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Relevant cases and other materials for presentation on Title VII claims by transgender plaintiffs, at April 3, 2018 CLE program "Applying Title VII to Sexual Orientation and Gender Identity."

(* = Copy of decision included in materials)

Relevant Supreme Court decisions

**Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII) (the leading case underlying all successful Title VII claims by transgender plaintiffs; it did not involve a transgender plaintiff, but established the doctrine that discrimination on the basis of "sex stereotypes" is a type of sex discrimination for purposes of Title VII liability, and that "gender must be irrelevant to employment decisions." *Id.* at 240, *see also id.* at 250-251 ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n 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'" (citation omitted)); *id.* at 272-273 (O'Connor, J., concurring)).

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (Title VII) (plaintiff stated sex discrimination claim based on employer's refusal to hire women -- but not men -- with small children, even though the refusal did not affect all women. *See* Marshall, J., concurring, *id.* at 545: "By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes'" (citing E.E.O.C. guidelines) -- in that case, the stereotype that women with small children are less committed to work, etc.).

Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (Title VII) (ruling that same-sex harassment violates Title VII despite lack of evidence of Congressional intent. *See* Scalia, J., for majority, *id.* at 79-80: although same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements.")

**Court of Appeals Decisions & Examples of District Court Decisions
Applying *Price Waterhouse* Sex Stereotyping Theory to Uphold Discrimination
Claims by Transgender Plaintiffs under Title VII and Other Statutes**

Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (ruling that claim by transgender prisoner against prison guard based on sexual assault stated claim under Gender Motivated Violence Act, relying on *Price Waterhouse*)

Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (ruling that claim by “cross-dressing” bank customer arising from defendant’s refusal to provide credit application stated claim under Equal Opportunity Credit Act, relying on *Price Waterhouse*)

Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001) (Title VII) (first District Court decision to apply *Price Waterhouse* sex stereotyping theory to uphold Title VII claim brought by a transgender plaintiff, who was terminated by her employer after suspicions raised about her appearance led to discovery that she had transitioned 27 years earlier)

**Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII) (first Court of Appeals decision to apply *Price Waterhouse* sex stereotyping theory to uphold Title VII claim by transgender plaintiff)

**Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII) (following *Smith* to sustain claim by Title VII claim by “a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty [and] had a reputation throughout the police department as a homosexual, bisexual or cross-dresser,” and alleged that she was demoted because of her failure to conform to sex stereotypes.

Fabian v. Hosp. of Central Conn., 172 F. Supp. 3d 509 (D. Conn. 2016) (Title VII) (with detailed discussion of previous cases on issue)

Whitaker by Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017) (Title IX, relying on Title VII cases)

Evancho v. Pine-Richland School District, 237 F.Supp.3d 267 (W.D. Pa. 2017) (Title IX, relying on Title VII cases)

**District Court, EEOC, and Court of Appeals Decisions Ruling that Claims by
Transgender Plaintiffs Stated *Per Se* Claims for Sex Discrimination Under Title VII**

**Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII) (first District Court decision to rule that discrimination against transgender plaintiffs is sex discrimination *per se* under Title VII – because transgender people are inherently gender-nonconforming -- without

requiring individualized proof that defendant's motivation was plaintiff's failure to conform to sex or gender stereotypes)

**Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Section 1983, relying on Price Waterhouse and Title VII cases)

**Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012) (first EEOC decision to rule that discrimination claims by transgender plaintiffs constitute sex discrimination *per se* under Title VII)

Finkle v. Howard Cty., Md., 12 F. Supp. 3d 780 (D. Md. 2014) (Title VII) (relying heavily on *Schroer* and *Glenn* in adopting *per se* sex discrimination theory)

**Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756 (E.E.O.C., Apr. 1, 2015) (Title VII) (transgender complainant proved that she was subjected to disparate treatment and harassment based on sex when her employer restricted her from using the common female restroom, and a team leader intentionally and repeatedly referred to her by male pronouns and made hostile remarks).

**E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, ___ F.3d ___, 2018 WL 1177669 (6th Cir., Mar. 7 2018) (Title VII) (first Court of Appeals decision to rule that discrimination against transgender people is sex discrimination *per se* under Title VII)

Bibliography of Recent Articles on Title VII Claims by LGBT People, for Further Reading

Lani Durio, Comment, *Title VII and Transgender Employees: The Transition Away from The Traditional Concepts of Sex Discrimination in The Workplace*, 58 S. Tex. L. Rev. 223 (2016)

William N. Eskridge Jr., *Title VII's Statutory History and The Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322 (Nov. 2017) (available at <https://www.yalelawjournal.org/feature/title-viis-statutory-history-and-the-sex-discrimination-argument-for-lgbt-workplace-protections>)

*Katie Eyer, *Sex Discrimination Law and LGBT Equality* (American Constitution Society for Law and Policy, Aug. 2017) (available at https://www.acslaw.org/sites/default/files/Sex_Discrimination_Law_and_LGBT_Equality.pdf)

*Katie Eyer, *The LGBT Employment Rights Tipping Point (EEOC v. R.G & G.R. Harris Funeral Homes, Part I)* (Mar. 9, 2018) (available at <https://acslaw.org/acsblog/the-lgbt-employment-rights-tipping-point-eec-v-rg-gr-harris-funeral-homes-part-1>)

Charly Shane Gilfoil, Note, *More Than Just "Sex:" Title VII, The Expanding Meaning of Sex Discrimination, And the Court's Role in Correcting Injustice*, 19 Geo. J. Gender & L. 135 (Fall 2017)

Alexandra Fiona McSpedon, Note, *Employer Perceptions of Trans Women's Sex and Behavior in Title VII Sex-Stereotyping Claims: The Case for Reading Price Waterhouse v. Hopkins as a Blanket Prohibition of Gender Policing by Employers*, 35 CARDOZO L. REV. 2505 (Aug. 2014) (available at <http://www.cardozolawreview.com/content/35-6/MCSPEDON.35.6.pdf>)

*Arthur Leonard, *Federal Appeals Court Rules for Transgender Funeral Director in Title VII Discrimination Suit* (Mar. 11, 2018) (available at <http://www.artleonardobservations.com/federal-appeals-court-rules-transgender-funeral-director-title-vii-discrimination-suit/>)

Tessa M. Register, Note, *The Case for Deferring to The EEOC's Interpretations in Macy And Foxx To Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 Iowa L. Rev. 1397 (Mar. 2017) (available at <https://ilr.law.uiowa.edu/assets/Uploads/ILR-102-3-Register.pdf>)