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## Sex Stereotyping: Whether Title VII Prohibits Discrimination Against Transgender People

Connor Q. Hollander

In 2019, the Supreme Court will have heard three cases that ask whether federal anti-discrimination laws should apply to sexual orientation and gender identity in the workplace.<sup>1</sup> One of the cases, *R.G. & G.R. Harris Funeral Homes v. EEOC*, will address whether existing anti-discrimination laws apply to transgender workers.<sup>2</sup> Specifically, the Supreme Court will address whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender, or (2) sex stereotyping under the 1989 decision in *Price Waterhouse v. Hopkins*.<sup>3</sup> This article will discuss the second issue; namely, sex stereotyping theory and why the Supreme Court should hold that transgender employees are protected under Title VII based on a sex stereotyping theory.

Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for employers to discriminate in the employment of an individual “because of such individual’s . . . sex.” However, questions have emerged surrounding the appropriate legal standard for establishing discrimination claims by transgender employees.<sup>4</sup> Transgender is defined as a person whose physical sex at birth differs from the sex with which the person later identifies.<sup>5</sup> Although Title VII does not explicitly mention gender identity, most federal courts have recognized discrimination because of the failure to conform to sex stereotypes as a viable theory.<sup>6</sup> Still, some federal courts uphold the position that Title VII does not refer to gender identity, and “sex” is ordinarily defined to mean biologically male or female.<sup>7</sup> Additionally, federal agencies have differing opinions

<sup>1</sup> Bill Chappell, *Supreme Court Will Hear Cases On LGBTQ Discrimination Protections For Employees*, NPR, (Oct. 7, 2019), <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP’T OF JUST., OFFICE OF THE ATTORNEY (“DOJ 2014”), MEMORANDUM ON TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2014) [hereinafter “DOJ 2014”].

<sup>5</sup> *Transgender*, BLACK’S L. DICTIONARY (11th ed. 2019).

<sup>6</sup> *See Federal Case Law on Transgender People and Discrimination*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited July 16, 2019).

<sup>7</sup> *Id.*

on whether Title VII protects transgender employees from employment discrimination.<sup>8</sup> Moreover, it is interesting to note that the United States Department of Justice changed its position on this issue after the 2016 presidential election; indicating that this issue has become highly politicized.<sup>9</sup> While this Supreme Court has already been unfair towards transgender people by upholding similar Trump administration discriminatory practices against transgender people, there is reason to believe that the Court will rule in their favor in the context of Title VII because of sex stereotyping theory.<sup>10</sup>

Sex stereotyping theory was first articulated in the 1989 Supreme Court case *Price Waterhouse v. Hopkins*.<sup>11</sup> The seminal case itself did not involve a transgender employee, but courts have subsequently interpreted the ruling as protecting gender identity.<sup>12</sup> In *Price Waterhouse*, Ann Hopkins worked as a senior manager for Price Waterhouse for five years when she was nominated for partnership.<sup>13</sup> All partners in the firm were invited to submit written comments to the Admission's Committee, who then recommended candidates for a full partnership vote to the Policy Board.<sup>14</sup> Even though Ann Hopkins successfully secured a \$25 million contract for the firm, which the partners labeled as "virtually at the partner level," her candidacy was put on hold for the following year.<sup>15</sup> None of the other partnership candidates that year had a comparable record in terms of successfully securing major contracts for the firm.<sup>16</sup> When the partners refused to re-propose her for partnership, she sued the firm

<sup>8</sup> See *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Dec. 4, 2019) (forbidding employment discrimination based on gender identity); *A Guide to Restroom Access for Transgender Workers*, U.S. DEP'T OF LABOR OSHA, <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited Dec. 4, 2019) (transgender employees should have access to restrooms that correspond to their gender identity); U.S. DEP'T OF JUST., OFFICE OF THE ATTORNEY, MEMORANDUM ON REVISED TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2017) (hereinafter "DOJ 2017") (Title VII does not encompass discrimination based on gender identity).

<sup>9</sup> See DOJ 2014, *supra* note 4; see also DOJ 2017, *supra* note 8.

<sup>10</sup> Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, NEW YORK TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>.

<sup>11</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

<sup>12</sup> Jessica L. Liss & David A. Martin, *Accommodating Transgender Employees: What Every Employer Needs to Know*, 71 J. Mo. B. 308, 308 (2015).

<sup>13</sup> See *Price Waterhouse*, 490 U.S. at 231-233.

<sup>14</sup> *Id.* at 232.

<sup>15</sup> *Id.* at 233.

<sup>16</sup> *Id.* at 234.

under Title VII, alleging that the firm had discriminated against her on the basis of sex.<sup>17</sup>

On many occasions, Ann Hopkins acted abrasively towards staff members.<sup>18</sup> Both supporters and opponents of her candidacy stated that she was sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff.<sup>19</sup> However, there were clear signs that the partners reacted negatively to this part of Hopkins' personality because she was a woman.<sup>20</sup> This came in the form of comments describing her as "macho," "overcompensated for being a woman," "because it's a lady using foul language," "had matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate," and recommending that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>21</sup> At trial, a social psychologist testified that the partnership selection process at the firm was likely influenced by sex stereotyping.<sup>22</sup> The Court held that the firm had discriminated against Hopkins on the basis of sex in violation of Title VII.<sup>23</sup>

The Court reasoned that in passing Title VII, Congress made the simple but momentous decision that sex is not relevant to the selection, evaluation, or compensation of employees.<sup>24</sup> Furthermore, the words of Title VII mean that gender must be irrelevant to employment decisions.<sup>25</sup> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be aggressive, has acted on the basis of gender.<sup>26</sup> In Hopkins' case, a number of partners' comments showed sex stereotyping at work. We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>27</sup> Fi-

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<sup>17</sup> *Id.* at 232.

<sup>18</sup> *Id.* at 234.

<sup>19</sup> *Id.* at 235.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 237.

<sup>24</sup> *Id.* at 239.

<sup>25</sup> *Id.* at 240.

<sup>26</sup> *Id.* at 250.

<sup>27</sup> *Id.* at 251.

nally, the Court stated that the employer must show that it had a legitimate reason, standing alone, which induced it to make the same decision.<sup>28</sup>

*Price Waterhouse* is analogous to *R.G. & G.R. Harris Funeral Homes v. EEOC*, the only contrast being that *Harris Funeral Homes* involves a transgender employee. In *Harris Funeral Homes*, Aimee Stephens, a transgender woman worked for the funeral home for six years as a man.<sup>29</sup> The funeral home requires its male employees to wear suits and ties and its female employees to wear skirts and business jackets.<sup>30</sup> Stephens provided her employer with a letter stating that she had struggled with a gender identity disorder her entire life and informed the employer that she had decided to become the person that her mind already was.<sup>31</sup> Stephens intended to have sex reassignment surgery and explained that the first step she must take was to live and work full-time as a woman.<sup>32</sup> After presenting the letter to her employer, Stephens was fired.<sup>33</sup> Stephens' employer testified that he fired her because she was no longer going to represent herself as a man and wanted to dress as a woman.<sup>34</sup>

The court held that discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.<sup>35</sup> The court reasoned that under any circumstances, sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.<sup>36</sup> Stephens' employer fired her for the sole reason that she was no longer going to represent herself as a man and failed to establish a non-discriminatory basis for Stephens' termination, admitting that he did not fire her for any performance-related issues.<sup>37</sup> In fact, Stephens' employer testified that she "was able to perform the jobs of a funeral director and embalmer," "showed sensitivity and compassion to the clients who came in," was an "incredible embalmer," and "families seemed very pleased with her work."<sup>38</sup> Thus, because Stephens presented unrefuted evi-

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<sup>28</sup> *Id.* at 252.

<sup>29</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

<sup>30</sup> *Id.* at 568.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 569.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 600.

<sup>36</sup> *Id.* at 572.

<sup>37</sup> *Id.*

<sup>38</sup> Brief for Respondent at 6-7, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 WL 2745392 (6th Cir. 2019).

dence that unlawful sex stereotyping was at least a motivating factor in the employer's actions, the court granted Stephens summary judgment.<sup>39</sup>

Although sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII as a gambit of a congressman seeking to defeat the adoption of the Civil Rights Act,<sup>40</sup> statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed.<sup>41</sup> No one ever thought that sexual harassment was encompassed by discrimination on the basis of sex back in '64. It wasn't until a book was written in the middle 70's bringing that out. And now we say, of course, harassing someone, subjecting her to terms and conditions of employment she would not encounter if she were a male, that is sex discrimination, but it wasn't recognized to be such in the beginning.<sup>42</sup> Thus, the Supreme Court should affirm the holding in *Harris Funeral Homes* based on a sex stereotyping theory and prevent the further discrimination of transgender individuals.

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<sup>39</sup> *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d. at 574.

<sup>40</sup> *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

<sup>41</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

<sup>42</sup> *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Oyez, <https://www.oyez.org/cases/2019/18-107> (last visited Nov 2, 2019).