leaves the contours of what representative proof will suffice on a case-by-case basis to lower courts. The *Braun* decision remarkably traces the reasoning of the Supreme Court’s decision in *Tyson* – finding that *Wal-Mart v. Dukes* and *Comcast Corp. v. Behrend* did not overrule longstanding, recognized and acceptable methods of proof in wage and hour cases where an employer failed to keep adequate records of time.



News and Analysis from Kelley Drye's Labor and Employment Practice

LABORDAYS

As we advised, employers must continue to regularly review and revamp their timekeeping policies, and follow-up these efforts with repeating and vigorous notice and training to their employees. Counsel for Wal-Mart, responding to the Supreme Court's refusal to hear the case, stated that the company has taken additional steps in the years since the *Braun* suit was initiated to enhance its timekeeping system and create more employee training.

LABORDAYS

Company to Pay \$115,000 to Settle Sex Discrimination Suit on Behalf of Transgender Employee

By Barbara E. Hoey and James B. Saylor on February 1, 2016
Posted in Discrimination, EEOC

As predicted, the news in the Labor/Employment world continues to center on developments in the area of legal rights for transgender employees. On January 21, the EEOC announced a \$115,000 settlement of a complaint against a company which had been accused of discriminating against a transgender female employee. According to the [EEOC press release](#), the employer – Deluxe Financial – was accused of failing to allow an employee who was hired as a male, but later informed her manager that she was transgender and began to “present as a woman” to use the female restroom. Plaintiff also alleged that managers and co-workers teased her and subjected her to a hostile environment.

In addition to the payment of monetary damages to the plaintiff, the employer was required to issue her a letter of apology and is now under a 3 year consent decree with the EEOC. The consent decree requires the employer to revise its EEO policies to cover transgender status, and to give employees additional training on sex -stereotyping and gender identity discrimination.

The EEOC’s press release makes the Agency’s position clear: “This settlement underscores EEOC’s commitment to securing the rights of transgender individuals under Title VII in the federal courts.” The EEOC goes on to note that this is the agency’s second settlement of such a lawsuit, with a Florida eye clinic paying \$150,000 to settle a similar claim by an employee who was transitioning from male to female

What does this mean for all employers? Clearly, EEOC settlements and consent decrees are no fun and are best avoided. So, what should you do? It is simple – BE SMART! Discrimination against LGBT and transgender employees may or may not be explicitly a violation of the law in your city or state, but the federal government clearly considers such discrimination to be a violation of Title VII. Apart from amending your policies, the most important thing that you can and must do as an employer is EDUCATE your management, so they understand that an employee who ‘present’ as one gender when hired, can lawfully present as another gender at some point later in the employment relationship. Such an employee must be accommodated, and cannot be the subject of jokes, teasing or harassment. From my experience counselling numerous clients through these situations, I know this is often easier said than done, as management may also encounter other employees who do not understand, are wary of this situation, or simply do not want to accept it. You need to be respectful of all of your staff, but you simply cannot tolerate discrimination against transgendered employees, just as you would not tolerate race discrimination.



News and Analysis from Kelley Drye's Labor and Employment Practice

LABORDAYS

These situations need to be monitored and handled carefully, so that you do not find yourself in the crosshairs of the EEOC or a plaintiff's attorney.

We are clearly in uncharted waters in this era of transgender rights, but it is the law, so all employers must take the right steps to be in compliance.

LABORDAYS

Transgender Rights on the Front Page: A Continuing Conversation

By Barbara E. Hoey on December 17, 2015
Posted in Discrimination, EEOC

The Evolving Expectation of Employers

Transgender issues continue to confront employers in a number of different industries.

A transgendered woman recently filed a complaint with the EEOC against one of the largest health care providers in the nation, and commenced a federal lawsuit alleging sex discrimination in violation of Title VII and sought unspecified damages. This case highlights a growing issue for all employers, including those in the health care industry, namely the rights of transgender workers and the evolving expectation of employers.

A few days later, the 5th Circuit issued a decision affirming summary judgment in favor of a trucking school, which had been accused by its former director of discrimination and retaliation, after she had hired a transgender employee (a woman who was transitioning to become a male). The director, Maggie Brandon, claimed that after she hired the transgender instructor, her employer threatened to “cut her pay in half.” She decided not to “wait and receive her first half-sized paycheck in the mail” and resigned her job. The lower court found that, due to the resignation, there had been no adverse employment action, and the 5th Circuit agreed. While the company prevailed, the case highlights the thorny issues which continue to confront employers as more transgender people enter the workforce. See [Brandon v. Sage Corp., 14-51320 \(5th Circuit\)](#).

As discussed in a [post from last month](#), the issue of transgender rights in the workplace has received a lot of attention in the media and the laws governing those rights continues to evolve. Transgender employees are demanding more and more rights and accommodations, and many employers are scrambling to respond to these increasing demands.

However, sometimes employee demands for accommodations can be unreasonable and can also be very difficult to meet operationally, and even more challenging to implement. The first case is a good example. It appears that the employee in question, a transgender female, wanted to be given access to a women’s locker room, which she claimed was “consistent with her gender.” She was not given that access, and had to thus store her coat in a ‘break room’, where she alleged it was vandalized. The plaintiff claims that she spoke with management, but still did not feel she was being treated equally. She ultimately left the job.

Reading between the lines, it is not difficult to envision why a request by a transgendered female for access to a female locker room facility may be difficult to meet. It is likely there were concerns about

LABORDAYS

the privacy of other female employees who also used that locker room. That said, an employer has an obligation to treat all employees, including those who identify as transgender, equally. A number of federal agencies, including the EEOC and the Office for Civil Rights, take the position that this requires a transgender employee to be given access to the restroom and locker room facilities which comport with the gender they identify with. The fact that other employees may object, in most situations, is not going to be a viable defense to a claim of discrimination.

The world—and the law—is evolving on this issue, and it is important for employers to recognize the key to compliance is understanding the law in their jurisdiction, revising existing policies and practices which may be inconsistent with recent decisions, and investing the time to explain these laws to employees who may have legitimate questions or concerns.

As always, we will stay abreast of developments in this evolving area of the law.

LABORDAYS

The Bathroom Dilemma in the News – Transgender Rights on the Front Page

By Barbara E. Hoey on November 3, 2015
Posted in Discrimination, EEOC

The front page of last Sunday's *New York Times* 'Styles' section was almost entirely devoted to an article called "[The Symbols of Change](#)," recounting how many public venues are converting from the traditional male/female restroom model to unisex restrooms.

On Wednesday, [it was reported](#) that a teacher in Texas is suing her school, claiming that she was fired for referring to a female-born, transgender student by a female name. According to the lawsuit, the teacher said that some days the student would ask to be called by a male name, and other days by a female name.

New York Governor Andrew M. Cuomo also just announced that he is proposing regulations which will outlaw discrimination against transgender people in all aspects of employment. See the announcement in a *New York Times* [article](#).

This is just the news from the past two weeks.

These pieces all discuss what I regard as the civil rights movement of this generation – the advances in the rights of gay and lesbian individuals, and the creation of rights for those who identify as 'transgender.' What the news did not discuss in detail, however, is how these advances are changing how many employers must manage their workplace.

There is currently no federal law which specifically prohibits discrimination against gay and transgender employees. A statute was proposed in July 2015 – the "Equality Act" – but it has not passed. See [H.R.3185 – 114th Congress \(2015-2016\)](#).

Title VII of the Civil Rights Act of 1964 does not expressly prohibit discrimination against transgender or gay employees. Nor does the Americans with Disabilities Act (ADA) recognize the condition of Gender Identity Disorder (GID) to be a 'disability' under the law. Interestingly, the Family and Medical Leave Act (FMLA) also does not recognize GID to be a 'serious health condition,' which would require FMLA leave.

On the other hand, the EEOC and many courts, starting with the Supreme Court in *Price Waterhouse v. Hopkins*, have recognized that 'sex stereotyping' is a form of sex discrimination, and is thus unlawful under Title VII. Following *Hopkins*, a number of courts and the EEOC have recognized that an employer cannot discriminate against a male employee who appears effeminate, or against a female who appears (or dresses) 'like a man.' Thus, while a gay or transgender employee may not be able to succeed with a

LABORDAYS

Title VII claim that he/she was discriminated against based on gender identity or transgender status, he/she may be able to assert a claim of 'sex stereotyping.'

Where the federal laws may have lagged behind, many states and localities have taken up the slack. Currently, there are 19 states and a number of cities which prohibit discrimination against both gay and transgender employees. These include major cities like New York, DC, and San Francisco, just to name a few. See [Non-Discrimination Laws Map](#).

There is also a gap between federal and state law in the 'disability' area. For example, while GID is not recognized as a disability under the ADA, or a serious health condition under the FMLA, a number of state disability laws, including New York's, do recognize this condition to be a disability. See New York City, N.Y. Admin. Code § 8-102.

So, before determining whether or not you must accommodate GID, be sure to check the law in your city or state.

It is not only the above mentioned laws and the EEOC which employers must consider. OSHA has recently issued a set of "Best Practices" for transgender employees, recommending that employers allow transgender employees to select the restroom of their choice. The "core principle" OSHA proclaimed, is that "[\[a\]ll employees, including transgender employees, should have access to restrooms that correspond to their gender identity.](#)" Under this guidance, a person who 'identifies' as a man may use the men's room, and a person who 'identifies' as a woman may use the women's room – even if that person has not gone through gender reassignment surgery. The agency also stated that a single use unisex restroom may also be acceptable.

The EEOC has likewise taken the position that "[\[a\]ccess to restrooms, if available, is a major and basic condition of employment.](#)" It has also asserted that the fact that other employees may be 'uncomfortable' with a transgender employee in the restroom is not sufficient to justify denying a transgender employee access to the restroom of their desired gender.

More recently, the federal Office for Civil Rights (OCR) issued a potentially more controversial opinion finding that a high school had violated Title IX of the Civil Rights Act by requiring a transgender female to change clothes behind a curtain in the girls' locker room. OCR took the position that this was a form of unlawful discrimination, as this student should have been allowed the same access to the female locker room as other female students. The school district had raised concerns about the privacy rights of other female students, which the OCR rejected. As of the [last report](#), the OCR had given the district only 30 days to resolve the issue or face enforcement action.

These new laws and rulings, along with more vocal employees and an increasingly active plaintiffs' bar, raise many potentially serious issues for employers. For one, you may have to provide transgender employees with equal access to all facilities – showers, restrooms, locker rooms – based on their gender identity. Such shared facilities may make some employees uncomfortable, at least initially, but from our

LABORDAYS

experience, this has not been a major issue for most companies. It is important to provide some training and education to aid in the implementation of the new policy. Of course, employees must understand that those who harass or discriminate against their transgender colleagues, cannot be tolerated; just as someone who harasses or discriminates against any protected group will not be tolerated.

The world is evolving as we speak and the concept of gender is becoming more fluid. The key to compliance is understanding: understanding the law in your specific jurisdiction, revising your policies and practices, and investing the time to explain these laws to those who may have questions or concerns.

Morgan Arons, a law clerk with Kelley Drye & Warren LLP, assisted in the drafting of this post.

LABORDAYS

Update on EEOC Transgender Litigation

By Kelley Drye on May 18, 2015

Posted in Discrimination, EEOC

The Equal Employment Opportunity Commission ("EEOC") has continued its push for increased focus on LGBT discrimination issues, with two cases in federal courts in Florida and Michigan pushing its position that gender stereotypes violate civil rights afforded under Title VII. One case, *EEOC v. Lakeland Eye Clinic*, in which the EEOC alleged the Clinic fired an employee after she informed them that she was transgender and intended to start presenting as a woman, settled last month for \$150,000. Meanwhile, the remaining case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* continues to move forward.

In its complaint, the EEOC accuses Detroit-based R.G. & G.R. Harris Funeral Homes, Inc., of having discriminated against a transgender funeral director and embalmer because she is transgender, was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.

The name plaintiff in the suit, Stephens, had been employed by Harris since October 2007 and had adequately performed the duties of her position during her employment. In 2013, Stephens gave Harris a letter explaining that she was undergoing a gender transition from male to female and would soon begin presenting to work in proper business attire consistent with her gender identity as a woman. She was fired two weeks later, her employer telling her that what she was "proposing to do" was unacceptable. In its complaint, the EEOC also takes issue with Harris' provision of a clothing allowance for male employees but not female employees.

The funeral home moved to dismiss the complaint, arguing, among other things, (1) that "gender identity disorder" is not protected by Title VII, (2) the unsuccessful legislative efforts of the Employment Non-Discrimination Act ("EDNA"), *infra*, necessarily acknowledges these characteristics are not protected by Title VII, and (3) the EEOC's contention that a transgender claimant is being punished for not conforming to his sex defeats its own premise, as presumably the transgender individual is being punished "precisely because he is conforming to his true sex."

On April 21, 2015, U.S. District Court Judge Sean F. Cox denied Harris' motion to dismiss for failure to state a claim, thereby allowing the case to proceed to discovery. The Court noted that "had the EEOC alleged that the Funeral Home fired Stephens based solely on Stephens' status as a transgendered person" it would have been inclined to grant the motion to dismiss the complaint. The EEOC, however, also asserted that the Harris fired Stephens because she did not conform to the funeral home's sex or gender-based preferences, expectation, or stereotypes. The Court, therefore, found that the EEOC had sufficiently pled a sex-stereotyping gender-discrimination claim under Title VII. Indeed, the Court also acknowledged that "even though transgendered/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.'"



News and Analysis from Kelley Drye's Labor and Employment Practice

LABORDAYS

While the Court did note that “there is no Sixth Circuit or Supreme Court authority to support the EEOC’s position that transgendered status is a protected class under Title VII,” Judge Cox’s decision certainly strengthens the EEOC’s position that Title VII might nevertheless protect the rights of transgendered workers discriminated against on the basis of their sex and or gender.

The EEOC has also filed an *amici* brief in a number of transgender discrimination cases across the country. Kelley Drye will continue to follow this case and update you on any developments in the ever changing landscape of LGBT discrimination.



Barbara E. Hoey

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Barbara Hoey is a partner in the firm's New York office and chair of the Labor and Employment practice group. She is a member of the firm's Executive Committee. Ms. Hoey has more than two decades of experience counseling her clients in all areas of employment law and representing them in single-plaintiff and class action litigation. Her work has been recognized in the 2008-2015 editions of *Chambers USA*, with clients describing her as "very good, very quick and articulate."

Ms. Hoey has litigated and won more than a dozen jury and bench trials involving claims arising under Title VII, Americans with Disabilities Act (ADA), False Claims Act, Fair Labor Standards Act (FLSA), New York State Whistleblower Law, Family Medical Leave Act (FMLA), and the Age Discrimination in Employment Act (ADEA). She has also litigated cases concerning breach of non-compete contracts and theft of trade secrets.

Ms. Hoey also advises clients on compliance with the employment laws and provides strategies for handling today's endless variety of workplace issues, such as managing difficult termination decisions, policy design, handling lay-offs and oversight of internal investigations.

She has worked with employers in a variety of industries and of all types, including healthcare and telecommunication companies, as well as universities and non-profit entities.

Ms. Hoey serves as co-editor of [Labor Days](#), Kelley Drye's labor and employment law blog.

Representative Experience

Won a defense verdict for a hospital accused of terminating its Director of Risk Management for whistleblowing.

Won a \$7.1 million verdict representing the plaintiff, a multinational corporation, asserting claims of breach of a non-compete contract and violation of the Lanham Act.

Won dismissal of a class action lawsuit alleging violations of the FLSA and New York State Labor Law.

Won summary judgment for the defendant in a lawsuit alleging violation of the ADA in U.S. District Court for the Eastern District of New York.

Won summary judgment for the defendant in an age discrimination lawsuit in U.S. District Court for the Northern District of New York. Court also dismissed plaintiff's claim for breach of contract.

Won a defense verdict after trial, dismissing a lawsuit alleging retaliation and violation of the New York Whistleblower Law.

Obtained a jury verdict for the defendant in a Title VII litigation matter in which the plaintiff alleged race discrimination, wrongful termination, racial harassment and retaliation.

Obtained a jury verdict for the defendant in a Title VII race/national origin discrimination litigation matter.

Obtained a jury verdict of \$1.00 in nominal damages in a federal sexual harassment litigation matter. Drafted appellate brief to Second Circuit in the successful appeal of the district court award of attorneys' fees to the plaintiff.

Obtained a jury verdict for the defendant in a federal civil rights/breach of contract action against the Yonkers School Board.

Obtained summary judgment in the U.S. District Court for the Eastern District of New York for The WIZ in an FLSA litigation matter brought by a sales associate.

Obtained summary judgment for the defendant in a sexual harassment litigation matter. Decision was affirmed by the Second Circuit.

Obtained summary judgment for the defendant in an action brought by a group of professional employees under the FLSA seeking to challenge their exempt status.

Honors and Awards

Listed as a New York "Super Lawyer," 2009-2011 and 2013-2015

Ranked as a leading practitioner in the Labor & Employment area by *Chambers USA*, 2008-2015

Kelley Drye Labor and Employment group recognized as a leading practice in New York, *Chambers USA*, 2008 and 2009

Editorial Advisory Board, *Employment Law 360*, Member

Corporate Circle - National Council for Research on Women, Member

Bar Admissions

New York, 1985

Court Admissions

U.S. Court of Appeals – Second and Third Circuits

U.S. District Court – Southern, Eastern and Northern Districts of New York

Education

Fordham University School of Law

J.D., *cum laude*, 1984

University at Albany, SUNY

B.A., *magna cum laude*, 1981



Mark A. Konkel

PARTNER

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Mark Konkel is a partner in the firm's New York office. He works closely with multinational companies across a range of industries, including technology, manufacturing, transportation, financial services, healthcare, retail, and hospitality to help them achieve their business objectives, protect their commercial interests, maximize employee relations and proactively reduce risk.

Mark provides strategic advice on compliance, employee privacy, best practices and policies, protection of intellectual property, restrictive covenants and business expansions and reductions-in-force (redundancy). He leads companies through internal and government investigations and provides frequent training at all levels. He helps many companies develop and refine talent acquisition, retention, performance and reward programs, and handles complex HR issues at the highest levels.

When unavoidable disputes arise, Mark defends companies in commercial and labor-related disputes in court, arbitration, mediation, and before governmental agencies. He routinely handles litigation and arbitrations involving commercial disputes, employment discrimination claims, labor disputes, employee privacy disputes, restrictive covenant and trade secret disputes, employment agreements, and wage and hour disputes.

Mark has extensive experience in addressing the concerns of organized labor, including in negotiations and labor disputes. He has achieved successful results in over 90 major labor arbitrations concerning hiring, discipline, termination, layoff and interpretation of collective bargaining agreements.

Mark is a frequent speaker, writer and television guest and a Member of the International Association of Privacy Professionals and the Labor & Employment Sections of the American Bar Association and New York Bar Association. He serves as co-editor of [Labor Days](#), Kelley Drye's labor and employment law blog, and has served as contributing editor to *The Developing Labor Law* and editor of the *Employment Law Strategist*.

Representative Experience

Developed and implemented a company-wide talent acquisition, retention and reward program, and provided training in labor and privacy compliance, for one of the world's largest insurers.

Successfully mediated and prevented threatened labor actions at a U.S. airline.

Won complete summary judgment for a manufacturer in complex federal litigation, avoiding liabilities in excess of \$4.7 million.

Won a federal appeal before the Third Circuit Court of Appeals in a case of alleged race discrimination against an airline after securing early dismissal of the claim in a federal trial court, prior to any discovery.

Served as lead adviser in guiding national and a regional airline through major union organizing efforts, to successful conclusions.

Won dismissal of multiple federal and state employment claims alleging national origin and disability discrimination against a nationwide security company.

Won a four-month labor arbitration covering more than seventy educational employers in New York City and involving mass layoffs and complex successor liability issues.

Won early dismissal of a False Claims Act lawsuit filed against a large social services agency in New York, also defeating U.S. government efforts to continue the litigation.

Assisted the national airline of a Pacific island nation in evaluating proposed labor legislation and successfully negotiated a collective bargaining agreement for the pilots of the airline.

Honors and Awards

Listed in New York “Super Lawyers”

Memberships and Associations

American Bar Association

New York State Bar Association

International Association of Privacy Professionals

Bar Admissions

New York

Court Admissions

U.S. Court of Appeals – Second and Third Circuits

U.S. District Court – Southern and Eastern Districts of New York

Education

New York Law School

J.D., *magna cum laude*, 2000

New York Law School Journal of International and Comparative Law, executive notes and comments editor

Rutgers University

M.A., 1997

University of Florida
B.A., *summa cum laude*, 1993



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Steve Augustino is a partner in the firm's Washington, D.C. office. He focuses his practice on telecommunications and enforcement matters.

Mr. Augustino represents telecommunications service providers in compliance, litigation and enforcement matters. Mr. Augustino defends clients in Federal Communications Commission (FCC) enforcement actions, including Universal Service Fund (USF) compliance investigations and Universal Service Administrative Company (USAC) reporting audits. Previous enforcement matters include customer proprietary network information (CPNI), third party billing ("cramming"), 911 call handling obligations, network outage reporting, prepaid card marketing, fax marketing, and other carrier practices.

With over 15 years of experience representing innovative content and service providers, Mr. Augustino added a gaming concentration to his practice in 2006, specifically geared towards addressing mobile and broadband access issues affecting video game developers and publishers. His experience in the gaming industry helps online and mobile gaming companies meet the business and legal challenges brought on by the intersection of gaming and communications policy in the United States.

Representative Experience

Represented a national wireless carrier in a multi-agency enforcement investigation involving its third party billing practices.

Represented a national telecommunications provider in connection with a multi-site 911 outage investigation.

Represented the largest conferencing provider in a USF appeal concerning classification of its services.

Represented a large telecommunications provider in USAC audit of Form 499-A filings. USAC audit took 25 months and examined over \$1 billion in revenues. The FCC remanded a portion of the appeal, resulting in substantial savings to the company.

Defended a prepaid calling card provider in investigation of prepaid card marketing disclosures. The FCC closed the investigation without taking action.

Led a coalition of carriers pursuing high-capacity and broadband network elements during the FCC's Triennial Review of unbundled network element obligations. The coalition was successful in obtaining rules that preserve access to these elements where competitive alternatives are not present.

Led an industry trade association in enforcing a statutory prohibition on Bell Telephone Company ownership of alarm monitoring companies. These efforts resulted in the FCC declaring over \$1 billion in acquisitions to be unlawful.

Honors and Awards

Recognized as a leading attorney in Communications practice area by Washington D.C. *Super Lawyers*., 2014-2015.

Recommended in *US Legal 500* for his work in the Telecoms & Broadcast – Regulatory area, 2011 and 2013-2015.

Memberships and Associations

American Bar Association

Federal Communications Bar Association, Current Co-Chair Enforcement Committee, 2013-Present

Federal Communications Bar Association, Former Co-Chair Wireline Committee, 2011-2012

Publications

"The FCC Open Internet Order," *The Metropolitan Corporate Counsel*, May 2015, co-author.

"FCC Seeks Input on State Attorneys General's Call-Blocking Technology Inquiry," *Above The Law*, December 16, 2014.

"This Week in Telecom Innovation: Portals to Innovation? The Broadcast Incentive Auction and the Future of Regulatory Oversight," *Telecom Innovation Blog*, May 16, 2014, co-author.

"Baby Steps in the Right Direction: An Overview of the FCC's Recent TCPA Rule Clarifications," *The Metropolitan Corporate Counsel*, May 2014, co-author.

"This Week in Telecom Innovation: Thinking Like a Carrier," *Telecom Innovation Blog*, April 11, 2014, co-author.

"FCC Opens The Door To Vicarious Liability For Third-Party Telemarketing Under Certain Conditions," *The Metropolitan Corporate Counsel*, July/August 2013, co-author.

"Communications" Chapter, *Developments in Administrative Law and Regulatory Practice 2005-2006*, American Bar Association Section of Administrative Law and Regulatory Practice, 2007, co-author.

“Regulating VoIP,” *Game Developer*, May 2007.

Client Advisories

“TCPA FCC Petitions Tracker,” April 11, 2016.

“FCC Proposes Sweeping Privacy and Data Security Rules with Significant Potential Impact on the Broadband Ecosystem,” April 8, 2016.

“United States Government Continues to Take Steps Expanding Opportunities to Serve U.S.-Cuba Telecommunications Routes and Cuban Markets,” February 29, 2016.

“For the First Time, FCC Will Collect Regulatory Fees from Companies That Manage Multiple Toll Free Numbers,” August 26, 2015.

“A First Look at the FCC’s 2015 TCPA Declaratory Ruling and Order,” July 13, 2015.

“Open Internet Rules Become Effective Today,” June 12, 2015.

“The USA FREEDOM Act Heightens the Need for Carriers to Examine their Data Retention Practices,” June 10, 2015.

“New Requirements Regarding Emergency Alert Access Imposed On Device Manufacturers And MVPDs,” June 9, 2015.

“FCC Plans Significant TCPA Rulings That Will Expand and Modify Compliance Obligations,” June 1, 2015.

“A First Look at the FCC’s 2015 Open Internet Order: What You Need to Know,” March 16, 2015.

“If the Government Contract Requires Outbound Calls or Texts: A Cautionary Tale,” March 10, 2015.

“Throttled: TracFone Enters \$40 Million Settlement with FTC over ‘Unlimited’ Plans,” February 5, 2015.

“FDA Holds October Workshop to Catalyze Collaborative Approach to Healthcare and Medical Device Cybersecurity; Seeks Comment from Interested Parties,” October 30, 2014.

“FDA Seeks to Catalyze Collaborative Approach to Healthcare and Medical Device Cybersecurity; Announces October Workshop and Comment Deadlines,” September 29, 2014.

“Insights From the FTC’s ‘Big Data’ Workshop,” September 26, 2014.

“FCC Issues TCPA Rule Clarifications Related to Package Delivery Notifications and Text-Based Social Networking Applications,” April 3, 2014.

“DC Circuit Court Holds that FCC Guidance on Agency Law in TCPA Cases is Not Binding on Courts,” January 23, 2014.

“DC Circuit Court Vacates Significant Portions of the FCC’s Net Neutrality Obligations,” January 16, 2014.

“Express Written Consent Requirement for Telemarketing Calls to Take Effect October 16, 2013,” October 9, 2013.

“Federal Communications Commission Announces 2013 Regulatory Fees and Modifies Rules for Future Assessment and Collection,” August 21, 2013.

“FCC Launches E-Rate 2.0 Proceeding,” July 19, 2013.

“EPA’s Telecommunications Enforcement Initiative – How Carriers Can Avoid Costly Risks and Ensure Compliance,” July 15, 2013.

“FCC Opens the Door to Vicarious Liability for Third-Party Telemarketing Under Certain Conditions,” May 15, 2013.

“FCC Requires Mobile Phone Manufacturers and Service Providers to Make Internet Browsers Accessible to the Blind and Visually Impaired by October 2013,” May 7, 2013.

“Federal Communications Commission Identifies Anticompetitive Practices on United States-Pakistan Route and Prohibits U.S. Carriers From Making Payments in Excess of Previously-Negotiated Termination Rates,” March 7, 2013.

“The FCC’s New Disabilities Access Requirements: What Advanced Communications Service Providers Need to Know Now (Before It’s Too Late),” January 23, 2013.

“FCC Clarifies Reseller Certification Process for Universal Service Fund Contributions,” November 20, 2012.

“FCC Grants Two Year Class Waivers of ACS Requirements to IP-TVS, Cable Set-Top Boxes and Video Game Equipment and Services,” October 19, 2012.

“FCC Suspends Pricing Flexibility Rules For Special Access Services,” August 24, 2012.

“The FCC’s Wireline Competition Bureau Clarifies Billing for VoIP-PSTN Traffic,” March 6, 2012.

“Comprehensive Low-Income Program Reform,” February 13, 2012.

“A Practical Look at the Federal Communications Commission’s Open Internet (Network Neutrality) Regulations,” October 14, 2011.

“FCC Releases Revised 2011 Form 499-A Telecommunications Reporting Worksheet and Instructions for April 1, 2011 USF Filing,” March 3, 2011.

“FCC Clarifies ‘Carrier’ Definition in Prepaid Calling Card Appeal,” November 3, 2010.

“Federal Communications Commission Significantly Decreases Carrier Contribution Factor for the Interstate Telecommunications Relay Service Fund,” July 9, 2010.

“FCC Seeks Comment on Extension of Outage Reporting Requirements to Broadband and VoIP Service Providers,” July 8, 2010.

“FCC Opens Inquiry In Response to Comcast Decision,” June 18, 2010.

“FCC Addresses Nondiscriminatory Use of and Timely Access to Poles and Seeks Further Comment on Pole Access Rates, Timelines, and Enforcement Issues,” May 26, 2010.

“FCC Issues Order Standardizing Number Porting Process,” May 24, 2010.

“FCC’s Wireline Competition Bureau Upends USAC TelePacific Decision, But Creates New Concerns,” May 4, 2010.

“FCC Releases Notice of Proposed Rulemaking, Notice of Inquiry on Comprehensive Universal Service Reform,” April 22, 2010.

“D.C. Circuit Rebuffs Federal Communications Commission’s Attempt to Exercise Jurisdiction Over Comcast’s Network Management Practices,” April 6, 2010.

“The National Broadband Plan,” March 23, 2010.

“Annual CPNI Certification and Statement Filings Due March 1, 2008/FCC Enforcement Bureau Releases Certification Template,” February 1, 2008

“FCC Accepts AT&T Voluntary Conditions, Approves Merger of AT&T Inc. and BellSouth Corporation,” January 25, 2007

“Commission Grants Substantial Forbearance From UNE Obligations in Anchorage, Alaska Metropolitan Statistical Area,” January 25, 2007

“Advanced Wireless Services Spectrum Auction Presents Opportunities for Wireless Providers,” January 24, 2007

“Anti-Pretexting Legislation Takes Effect - VoIP Call Records Included,” January 19, 2007

Speaking Engagements

The New FCC Enforcement Bureau: One Year Later,” TeleStrategies' Communications Taxation 2016, May 18, 2016.

“Three Lawyers and an Auditor Walk into a USF Panel,” TeleStrategies' Communications Taxation 2016, Phoenix, AZ, May 17, 2016.

“Lessons Learned from the NYC E-rate Consent Decree,” 2016 SHLB Annual Conference, Crystal City, VA, April 29, 2016.

“How BroadbandUSA Can Help Local Communities Navigate Federal Funding Opportunities,” Smart Gigabit LA 2016, Los Angeles, CA, March 29, 2016.

“Taxing the Deal: State and Local Tax Issues in Telecom M&A Transactions,” Webinar, March 10, 2016.

“7th Annual USF Update,” Webinar, February 24, 2016.

“False Claims Act: Enforcing USF Beneficiary Rules and Policing Fraud,” FCBA CLE Program, Washington, D.C., January 20, 2016.

“The TCPA Thicket: Making Sense of the FCC's Latest Ruling,” Webinar, July 17, 2015.

“The TCPA Thicket: Have We Seen the Worst Yet?,” 2015 Advertising and Privacy Law Summit, Washington, D.C., June 11, 2015.

“A New Sheriff in Town: The New World of FCC Enforcement,” Telestrategies Communications Taxations 2015, Orlando, FL, May 15, 2015.

“Communications M&A: Lessons & Strategies,” Telestrategies Communications Taxations 2015, Orlando, FL, May 14, 2015.

“FCC Releases Open Internet Order,” Webinar, March 24, 2015.

“Kelley Drye 6th Annual USF Update,” Webinar, February 25, 2015.

“Consumer Electronics Show 2015 Debrief,” Telecom Council's Consumer Electronics Show 2015, Las Vegas, NV, January 6, 2015.

“TCPA Litigation: What is happening and where is it going?,” Federal Communications Bar Association, October 20, 2014.

“What Telcos Need to Understand Before Providing Cloud Services to the Public Sector,” Telco Cloud World Forum, Dallas, TX, October 7, 2014.

“The Cybersecurity Review: Emerging from the Cloud to Find What Matters,” Webinar, June 24, 2014.

“Deep Dive: Last Mile,” Telecom Council of Silicon Valley, Milpitas, CA, June 11, 2014.

“Employment Law Minefields for Telecom and Technology Companies,” Webinar, May 6, 2014.

“The Next Big Thing: Capitalizing on Emerging Trends at the Intersection of Public Policy and Business,” COMPTel PLUS, Washington, D.C., March 19, 2014.

“The 500 MHz Challenge: Spectrum Policy and FCC Chairman Tom Wheeler,” Telecom Council of Silicon Valley, Milpitas, CA, March 12, 2014.

“Kelley Drye Annual USF Update,” Kelley Drye Webinar, February 27, 2014.

“FCC’s New Consent Rules for Text and Voice Telemarketing,” Law Seminars International, Webinar, January 15, 2014.

“Avenues to Resolution of an Investigation,” FCBA’s FCC Enforcement Committee, Washington, D.C., October 2, 2013.

“Wireless and Internal Connections: What Options Are Available to Schools to Bring Learning to the Classroom and the Community?,” Schools, Health & Libraries Broadband Coalition, Washington, D.C., October 1, 2013.

“Policy Towards Progress – Likely FCC Strategic Goals for Next Chairman,” Telecom Council Carrier Connections 2013, Sunnyvale, CA, September 18, 2013.

“The Vendor as a Path to the Market,” Telecom Council Carrier Connections 2013, Sunnyvale, CA, September 18, 2013.

“Preparing for the FCC E-Rate Reform Proceeding,” Kelley Drye Webinar, August 6, 2013.

“10 Tips for Mobile Disclosures and Privacy,” Casual Connect USA 2013, San Francisco, CA, July 30, 2013.

“FCC and USAC Enforcement Actions: What to Expect and What to Do,” Webinar, June 11, 2013.

“Healthcare Connect Fund Webinar,” Kelley Drye Webinar, May 22, 2013.

“Next Generation 911,” Law Seminar International's Eighteenth Annual Comprehensive Conference on Telecommunications Law, Seattle, WA, April 4, 2013.

“Kelley Drye Annual USF Update Webinar,” March 19, 2013.

“The FCC’s New Disabilities Access Requirement: What Advanced Communications Service Providers Need to Know Now (Before It’s Too Late),” Webinar, January 23, 2013.

“Location Services 2.0,” Mobile Forum: Locations & Beyond 2012, Palo Alto, CA, December 11, 2012.

“The Smartphone Revolution – Reaching Today’s Mobile Users Without Dialing for Trouble,” Webinar, November 16, 2012.

“High Cost and Low-Income USF Reform One Year Later: A Progress Report,” FCBA CLE Seminar, Washington, D.C., November 15, 2012.

“Free Conferencing, IP Conferencing and More,” Telespan's Seventh Annual Future of Conferencing Workshop, Las Vegas, NV, March 15, 2012.

“Kelley Drye Annual USF Update Webinar,” March 13, 2012.

“USAC Role in Universal Service Audits and Appeals,” Federal Communications Bar Association Wireline Committee Brown Bag Lunch, Washington, D.C., February 15, 2012.

“How the FCC is Ruining VoIP,” Telecom Council of Silicon Valley Service Provider Forum, Palo Alto, CA, January 27, 2012.

“Pitfalls in Mobile Games,” Casual Connect Seattle, Seattle, WA, July 21, 2011.

“Future of ‘Free Conferencing’” and “USF Update,” Telespan’s 6th Annual Future of Conferencing Workshop, Las Vegas, NV, March 18, 2011.

“Kelley Drye Annual USF Update Webinar,” March 2, 2011.

“Net Neutrality and Game Development,” Game Developers Conference Online, Austin, TX, October 7, 2010.

“Federal Universal Service Updated,” Kelley Drye & Warren LLP Webinar, Washington, D.C., March 9, 2010.

“Telecommunications Policy in the Next Administration and Congress,” Kelley Drye & Warren LLP Webinar, November 13, 2009.

“Implementing InterCall: USF Implications for the Conference Call Industry,” Kelley Drye & Warren LLP Webinar, July 2008.

“Virtual Worlds: Real Disputes Around the Globe,” 2008 ION Game Conference, Seattle, WA, May 2008.

“Pre-Due Diligence: Preparing Your Company for Mergers & Acquisitions,” Kelley Drye & Warren LLP Seminar, February 2008.

“Best Practices for Multi-National Casual Game Sites,” Casual Connect Europe, February 2008.

“Federal Enforcement Issues – Shared Jurisdiction of the FCC and the FTC,” COMPTTEL’s Regulatory Workshop, October 2007.

“From Austin to Washington: Politics and Video Games,” Austin Games Developers Conference, September 2007.

“Politics and Video Games,” Casual Game Association’s Casual Connect 2007, July 2007.

“Net Neutrality, IPTV, Wireless Broadband and More: A Gamer’s Guide to Broadband Issues,” Online Game Developers Conference, May 2007.

“USF Reform and Enforcement,” Kelley Drye & Warren LLP’s Regulatory and Legislative Update, April 2007.

Bar Admissions

District of Columbia, 1993

Maryland, 1991

Court Admissions

U.S. Supreme Court

U.S. Court of Appeals – District of Columbia

U.S. District Court – District of Columbia

U.S. District Court – Maryland

Education

Georgetown University Law Center

J.D., *magna cum laude*, 1991

University of Virginia

B.A., with highest distinction, 1988