

5-1-2014

Sexual Minorities And The Physical Construction Of Sex Under Title VII

Briehan Ashley Moran

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Moran, Briehan Ashley, "Sexual Minorities And The Physical Construction Of Sex Under Title VII" (2014). *Law School Student Scholarship*. 537.

https://scholarship.shu.edu/student_scholarship/537

SEXUAL MINORITIES AND THE PHYSICAL CONSTRUCTION OF SEX UNDER TITLE VII

Brihan Moran
Law and Sexuality
April 30, 2013

CONTENTS

I. INTRODUCTION

A. Argument

B. Background: A Historical Precedent of Disparate Treatment

II. INABILITY OF TITLE VII TO PROTECT THE TTH COMMUNITY FROM DISPARATE TREATMENT BASED ON SEX

A. Title VII and Construing the Meaning of “Sex”

1. Adherence to the Majority Approach
2. A Glimmer of Hope: Protection for Gender Non-Conformity

B. Deficiencies of Title VII Protection

1. Rigorous Standard of Exclusion of Transsexual and Transgender Plaintiffs from Protection
2. What About Gender Conforming TTH Plaintiffs?

III. ADDITIONAL EVIDENTIARY BURDENS RESULTING FROM THE MAJORITY APPROACH’S REDUCTION OF THE COMPLEXITY OF SEXUAL IDENTITY CONSTRUCTION

IV. TITLE VII FAILS TO PROTECT THE PERFORMATIVE NATURE OF SEX

V. CONCLUSION

I. INTRODUCTION

This Article examines the scope of protection Title VII confers upon transsexual, transgender, and homosexual (hereinafter “TTH”) plaintiffs seeking relief from sexual harassment occurring in the workplace. Individuals belonging to these minority groups face a number of substantial hurdles when attempting to pursue a Title VII claim. Obstacles largely stem from the majority approach to interpreting the statutory meaning of the word “sex.” Most jurisdictions prefer a narrow construction of the term, which looks to anatomical reproductive organs to indicate which of the two legal categories an individual belongs - male or female. Owing to Title VII’s prohibition of an employer’s refusal 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... sex,”¹ assigning a narrow definition to sex has the affect of precluding TTH victims from using the statute as an effective means of protection.

The majority approach interpreting the extent and meaning of “sex” generally prevents transsexual and transgender plaintiffs from receiving relief under Title VII by limiting its conferral of protection to those who fall squarely into the categories of male and female. The absence of legal recognition of the trans community perpetuates its existence as undefined and disadvantaged minority class. Similarly, Title VII does not generally encompass harassing behavior that targets homosexuals because the majority approach excludes sexual preference from the statutory meaning of sex. Courts adopting an understanding of sex that depends entirely upon the existence of physical sex organs fail to protect a historically afflicted and

¹ 42 U.S.C. § 2000e-2 (2000).

underrepresented TTH community. The following example is illustrative.²

The year is 1992. Bill Clinton is in the midst of a presidential election campaign and the civil rights of gays and lesbians—particularly in respect to their open service in the military—is attracting attention from the press. Under pressure from the bulk of the Democratic Party, Clinton adopts a liberal stance on the issue; however, opponents of Clinton’s stance suggest that such open expressions of homosexual identity could, in turn, threaten the lives and psychological well-being of others. Clinton introduces “Don’t Ask Don’t Tell” as a compromise measure in 1993, living up to his promise to allow all citizens to serve in the military—albeit in a roundabout and less than ideal manner. The controversial act ruffles feathers in Washington³ while the media frenzy over the Rodney King trial is peaking in Los Angeles.⁴ Over on the east coast, a bull market forges ahead on Wall Street. Suit-clad twenty-somethings climb the rungs of the corporate ladder to salaries that have long since become extinct.

Jennifer Miles is among those New Yorkers beginning to navigate their professional careers.⁵ Enrolling in graduate classes at New York University, Jennifer commences the process of obtaining a doctoral degree in musicology.⁶ Per the university’s curriculum, Jennifer is required to complete a series of one-on-one instrument tutorials with a professor from the music

² *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997); see also Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN’S L.J. 31 (2002) (explaining “the similarity between the ‘on the basis of sex’ language in Title IX, and the ‘because . . . of sex’ language in Title VII, Title IX can also be used as a vehicle to address discrimination and harassment in educational institutions that receive federal funding”).

³ Adam Clymer, *Lawmakers Revolt on Lifting Gay Ban on Military Service*, N.Y. TIMES, Jan. 27, 1993, at A13.

⁴ *King Verdict’s Message: Time for Change*, L.A. TIMES, Apr. 30, 1993, http://www.articles.latimes.com/1993-04-30/local/me-29533_1_police-department.

⁵ *Miles*, 979 F. Supp. at 248.

⁶ *Id.* at 249.

department.⁷ NYU's reputation as one of the most LGBTQ friendly campuses in the country,⁸ coupled with its location in the heart of New York's most notoriously queer neighborhood - the West Village - makes it an unlikely stage for the events that are about to unravel.

Jennifer began her individual training sessions with Professor Cliff Eisen beginning in 1993.⁹ Just about halfway through the spring semester, Jennifer was forced to file a grievance with NYU's Sexual Harassment Committee. Her complaint contained a detailed account of the lessons with Eisen, during which he subjected Jennifer to repeated sexual advances. The grievance recited numerous occasions of Eisen propositioning Jennifer to engage in sexual intercourse and his forcible attempts to kiss her and fondle her breasts, buttocks, and crotch.¹⁰ New York University failed to reprimand Eisen via an internal mechanism¹¹ and Jennifer responded by filing a claim for relief from disparate treatment based on sex occurring under any "education program or activity receiving federal financial assistance..."¹²

NYU asserts the affirmative defense that liability is improper because Eisen's advances were not based on Jennifer's sex.¹³ The university instead claims that the harassment was precipitated by one very unusual fact, which distinguishes the behavior of Professor Eisen from similar behavior typically rendering an education institution liable: Jennifer Miles was a male-to-female transsexual.¹⁴

⁷ *Id.*

⁸ *Princeton Review Releases List of LGBT Friendly Colleges, and Not*, BILERICO, Aug. 4, 2011, http://www.bilerico.com/2011/princeton_review_releases_list_lgbt_friendly_php (New York University tops the list of most friendly LGBTQ colleges).

⁹ *Miles*, 979 F. Supp. at 249.

¹⁰ *Id.*

¹¹ *Id.*

¹² 20 U.S.C. § 1681(a) (2006).

¹³ *Miles*, 979 F. Supp. at 250.

¹⁴ *Id.*

New York University's affirmative defense creates a sizable hurdle to the success of Jennifer's claim. Courts generally construe the word "sex" narrowly, limiting its meaning to include only biological sex.¹⁵ While gender includes the social categorizations and behavioral qualities typically characterizing members of a particular sex, "sex" is legally defined by the anatomical and biological factors designating an individual as a female or male.¹⁶ However, a dichotomous construction of sex encompassing only males and females excludes the TTH community from statutory protection. A majority of jurisdictions adhere to this approach in determining the meaning and extent of "sex." In fact, only two courts have endorsed the minority position of extending relief from disparate treatment based on sex to transsexuals.¹⁷

NYU therefore urged the court to adopt the narrow and generally accepted interpretation of "sex".¹⁸ The university argued meaning of sex is not so expansive so as to include a biological male experiencing discrimination originating from the mistaken perception that he is actually a she!¹⁹ The *Miles* court ultimately rejects the defense offered by NYU, reasoning that Eisen's sexual advances took place while perceiving Jennifer as a female. Despite the fact that the professor's perception of Jennifer's sex was incorrect, the harassing behavior originating from his false perception nevertheless results *because of sex*.²⁰ Ironically, Professor Eisen's failure to correctly assess Jennifer's transsexuality, fortuitously enables her claim to prevail. In the

¹⁵ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

¹⁶ SUSAN STRYKER, *TRANSGENDER HISTORY* 7-11 (2009).

¹⁷ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (6th Circuit extends Title VII protection to a transgender individual who fails to conform with sex stereotypes); *Schroer v. Billington*, 577 F.Supp. 2d 293 (D.D.C. 2008).

¹⁸ *Miles*, 979 F. Supp. at 250.

¹⁹ *Id.*

²⁰ *Id.*

alternative, facts tending to evidence disparate treatment based on the fact that Jennifer was a transsexual would yield a contrary result.

The *Miles* court adheres to the majority approach and interprets sex narrowly to encompass only the physical attributes designating an individual as male or female. Though Jennifer prevails, the opinion notes that Professor Eisen would not be liable for his egregious behavior if he possessed knowledge of Jennifer's transsexuality. In other words, Professor Eisen and similarly situated defendants may be able to escape liability with evidence tending to show they were aware of the physical nature and dimensions of a transsexual victim's body. The presumptive likelihood of this outcome is directly proportionate to the degree of pervasiveness of the defendant's criminal conduct. The more frequent Professor Eisen's sexual advances become, the more likely he is to discover Jennifer's sexual identity and unwittingly provide himself with a viable defense.

The potential for this seemingly arbitrary outcome begs the question: "Why construe the meaning of sex to have this result?" Endorsing the majority's approach to Title VII interpretation essentially provides a "get-out-of-jail-free" card to anyone targeting sexual minorities as the subjects of harassment. Perhaps Congress did not contemplate the broad construction of sex to explicitly include gender identity and sexual orientation. Even so, adopting an interpretation with the effect of excluding minority groups from protection runs contrary to the fundamental purpose of the Civil Rights Act to protect individuals and promote equality. Should a professor who betrays his position of confidence to prey upon the misplaced trust of a student receive a *carte blanche* for his repeated sexual transgressions?

The outcome of *Miles* demonstrates an exception to the rule. The success of Jennifer's claim depends entirely upon the existence of a peculiar factual circumstance: the erroneous perception of the victim's sex. Absent a false presumption however, the sexual harassment claims asserted by members of the TTH community are typically met with reluctance and dismissal in most jurisdictions. Employing a naturalistic construction of sex permits discriminatory conduct to go unchecked. This analytical paradigm places a disproportionate degree of emphasis on the physical definition of sex and marginalizes the complexity of identity construction. In so doing, courts fail to safeguard a handful of sexual minority groups who require a heightened degree of protection to end a historical pattern of disparate treatment.²¹

A. Argument

A naturalistic interpretation of "sex" errs by reducing the complexity of the identity construction process. The majority interpretation ignores the reflexivity inherent in the development of sexual identity. Identity emerges from a web of intersecting variables. All of these variables combine to create the individual and ultimately influence one's personal experience of sex and gender. This conception of sexual identity development distinguishes gender as a socio-cultural, historical, and geographical construct, as well as a product of social location. Such a comprehensive understanding of identity formation is fundamentally at odds

²¹ See, e.g., Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201(2008); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713 (2010).

with the legislative and judicial definition of sex, which turns on the concrete existence of bodily sex organs.

The structure of classification systems - particularly gender and sexuality classification systems - are often misconstrued to consist of binary oppositions and dualisms. One can *either* be male *or* female; heterosexual *or* homosexual; this *or* that; here *or* there. All that falls between these dichotomous categories - all that is “betwixt and between”²² - remains in a perpetual state of liminality, devoid of identity within the constructs of normative society. An interpretation centered on the physical embodiment of sex characteristics fails to adequately protect the TTH community from workplace harassment.

The traditional naturalistic construction also ignores the most salient attribute of sexual identity; namely, an emergent system produces it. Sexual identity results from the mutually reciprocal effects of an individual’s ability to visibly express his or her sexual identity and the extent to which the individual’s surroundings permit recognition of that identity. Reflexivity characterizes the construction of sexual identity. One’s ability to negotiate the extent to which his or her sexuality identity is visible within a given space in turn defines and largely shapes that identity. Failure to adopt a holistic conception of sexual identity reveals a staggering deficiency in the protection of the performative aspect of identity. Performativity and physical expression of sexual identity, rather than the possession of sex organs, are the bedrock of minority communities and the primary vehicle by which they organize, express, and define themselves.

Application of Title VII to prevent TTH employees from falling subject to sexual harassment reveals three formidable deficiencies in the ability of the statute to effectively shield

²² VICTOR TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* (2008).

the community from disparate treatment. First, the majority's adoption of a naturalistic interpretation of sex all but eliminates the potential of TTH plaintiffs to successfully litigate a Title VII claim. Second, the majority approach's dichotomous definition of sex erroneously reduces the complexity of identity construction and in so doing, fails to acknowledge that sexual identity is an emergent system dependent upon the aggregate effort of its component surroundings to define its existence. Third, the momentous of Title VII is its inability to safeguard the indispensable element of performativity, which is essential to the construction of sexual identity.

In short, reliance upon the physical attributes of one's body to define sex fails to safeguard the physical expression of sexual identity. Rather, the visibility of sexual identity performance in discursive spaces is unarguably the most fundamental and effective mechanism by which the TTH communities validate and define themselves. Failure to protect performativity exposes each community's emergent system to the potential for unhindered disparate treatment.

B. Background: A Historical Precedent of Disparate Treatment

Members of the TTH communities have been subject to a historical pattern of inequality. Illustrative of the disparate treatment of homosexuals is a 1994 survey in which 191 employers were questioned about the employment of LGBTQ individuals.²³ The survey reveals that of the

²³ B. SCHATZ & K. O'HANLON, ANTI-GAY DISCRIMINATION IN MEDICINE: RESULTS OF A NATIONAL SURVEY OF LESBIAN, GAY AND BISEXUAL PHYSICIANS (1994) *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071239/>.

employers surveyed, 18% would fire, 27% would refuse to hire, and 26% would refuse to promote a person perceived to be lesbian, gay or bisexual.²⁴

Unlike homosexuality, transsexualism is a medically recognized condition where an otherwise physically normal person fails to identify with the gender characteristics of their biological sex. As a result, most transsexuals experience a profound desire to become a member of the opposite sex. In addition to grappling with a crippling social stigma, transsexuals must navigate legal marginalization, which includes the denial of employment and health care benefits as well as the refusal of certain educational and housing opportunities.²⁵

The reported frequency with which transsexual and transgender individuals experience disparate treatment in the employment context far surpasses the prevalence of other forms of reported harassment. A shocking study conducted in 2009 disclosed that an overwhelming 97% of the transsexual and transgender individuals participating in the survey had experienced harassment or mistreatment in the workplace!²⁶ Reflecting a similar conclusion, research conducted by the Transgender Law Center in San Francisco demonstrated that 60% of those surveyed earned less than \$15,300 annually and only 8% earned more than \$45,900 per year.²⁷ Moreover, less than half of transgender individuals are employed full time,²⁸ while the average

²⁴ *Id.*

²⁵ See Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 714 (2005).

²⁶ NATIONAL CENTER FOR TRANSGENDER EQUALITY AND THE NATIONAL GAY AND LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2009), available at http://www.thetaskforce.org/reports_and_research/ntds.

²⁷ TRANSGENDER LAW CENTER, THE STATE OF TRANSGENDER CALIFORNIA REPORT: RESULTS FROM THE 2008 CALIFORNIA TRANSGENDER ECONOMIC HEALTH SURVEY, at 7 (2009), available at http://www.calcomui.org/images/StateTransCA_report_2009Print.pdf.

²⁸ *Id.*

annual income of those with Bachelor's degrees is 40% lower than the overall average of college graduates.²⁹

Disparate treatment of TTH individuals becomes exponentially more abhorrent in environments characterized by structural hierarchies. Misogyny and homophobia establish and delineate roles of leadership and subordination within the employment context. The ubiquitous subjection of the TTH communities to sexual harassment pervades the history, legal precedent, and normative societal standards of this country. These historically aggrieved, minority groups have attempted to vindicate their rights based on a handful of legal theories. Marked by considerable failure, the unsuccessful efforts of the LGBTQ community to protect itself from disparate treatment based on sex are due in large part, to the majority's narrow interpretation of sex under Title VII.

II. INABILITY OF TITLE VII TO PROTECT THE TTH COMMUNITY FROM DISPARATE TREATMENT

BASED ON SEX

A. Title VII and Construing the Meaning of "Sex"

Title VII creates a federal cause of action for sexual harassment occurring in the workplace. Enacted as part of the 1964 Civil Rights Act, the statute makes it an unlawful business practice to discriminate against an individual on the basis of sex.³⁰ Title VII seeks to

²⁹ *Id.* at 8-12.

³⁰ 42 U.S.C. § 2000e-2 (2000).

“deter conduct which has been identified as contrary to public policy and harmful to society as a whole.”³¹ It was the intent of the original legislators to eliminate the economic deprivation of any societal class of individuals resulting directly from employment discrimination. The majority approach enables the existence of the precise injustices that Congress set out to prevent. To effectively administer justice, the entirety of society must recognize and include those on its fringes and the laws in turn must aspire to protect them. Even if a class of individuals who are plagued by discrimination based on their gender non-conformity is not implicit in Title VII, there exists no support justifying their categorical exclusion.

1. Adherence to the Majority Approach

The 9th Circuit in *Holloway v. Arthur Andersen & Co.*³² construes sex narrowly to exclude “transsexual discrimination.” After being diagnosed with gender identity disorder (hereinafter “GID”), Holloway underwent sex reassignment surgery and returned to work as a female.³³ Upon discovering its employee’s new affinity for women’s clothes, jewelry, lipstick, and nail polish, Arthur Andersen promptly ended Holloway’s employment.³⁴ The court explains that an employer who refuses to hire or promote an employee simply because she is a woman violates Title VII.³⁵ However, the refusal to hire or promote an employee based on her sexual orientation or gender identity does not violate Title VII. As such, the latter does not constitute

³¹ *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring).

³² *Holloway*, 566 F.2d at 661.

³³ *Id.* at 62.

³⁴ *Id.*

³⁵ *Id.*

discrimination based on the employee's biological sex, but rather originates from a quality of that person relating to the person's sex.

Holloway was followed by the 1982 decision of *Sommers v. Budget Marketing, Inc.*,³⁶ which dealt an equally devastating blow to the TTH communities. The *Sommers* court upheld the termination of a transsexual manager, when he began to appear at work as a female. Refusing to extend the definition of sex beyond its biological limits, the 8th Circuit supported its conclusion by citing the absence of subsequent legislation amending Title VII to include protection from discrimination based on "sexual preference."³⁷ The Court reasoned that Congressional failure to clarify the statute's meaning in the two intervening decades following its enactment evidenced its original intent to limit sex to its anatomical meaning.

Up next in the progeny of *Holloway*, is *Ulane v. Eastern Airlines*, in which the 7th Circuit Court of Appeals reversed the district court's grant of protection to a transsexual pilot who had sex re-assignment surgery.³⁸ Upholding the pilot's termination, the *Ulane* court decided that sex could not be read to include psychological questions concerning the manner in which society perceives an individual's sexuality and expression of gender.³⁹

Although they rely upon conflicting justifications, the decisions in *Holloway*, *Ulane*, and *Sommers* all adhere to the majority approach of narrowly construing "sex" to exclude sexual orientation and gender identity. The trio of opinions all take painstaking efforts clearly delineate the subversive conduct that qualifies for Title VII protection, and the subversive conduct that does not. However the disparate results of this distinction on the ability of the LGBTQ

³⁶ 667 F.2d 748 (8th Cir. 1982).

³⁷ *Id.*

³⁸ *Ulane*, 742 F.2d at 1084.

³⁹ *Id.*

community to defend itself against workplace discrimination appears to be squarely at odds with the initial intent of the Civil Rights Act. However, this distinction creates disparate outcomes for TTH plaintiffs pursuing Title VII claims. Continued support of the majority approach ignores and circumvents Title VII's objective of eradicating the economic deprivation of a class of individuals resulting from workplace harassment.

2. A Glimmer of Hope: Protection for Gender Non-Conformity

A TTH plaintiff's Title VII claim prevails in few circumstances, most notably, sex-stereotyping. The Supreme Court decision of *Price Waterhouse v. Hopkins* extends Title VII protection to include disparate treatment based on the failure of an individual to conform to gender norms attributed to his or her biological sex.⁴⁰ The facts of *Price Waterhouse* concern a female accountant who is denied a promotion based on her employer's belief that she is too "macho," and that women should refrain from displaying aggression in the workplace.⁴¹ The employee was told she had a better chance at attaining partnership within the firm if she took, "a course at charm school... walked and talked more femininely," and decided to "wear some make-up."⁴² The opinion explains that the employer engages in "sex-stereotyping," or harassment based on the accountant's failure to act as femininely as society's norms dictate.⁴³

⁴⁰ See generally, *id.*

⁴¹ *Id.* at 235.

⁴² *Id.*

⁴³ *Id.* at 255-258.

Basing its decision on the plaintiff's failure to conform to gender stereotypes, the Court found actionable harassment under Title VII because it would not occur "but for" the victim's sex.⁴⁴

The 9th Circuit decision in *Rene v. MGM Grand Hotel Inc.*,⁴⁵ adopts and reinforces the Supreme Court and Title VII's prohibition of gender stereotyping. The facts of *Rene* concern the all male butler staff at the MGM Gran Hotel and Resort in Las Vegas.⁴⁶ Similar to the accountant in *Price Waterhouse*, a member of the MGM staff falls victim to repeated sexual harassment resulting from the his failure to embody the physical appearance and demeanor typified by males and the general expectations of society.⁴⁷ Rather than dismissing the plaintiff's claim on the grounds that the harassing behavior derives from the employee's homosexuality, the 9th Circuit allows the claim to prevail.⁴⁸ The court reasons the harassing behavior occurs because of an expectation that employees conform to the norms of their gender and is therefore prohibited sex-stereo-typing under Title VII.⁴⁹

The 6th Circuit took the reasoning of *Price Waterhouse* a step further in 1994 when it became the one of two jurisdictions to afford protection from sex-discrimination to a transsexual.⁵⁰ In *Smith v. City of Salem*,⁵¹ the court finds Title VII liability for the "sex-stereotyping" of a transsexual fireman who begins to act and dress in a manner failing to conform with the perceived notions of his employer and co-workers of a how a man *should* act.⁵²

⁴⁴ *Id.* at 259.

⁴⁵ 305 F.3d 1061 (9th Cir. 1977).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1063.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1064.

⁵⁰ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁵¹ *Id.*

⁵² *Id.* at 573-75.

A similar outcome results in *Schroer v. Billington*,⁵³ in which an applicant for an analyst position at the Library of Congress reveals his transsexual status after receiving an employment offer from the government. Despite the plaintiff's numerous qualifications and his interview score topping the scores of other applicants, the offer was consequently revoked.⁵⁴ The court held for the plaintiff because "unlike most cases of disparate treatment, this case does not involve a generally applicable, gender-specific policy requiring proof that the policy itself imposed unequal burdens on men and women."⁵⁵ This case illustrates the very narrow vacuum in which successful Title VII claims exist, prevailing only because the plaintiff possessed direct and compelling evidence of disparate treatment.⁵⁶

Price Waterhouse represents a milestone in the ongoing campaign against the disparate treatment of sexual minorities. The decision made clear that harassment based on one's gender is forbidden under Title VII and that "gender must be irrelevant to employment decisions."⁵⁷ The Supreme Court famously declares, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."⁵⁸ However, it may have spoke too soon for a series of decisions would follow with the effect of distinguishing instances of sex-stereotyping from actionable harassment.

B. Deficiencies of Title VII Protection

⁵³ 577 F.Supp. 2d 293 (D.D.C. 2008).

⁵⁴ *Id.* at 296.

⁵⁵ *Id.* at 305.

⁵⁶ *Id.*

⁵⁷ *Id.* at 240.

⁵⁸ *Id.* at 251.

Unfortunately for TTH communities, the majority approach still construes sex narrowly to prohibit recourse for workplace discrimination. As a preliminary matter, Title VII only applies to harassment, which occurs in the workplace. This precludes many instances of harassment in structural hierarchies where disparate treatment of TTH individuals flourishes. Educational establishments and athletic entities are therefore able to evade liability for disparate treatment of student-athletes- including those receiving scholarships- because they are not within the definition of “employees.”⁵⁹ Several other shortcomings of Title VII in protecting the rights of TTH employees are examined below.

1. Rigorous Standard of Exclusion of Transsexual and Transgender Plaintiffs from Protection

A body of legal precedent distinguishes sex-stereotyping from sexual harassment, the effect of which is to significantly reduce the scope of the *Price Waterhouse* decision.⁶⁰ Transsexual and transgender plaintiffs feel the brunt of this distinction and face a rigorous list of exceptions with the effect of extinguishing Title VII claims. In *Etsitty v. Utah Transit Authority*,⁶¹ the 10th Circuit upheld the termination of a transsexual bus driver diagnosed with GID after several occasions on which the employee originally known as Michael Etsitty, arrived at work dressed as a female by the name of Krystal. The opinion attempts to distance itself from the ruling in *Ulane* by taking the position that the nature and demeanor of a transsexual differs

⁵⁹ *Rensing v. Indiana State Univ.*, 444 N.E. 2d 1170 (Ind. 1983) (holding that a TCU football player who was paralyzed during a sponsored university competition is ineligible to receive workman’s compensation from the school because student-athletes are not considered employees of educational institutions).

⁶⁰ *See Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1068, (7th Cir. 2003) (Posner, J., concurring); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000).

⁶¹ 113 No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah June 24, 2005).

from the failure of a woman to behave as femininely as her employer would like.⁶² The *Etsitty* decision cites as support, the potential disturbance to a public bathroom the presence of a transsexual creates as well as the diagnosis of GID as a “profound disturbance of the individual’s sense of identity with regard to maleness and femaleness.”⁶³

Ultimately, the discretion of each jurisdiction to construe the meaning of sex significantly circumvents the effects of *Price Waterhouse* and *Smith*. The *Etsitty* decision not only negates the authority of *Price Waterhouse* by reverting to the traditional analysis of sex.⁶⁴ Emphasizing the medical infirmity of one suffering from GID, the court uses the medical diagnosis of the bus driver to disqualify him from inclusion within either biological classification of sex.⁶⁵ The 6th Circuit similarly relies upon physical location as mechanism to define sexual identity, when it points to the plaintiff’s choice of restroom preference.⁶⁶ *Etsitty* symbolizes the continuing disagreement among jurisdictions over the extent to which protection from sexual harassment should apply to members of the TTH communities.

2. What About Gender Conforming TTH Plaintiffs?

Unfortunately, the distinction between sex-stereotyping and harassment based on gender considerably limits the ability of *Price Waterhouse* to defend the TTH communities as well. Noticeably excluded from protection are individuals who conform to gender stereotypes, but are

⁶² *See id.* at *4-*5.

⁶³ *Id.* (citing the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 564 (4th ed. 1994)).

⁶⁴ *Id.* at *3.

⁶⁵ *Id.*

⁶⁶ *Id.*

nonetheless subject to disparate treatment based on sex. The extension of *Price Waterhouse* to gender non-conformity *only*, severely limits the scope of its protection. Consider the following hypothetical scenario: a stereotypically “butch” lesbian, whose appearance embodies traditional notions of masculinity, files an action seeking Title VII relief based on circumstances identical to those faced by a “lipstick lesbian” pursuing the same claim. Under *Price Hopkins*, the adherence of the appearance of the lipstick lesbian to the typical characteristics of the female sex, will ultimately result in her preclusion from relief. Thus, even in jurisdictions where protection extends to gender non-conformity, sexual minorities are able to defend themselves only in so far as their appearances and demeanor fail to comport with the characteristics society perceives as typical of their biological sex.

III. ADDITIONAL EVIDENTIARY BURDENS RESULTING FROM THE MAJORITY APPROACH’S REDUCTION OF THE COMPLEXITY OF SEXUAL IDENTITY CONSTRUCTION

The brain is not separate from the body – that was Descartes error. Interpretation of “sex” to depend on the physical errs by ignoring the complexity of an individual’s sexual identity. The construction of one’s sexual identity depends upon the recognition of external mechanisms to define that identity. Sex is the result of an incredibly complex emergent system in which an unimaginable number of factors contribute to the production of something far greater than its individual parts. Cultures, societies, customs, and religions are all emergent systems.

Humans historically tend to regard themselves as rational scientists. If the prototype of humankind managed to settle Rome, erect some pyramids in Egypt, and casually develop the

contours of Greek philosophy all in a days work, surely the new and improved model of modern man would not need a “HOT!” warning on the coffee cup he buys everyday... The traditional theory concerning the ways in which humans understand one another, generously posits man as a clever theorizer. In this model, humans are constantly conjuring up new hypothesis as to how another will act and then testing those hypotheses against the evidence we observe. However, contemporary research supports at least a partial divergence from the orthodox presumption of humans as cold, rationale decision-makers.

A 1992 study at the University of Parma in Italy is responsible for developing the theory surrounding mirror neurons.⁶⁷ The original purpose of the experiment was to study how the brains of macaque monkeys function when the monkeys first recognize the occurrence of strange phenomenon. Eventually the researchers began to notice unusual activity in the brains of the monkeys whenever the human researchers would eat a peanut within the eyesight of the monkeys. Over time, the brain of the monkey starts to fire neurons in a manner identical to how the neurons would fire if the monkey were raising the peanut to its own lips. Hence the theory of mirror neurons supports the contention that humans relate to and understand one another by mentally simulating the processes we observe in others.

When an individual synthesizes a version of what others are feeling around him, it helps him to not only better understand the emotions and thought processes of others, but also to develop himself in the recreation of internal processes just learned. In this way, humans rely on others to shape their own understandings and form identities in mutually reciprocal pattern of dependency on one another. The binary concept of male and female, masculine and feminine,

⁶⁷ MARCO IACOBONI, MIRRORING PEOPLE: THE NEW SCIENCE OF HOW WE CONNECT WITH OTHERS 26 (2008).

gives rise to heteronormativity, the conclusion that heterosexual relations between women and men are natural and that homosexual behavior is unnatural. This conclusion often imposes an additional burden on plaintiffs pursuing Title VII claims to prove the heterosexuality of their assailants.

The decision of *Oncale v. Sundowner Offshore Services, Inc.*,⁶⁸ affirms the verdict of *Price Waterhouse* and resolves the over-arching question of whether a person can experience harassment because of sex by someone of the same-sex. Joseph Oncale was a roustabout on an offshore oil rig which housed eight crew members, all of which were males.⁶⁹ During his employment, Oncale was repeatedly subject to physical and verbal assaults and threats of rape by the other crew members due to his homosexuality, which resulted in his decision to quit after his employer failed to take any remedial action.⁷⁰ The court in *Oncale* prefaces its decision by clarifying that not *all* workplace sexual harassment is actionable, only harassment “because of sex.”⁷¹ The Supreme Court explains, it is “easy to draw” and “reasonable to assume” an inference of discrimination in when the parties involve concern a male and a female because sexual harassment consists typically of, “explicit or implicit proposals of sexual activity” that would not be made to members of an individual’s own sex.⁷² On the other hand, the Court refuses to extend a similar line of reasoning to harassment involving two individuals of the same sex instead concluding that a plaintiff must establish by “credible evidence that the harasser was

⁶⁸ 523 U.S. 75 (1998).

⁶⁹ *Id.* at 77.

⁷⁰ *Id.*

⁷¹ *Id.* at 78.

⁷² *Id.* at 80.

homosexual.”⁷³ Victims of male-female harassment in contrast, are not required to prove the heterosexuality of their assailants because heterosexual desire is presumed.

IV. TITLE VII FAILS TO PROTECT THE PERFORMATIVE NATURE OF SEX

"Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct; not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasure, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power."⁷⁴

Perhaps the most significant failure of Title VII, is its inability to protect performance. Foucault and to an even greater extent, the contemporary political philosophy of Judith Butler suggest that performance of normative kinship serves as the foundation of communal identity.⁷⁵ Butler criticizes the hypothesis that gender performance is the result of one's innate and natural affinity to gender or worse, that the body is a "natural species" deriving its social existence from

⁷³ *Id.*

⁷⁴ MICHEL FOUCAULT, *CULTURE, SOCIETY & SEXUALITY: A READER* 105-06 (1979).

⁷⁵ See generally MICHEL FOUCAULT, *CULTURE, SOCIETY & SEXUALITY: A READER* (1979); Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *THEATER JOURNAL*, 519, n.4 (1988).

the physiological traits of the body.⁷⁶ Rather Butler invalidates naturalistic conceptions of identity by arguing that if gender attributes or acts are the ways by which the body shows cultural significance, than those acts must be performative.⁷⁷ Yet, how can they be performative if they are not pre-existed by identities against which they can be measured? Butler makes her point: “That gender reality is created through sustained social performances means that the very notions of an essential sex, a true or abiding masculinity or femininity, are also constituted as part of the strategy by which the performative aspect of gender is concealed.”⁷⁸

Focusing on “sustained social performances” and repeated “iterations,” Butler suggests that when gender is performed, repeated, and reiterated by an individual, it communicates an identity to that individual’s surroundings, which is then circulated.⁷⁹ This is the basis of socio-political influence. It is the second half of the argument. Upon accepting the nature of identity construction as one that results from the interdependent factors of an emergent system, the next step is how to most effectively interact with that system. If the performance of small iterations of identity circulate within the emergent system, they stand a higher likelihood of being assumed, repeated, and performed by the component members of that system. This is the process by which an expression of individual identity is assumed by the aggregate - it is the way to enact change.

The importance of dramaturgically existing in public spaces strikes at the heart of personal identities, which are continually being revised, reformulated, and redressed by hegemonic social conventions and ideologies. Human desire for recognition is the very foundation driving the interactions of mankind. Individuals are constantly negotiating their

⁷⁶ BUTLER, *supra* note 77.

⁷⁷ *Id.* at 526.

⁷⁸ *Id.* at 527.

⁷⁹ *Id.*

identities in discursive spaces where that identity stands to either be legitimized by recognition or marginalized through exclusive schemas. Whether performances occurs at a gay bar, on the a float at the pride parade, or on the stage of the Rocky Horror Picture show, visible performance is crucial to the definition of TTH identities.

As an examination of Title VII cases illustrate, the majority approach to interpreting “sex” generally fails to protect the performative nature of sexual identity. By relying upon physical anatomical sex organs to afford protection under Title VII, courts threaten the meaning and scope of TTH identities, which are defined by performance and recognition of that performance. The deficiencies of Title VII in providing TTH communities with sexual harassment protection within the workplace are numerous, but it’s failure to protect the ability of one to express sexual identity as seen *Ettsity*, *Ulane*, and *Holloway* is egregious because it affects the identity of a TTH individual.

V. CONCLUSION

The naturalistic construction of “sex” within Title VII’s fails to offer protection to TTH communities. A narrow understanding of the word, which depends on an individuals’ body traits is at odds with the purpose of the Title VII and the over-arching objective of the Civil Rights Act. Even where claims asserted by TTH plaintiffs prevail, they do so only on the narrowest of conditions or by unusual factual circumstances as evidenced by the *Miles* decision. Title VII does not confer protection upon TTH individuals who do conform to gender roles, nor does it

even recognize the existence of transsexual and transgender employees thus precluding them from enjoying its protection.

This approach must be discarded for a more expansive understanding of sex, which includes expressions of gender and sexual preference. There is no reason to support a naturalistic construction of the statute, which has the effect of precluding an aggrieved class of individuals. Not only does it reduce the complexity of identity construction and unjustly impose additional burdens on non-heterosexual plaintiffs, but it ignores the importance of performance in constructing that identity. Until courts recognize the definition “sex” under Title VII to include more than one’s physical organs, the TTH communities will be precluded from enjoying protection from disparate treatment.