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TRANSITIONING INTO MODERN SOCIETY: WHY THE LAW IS NOT “KEEPING UP” WITH GENDER IDENTITY

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TRANSITIONING INTO MODERN SOCIETY: WHY THE LAW IS NOT “KEEPING UP” WITH GENDER IDENTITY

Gianna M. Kelly*

I. INTRODUCTION

I hate the word girl stuck in a guy's body. I hate that terminology. That's not who I am. I'm me. I'm me, I'm a person and this is who I am. I'm not stuck in anybody's body, it's just who I am as a human being. My brain is much more female than it is male. It's hard for people to understand that, but that's what my soul is.

—Caitlyn Jenner¹

In 1955, Christine Jorgensen, formerly George Jorgensen, became America's first openly recognized transsexual woman.² Her story captured the media's attention and brought to light the “transsexual phenomenon.”³ A more recent monumental moment in the transsexual and transgender (hereinafter collectively referred to as “trans”) community, came with the televised interview of Caitlyn Jenner (formerly Bruce Jenner), Olympic gold medalist and reality television celebrity, during which she told America her story of being transgender.⁴ Since that interview, many people have come out in support of her bravery and her encouragement to others who previously succumbed to social pressures to hide their trans identities.⁵ With this recent

* J.D. Candidate, University of Pittsburgh School of Law, 2017; B.S., University of Pittsburgh, 2014. Special thanks to my parents, Lawrence and Marisa, and my sisters, Lauren, Erica, and Ariana, for their support during the writing of this Note.

¹ Emily Yahr, *Bruce Jenner's in-depth interview: 'For all intents and purposes, I am a woman,'* WASH. POST (Apr. 24, 2015), <http://www.washingtonpost.com/blogs/style-blog/wp/2015/04/24/bruce-jenner-for-all-intents-and-purposes-i-am-a-woman/>.

² See Brittany Ems, Note, *Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity*, 54 ST. LOUIS U. L.J. 1329, 1329 (2010); see also Kristine W. Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 283 (1997).

³ Holt, *supra* note 2.

⁴ See Yahr, *supra* note 1.

⁵ *Id.*

surge in public awareness, however, comes a new wave of hostility and discrimination towards trans individuals, and continued uncertainty with respect to the legal status of such individuals.⁶

The law enabling trans individuals to enjoy the privileges of employment free from harassment and discrimination varies by jurisdiction.⁷ Additionally, an analysis of existing case law reveals that traditional public policy is opposed to the recognition of equal rights for trans individuals.⁸ Courts are split as to whether there is a definitive answer for Title VII protection of trans plaintiffs⁹—some have drawn boundaries which effectively deny statutory protection for sexual minorities altogether,¹⁰ and some consider discrimination based on sexual stereotyping¹¹ to be sex discrimination under Title VII, while discrimination based on sexual orientation or gender identity is not.¹² While Title VII of the Civil Rights Act of 1964¹³ protects employment discrimination “because of . . . sex,” the statute does not explicitly protect individuals based on sexual orientation, gender identity, or expression.¹⁴ Consequently, trans individuals have uniformly fallen outside of this protected area.¹⁵

Part II of this Note will provide a general history of trans individuals’ lives in America and will analyze how Title VII directly affects them as a class of people. It will discuss how trans people have uniformly been denied the right of protection from employment discrimination because they do not fit within the established and very narrow grouping of “sex” as set forth in Title VII. Part III will explore seminal sexual-minority case law and its influence on Title VII and the trans community. Part IV will examine the underlying problems with using this case law as precedent for current

⁶ Holt, *supra* note 2, at 284.

⁷ *Id.* at 285.

⁸ *Id.*

⁹ See Ems, *supra* note 2, at 1330.

¹⁰ Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715 (2010).

¹¹ “Sexual stereotyping” is defined as “[a] generaliz[ation] of a person’s abilities and limitations based on the known tendencies of that person’s sex.” *Sexual stereotype*, SEGEN’S MEDICAL DICTIONARY, <http://medical-dictionary.thefreedictionary.com/Sexual+Stereotype> (last visited Mar. 1, 2016). An example would be the belief that women are more intuitive and emotional; men are more rational and less passionate. See *id.*

¹² See McGinley, *supra* note 10, at 715.

¹³ 42 U.S.C. § 2000e-2 (2016).

¹⁴ McGinley, *supra* note 10, at 714.

¹⁵ *Id.*

employment discrimination adjudication. Part V will discuss the Equal Employment Opportunity Commission's noteworthy decision in *Macy v. Holder*, a step in the right direction for trans employment rights. Part VI of this Note will examine the economic consequences stemming from this type of employment discrimination. Part VII will demonstrate the need for an amendment to Title VII in order to protect the trans community and in order for the law to align with the increasing awareness and support of trans individuals in the United States.

II. TRANS INDIVIDUALS AND TITLE VII GENERALLY

A. Overview of Trans Identities and Trans People in the Workplace

The term “transgender” applies to a wide range of people who express themselves as the “opposite” sex, including transsexuals (a person whose external anatomy has been changed to resemble that of the opposite sex), cross-dressers (those who wear clothing of the “opposite” biological sex for emotional purposes), and inter-sexed people (also known as hermaphrodites or a person having both male and female sexual characteristics and genital tissues).¹⁶ “Transgender” is also used to describe someone who experiences gender dysphoria.¹⁷ Transgender people do not conform to societal stereotypes of what it means to be “male” or “female.”¹⁸ A transgender person's sexual identity is their “fundamental . . . sense of being male or female, or something or other in between.”¹⁹

¹⁶ *Id.* at 746.

¹⁷ See Ems, *supra* note 2, at 1332. “Gender dysphoria” is defined as “[a] persistent unease with the gender to which one was assigned at birth, often accompanied by dislike of the physical characteristics of one's sex and strong identification with, and desire to live as a member of, a different gender.” *Gender dysphoria*, THE AMERICAN HERITAGE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/gender+dysphoria> (last visited Mar. 1, 2016).

¹⁸ Transgender Issues: A Fact Sheet, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/resources/transfactsheet.pdf> (last updated Apr. 9, 2010).

¹⁹ Paisley Currah, Shannon Minter & Jamison Green, *Transgender Equality: A Handbook for Activists and Policymakers*, THE POL'Y INST. OF THE GAY AND LESBIAN TASK FORCE 8, http://www.thetaskforce.org/static_html/downloads/reports/reports/TransgenderEquality.pdf (last visited Nov. 20, 2016).

Statistics show that trans individuals often suffer discrimination in the workplace.²⁰ According to the Gay and Lesbian Alliance Against Defamation, an advocacy group also known as GLAAD, 52% of the lesbian, gay, bisexual and transgender population in the United States lives in cities or states that do not prohibit discrimination against the individuals in employment, housing, or public accommodations—meaning that a person can potentially be fired or denied services for being gay, lesbian or transgender.²¹ Further, wage disparities for trans individuals are shocking. A survey of 194 transgender individuals found that 60% of the surveyed individuals “earned less than \$15,300 per year and only eight percent earned more than \$45,900 annually.”²² Fifty-seven percent of those surveyed stated they had experienced employment discrimination, but only 12% of those alleging discrimination took any action to stop it.²³ Further, testimony to Congress, presented by Bradley Sears of the Williams Institute at University of California Los Angeles School of Law, indicated that transgender individuals suffer significantly in the labor market, yielding high rates of poverty and unemployment, which is related to discrimination.²⁴ A recent study examined the pay of transsexuals who were employed before and after transitioning from one sex to another.²⁵ The study found that there is a large discrepancy in pay for both “male-to-female” (MTF) and “female-to-male” (FTM) transsexuals.²⁶ A separate study showed that MTF transsexuals experience harassment and termination once they began transition.²⁷ Moreover, a survey by the National Center for Transgender Equality found that the unemployment rate for transgender individuals was 14%, twice the

²⁰ Matt Pearce, *The Next Battleground for LGBT Rights*, L.A. TIMES (Mar. 7, 2016), <http://www.latimes.com/nation/la-na-transgender-bathroom-bills-20160307-story.html>.

²¹ *Id.*

²² *An Examination of Discrimination Against Transgender Americans in The Workplace: Hearing Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Comm. on Education & Labor*, 110th Cong. 85 (2008) (statement of The Transgender Law Center).

²³ *Id.*

²⁴ See McGinley, *supra* note 10, at 747.

²⁵ See *id.* at 748.

²⁶ See *id.*

²⁷ See *id.*

rate for the population as a whole, with the rate for trans individuals of color reaching as high as four times the national unemployment rate.²⁸

A recently published report describes the reality of the workforce for trans individuals as a “broken bargain”—illustrating that trans individuals who work hard to meet their responsibilities are not afforded the benefit of their bargain.²⁹ Because no federal law currently provides explicit legal protections for trans employees based on gender identity and the Employment Non-Discrimination Act³⁰ has not yet been passed, trans individuals often suffer discrimination in the workplace,³¹ yielding high unemployment and poverty rates among trans people in the United States.³² Currently, only twenty states and the District of Columbia explicitly prohibit discrimination based on gender identity and expression.³³

Sociologists and feminist scholars argue that the concept of gender is socially constructed—that gender role or expression is not natural, but learned behavior.³⁴ While biology plays an important role in behavior, medical professionals have contributed to the evolution of gender as a social construct by encouraging individuals to conform to gender norms and roles.³⁵ Against this backdrop, legislators have adhered to strict societal notions of gender evident in the original construction of Title VII.

B. Overview of Title VII and Traditional Notions of Sexual Minorities Under the Statute

Title VII prohibits discrimination against employees and applicants “because of . . . sex,” but does not expressly protect them from discrimination based on sexual orientation, gender identity, or gender expression.³⁶ Historically, Title VII has not protected lesbian, gay, bisexual, or trans

²⁸ *A Broken Bargain for Transgender Workers*, MOVEMENT ADVANCEMENT PROJECT 1 (Sept. 2013), <http://www.lgbtmap.org/file/a-broken-bargain-for-transgender-workers.pdf>.

²⁹ *Id.*

³⁰ S. 815, 113th Cong. (2013) [hereinafter ENDA].

³¹ *A Broken Bargain for Transgender Workers*, *supra* note 28, at 3.

³² *Id.*

³³ *Non-Discrimination Laws: State by State Information—Map*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Nov. 17, 2016).

³⁴ See McGinley, *supra* note 10, at 717.

³⁵ *Id.* at 718.

³⁶ *Id.* at 728 (citing 42 U.S.C. § 2000e-2).

individuals from discrimination.³⁷ Today, many consider homosexuality to be an identity.³⁸

Even with the increasing acceptance of homosexual identity, this newly expanded binary presumes that persons are either male or female and that they are either heterosexual or homosexual.³⁹ Trans persons fail to receive adequate protection from discrimination because their gender identities or expressions do not comport with binary definitions.⁴⁰ In fact, legal scholars have just recently begun to struggle with the treatment of trans individuals under Title VII.⁴¹

In passing Title VII, Congress made clear that sex, race, religion, and national origin are not to be considered in the selection, evaluation, or compensation of employees.⁴² However, the statute does not limit other characteristics that employers may consider when making employment decisions.⁴³ Congress' intent to forbid employers from considering gender when making employment decisions is specifically noted in the statute.⁴⁴ The statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex.*"⁴⁵

In the first several cases brought by trans individuals, *Holloway v. Arthur Andersen & Co.*,⁴⁶ *Sommers v. Budget Marketing*,⁴⁷ and *Ulane v. Eastern Airlines*,⁴⁸ discussed in further detail infra Part III, the courts held that Title VII's prohibition against discrimination because of sex did not

³⁷ See *id.* at 726.

³⁸ See *id.* at 727.

³⁹ See *id.* at 717.

⁴⁰ See *id.* at 718.

⁴¹ See *id.* at 727.

⁴² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 239–40 (citing 42 U.S.C. §§ 2000e-2(a)(1)–(2) (emphasis added)).

⁴⁶ 566 F.2d 659 (9th Cir. 1977).

⁴⁷ 667 F.2d 748 (8th Cir. 1982).

⁴⁸ 742 F.2d 1081 (7th Cir. 1984).

protect trans persons from discrimination based on their sexual identities.⁴⁹ Although the courts also noted that there may be a Title VII action if a trans individual is discriminated against because she is female or he is male,⁵⁰ they nonetheless concluded that, without a congressional amendment that includes trans individuals as a protected category, the law does not prohibit employment discrimination against trans people.⁵¹ Specifically, in *Holloway*, the Ninth Circuit Court of Appeals determined that Congress “had only the traditional notions of ‘sex’ in mind” when drafting Title VII.⁵² Accordingly, the problem of sufficiently protecting sexual minorities under Title VII ultimately lies in the legislature and the courts’ binary view of sex and gender—a view that identifies men and women as complete opposites and that sees gender as solely attributed to biological sex.⁵³

III. THE SEMINAL CASES ANALYZING SEXUAL MINORITIES UNDER TITLE VII

A. *Holloway v. Arthur Andersen & Co.*

In *Holloway v. Arthur Andersen & Co.*, the plaintiff, Ramona Holloway, informed her supervisor that she would be undergoing a transition from male to female.⁵⁴ At her annual review, her supervisor suggested that she would “be happier at a new job where her transsexualism would be unknown.”⁵⁵ Shortly thereafter, Holloway requested a change in company records to reflect her new name, and she was subsequently fired from her job.⁵⁶ In considering whether Holloway was discriminated against because of her sex, the Ninth Circuit Court of Appeals concluded that transsexual persons are not covered by Title VII’s prohibition against sex discrimination.⁵⁷ The court’s reasoning was premised on the “clear intent” of the 1972

⁴⁹ See McGinley, *supra* note 10, at 732–33.

⁵⁰ See *id.* at 733.

⁵¹ See *id.*

⁵² Holt, *supra* note 2, at 289 (citing *Holloway*, 566 F.2d at 662).

⁵³ See McGinley, *supra* note 10, at 715.

⁵⁴ 566 F.2d at 661.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 664.

Amendments to Title VII to remedy “the economic deprivation of women as a class”⁵⁸ and the fact that Congress “had only the traditional notions of ‘sex’ in mind” given the plain meaning of the statute.⁵⁹ The court noted that while several bills to amend the Civil Rights Act to prohibit discrimination against “sexual preference” had been introduced, none had been enacted into law.⁶⁰ As such, the court dismissed Holloway’s complaint, holding that trans individuals did not fall within the protective scope of Title VII.⁶¹

B. *Ulane v. Eastern Airlines*

Subsequently, in *Ulane v. Eastern Airlines*, Kenneth Ulane, an eleven-year employee of Eastern Airlines, was fired after undergoing sex reassignment surgery.⁶² Though the district court found in favor of Ulane, the Seventh Circuit Court of Appeals reversed the decision, finding that “the total lack of legislative history supporting the sex amendment, coupled with the circumstances of the amendment’s adoption, clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.”⁶³

C. *Price Waterhouse v. Hopkins*

The years following the aforementioned cases, the United States Supreme Court granted certiorari to resolve a conflict among the circuit courts concerning the burden of proof in a Title VII case when an employment decision resulted from a mixture of legitimate and illegitimate motives.⁶⁴ In *Price Waterhouse v. Hopkins*, the plaintiff, Ann Hopkins, claimed she was denied partnership at an accounting firm because the

⁵⁸ *Id.* at 662.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 664.

⁶² 742 F.2d at 1082.

⁶³ *Id.* at 1084–85.

⁶⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

partners perceived her to be too masculine and aggressive.⁶⁵ The Supreme Court agreed, ultimately concluding that:

[W]hen the plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made same decision even if it had not taken plaintiff's gender into account.⁶⁶

The Court explained that the words “because of” in § 703(a)(1) of the act, which forbid an employer to make an adverse decision against an employee “because of such individual’s . . . sex,” requires an analysis of *all* the reasons contributing to the decision at the time it was made.⁶⁷ The Court remanded, signaling to the lower court that the evidence in the case was sufficient to establish that sexual stereotyping played a part in evaluating Hopkins’ candidacy.⁶⁸

D. Smith v. City of Salem

After *Price Waterhouse*, and because of the absence of federal law prohibiting employment discrimination based on sexual orientation or identity, trans plaintiffs began to bring claims for discrimination using the sex stereotyping theory.⁶⁹ In *Smith v. City of Salem*, Jimmie Smith, a transgender individual, was fired from his position as lieutenant in the Salem Fire Department after informing his supervisor of plans to transition from male to female.⁷⁰ Analyzing Smith’s claim under the analysis laid out in *Price Waterhouse*, the Sixth Circuit Court of Appeals found that the “Supreme Court clearly extended Title VII’s discrimination prohibition to victims of ‘gender’ discrimination.”⁷¹ The court found in favor of Smith and held that, pursuant to *Price Waterhouse*, an employer engages in sex discrimination when it discriminates against a woman who does not wear dresses or makeup, and likewise when it discriminates against a man who

⁶⁵ *Id.* at 235.

⁶⁶ *Id.* at 258.

⁶⁷ *Id.* at 240.

⁶⁸ *Id.* at 258.

⁶⁹ See Ems, *supra* note 2, at 1342.

⁷⁰ 378 F.3d 566, 568 (6th Cir. 2004).

⁷¹ Ems, *supra* note 2, at 1343 (citing *Smith*, 378 F.3d at 574).

does wear dresses and makeup, “because the discrimination would not occur but for the victim’s sex.”⁷²

IV. PROBLEMS WITH THE EXISTING CASE LAW

While the *Price Waterhouse* sex stereotyping theory worked in the plaintiff’s favor in *Smith*, *Price Waterhouse* does not always guarantee a favorable result.⁷³ “*Price Waterhouse* creates a cause of action for transsexuals under Title VII if the reason for discrimination is the failure of the plaintiff to conform to sexual stereotypes.”⁷⁴ However, Title VII does not protect individuals who assert discrimination solely on the basis of their *status* as trans individuals.⁷⁵ Therefore, *Price Waterhouse* does not reach as far as protecting all transgender persons from employment discrimination, but rather it protects employees that fail to conform to the norms of societal sexual stereotypes.⁷⁶

As such, there are various limitations to applying the *Price Waterhouse* theory to employment discrimination cases involving trans individuals. For example, a defendant-employer could legally fire an employee for cross dressing outside of work, asserting that it did not discriminate against the employee for his or her failure to conform to gender roles at work, but instead that it fired the employee for “deviant behavior.”⁷⁷ In other words, an employer could discharge a male employee for dressing like a female outside of the workplace, and this would not constitute employment discrimination under *Price Waterhouse*.⁷⁸ The Court’s reasoning in *Price Waterhouse* does nothing to prevent employment discrimination based on gender non-conforming behavior of an employee outside of the workplace.⁷⁹

The *Price Waterhouse* analysis is too narrow to serve as a bright-line rule in the context of employment discrimination against trans individuals,

⁷² *Id.* (quoting *Smith*, 378 F.3d at 574).

⁷³ McGinley, *supra* note 10, at 757.

⁷⁴ *Id.* at 758.

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *Oiler v. Winn Dixie Louisiana Inc.*, Civ. A. No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (holding that it is acceptable to fire someone for cross dressing)).

⁷⁸ *Oiler*, 2002 U.S. Dist. LEXIS 17417.

⁷⁹ *See id.*

and current law does not provide these individuals with sufficient protection from employment discrimination. Under federal laws and the laws of more than twenty-five states, employers can legally fire, refuse to hire, and refuse to promote trans employees for discriminatory purposes, and thus, trans plaintiffs who suffer adverse employment actions in states without protection are left without legal remedies.⁸⁰ While they may proceed with a sex stereotyping argument, such an argument has a slim likelihood of success.⁸¹

V. *MACY V. HOLDER*—A STEP IN THE RIGHT DIRECTION

Despite the shortcomings of the current law, there has been some legal recourse for trans individuals after a 2012 decision by the Equal Employment Opportunity Commission (“EEOC”) in *Macy v. Holder*.⁸² In that case, Mia Macy, a police detective in Phoenix, Arizona had moved to San Francisco, California, after which her supervisor in Phoenix told her about an opening with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) in the crime laboratory—a position for which Macy was qualified.⁸³ Macy spoke with the lab director regarding the position and claimed she was told that she would be offered the job pending a background check.⁸⁴ Macy was asked to complete the required paperwork, and an investigator was assigned to perform her background check.⁸⁵ She thereafter informed the contractor responsible for filling the position that she was in the process of transitioning from male to female and asked that this information be given to the director of the lab.⁸⁶ Five days after the contractor informed the ATF of Macy’s name and gender changes, Macy was told the position was no longer available due to federal budget cuts.⁸⁷

Macy contacted an Equal Employment Opportunity counselor to voice her concerns, and that counselor informed her that the position had not been

⁸⁰ Ems, *supra* note 2, at 1358.

⁸¹ *Id.*

⁸² No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

⁸³ *Id.* at *1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

cut, but rather, that it had been given to someone else.⁸⁸ Macy believed that the ATF did not want to hire her because she was transgender, and filed a formal discrimination complaint with the agency to that effect.⁸⁹ On a preprinted complaint form, she noted her sex as “female,” and typed in “gender identity” and “sex stereotyping” as the basis for the complaint.⁹⁰ Macy further specified that she was not hired on the basis of “[her] sex, gender identity (transgender woman) and on the basis of sex stereotyping.”⁹¹ After multiple exchanges between the parties, the ATF proceeded to separate Macy’s complaint into two separate claims, one described as discrimination based on sex and the other based on gender identity and stereotyping.⁹² Pursuant to the Department of Justice’s segregated system for adjudication of claims of ordinary sex discrimination versus those for discrimination based on gender identity and sexual orientation,⁹³ the ATF was able to argue that it could only process Macy’s sex discrimination claim, not her claim for discrimination based on gender identity.⁹⁴

The EEOC accepted appeal of Macy’s complaint as a whole, finding that “the [a]gency mistakenly separated [her] complaint into [two] separate claims.”⁹⁵ Importantly, the Commission explained, “[e]ach of the formulations of Complainant’s claims [were] simply different ways of stating the same claim of discrimination ‘based on . . . sex,’ a cognizable claim under Title VII.”⁹⁶ The EEOC ultimately held that discriminating against someone because that person is transgender is discrimination based on sex.⁹⁷ It went on to explain:

This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical

⁸⁸ *Id.* at *2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at *3.

⁹³ According to the order in *Macy*, “the Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees.” *Id.* at *2. Notably, the latter system does not grant a complainant the ability to request a hearing before an EEOC administrative judge or to appeal the final Agency decision to the EEOC. *Id.*

⁹⁴ *Id.* at *3.

⁹⁵ *Id.* at *5.

⁹⁶ *Id.*

⁹⁷ *Id.* at *7.

fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.⁹⁸

In each of the aforementioned circumstances, the employer is violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."⁹⁹

Accordingly, the EEOC's *Macy* decision affords Title VII coverage to transgender individuals when they are discriminated against because they are gender nonconforming *and* because they are transgender.¹⁰⁰ Under the EEOC's construction of "sex" under Title VII, trans individuals can directly claim discrimination based on their trans status.¹⁰¹

What the *Macy* decision did not do was create a new protected class for trans individuals under Title VII—this is a change that could only effectively be brought about by Congress. *Macy* is binding on EEOC officers and investigators throughout the country, meaning that trans individuals can file complaints of discrimination with the EEOC and have access to the EEOC investigation and enforcement process.¹⁰² However, while courts often grant deference to the *Macy* decision,¹⁰³ they are not bound by it.¹⁰⁴ Thus, it is still crucial to have clear laws enacted by Congress, state, and local governments, and affirmed by the courts, in order to ensure that employers and employees are made aware of trans rights.¹⁰⁵

VI. ECONOMIC COSTS OF DISCRIMINATION

Discrimination against trans individuals does not just impact that group; rather, it affects each individual in the workplace, and in turn, can create large

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)).

¹⁰⁰ *Id.*

¹⁰¹ Taylor Alyse Pack Ellis, Note, *Why the EEOC Got It Right in Macy v. Holder: The Argument for Transgender Inclusion in Title VII Interpretation*, 16 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOCIAL JUST. 375, 401 (2014).

¹⁰² *What the EEOC's Decision in Macy v. Holder Means for You*, TRANSGENDER L. CTR., <http://transgenderlawcenter.org/issues/employment/eecofa> (last updated May 1, 2012).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

economic costs for companies as a whole.¹⁰⁶ Annual estimated costs of losing and replacing employees who leave their jobs due to unfairness and discrimination equals \$64 billion.¹⁰⁷ High turnover rates and costs associated with recruitment, retention, and ultimate hiring of new employees to replace those trans employees who have left their jobs because of discrimination pose significant threats to companies' profitability, productivity, and performance.¹⁰⁸ It is an overall competitive disadvantage for companies to engage in this type of discrimination.¹⁰⁹

Such diminished ability to employ the best and most qualified candidates for the job and suppression of overall job performance are only some of the consequences of discrimination in employment.¹¹⁰ Discrimination also disadvantages companies by excluding lucrative consumer markets.¹¹¹ Gay and trans individuals have a cumulative buying power of nearly \$1 trillion.¹¹² "In 2007, gay consumers spent \$660 billion on goods and services."¹¹³ In 2011, that number was expected to rise to \$835 billion.¹¹⁴ The gay consumer market has a large impact worldwide and accounts for 6% of all sales across the globe.¹¹⁵ Given the spending power of these groups, it is not within the best interest of companies to simply ignore these consumer markets.

Further, if the aforementioned reasons are not enough to persuade businesses to engage in trans nondiscrimination policies, the threat of litigation might be more convincing. Litigation associated with

¹⁰⁶ *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace*, LEVEL PLAYING FIELD INST. (2007), <http://www.workforcediversitynetwork.com/docs/corporate-leavers-survey.pdf>. [hereinafter LEVEL PLAYING FIELD INST.].

¹⁰⁷ *Id.*

¹⁰⁸ Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. FOR AM. PROGRESS 1 (Mar. 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf.

¹⁰⁹ See LEVEL PLAYING FIELD INST., *supra* note 106.

¹¹⁰ *Id.*

¹¹¹ See Burns, *supra* note 108.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Press Release, Witeck Combs Communications, Buying power of U.S. Gays and Lesbians to Exceed \$835 billion by 2011 (Jan. 25, 2007), http://www.witeckcombs.com/news/releas-es/20070125_buyingpower.pdf.

¹¹⁵ Press Release, PR Web, Diversity Sells: Supporting Gays and Lesbians Drives Sales (July 20, 2010), <http://www.prweb.com/pdfdownload/4150624.pdf>.

discrimination can require significant time, money, and resources that could ultimately be used for the betterment of the company. In fact, the top ten private plaintiff employment discrimination lawsuits in 2010 alone cost firms \$346.4 million.¹¹⁶

Importantly, there is a trend toward workplace equality among some of the largest and most successful American corporations. Statistics show that 85% of Fortune 500 companies already have nondiscrimination policies that include sexual orientation, and 49% include gender identity.¹¹⁷ Further, 96% of Fortune 50 companies have nondiscrimination policies that include sexual orientation, and 74% of those include gender identity.¹¹⁸

Overall, trans-inclusive nondiscrimination policies can create a diverse and inclusive workplace and workforce. This is beneficial, in that it can result in a significant decrease in the costs associated with employee turnover. Lower employee turnover and higher employee satisfaction due to a nondiscriminatory environment can boost productivity and can ultimately yield higher profit margins for companies.¹¹⁹

VII. PROPOSED CHANGES TO THE LAW TO PROTECT TRANS INDIVIDUALS FROM DISCRIMINATION

As long as the law remains unclear in this area, trans individuals will be denied fair treatment in the workplace.¹²⁰ Thus, it is essential that protections for trans individuals are strengthened at the federal, state, and local levels in an effort to eliminate or, at the very least, reduce, bias, discrimination and wage gaps for trans individuals in the workplace.¹²¹ Over the years, and even more so today, sexual minority advocates have continued to lobby Congress to either amend Title VII to include protection based on sexual orientation and gender identity, or to pass a new law to protect against this type of

¹¹⁶ Jared Bilski, *Last year's top discrimination suits cost employers \$346M*, CFO DAILY NEWS (Jan. 11, 2011), <http://www.cfodailynews.com/last-years-top-discrimination-suits-cost-employ-ers-346m/>.

¹¹⁷ See Burns, *supra* note 108.

¹¹⁸ *Id.*

¹¹⁹ See discussion *supra* Part V.

¹²⁰ See Ems, *supra* note 2, at 1360.

¹²¹ See Burns, *supra* note 108.

employment discrimination.¹²² One way to accomplish this would be for Congress to pass, and for the President to sign, the trans-inclusive ENDA, a bill currently before Congress.¹²³ The legislature should examine the overall purpose of anti-discrimination law.¹²⁴ The ENDA should include an accurate description of whom Congress seeks to protect and should add and define the terms “sexual orientation,” “gender identity,” and “gender expression.”¹²⁵ By broadening the statute’s definition of sexual orientation, the law could become one step closer to aiding trans individuals who do not fit within the historic binary categories of “sex.”

A 2001 opinion by the Third Circuit Court of Appeals,¹²⁶ which remains effective today, exemplifies the need for change to occur starting with Congress itself. Namely, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, that court held that the plaintiff did not have a cause of action under Title VII for harassment that occurred on the basis of sexual orientation.¹²⁷ While it noted that harassment on the basis of sexual orientation has no place in society,¹²⁸ it based its decision on the fact that Congress had not yet found it necessary to provide protection against such harassment.¹²⁹ Thus, although it may not have been Congress’ original intent to protect trans persons, the need for protection of this particular class of people is crucial. The legislative history of Title VII demonstrates different perceptions and notions of sexual identities from an earlier generation that may not have foreseen the radical changes that would occur in society.¹³⁰ Hence, the trans community suffers from stagnant laws in desperate need of reform.

To effectuate change, the trans community must continue to rally and lobby for changes in the law. While Caitlyn Jenner took a major step in bringing awareness of trans individuals to the collective forefront of the general public, there is so much more to do to ensure that trans individuals

¹²² McGinley, *supra* note 10, at 715.

¹²³ See Ems, *supra* note 2, at 1360. The ENDA, if enacted, would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least fifteen employees.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Bibby v. Phila. Coca Cola Co.*, 260 F.3d 257 (3d Cir. 2001).

¹²⁷ *Id.* at 265.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 BERKELEY J. EMP. & LAB. L. 68 (1977).

receive adequate protection against discrimination in employment. Educating the public—and lawmakers—about the trans and intersex community is paramount if the law is to evolve toward what is necessary to ensure equal protection for these individuals.

However, reform must also occur *in* the workplace. Both employers and co-workers of trans individuals must be educated on what it means to be trans. It is crucial that employers make trans persons aware of their individual rights in the workplace. Employers should implement zero-tolerance policies with regards to workplace discrimination and have easy, judgment-free ways for trans individuals to voice their opinions and concerns with regard to issues they experience in the workplace. Trans-inclusive nondiscrimination policies can create diverse and inclusive workplaces. It is important to recognize that diversity within a company is crucial for both innovation and perspective.

While lawmakers may be hesitant to include sexual orientation into the ENDA, the failure to do so is essentially a refusal to protect an entire class of people. While opponents to trans-inclusive protections may argue that it is easier to use bright-line rules in defining gender in employment discrimination cases and that allowing for other gender identities blurs the lines, we no longer live in a world where a “one size fits all” approach is sufficient.

VIII. CONCLUSION

In conclusion, the need for the law to adapt to the ever-changing modern world is crucial. Implementing a trans-inclusive Employment Non-Discrimination Act is an essential step our lawmakers must take to ensure equal protection for all individuals. In doing so, trans individuals will be afforded the rights that they deserve. In turn, employers in the United States will not only foster a positive work environment for all classes of people, but will also reap positive economic benefits as well.