

NOTES

EXPLICIT EQUALITY: THE NEED FOR STATUTORY PROTECTION AGAINST ANTI-TRANSGENDER EMPLOYMENT DISCRIMINATION

ASHLEY ATTIA*

I. INTRODUCTION

Those who identify as transgender frequently suffer from extensive discrimination in the workplace. Consider the story of Rebecca Juro, a New Jersey citizen who was discharged from her employment after informing her employer that she would be undergoing a gender transition from male to female.¹ Convinced that firing someone for being transgender was illegal,² Juro called the New Jersey Division on Civil Rights to inquire about pursuing legal recourse against her former employer.³ However, the Division told her that “it’s perfectly legal—we don’t have a problem with that.”⁴ It was then that Juro realized that “transitioning from male to female had real and serious political implications.”⁵ She lamented that she “was literally giving up significant civil rights by doing so.”⁶

Unfortunately, Juro’s experience is a common one for transgender employees. In fact, a recent nationwide study revealed that nearly half of

* Class of 2016, University of Southern California Gould School of Law; B.A. Political Science and Spanish 2012, University of San Diego; Senior Content Editor, Southern California Interdisciplinary Law Journal, Volume 25. I would like to thank the staff and executive editorial board of Volume 25 of the Southern California Interdisciplinary Law Journal for their hard work on this Note. Thank you also to Professor David B. Cruz for his unwavering guidance and invaluable expertise.

¹ HuffPost Live, *Transgender Discrimination: I was Fired for Transitioning from Man to Woman (Video)*, HUFFINGTON POST (July 12, 2013, 4:01 PM), http://www.huffingtonpost.com/2013/07/12/transgender-discrimination_n_3587738.html.

² Transgender is “[a] term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth.” *Transgender Terminology*, NAT’L CTR. FOR TRANSGENDER EQUALITY (January 15, 2014), <http://transequality.org/issues/resources/transgender-terminology>.

³ Huffpost Live, *supra* note 1.

⁴ *Id.* New Jersey has since enacted legislation prohibiting discrimination based on gender identity. *Know the Law*, N.J. DEP’T OF LAW & PUB. SAFETY, OFFICE OF THE ATTORNEY GENERAL, DIV. ON CIVIL RIGHTS, <http://www.nj.gov/oag/dcr/law.html#LAD> (last visited Sept. 3, 2015).

⁵ Huffpost Live, *supra* note 1.

⁶ *Id.*

surveyed trans people have never been offered a job while living openly as a transgender person.⁷ Furthermore, on average, transgender workers have twice the unemployment rate of non-transgender workers.⁸ This bleak reality often leaves transgender individuals susceptible to high rates of poverty. According to the National Transgender Discrimination Survey, a trans American is four times more likely than an average American to have a household income below \$10,000.⁹ Additionally, almost one in five transgender Americans reported being homeless at some point in their lives.¹⁰

Even when transgender persons are successful in obtaining jobs, they are often faced with hostile work environments.¹¹ In fact, ninety percent of trans people surveyed by the University of California, Los Angeles reported experiencing harassment, mistreatment, or discrimination on the job.¹² Such treatment includes being frequently subjected to “anti-transgender slurs, jokes and verbal harassment . . .”¹³ Furthermore, discrimination against transgender workers can also result in negative performance evaluations, missed promotions, and unfair terminations.¹⁴ The latter often results in trans individuals facing even greater difficulties in finding new employment.¹⁵

Currently, the legal landscape in the United States does not adequately protect transgender employees from being subjected to such employment discrimination.¹⁶ At the federal level, Title VII of the Civil Rights Act’s ban on sex discrimination has not consistently been interpreted as prohibiting anti-transgender discrimination.¹⁷ Some circuits do not recognize transgender discrimination as a viable claim at all,¹⁸ and others do so under various legal theories.¹⁹

Furthermore, of the states that have sex discrimination bans, many state courts do not interpret such bans to include a ban on transgender

7 MOVEMENT ADVANCEMENT PROJECT, ET AL., A BROKEN BARGAIN FOR TRANSGENDER WORKERS (Sept. 2013), <http://www.lgbtmap.org/file/a-broken-bargain-for-transgender-workers.pdf>.

8 *Id.*

9 Brad Sears and Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, WILLIAMS INSTITUTE (June 2012), <http://williamsinstitute.law.ucla.edu/headlines/beyond-stereotypes-poverty-in-the-lgbt-community/>.

10 *Id.*

11 MOVEMENT ADVANCEMENT PROJECT, *supra* note 7.

12 Sears, *supra* note 9.

13 MOVEMENT ADVANCEMENT PROJECT, *supra* note 7.

14 *Id.*

15 *Id.*

16 *See infra* notes 23–26, 49–50 and accompanying text.

17 *See infra* notes 23–24 and accompanying text.

18 *See infra* notes 27–30 and accompanying text.

19 *See infra* note 79 and accompanying text.

discrimination.²⁰ As for explicit protection, only seventeen states, in addition to the District of Columbia and Puerto Rico, have enacted laws that unequivocally protect trans people from discrimination.²¹ Presently, there is no explicit federal legislation that protects transgender individuals from the numerous forms of discrimination they face.²²

The purpose of this Note is to suggest that this patchwork of legal rules is insufficient to protect trans people in the employment context, and that legislation explicitly prohibiting discrimination based on gender identity must be adopted at the national level and in every state. Part I will highlight a few foundational cases that represent the development of the legal landscape of transgender employment discrimination protections. Part II will describe the reluctance of courts to protect transgender persons under sex discrimination bans at the state level. Part III laments the many years it has taken transgender plaintiffs to achieve even limited protections under Title VII. Part IV describes the lack of uniformity of judicial doctrine in the United States, which consists of limited and problematic theories that hinder the ability of all transgender individuals to pursue legal recourse for employment discrimination. Part V discusses the educational and expressive function that explicit protection for trans individuals would have. And finally, Part VI explores two different statutory frameworks by which explicit protection could be achieved, and advocates that one such framework is the better alternative.

II. TITLE VII'S PATCHWORK OF PROTECTIONS

Title VII of the Civil Rights Act makes it unlawful for employers “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex.”²³ For many years, this federal ban on sex discrimination was interpreted by courts not to encompass a ban on transgender discrimination.²⁴ This left virtually all transgender employees without federal protection or recourse. Eventually, a progressive line of cases emerged, which found that transgender employees were protected by Title

²⁰ See *infra* notes 59–64 and accompanying text.

²¹ Dana Beyer et al., *New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDER LAW CTR. (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf>.

²² *Id.*

²³ 42 U.S.C. § 2000e–2 (2015).

²⁴ See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

VII's ban on sex discrimination.²⁵ This line of cases, however, is by no means universally accepted.²⁶

The most notorious case that declined to protect transgender persons from employment discrimination under Title VII, and one of the first cases to interpret the federal ban on sex discrimination as it applies to transgender employees, was a 1984 Seventh Circuit decision, *Ulane v. Eastern Airlines*.²⁷ In *Ulane*, an Eastern Airlines pilot was fired after transitioning from male to female.²⁸ The Court took what it claimed was a strict textual approach and concluded that “[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . .”²⁹ For years, the reasoning and outcome of *Ulane* were consistently adopted by other courts interpreting Title VII's ban on sex discrimination as it applied to transgender litigants.³⁰

However, change was imminent after the Supreme Court handed down its 1989 landmark decision, *Price Waterhouse v. Hopkins*.³¹ In *Price Waterhouse*, Ann Hopkins was not offered a partnership position at a national accounting firm, despite her excellent qualifications and success, because she did not conform to traditional feminine stereotypes.³² According to some, she was “overly aggressive,” “macho,” and she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³³ The Supreme Court held that Title VII prohibits employers from discriminating against employees by enforcing stereotypical assumptions based on gender.³⁴ It indicated that “[a]s for the legal relevance of sex-stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”³⁵

25 See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

26 See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane*, 742 F.2d at 1085.

27 *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081.

28 *Id.* at 1082.

29 *Id.* at 1085.

30 See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

31 See *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

32 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–35 (1989).

33 *Id.* at 235.

34 Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in *TRANSGENER RIGHTS* 93, 96 (Paisley Currah et al. 2006).

35 *Price Waterhouse*, 490 U.S. at 251.

It was this reasoning that served as a catalyst for some later courts to conclude that discrimination because of “sex,” in Title VII, included discrimination because one is transgender.³⁶

The Sixth Circuit reached that conclusion fifteen years later in *Smith v. City of Salem*.³⁷ In *Smith*, firefighter Jimmie Smith, who was classified male at birth but whose gender identity was female, had been suspended from the Salem Fire Department for “expressing a more feminine appearance.”³⁸ The Court held that “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.”³⁹ *Smith* is not alone in so reasoning; it is part of a growing trend of courts interpreting Title VII’s ban on sex discrimination to include transgender discrimination.⁴⁰

A monumental and more recent case to interpret Title VII’s ban on sex discrimination to include transgender discrimination was *Macy v. Holder*, a 2012 decision by the Equal Employment Opportunity Commission (EEOC).⁴¹ The plaintiff, Mia Macy, was a transgender woman who was offered a position with the federal government while still presenting as a man.⁴² After Macy revealed that she would be transitioning from male to female, she was informed that the position was no longer available.⁴³ The EEOC concluded “that intentional discrimination against a transgender [person] is, by definition, discrimination ‘based on . . . sex’ and such discrimination therefore violates Title VII.”⁴⁴ Although the EEOC established a very strong precedent with its unambiguous ruling, it is not binding on any federal (or state) court, and thus is merely persuasive authority.⁴⁵

Although *Price Waterhouse*, *Smith*, and *Macy* represent a modern trend of courts interpreting Title VII’s definition of “sex” discrimination to include transgender discrimination, they are not universally accepted. Cases following the reasoning and outcome of *Ulane* still present a formidable obstacle for transgender employees in many places. For

36 Broadus, *supra* note 34, at 94–96.

37 *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

38 *Id.* at 569.

39 *Id.* at 575.

40 *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011); Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

41 *Macy*, 2012 WL 1435995.

42 *Id.*

43 *Id.*

44 *Id.* at *11.

45 Beyer, *supra* note 21, at 3.

example, a 2007 Tenth Circuit decision, *Etsitty v. Utah Transportation Authority*, is a case closely resembling *Ulane*.⁴⁶ *Etsitty* involved a transgender woman who began her transition from male to female after obtaining a bus operator position with the Utah Transportation Authority.⁴⁷ Citing *Ulane* and similar cases, the Court unambiguously stated that “discrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex.’ Therefore, transsexuals are not a protected class under Title VII.”⁴⁸

Cases like *Etsitty* serve as an important reminder that, despite holdings like *Smith* and *Macy* that expand Title VII protection to transgender employees, there are still jurisdictions that do not interpret Title VII’s ban on sex discrimination to include transgender discrimination. Given this reality, many transgender employees are still without recourse at the federal level. However, a statutory grant of federal protection could remedy the patchwork of caselaw that exists and protect trans people nationwide.

III. THE NEED FOR EXPLICIT STATE LAW PROTECTIONS

Explicit protection from anti-transgender employment discrimination is needed at the state level as well. Only seventeen states, in addition to the District of Columbia and Puerto Rico, have enacted laws that explicitly protect trans people from employment discrimination.⁴⁹ While the number of states adopting such measures has steadily increased in recent years, more than half of the states have still not enacted gender identity statutory provisions.⁵⁰ State legislation would provide transgender employees another avenue of recourse for their discrimination claims, which is necessary for a few reasons.

First, a federal ban on transgender discrimination would likely have a minimum employee threshold requirement that a similar state law would probably not have. Federal discrimination laws have minimum employee thresholds because they act as a proxy for constitutional limits.⁵¹ Congress derives its authority to pass some antidiscrimination laws from the commerce clause, and so the thresholds are an attempt to ensure that it is

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

47 *Id.* at 1218–19.

48 *Id.* at 1221.

49 Beyer, *supra* note 21, at 2 (Furthermore, some untold number of states may also cover gender identity under their sex discrimination bans).

50 *State by State Guide to Laws That Prohibit Discrimination Against Transgender People*, NAT’L CTR. FOR LESBIAN RIGHTS 2 (2010), <https://www.lgbtagingcenter.org/resources/pdfs/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf>.

51 Jeffrey A. Mundell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1060 (2005).

not exceeding that power in regulating employers.⁵² The idea is that when an employer has fewer than the required number of employees, the employer will not be subject to the federal statute because Congress has used the number of employees as a proxy for when the employer affects commerce.⁵³ By contrast, state statutes can usually reach all employers because state governments are governments of general jurisdiction and are vested with a general-purpose police power that is not subject to similar constitutional limits.⁵⁴ Thus, a state law would have the potential to reach further than a federal law, thereby giving those who are unable to pursue a remedy at the national level, an opportunity to do so at the state level.

For example, Minnesota's Fair Employment Practices legislation applies to all employers in the state.⁵⁵ However, The Age in Discrimination in Employment Act (ADEA) is a federal law that only applies to employers with at least twenty employees.⁵⁶ Title VII has a similar requirement in that it only applies to employers with at least fifteen employees.⁵⁷ Most employers in the United States have fewer than the requisite fifteen to twenty employees, thus most are not subject to these federal anti-discrimination laws.⁵⁸ Since an explicit federal ban on transgender employment discrimination would likely have a similarly limited reach, and would thus leave many trans people without recourse at the federal level, state laws are a necessity.

Additionally, *explicit* bans on gender identity discrimination are needed at the state level because many state laws, like Title VII, specifically protect against discrimination based on sex, but not discrimination based on transgender status. And like many federal courts interpreting Title VII, state courts may not interpret a state ban on sex discrimination to include a ban on transgender discrimination. For example, in *Sommers v. Iowa Civil Rights Commission*,⁵⁹ a transgender female was fired from her new job after an old friend recognized her and revealed that she was classified as a male at birth.⁶⁰ In 1983, the Iowa Supreme Court held that the word "sex"

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 779 (2007).

⁵⁵ *Thresholds for Coverage Under State Employment Laws*, SOC'Y FOR HUMAN RES. MGMT. (Jan. 2014), <http://www.shrm.org/Research/SurveyFindings/Documents/Multi-state%20Coverage%20Thresholds.pdf>.

⁵⁶ *Facts About Age Discrimination*, THE U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 8, 2008), <http://www.eeoc.gov/facts/age.html>.

⁵⁷ 42 U.S.C. § 2000e-2 (2015).

⁵⁸ *Small Business Facts & Data*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, <http://www.sbecouncil.org/about-us/facts-and-data/> (last visited Sept. 3, 2015).

⁵⁹ *Sommers v. Iowa Civil Rights Com.*, 337 N.W.2d 470 (Iowa 1983).

⁶⁰ *Id.* at 471.

in Iowa's Civil Rights Act did not include protection for transgender persons.⁶¹ Similarly in *Underwood v. Archer Management Services*,⁶² a receptionist was allegedly fired for being a transgender woman, which she claimed violated the District of Columbia's Human Rights Act's (DCHRA) ban on sex discrimination.⁶³ In 1994, the United States District Court of the District of Columbia treated *Ulane v. Eastern Airlines* as persuasive precedent and concluded that "being discharged on the basis of one's transsexuality does not violate the DCHRA" because "transsexuality is not included in the definition of 'sex.'"⁶⁴

Such decisions highlight the need for all states to adopt explicit legislation banning anti-transgender discrimination. Indeed, that is exactly what Iowa and the District of Columbia did after the *Sommers* and *Underwood* cases were decided.⁶⁵ Although these two jurisdictions represent a promising initial step toward achieving freedom from discrimination for trans employees, there are still thirty-three states that do not extend such statutory protection. Louisiana, for example, is one of those states.

Louisiana, like Iowa, has a statute that prohibits discrimination on the basis of sex, however its applicability to transgender employees is uncertain.⁶⁶ In *Oiler v. Winn-Dixie Louisiana*,⁶⁷ the United States District Court for the Eastern District of Louisiana held that Title VII did not ban anti-trans discrimination,⁶⁸ and it accepted the fact that the state statute had a similar scope as Title VII.⁶⁹ Consequently, it can be inferred that the state ban on sex discrimination likely does not extend to anti-transgender discrimination. Therefore, in the absence of any explicit ban on transgender discrimination, trans employees in Louisiana could be without *any* recourse against employment discrimination, state or federal. Unfortunately, transgender individuals in other states like Louisiana may similarly find themselves without any protection against discrimination in the workplace.

61 *Id.* at 474.

62 *Underwood v. Archer Mgmt. Servs.*, 857 F. Supp. 96 (D.D.C. 1994).

63 *Id.* at 97.

64 *Id.* at 98 (It should be noted that this case was decided after, and despite *Price Waterhouse v. Hopkins*. This demonstrates the unwillingness of courts to afford transgender employees protection under sex discrimination laws.).

65 Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CENTER FOR AM. PROGRESS ACTION FUND 5 (June 2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

66 *Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417, *2 n.1 (E.D. La. Sept. 16, 2002).

67 *Id.*

68 *Oiler*, 2002 U.S. Dist. LEXIS 17417, at *30.

69 *See Id.* at *2 n.1 ("For the sake of convenience, because the Louisiana state law counterpart to Title VII is 'similar in scope' to Title VII, Mr. Oiler discussed only Title VII in this memorandum.").

Thus, the thirty-three remaining states must be urged to act so that their trans employees will be protected where federal law falls short. Otherwise, transgender employees will have to rely on the courts, which are often unwilling to interpret state bans on sex discrimination to reach gender identity discrimination. Explicit state protection, along with the previously mentioned federal legislation banning discrimination based on gender identity, will be essential in combating the grave forms of employment discrimination faced by transgender people in the United States every day.

IV. A LONG WAIT TO EQUALITY

Since *Price Waterhouse v. Hopkins* in 1989, protection for employees who identify as transgender has greatly expanded beyond what it was prior to the landmark decision.⁷⁰ However, such expansion took far too long to achieve. Today, many transgender employees are still left without adequate protection from employment discrimination given the patchwork of protections provided to them by the current legal landscape. Thus, whether by state or federal means, protecting trans employees from employment discrimination is necessary in order to end the long wait for gender equality.

It has been nearly forty years since the first reported cases involving transgender plaintiffs seeking protection under sex discrimination statutes were decided.⁷¹ It was in 1975 that district courts in California and New Jersey, in *Voyles v. Ralph K. Davies Medical Center*⁷² and *Grossman v. Bernards Township Board of Education*,⁷³ respectively, found that Title VII's ban on sex discrimination did not extend to transgender employees.⁷⁴ For quite some time after those cases were decided, other courts consistently adopted similar reasoning and outcomes.⁷⁵ These courts included the Seventh Circuit, which decided the notorious 1984 case: *Ulane v. Eastern Airlines* (discussed previously).

In 1989 the Supreme Court in *Price Waterhouse* finally established a theory of sex-stereotyping that applied to Title VII and could extend protection to transgender employees.⁷⁶ Although an important decision, *Price Waterhouse* only represented a hope and possibility that such a theory could vindicate transgender individuals suing under Title VII in the future.

⁷⁰ Broadus, *supra* note 34, at 97–98.

⁷¹ *Id.* at 94–95.

⁷² *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975).

⁷³ *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 U.S. Dist. LEXIS 16261 (D. N.J. 1975).

⁷⁴ *Id.*

⁷⁵ *Id.* at *95.

⁷⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).

In fact, it wasn't until fifteen years later in *Smith v. City of Salem*, that the Sixth Circuit held that a transgender female was protected under Title VII after being suspended from her job for acting "more feminine."⁷⁷ *Smith* was the first case to apply the *Price Waterhouse* sex-stereotyping reasoning to protect a transgender plaintiff under Title VII.

Since the *Smith* decision in 2004, more courts have been willing to extend Title VII protection to transgender individuals.⁷⁸ However, as of the writing of this Note, many courts have still chosen not to extend such protection.⁷⁹ As a consequence, countless transgender individuals are still not adequately protected from employment discrimination. It has taken far too long for transgender employees to achieve the limited protections they have achieved thus far. Therefore, it is essential that explicit legislation be adopted because it is unknown just how much longer it could take to obtain full and adequate protection through the court systems.

V. A LACK OF JUDICIAL UNIFORMITY NECESSITATES EXPLICIT PROTECTIONS

An additional reason why it is necessary to implement explicit protections for transgender employees is precisely because the legal recourse that is available to them is not uniform.⁸⁰ This lack of uniformity has created serious limitations on the ability of all trans plaintiffs to pursue a Title VII claim against an employer that discriminated against them based on their transgender identity.⁸¹ For example, post-*Price Waterhouse* cases which have allowed transgender plaintiffs to bring employment discrimination claims under Title VII have been decided under various theories.⁸² Commentator Jason Lee argues that these theories can be categorized into three main approaches: the Gender Nonconformity Approach, the Per Se Approach, and the Constructionist Approach.⁸³ However, because each approach (discussed below) has certain weaknesses, Lee argues that neither a single theory, nor all of them together, can provide all transgender plaintiffs an avenue for recourse.⁸⁴

⁷⁷ *Smith v. City of Salem*, 378 F.3d 566, 569 (6th Cir. 2004).

⁷⁸ *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

⁷⁹ *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977); *Sommers v. Iowa Civil Rights Com.*, 337 N.W.2d 470, 749–50 (Iowa 1983).

⁸⁰ *See* Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 429 (2012).

⁸¹ *Id.*

⁸² *Id.* at 427.

⁸³ *Id.*

⁸⁴ *Id.* at 429.

Firstly, the Gender Nonconformity Approach allows transgender plaintiffs to bring a Title VII claim if the employment discrimination was due to “the perceived gender nonconformity of the plaintiff.”⁸⁵ Alternatively, a few courts follow the Per Se Approach and hold that employment discrimination due to one’s transgender identity is per se sex discrimination under Title VII.⁸⁶ Finally, the Constructionist Approach, which has only “sparse application by transgender plaintiffs and minimal success in the courtroom,”⁸⁷ contends that gender is a social construct and that under Title VII, an employer cannot discriminate against any person based on the gender he or she embraces regardless of his or her sex-classification at birth.⁸⁸

A: THE GENDER NONCONFORMITY APPROACH

The first method of reasoning, the Gender Nonconformity Approach, has been the primary way transgender plaintiffs have challenged employment discrimination under Title VII.⁸⁹ This approach is essentially a sex-stereotyping claim and does not take into account the plaintiff’s transgender status.⁹⁰ The Gender Nonconformity Approach is best exemplified in *Smith v. City of Salem* (discussed previously), a case in which a transgender woman was fired because she chose to transition from male to female.⁹¹ The *Smith* court held that the plaintiff “had properly alleged discrimination on the basis of nonconformity with her supervisors’ and other municipal officers’ stereotypical notions of masculinity.”⁹² Although *Smith* was a novel decision and should be celebrated for being the first case to offer transgender employees an avenue of recourse under Title VII,⁹³ its Gender Nonconformity Approach is problematic for several reasons.

First, it only protects against discrimination based upon a person’s gender nonconformity, not upon a person’s transgender status.⁹⁴ In fact, the *Smith* court cautioned future courts to “refrain from characterizing actionable gender nonconformity claims as unactionable claims of transgender discrimination.”⁹⁵ While gender nonconformity and

85 *Id.* at 427.

86 *Id.*

87 *Id.* at 455.

88 *Id.* at 427.

89 *Id.* at 436–37.

90 *Id.* at 437.

91 *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

92 *Lee, supra* note 80, at 438.

93 *But cf. Ulane v. Eastern Airlines, Inc.*, 1982 U.S. Dist. LEXIS 13049 (D. Ill. Apr. 21, 1982), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

94 *Lee, supra* note 80, at 440.

95 *Id.*

transgender status often overlap given that an employer discriminating against an employee because of his or her transgender status is usually doing so because of the employee's gender nonconformity, this may not always be the case.⁹⁶ A scenario may arise in which a transgender employee, who was born and still presents as a woman but identifies as a man, is fired solely due to his employer's animus toward his transgender status.⁹⁷ In such a scenario, the Gender Nonconforming Approach has limited application and exposes how problematic it is for courts to explicitly state that transgender discrimination is not actionable under Title VII.⁹⁸

The second problem that arises out of the Gender Nonconformity Approach is that it "forces one to conceive of gender as a linear 'spectrum' with 'paradigmatic masculinity' at one end and 'paradigmatic femininity' at the other."⁹⁹ However, this linear notion of gender is problematic because there are certain characteristics that are neither solely masculine nor solely feminine.¹⁰⁰ Moreover, the concept of gender is entirely subjective, susceptible to various opinions, and bound to change over time. Furthermore, what poses an even greater problem is that the "gender" of a transgender plaintiff is "quite literally in flux" throughout the time in which they are undergoing a gender transformation.¹⁰¹ This reality makes the linear notion of gender an unstable and unreliable method for courts to measure nonconformity.¹⁰² Consequently, the Gender Nonconformity Approach can often result in arbitrary and inconsistent rulings.¹⁰³

Additionally, the Gender Nonconformity Approach is not as broad as it might appear.¹⁰⁴ Even in light of *Smith* and *Price Waterhouse*, courts still allow gender distinctions in the workplace.¹⁰⁵ For example, sex-based personal appearance guidelines are considered to be acceptable even though they can be said to discriminate against gender nonconforming employees (among other employees).¹⁰⁶ *Jespersen v. Harrah's Operating*

96 *Id.* at 441.

97 *Id.* at 440.

98 *Id.*

99 *Id.* at 442.

100 *Id.*

101 *Id.* at 443. A court deciding a claim of sex-stereotyping merely has to consider, from the point of view of the employer, whether its employee failed to conform to the gender norms of the employer. However, "many courts seem to instead make broad, descriptive claims about the actual gender nonconformity of their respective transgender plaintiffs." This reality raises even more concerns about the use of the Gender Nonconformity Approach and its linear concept of gender. *Id.* at 444–45.

102 *Id.* at 443.

103 *See Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 443–44.

Co., Inc.,¹⁰⁷ a 2006 Ninth Circuit decision, offers an example of a court unwilling to expel all gendered distinctions in the employment context.¹⁰⁸ In that case, the court upheld a personal grooming and appearance standard that mandated female employees to wear makeup on the job.¹⁰⁹ The court found the policy to be reasonable and not adopted for the purpose of making female employees “conform to a commonly-accepted stereotypical image of what women should wear.”¹¹⁰ This suggests that the Gender Nonconformity Approach will not protect employees, including transgender employees who are disproportionately affected, from discrimination that is the product of reasonable, gender-specific workplace grooming and conduct guidelines.¹¹¹

Finally, the Gender Nonconformity Approach is problematic because frequently, a transgender plaintiff is required to relinquish his or her transgender identity to bring a Title VII claim.¹¹² The approach is supposed to render a plaintiff’s transgender status neutral for the purpose of analysis, but instead requires the court to ignore the plaintiff’s transgender status completely.¹¹³ For example, under the Gender Nonconformity Approach, a transgender female is often characterized not as a woman (the gender she should be characterized as because it is the gender she identifies with), but as a nonconforming male.¹¹⁴ This was true in *Smith*, where Jimmie Smith, a transgender woman, was referred to as a man throughout the litigation process.¹¹⁵ Giving up one’s true identity in exchange for legal strategy is demeaning to plaintiffs and undermines the ultimate objective of receiving Title VII protection – equality.¹¹⁶ “As one transgender female Title VII plaintiff [articulated], ‘I haven’t gone through all [of] this only to have a court vindicate my rights as a gender non-conforming man.’”¹¹⁷

B: THE PER SE APPROACH

The second method of reasoning is the Per Se Approach. This approach considers employment discrimination on the basis of a person’s transgender

107 *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

108 *Lee*, *supra* note 80, at 443.

109 *Id.*

110 *Id.*

111 *Id.* at 444.

112 *Id.* at 445–46.

113 *Id.*

114 *Id.* at 446.

115 *Id.*

116 Under Title VII’s disparate treatment doctrine, “a plaintiff could plead that an employer perceived her as a man without asserting that it was in fact the case that she was a man.” David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 L. & INEQ. 257, 283 (2014). However, as we see in the *Smith* case, this is not always done.

117 *Lee*, *supra* note 80, at 446.

status to be actionable under Title VII per se.¹¹⁸ There are arguably two forms of per se Title VII discrimination that courts have utilized on behalf of transgender plaintiffs.¹¹⁹ The first type assumes that one's transgender status automatically implies gender nonconformity to some degree, and thus falls within Title VII's sex-stereotyping doctrine previously mentioned.¹²⁰ The second form of the Per Se Approach is more of a textual argument which concludes that discrimination against an individual merely because they wish to transition, are transitioning, or have transitioned to another sex, is per se sex discrimination.¹²¹

The first type of per se Title VII reasoning, which resembles the Gender Nonconformity Approach (thus later referred to as the Gender Nonconformity Per Se Approach), takes into account the nature of transgender people.¹²² *Glenn v. Brumby*,¹²³ a 2011 Eleventh Circuit decision, relied on this Title VII Per Se Approach in its Equal Protection decision when it held that a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."¹²⁴ The court stated further that "discrimination on the basis of gender stereotype is sex-based discrimination."¹²⁵ The Sixth Circuit also adopted this approach in an initial version of *Smith v. City of Salem*, where the court contended that "[b]y definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify."¹²⁶ The amended *Smith* opinion, however, retreated from this type of reasoning.¹²⁷

The other per se Title VII approach is largely a text-based argument.¹²⁸ This reasoning was present in *Schroer v. Billington*,¹²⁹ a 2008 District Court Case for the District of Columbia, which has been the only case to apply this view.¹³⁰ In *Schroer*, the Court found that the transgender plaintiff was protected under the plain language of Title VII.¹³¹ It held that discrimination because of an individual's transition from one sex to another

118 *Id.* at 447.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at 449.

123 *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

124 *Lee*, *supra* note 80, at 450.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 447.

129 *Schroer v. Billington*, 577 F. Supp. 2d 293 (D. D.C. 2008).

130 *Lee*, *supra* note 80, at 447. *See also* *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 *4 (E.E.O.C., Apr. 20, 2012).

131 *Lee*, *supra* note 80, at 448.

was literally discrimination “because of . . . sex.”¹³² The court reinforced its ruling by noting how discrimination against an individual undergoing a sex transformation would be a clear case of discrimination because of sex just as discrimination against a religious convert would be a clear case of discrimination “because of religion.”¹³³

Although the Per Se Approach is a powerful tool that has the potential to offer transgender plaintiffs widespread protection against employment discrimination under Title VII, it poses several problems and has several limitations. First of all, both forms as presented in *Schroer* and *Glenn*, conflict with much of Title VII precedent.¹³⁴ For example, the *Ulane* Court completely rejected the *Schroer* Court’s textual Per Se Approach by holding that Title VII only protects against “discrimination against women because they are women and against men because they are men.”¹³⁵ Additionally, the Gender Nonconformity Per Se Approach contradicts cases like *Oiler v. Winn-Dixie Louisiana*, which contend that the nonconformity of transgender persons is not protected under Title VII because it is completely different than the nonconformity exhibited by the cisgender plaintiff in *Price Waterhouse*.¹³⁶ Consequently, although the Per Se Approach, in both forms, represents the possibility of widespread Title VII applicability to transgender Plaintiffs, it “by no means represent[s] settled law.”¹³⁷

An even greater problem with the Per Se Approach is that it could be ineffective at protecting against anti-transgender discrimination where it is present but not so obvious.¹³⁸ For example, the gender-specific personal appearance and grooming standards mentioned above are generally enforced when reasonable. These standards often serve as a pretext for anti-transgender discrimination and penalize trans employees for not embracing particular gendered attributes.¹³⁹

132 *Id.*

133 *Id.* at 448–49.

134 *Id.* at 450.

135 *Id.* at 451.

136 *Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417, at *29-30 (E.D. La. Sept. 16, 2002); The word cisgender describes “a person who is not transgender.” Katy Steinmetz, *This is What ‘Cisgender’ Means*, TIME (Dec. 23, 2014), <http://time.com/3636430/cisgender-definition/>.

137 Lee, *supra* note 80, at 451. “[I]n the multi-jurisdictional U.S. legal system, the fact that courts disagree about the meaning of a statute” is not a reason to conclude that one meaning is correct and the other not. David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 L. & INEQ. 257, 275 (2014). However, this disagreement serves to highlight the fact that transgender individuals in certain jurisdictions are protected by courts’ interpretations of Title VII, and transgender individuals in other jurisdictions may not be. This disparity is what is problematic and must be remedied.

138 Lee, *supra* note 80, at 451–52.

139 *Id.* at 452.

Another example would be bathroom usage, in which employers are unwilling to accommodate transgender employees' unique restroom needs.¹⁴⁰ Because "courts have been, by and large, unwilling to question the sincerity of employers' concerns with regard to restroom usage," they are unlikely to find a discriminatory action warranting Title VII protection.¹⁴¹

Furthermore, the Per Se Approach is limited in the fact that it is underinclusive.¹⁴² For example, the textual per se argument in *Schroer* suggests that, among transgender individuals, only individuals transitioning between sexes are protected by Title VII.¹⁴³ This is problematic because 18 percent of those who identify as transgender say they do not want to live full time as the gender they identify with.¹⁴⁴ Actually, *Schroer* may be even more limited because the plaintiff in that case was only protected under Title VII due to the fact that she intended to transition sexes by undergoing genital surgery.¹⁴⁵ The Court stated that "the Library's refusal to hire Schroer after being advised that she planned to *change her anatomical sex by undergoing sex reassignment surgery* was literally discrimination 'because of . . . sex.'"¹⁴⁶ However, many transgender persons do not wish to undergo such a transition.¹⁴⁷ Indeed, 72 percent of transgender men reported no desire to undergo phalloplasty and 14 percent of transgender women had no interest in vaginoplasty.¹⁴⁸ Even for those who would like to undergo an anatomical transition, it might not be possible due to financial reasons.¹⁴⁹ Consequently, the Per Se Approach may only protect a subset of transgender employees in the United States.¹⁵⁰

140 *Id.* at 453.

141 *Id.*

142 *Id.* at 454.

143 *Id.*

144 *Id.*

145 *Id.* at 454–55.

146 *Id.* at 455 (quoting *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D. D.C. 2008)).

147 *Id.*

148 *Id.*

149 *Id.*

150 This underinclusiveness is challenged by the 2012 EEOC decision, *Macy v. Holder*. There, the Court concluded "that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII." *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C., Apr. 20, 2012). This pronouncement suggests that all transgender plaintiffs are protected from anti-trans discrimination in the workplace, regardless of whether or not they decide to present as another gender or undergo anatomical transformation. However, as noted earlier in this Note, the *Macy* decision has no binding authority, as it was decided by the EEOC. Furthermore, despite its clear language suggesting that anti-transgender discrimination is per se sex discrimination, the facts of the case limit such a broad reach (the plaintiff was denied employment because she chose to transition from one sex to another. As mentioned, there may be other situations in which a transgender employee may be discriminated against, such as an employer having animus toward a transgender individual even though that individual has not chosen to transition to another sex and is still presenting as his or her birth-assigned gender.).

Moreover, the Gender Nonconformity Per Se Approach in *Glenn* is limited by its presumption that transgender individuals always exhibit gender nonconforming characteristics.¹⁵¹ However, there are many members of the transgender community that visually conform to society's traditional view of what is masculine and what is feminine.¹⁵² In fact, 21 percent of transgender individuals note that people who do not know they are transgender do not become aware of it by interacting with them in casual settings.¹⁵³ Thus, this presents another example in which the Per Se Approach may only protect a subset of transgender employees.¹⁵⁴

C: THE CONSTRUCTIONIST APPROACH

The third method of reasoning that could protect transgender plaintiffs under Title VII is coined the Constructionist Approach. This approach contends that gender is a social construct and under Title VII an employer cannot discriminate against any person based on the gender construct he or she embraces (i.e., their gender identity), regardless of his or her sex-classification at birth.¹⁵⁵ Only one decision, which was reversed on appeal, utilized this method of reasoning.¹⁵⁶ The district court judge in *Ulane* noted that "sex is not a cut-and-dried matter of chromosomes."¹⁵⁷ He further stated "that the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of [gender] identity . . . therefore, transsexuals are protected by Title VII."¹⁵⁸ However, since the only court that employed the Constructionist Approach was later reversed, it is limited because of courts' unwillingness to embrace it.¹⁵⁹

D: CONCLUSION

The Gender Nonconformity, Per Se, and Constructionist Approaches each have significant problems and limitations. For example, none of them have universal binding power on the courts. Consequently, the certainty of Title VII protection for all transgender plaintiffs is far from a reality. Although Title VII has been expanded in various ways to protect

151 Lee, *supra* note 80, at 454.

152 *Id.*

153 *Id.*

154 Additionally, this version of the Per Se Approach will encounter the same problems that the Gender Nonconforming Approach will encounter (since they are similar). See *supra* notes 89–116 and accompanying text.

155 Lee, *supra* note 80, at 427.

156 *Id.* at 457.

157 *Id.*

158 *Id.*

159 *Id.* at 457–58.

transgender individuals in certain instances, and such expansion is much welcomed in a legal environment “where no such mechanisms had existed before,”¹⁶⁰ more must be done.

To remedy this lack of uniformity that has resulted from the absence of a statute explicitly protecting transgender persons, legislators need to act. Explicit language would expand the reach of anti-trans discrimination protections to ensure that there is recourse for all transgender employees suffering from employment discrimination. Until then, they will be left with the current patchwork of limited or inadequate judicial protections.¹⁶¹

VI. THE EDUCATIONAL AND EXPRESSIVE FUNCTION OF EXPLICIT PROTECTIONS

Legislation explicitly protecting transgender employees from workplace discrimination is also essential because it has the potential to enhance societal awareness of the extensive problems transgender individuals face and change community norms regarding transgender equality. First, the passage of such legislation will undoubtedly have an educational effect on our culture. It will be inscribed in our nation’s (or state’s) legislation, a pronouncement that is accessible to everyone, inviting interpretation and encouraging debate as the parameters of such new laws are defined.

Indeed, in an interview with the Transgender Law Center, transgender advocate Ilona Turner recounted California’s positive experience in implementing explicit protections against anti-transgender discrimination.¹⁶² Ms. Turner noted that in 2011, when every state anti-discrimination law was updated to include explicit protection against gender identity discrimination, California employees and employers better understood their rights and obligations.¹⁶³ Turner observed that since the protection became “explicit, and now people could see it, and could really easily understand it,” a vast increase of people’s awareness became apparent.¹⁶⁴ She further noted that the protections soon made their way onto

¹⁶⁰ *Id.* at 461.

¹⁶¹ This is by no means meant to suggest that Title VII protection should not be applied to transgender employment discrimination victims. In fact, Title VII protection as it stands, and even potential future expansions to Title VII doctrine, is welcomed. However, Title VII protection must be in addition to explicit protection.

¹⁶² Transgender Law Center, *Transgender Rights in the Workplace: The EEOC’s Macy Decision*, YOUTUBE (Dec. 18, 2013), https://www.youtube.com/watch?v=HLV_pjkZVXg.

¹⁶³ *Id.* (In the webinar interview, Ilona Turner did not say whether employers and employees lacked adequate notice of what was unlawful prior to the introduction of express statutory protection in California, but she did state that making the protection explicit enhanced awareness.)

¹⁶⁴ *Id.*

posters displayed in office buildings statewide for many to see.¹⁶⁵ This essential educational function, which would inform employers and employees that gender identity discrimination is intolerable and will be the basis of legal action, is an important reason why explicit protection is needed.

Furthermore, legislation expressly banning gender identity discrimination in the workplace should be enacted because it would have the potential to change social norms and meanings in the United States.¹⁶⁶ Explicit protection would do this by acting as a form of legal expression establishing what constitutes appropriate behavior in society.¹⁶⁷ It would provide a normative framework that would be regarded by citizens as authoritative since it expresses certain normative values, principals, and rules that are legally binding.¹⁶⁸ Essentially, anti-transgender employment discrimination legislation will act as a form of communication from the legislature to the citizens of the United States that will shape and guide social norms and behavior.¹⁶⁹

The social norms established by such legislation would help solve the current transgender discrimination problem by imposing social sanctions on people who defect from ordinary practice.¹⁷⁰ “When defection violates norms, defectors will probably feel *shame*, an important motivational force.”¹⁷¹ To give an example, laws that prohibit certain types of conduct, such as littering, set a social expectation and signal what our culture considers acceptable.¹⁷² If someone violates such a law, by littering for instance, they are looked down upon by others because they deviated from the status quo, and thus feel pressure not to do so again in the future.¹⁷³ Consequently, many people refrain from breaking such laws in the first place for fear of that social stigma.¹⁷⁴ As commentator Cass R. Sunstein puts it, “the most effective use of norms is *ex ante*. The expectation of shame—a kind of social ‘tax,’ sometimes a very high one—is usually enough to produce compliance.”¹⁷⁵ If applied to transgender employment discrimination, a “social tax,” i.e. explicit legislation, will ameliorate the

¹⁶⁵ *Id.*

¹⁶⁶ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

¹⁶⁷ *Id.* at 2031.

¹⁶⁸ Wibren Van Der Berg, *The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues*, 20 J. L. & PHIL. 31, 48 (2001).

¹⁶⁹ *Id.*

¹⁷⁰ Sunstein, *supra* note 166, at 2029–30.

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 2030.

¹⁷⁵ *Id.*

pervasive gender identity discrimination problem our society currently faces.

Utilizing such social sanctions to alleviate the pervasiveness of discrimination, as opposed to legal sanctions, is important because they often offer a higher deterrence value than legal sanctions.¹⁷⁶ This is due to the fact that people usually think legal sanctions are an unlikely consequence of illegal activity.¹⁷⁷ However, they often feel differently about social sanctions.¹⁷⁸ Indeed, it is evidenced that peer pressure and possible damage to one's self-image often serve as a stronger deterrent.¹⁷⁹ Thus, with explicit legislation banning gender identity discrimination, employers working with transgender employees will likely be subject to the same social deterrence and refrain from engaging in anti-transgender discrimination.

In addition to being able to change societal norms, explicit legislation has the power to memorialize a nation's identity in text.¹⁸⁰ Legislation "tells us something . . . about us as a society and about us as members of that society."¹⁸¹ For example, the Constitution of the United States acts as a symbol of the democratic character of our nation and expresses its democratic political identity.¹⁸² Indeed, the adoption of the Nineteenth Amendment to the Constitution, which afforded women the right to vote, was a symbolic amendment that "emancipated women from traditional understandings of family life inconsistent with equal citizenship in a democratic order."¹⁸³ Similarly, explicit legislation banning transgender employment discrimination would make a statement about America's disapproval of such discrimination, its effort to become more of an inclusive society, and its desire to provide equal rights to transgender individuals.

VII. WHAT STATUTE?

A: THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) AS A STANDALONE STATUTE

As demonstrated throughout this Note, explicit legislation is necessary to afford transgender individuals with equality in the employment context.

¹⁷⁶ See Herbert Jacob, *Deterrent Effects of Formal and Informal Sanctions*, 2 L. & POL'Y Q. 61, 76 (1980).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 77.

¹⁸⁰ Van Der Burg, *supra* note 168, at 36.

¹⁸¹ *Id.*

¹⁸² Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945, 1039 (2002).

¹⁸³ *Id.*

One option for obtaining such equality is a standalone statute that provides protection against anti-transgender employment discrimination.¹⁸⁴ This has been the approach that a majority of advocates have championed throughout recent years.¹⁸⁵ The proposed 2007 Employment Non-Discrimination Act (ENDA) was introduced in the 110th Congress and would have protected gay, lesbian, bisexual, and transgender (LGBT) persons.¹⁸⁶ However, there was much opposition to the inclusion of anti-transgender employment discrimination protection, and thus the bill failed.¹⁸⁷ A similar version of ENDA was again introduced into the 111th and 112th Congresses, however those failed as well.¹⁸⁸

Some attribute ENDA's failure to a lack of education and awareness about anti-transgender employment discrimination.¹⁸⁹ Prior versions of ENDA only included protections for gay, lesbian, and bisexual individuals (LGB).¹⁹⁰ While these bills ultimately failed as well, support for the LGB-only ENDAs usually enjoyed bipartisan support.¹⁹¹ In his explanation of the disparity of support between the two versions of the act, Congressman Barney Frank stated that "while there have been literally decades of education . . . about the unfairness of sexual orientation discrimination . . . our educational efforts regarding gender identity are much less far along, and given the prejudices that exist, face a steeper climb."¹⁹²

Despite the fact that a trans-inclusive ENDA may face greater opposition than a trans-exclusive version (which would only afford protection to LGB individuals), a trans-inclusive ENDA remains a desirable option for the trans community and should be supported by it. However, there are some who do not agree. Those individuals, such as commentator Alex Reed, believe that due to the current legal climate, the transgender community should actively oppose any version of a trans-inclusive ENDA.¹⁹³

184 William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 492 (2011).

185 *Id.* For the purposes of this Note, we will assume that the standalone law being considered is the Employment Non-discrimination Act (ENDA). ENDA is the latest freestanding bill proposed in Congress to combat sexual orientation and gender identity employment discrimination. *Id.* at 492–493.

186 Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L. J. 835, 842 (2013).

187 *Id.* at 842–43.

188 *Id.* at 845–48.

189 *Id.* at 843.

190 *Id.* at 841–42.

191 *Id.* at 841.

192 *Id.* at 843.

193 *Id.* at 849.

B: HAVE TRANSGENDER PLAINTIFFS ACQUIRED ENOUGH TITLE VII PROTECTION THROUGH LITIGATION?

The first argument contending that an inclusive ENDA should be opposed is that the transgender community has already acquired significant Title VII protection through federal court litigation, and it will continue to expand protection in that way.¹⁹⁴ More specifically, this argument suggests that the EEOC decision in *Macy v. Holder*,¹⁹⁵ which utilizes the Per Se Approach discussed above, will be “eminently persuasive such that in the not-so-distant future a majority of jurisdictions in the United States will permit transgender persons to bring status-based discrimination claims under Title VII.”¹⁹⁶ The argument then concedes that the Gender Nonconformity Approach, as seen in *Smith v. City of Salem*,¹⁹⁷ has gained only limited support and is only accepted in a few jurisdictions.¹⁹⁸ As a result, the Gender Nonconformity Approach will not succeed in persuading many other courts to adopt it in order to protect transgender employees under Title VII.¹⁹⁹

The above argument is correct in many respects, but is problematic as well. It is correct to acknowledge that courts have recently become more receptive to Title VII claims brought by transgender plaintiffs. Further, one could assume that given the recent progressive pattern of some courts, Title VII protection will be expanded. However, it is likely premature to assume that courts will be so persuaded by the Per Se Approach utilized in the *Macy* decision that soon “a majority of jurisdictions” will allow transgender individuals to bring Title VII claims.²⁰⁰ While *Macy* established persuasive precedent, it is not binding on any court, and thus it is unreasonable to assume that courts will so widely and readily adopt its analysis in the “not-so-distant future.”²⁰¹ Moreover, this argument fails to take into consideration that even if such an expansion of the Per Se Approach were to occur, that method of reasoning falls victim to several

¹⁹⁴ *Id.* It is unclear why transgender rights advocates should affirmatively oppose a trans-inclusive version of ENDA just because Title VII has been expanded to afford some protection for transgender persons. According to this view, it might be appropriate to say that the transgender community simply should just not pursue an inclusive ENDA, instead of say they should actively oppose it.

¹⁹⁵ *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

¹⁹⁶ Reed, *supra* note 186, at 866.

¹⁹⁷ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

¹⁹⁸ Reed, *supra* note 186, at 862–63.

¹⁹⁹ *Id.* at 863.

²⁰⁰ *Id.* at 866.

²⁰¹ *Id.*

weaknesses, as mentioned previously in this Note, which could be alleviated with explicit legislation.²⁰²

Additionally, the above contention that the Gender Nonconformity Approach will not persuade many courts to protect transgender employees under Title VII is incorrect. In fact, since first utilized in *Smith v. City of Salem*,²⁰³ this approach has been the most common way transgender employees have pursued litigation under Title VII.²⁰⁴ Thus, there is no reason to assume that a majority of courts that wish to extend Title VII protection to transgender individuals will reject the Gender Nonconformity Approach in favor of the Per Se Approach.²⁰⁵ Furthermore, the limitations of the Gender Nonconformity Approach, like the limitations of the Per Se Approach, can be remedied by explicit protections.²⁰⁶

C: WOULD A TRANS-INCLUSIVE ENDA *UNDERMINE* THE TRANSGENDER COMMUNITY'S PROGRESS?

Another argument contending that the transgender community should oppose an inclusive ENDA is that it would actually undermine the progress transgender individuals have already achieved through Title VII litigation.²⁰⁷ Legal commentator Alex Reed, for example, supports this proposition by arguing that courts have dismissed transgender discrimination claims in the past because Congress has repeatedly rejected bills attempting to protect sexual orientation.²⁰⁸ He claims this is evidence of the fact that “Congress had only the traditional notions of ‘sex’ in mind when it passed Title VII.”²⁰⁹ Under this view, courts may assume that an inclusive ENDA confirms the fact that Congress did not intend for Title VII to offer protection to transgender persons.²¹⁰ Consequently, transgender individuals would only have one method of contesting anti-trans employment discrimination—ENDA.²¹¹

However, this argument is flawed in many respects. First, the progressive line of recent caselaw affording protection to transgender

202 See *supra* notes 134–155 and accompanying text.

203 *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

204 Lee, *supra* note 80, at 436–37.

205 This is not to say that the Per Se Approach will not work (nor is it to say that the Per Se Approach will not be expanded). This assertion merely suggests that it is an arbitrary assumption to contend that most courts that want to extend Title VII protection to transgender individuals will reject the Gender Nonconformity Approach in favor of the Per Se Approach, given that the Gender Nonconformity Approach has proven to be a common method by which transgender employees have pursued Title VII litigation, and one that many courts have already adopted.

206 See *supra* notes 94–116 and accompanying text.

207 Reed, *supra* note 186, at 862.

208 *Id.*

209 *Id.* at 862–63.

210 *Id.* at 863.

211 *Id.*

individuals under Title VII undermines the likelihood that courts will actually believe that “Congress had only the traditional notions of ‘sex’ in mind when it passed Title VII.”²¹² Furthermore, an inclusive ENDA would not likely confirm that Congress intended to exclude transgender individuals from Title VII protection. It is erroneous to assume that establishing an additional path of legal recourse necessitates the exclusion of another. There are often various methods of legal recourse available to a given class, and the transgender community should be no different.

D: AMENDING TITLE VII OF THE CIVIL RIGHTS ACT

Despite some objectionable arguments made by trans-exclusive ENDA supporters,²¹³ ENDA is still a viable method for obtaining much needed statutory protections for transgender employees. Thus, it should not be adamantly opposed by transgender advocates. However, there may in fact be some valid reasons why a freestanding anti-transgender employment discrimination bill, like ENDA, would not be the best method to gain statutory protections. Commentator William Sung advocates not for a standalone bill, but for an amendment to Title VII of the Civil Rights Act of 1964.²¹⁴ Indeed, an amendment may prove to be a better alternative.

Amending Title VII of the Civil Rights Act to protect at least some members of the LGBT community is not a new idea.²¹⁵ In fact, starting in 1974, Congresswoman Bella Abzug championed for LGBT rights through a proposed amendment to the Civil Rights Act, coined the “Equality Act.”²¹⁶ This act would have added sex, marital status, and sexual orientation as protected classes.²¹⁷ The Equality Act was unsuccessful, but in the following years (but prior to the 1994 introduction of ENDA), several more attempts to amend the Civil Rights Act to prohibit discrimination on the basis of sexual orientation or preference were made.²¹⁸ Although those attempts were similarly unsuccessful, the precedent of staunch efforts to amend Title VII to include protections for some members of the LGBT community is promising.

An amendment to Title VII might actually be a better alternative than ENDA because it may have a broader reach, and therefore may be more effective in combating anti-transgender discrimination.²¹⁹ For example,

212 *Id.* at 862.

213 *See supra* text accompanying notes 195–213.

214 Sung, *supra* note 184, at 493.

215 *Id.* at 495.

216 *Id.*

217 *Id.*

218 *Id.* at 496.

219 *Id.* at 508.

ENDA tends to have extensive religious exemptions that seem to get broader every time a new version of the bill is introduced.²²⁰ In fact, the 2009 version of ENDA is so expansive that it would allow a religious organization “to discriminate virtually at will on the bases of sexual orientation and gender identity without having to justify its actions.”²²¹ On the other hand, Title VII has much narrower religious exemptions. Consequently, a religious organization’s ability to discriminate is much more constrained.²²² Under Title VII, (1) a religious organization can only discriminate on the basis of religion, sex or national origin if religion, sex, or national origin is a bona fide occupational qualification (BFOQ); or (2) a religious school can discriminate without a BFOQ only on the basis of religion.²²³ Thus, given the discrepancy between the ability of religious organizations to engage in discrimination under Title VII versus ENDA, an amendment to Title VII would prove, in this regard, to be a better method of obtaining statutory protections for transgender employees.

Furthermore, Title VII may be more effective than ENDA because disparate impact claims are prohibited under ENDA but permitted under Title VII.²²⁴ A disparate impact claim would contend that a facially neutral policy was discriminatory because it had a disproportionate effect on transgender employees (or whatever the protected class may be).²²⁵ This would be most pressingly applicable for transgender plaintiffs in the context of bathroom usage in the workplace. For example, employers wanting to discriminate against transgender individuals could enact policies that require employees to use the bathroom that corresponds to the sex they were assigned at birth.²²⁶ These policies are neutral on their face, in the sense that they do not explicitly classify people based on their transgender status, but they do undoubtedly have a disproportionate effect on transgender persons.²²⁷ Trans employees would benefit from the availability

220 *Id.* at 509.

221 *Id.* This is still true as of the writing of this Note. The most recent version of the Employment Non-Discrimination Act, which was introduced in the Senate in 2013, still contains a broad religious exemption similar to those that have perpetually plagued versions of ENDA in the past. See Employment Non-Discrimination Act S. 815, 113th Cong. § 6 (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s815is/pdf/BILLS-113s815is.pdf>.

222 Sung, *supra* note 184, at 508–09.

223 *Id.* at 508. A Bona Fide Occupational Qualification is a type of discriminatory policy that is justified, such as “only individuals over the age of 50 shall not be hired as police officers. Legal Information Institute, *Bona Fide Occupational Qualification (BFOQ)*, LII, http://www.law.cornell.edu/wex/bona_fide_occupational_qualification_bfoq (last visited Nov. 24, 2014).

224 Sung, *supra* note 184, at 510. As of the writing of this Note, this is still true of the most recent version of ENDA introduced in the Senate. See Employment Non-Discrimination Act S. 815, 113th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s815is/pdf/BILLS-113s815is.pdf>.

225 Reed, *supra* note 186, at 864.

226 *Id.*

227 *Id.*

of a disparate impact claim for circumstances such as these. Moreover, if a version of ENDA is passed that is similar to the 2009 version, which does not discuss whether employers can deny transgender employees access to the restroom for the gender with which they identify, that disparate impact claim would not be available.²²⁸

Additionally, an amendment to Title VII would be preferred over a standalone bill like ENDA because if enacted, ENDA would be a brand new statute that may be interpreted by the courts in an unpredictable manner.²²⁹ However, Title VII has had over forty-five years to develop doctrinally.²³⁰ This development, while not always consistent, has resulted in an increasing number of courts affording Title VII protection to transgender plaintiffs. A Title VII amendment protecting transgender persons from employment discrimination would merely codify this growing trend.²³¹

Furthermore, an amendment to Title VII may not only offer protection against anti-transgender discrimination, it could potentially extend protection to sexual orientation discrimination as well.²³² This is because such an approach arguably does not require Congress to add a new protected class, rather, it would only require Congress to “redefine and expand Title VII’s existing protections”²³³ William Sung noted that Congress has demonstrated a “willingness to redefine and expand Title VII’s existing protections as long as no new classes are added.”²³⁴ Extending protection against discrimination based on sexual orientation and gender identity is feasible by expanding Title VII’s meaning of “sex” because both types of discrimination can be construed as “natural extension[s] of sex discrimination.”²³⁵ This is evidenced by some courts’ recognition, after *Price Waterhouse*, that Title VII’s ‘sex’ provision encompasses more than just anatomical sex, it covers gender nonconforming characteristics as well.²³⁶ Since “[gay], bisexual, and transgender people, often do not conform to conventional expectations of

228 Sung, *supra* note 184, at 510-11. The most current version of ENDA also fails to discuss whether employers are allowed to deny transgender employees access to the restroom for the gender with which they identify. *See* S. 815.

229 Sung, *supra* note 184, at 511.

230 *Id.*

231 *Id.* at 524.

232 *Id.* at 526.

233 *Id.* at 525-26.

234 *Id.* at 525. (This is what happened with the Pregnancy Discrimination Act of 1978, which was an amendment to Title VII’s “because of sex” clause. Congress defined that clause to “include because of or on the basis of pregnancy, childbirth, or related medical conditions.” To reach anti-transgender and sexual orientation discrimination, Congress could expand Title VII’s definition of “because of sex” to include discrimination on the basis of “sexual orientation and gender identity.”)

235 *Id.* at 526.

236 *Id.*

masculinity or femininity,” a natural extension of sex discrimination to include discrimination based on sexual orientation and gender identity is conceivable.²³⁷

Extending Title VII protection to both anti-transgender and sexual orientation discrimination would be ideal given that the transgender and LGB communities have been polarized in advocating for their respective rights by way of ENDA.²³⁸ Although recent versions of ENDA have included protections against anti-trans discrimination,²³⁹ this has not always been the case.²⁴⁰ For example, from 1994 to 2003, all versions of ENDA failed to include anti-transgender discrimination protections.²⁴¹ Moreover, a 1995 effort by transgender activists to introduce into Congress a trans-inclusive ENDA, which “marked the ‘first organized transgender lobbying event in [the] nation’s capital,’” was unsuccessful.²⁴²

Further demonstrating the divide between the transgender and LGB communities with respect to ENDA, is the fact that courts have been reluctant to grant gay, lesbian, and bisexual individuals recourse under Title VII’s gender-stereotyping framework.²⁴³ This has created concern among many LGB advocates that introducing a trans-inclusive discrimination bill like ENDA into Congress will decrease its chances of being enacted (since the gender identity provision was what caused the most vigorous opposition).²⁴⁴ This would result in LGB individuals not having any recourse against workplace discrimination, yet transgender individuals would at least have the limited protections offered to them through Title VII litigation. While this is a valid concern, such worry could be eliminated with the adoption of an amendment to Title VII of the Civil Rights Act.

Such an amendment to Title VII could serve as a compromise between those who are advocating for a trans-inclusive ENDA and those who support a trans-exclusive version. The amendment would forge this compromise by offering protection to the transgender community, as well as the LGB community. This will thereby eliminate the polarization that has occurred between both groups, as well as the need to advocate for one side at the expense of the other. In sum, an amendment to Title VII is likely the stronger and more preferable statutory scheme given that it would

²³⁷ *Id.* at 526.

²³⁸ *Id.* at 503–505.

²³⁹ *Id.* at 504; Employment Non-Discrimination Act S. 815, § 2 113th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/BILLS-113s815is/pdf/BILLS-113s815is.pdf>.

²⁴⁰ Sung, *supra* note 184, at 503.

²⁴¹ *Id.*

²⁴² *Id.* at 503–04.

²⁴³ *Id.* at 533–34.

²⁴⁴ *See supra* notes 187–192 and accompanying text.

extend protection to the whole LGBT community where courts have failed to do so, and where ENDA may fall short.²⁴⁵

VII. CONCLUSION

Workplace discrimination is a pervasive problem for the transgender community. As a result, many trans individuals have an incredibly difficult time obtaining, maintaining, and advancing in employment. Although transgender individuals have had significant successes in the court system, those successes are limited. There is still undoubtedly a pressing need for explicit legislation banning anti-transgender discrimination. As of this writing, only a minority of states have enacted statutes explicitly prohibiting anti-trans discrimination, and no such legislation exists at the federal level. Without such legislation at both levels of government, transgender individuals are left with a patchwork of protections that provides incomplete and problematic avenues of recourse.

As proposed above, a legislative solution can come as a freestanding anti-discrimination bill, like ENDA, or an amendment to Title VII of the Civil Rights Act. While both of those methods are viable and promising ways of obtaining much needed protections, amending Title VII is the better option. Enacting the most expansive and effective statutory scheme is essential to combat the discrimination that leaves far too many transgender individuals without work. After all, the ability to work and support one's self is one of the most fundamental aspects of human dignity,²⁴⁶ to which all are entitled.²⁴⁷

²⁴⁵ This idea can also be applied to a state context, assuming that a state has a statute similar to the Civil Rights Act.

²⁴⁶ Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 285–288 (Nov. 1997).

²⁴⁷ *Id.*