IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PATRICIA DAWSON,	)	
Plaintiff,	)	Case No. 4:14cv00583 SWW
v.	)	
H & H ELECTRIC, INC.,	)	
Defendant.	)	
	)	

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AS AMICUS CURIAE

STATEMENT OF INTEREST

The U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") is the primary agency charged by Congress with administering, interpreting, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This case raises the issue of whether discharge of an individual because she is transgender is cognizable as discrimination "because of … sex." Defendant H & H Electric, Inc. ("H & H") has moved for summary judgment and argues that Title VII does not protect "transsexuals." The Commission has taken the position that intentional discrimination because an individual is transgender is grounded in sex-based norms, expectations, or stereotypes. In the Commission's view, H & H's position is contrary to Supreme Court precedent holding that discrimination against an individual because he

or she does not conform to gender stereotypes is sex discrimination under Title VII, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and appellate court decisions recognizing that transgender-based discrimination is sex discrimination. Because the court's ruling could implicate the interpretation and effective enforcement of Title VII, the Commission offers its views for the court's consideration.

STATEMENT OF THE ISSUE[1]

Whether discrimination against an individual because he or she is transgender is cognizable as discrimination because of sex under Title VII.

STATEMENT OF FACTS[2]

Dawson began working for H & H as an electrical apprentice in 2008. R.1 at 3 ¶ 13. At the time she was hired, she was using her birth name, Steven, and presenting as male. *Id.* at ¶ 14. Dawson states in her complaint that "over time she came to understand that the gender designation assigned to her at birth does not conform to her gender identity and was diagnosed with gender dysphoria." *Id.* at ¶ 15. She began transitioning from male to female following this diagnosis. *Id.* at ¶ 17. She legally changed her name to Patricia Yvette Dawson on June 21, 2012. *Id.* at ¶ 19. The following day, Dawson told H & H Vice President Marcus Holloway that she had legally changed her name because she is a transgender woman and showed him her new driver's

[1] The Commission takes no position on any other issue in this case.

[2] This recitation of the facts is based on the allegations set out in the complaint at Record ("R.") 1.

license. R.1 at 4 ¶ 20. Holloway responded that he would hate to lose her, one of his best employees, and needed the weekend to decide what to do. *Id.* Dawson completed a set of employee forms using her legal name the next week, but Holloway told her not to use her new name or discuss her transition with others. *Id.* at ¶ 21.

Dawson was assigned to a job site at Remington Arms Company during the summer of 2012. *Id.* at ¶ 21. In July, Dawson asked Holloway if she could use her legal name because employees at Remington already knew about her name change and transition. *Id.* at ¶ 22. Holloway refused. *Id.* Someone at the Remington site sabotaged Dawson's electrical work on two occasions. *Id.* at ¶ 23. Additionally, someone wrote "ass" on Dawson's trash can she had labeled with her name. *Id.* Dawson reported all three incidents to Holloway. *Id.*

At the end of August, a Remington employee told Dawson that he knew the name on her driver's license was not what everyone called her and asked her what name she preferred. R.1 at 4-5 ¶ 24. She responded that she would like to be called Patricia, Trisha, or Trish. *Id.* When Dawson told Holloway about this conversation, Holloway reiterated that they were guests at Remington and not to rock the boat. R.1 at 5 ¶ 25. Holloway also told Dawson that many Remington employees had talked to him about Dawson and that they "needed to lie low." *Id.* In mid September, Holloway complained about Dawson's feminine style of dress—she wore makeup, a bra, and

blouses—asking if she was trying to drive him into early retirement. *Id.* at ¶¶ 27-28. He also said people were frequently approaching him to discuss Dawson and suggested she was dressing to get attention. *Id.* at ¶¶ 28-29.

On September 17, 2012, Dawson trained another employee to build control panels. R.1 at 5-6 ¶ 30. He asked Dawson if she was allowed to use her legal name to sign in to work at the Remington site. *Id.* Dawson said that she had to use her former name, Steven. *Id.* The employee noted that doing so was technically falsifying her identity and could be a liability issue. *Id.* Dawson agreed. *Id.* Later that day, Holloway fired Dawson, telling her, "I'm sorry, Steve, you do great work, but you are too much of a distraction and I am going to have to let you go." R.1 at 6 ¶ 31. Holloway added that he was worried about losing H & H's contract with Remington. *Id.* at ¶ 32.

Dawson filed suit on September 29, 2014, alleging that her termination violated Title VII where H & H fired her "because of her gender transition" and "because it perceived Plaintiff to be a man who did not conform to gender stereotypes associated with men in our society or because it perceived Plaintiff to be a woman who did not conform to gender stereotypes associated with women in our society." R.1 at 6 ¶¶ 36-37.

H & H moved for summary judgment, arguing that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual" and "Title VII does not provide a basis for protected status because sexual

orientation is not listed as a protect class under Title VII." R. 18 (Def. Mem. Brf. in Support of Mot. for Summary Judgment) at 4-5 (citing *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)).

ARGUMENT

Transgender discrimination is cognizable as discrimination because of sex under Title VII.

Price Waterhouse makes clear that Title VII prohibits discrimination based on gender non-conformity. The Supreme Court held that "[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." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (citation omitted). The Court held that Title VII barred not just discrimination because the plaintiff was a woman, but also discrimination based on the employer's belief that she was not *acting* like a woman. *Id.* at 250-51. Thus, "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (emphasis in original).

After *Price Waterhouse*, the courts of appeals have recognized that a transgender plaintiff may state a claim for discrimination because of sex if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. *See*

Smith v. City of Salem, 378 F.3d 566, 572-73 (6th Cir. 2004) (holding that an adverse action taken because of transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful gender discrimination); *Schwenk,*, 204 F.3d at 1201-02 (concluding that a "transsexual" prisoner had stated a viable sex discrimination claim under the Gender Motivated Violence Act because "[t]he evidence offered … show[s] that [the assault was] motivated, at least in part, by Schwenk's gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor" and noting that its analysis was equally applicable to claims brought under Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (stating that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"); *cf. EEOC v. Boh Bros. Constr. Co.,* 731 F.3d 444, 454 (5th Cir. 2013) (en banc) ("[A] plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes.") (same-sex harassment case, relying in part on *Smith* and *Glenn*); *Etsitty v. Utah Transit Auth*. 502 F.3d 1215, 1224 (10th Cir. 2007) (assuming without deciding that Title VII protects "'transsexuals' who act and appear as a member of the opposite sex").

Numerous federal district courts have also concluded that transgender discrimination is cognizable under Title VII. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral*

Homes, Inc., No. 14-13710, 2015 WL 1808308, at *9 (E.D. Mich. Apr. 21, 2015) (holding that complaint alleging that the transgender plaintiff's failure to conform to sex stereotypes was the driving force behind the decision to fire her sufficiently pled a sex-stereotyping gender-discrimination claim under Title VII); *Chavez v. Credit Nation Auto Sales*, 49 F. Supp. 3d 1163, 1174 (N.D. Ga. 2014) ("Because Title VII protects discrimination based on gender stereotypes, Plaintiff can assert a sex discrimination claim because Plaintiff was transitioning from a male to a female, and Plaintiff essentially claims that the failure to conform to male stereotypes caused Plaintiff's termination."); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659-61 (S.D. Tex. 2008) ("Title VII and *Price Waterhouse* … do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female who while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes."); *Schroer v. Billington*, 577 F. Supp. 2d. 293, 305-06 (D.D.C. 2008) ("While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself."); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) ("'Transsexuals' are not genderless, they are either male or female and are thus

protected under Title VII to the extent they are discriminated against on the basis of sex.").

In arguing that "'transsexuals' may not claim protection under Title VII," H & H relied on the Eighth Circuit's decision in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), as well as on *Ulane v. Eastern Airlines*, 742 F.3d 1081 (7th Cir. 1984). Both *Sommers* and *Ulane* pre-date *Price Waterhouse*. The Supreme Court has since rejected the rationales these courts used to decline to extend protections to transgender individuals—a narrow definition of "sex" and a refusal to expand protections beyond the protected groups originally considered by Congress. First, as noted, *Price Waterhouse*, 490 U.S. at 251, makes clear that Title VII does not simply prohibit discrimination based on biological sex, but also "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *See also Smith*, 378 F.3d at 563 ("[T]he approach in [] *Sommers*[] and *Ulane* … has been eviscerated" by *Price Waterhouse*'s holding that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."); *cf. Radtke v. Miscellaneous Drivers & Helpers Union Local #638*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (assessing claim under ERISA for wrongful termination of benefits to spouse of transgender individual, court rejected "decades-old Title VII cases" and "'narrow view' of the term

'sex' in Title VII has been eviscerated by Price Waterhouse.") (internal citations omitted).

Second, in *Oncale v. Sundowner Offshore Oil Services, Inc.*, 523 U.S. 75 (1998), in ruling that same-sex harassment is actionable, the Supreme Court explicitly rejected the notion that Title VII only proscribes types of discrimination specifically contemplated by Congress. *Id.* at 79-80 (explaining that "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"); *see also Boh Bros.*, 731 F.3d at 454 (same); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 381 (1977) ("The evils against which [Title VII] is to be aimed are defined broadly."). Thus, that a plaintiff is transgender does not provide a basis for excluding her from Title VII's protections. *See Smith*, 378 F.3d at 574-75 ("*Price Waterhouse* ... did not provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.").

Third, the *Sommers* court deemed it significant that proposals to amend the Civil Rights Act to expand the definition of sex were defeated by Congress over the years. *Sommers*, 667 F.2d at 750. The *Sommers* court construed that subsequent legislative inaction to mean that discrimination based on one's "transsexualism" does not fall

within the protective purview of the Act. *Id.* The Supreme Court has since rejected this logic: the Court has explained that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" and is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns a proposal that does not become law." *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). The Court went on to point out that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Id.*

H & H also relies on *Etsitty v. Utah Transit Authority* in arguing that a transgender individual is not covered by Title VII. But *Etsitty* does not stand for the broad proposition that Title VII does not encompass transgender discrimination. In fact, while *Etsitty* declined to adopt a per se rule that transgender discrimination always amounts to sex discrimination, the court held it would assume that the plaintiff could establish a claim under the *Price Waterhouse* theory of gender stereotyping. 502 F.3d at 1224 (assuming that Title VII protects "'transsexuals' who act and appear as a member of the opposite sex"). Additionally underpinning the *Etsitty* court's rejection of a broader per se rule was its interpretation of Title VII as prohibiting discrimination against men or women, but not against individuals who change their sex. The court's reasoning is

flawed, as discrimination against someone for changing genders is itself evidence of sex discrimination. *See Schroer,* 577 F. Supp. 2d at 305-06. The district court in *Schroer* analogized to a religious conversion: an employer that fires an individual for converting from Christianity to Judaism, and that harbors no bias against Christians or Jews but only converts, has discriminated "because of religion." The court concluded that "[n]o court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Id.* (emphasis in original). It follows that discrimination against transgender individuals—those who have changed their gender expression—"is literally discrimination 'because of … sex.'" *Id.* at 302.

H & H relies on case law from several circuits that recognize that discrimination on the basis of sexual orientation has not been held actionable under Title VII. R.18 (Def. Br. at 4-5). But Dawson's sexual orientation is irrelevant for the purposes of the claim at issue. The term "transgender" is defined as an individual "who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth."[3] In contrast, "sexual orientation" is defined as "the inclination of an

[3] Merriam Webster Online Dictionary, Transgender (June 12, 2015) http://www.merriam-webster.com/dictionary/transgender)

individual with respect to heterosexual, homosexual, and bisexual behavior."[4] The two considerations are independent.[5] Discrimination against transgendered individuals is discrimination based on sex versus sexual preference, and whether discrimination on the basis of sexual orientation is covered under Title VII is not the question before the district court.

Further, Dawson need not have specific evidence of gender stereotyping by H & H because "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012). H & H contends that "[a] plaintiff must ultimately prove that a claim actually arose from the employee's appearance or conduct and the employer's stereotypical perceptions." R. 18 (Def. Br.) at 6 (emphasis in original). H & H also argues that the "plaintiff has no evidence concerning any stereotypical perceptions of Marcus Holloway, the Vice-President of defendant who terminated her, and her claim here fails for that reason alone." *Id.*

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[4] Merriam Webster Online Dictionary, Sexual Orientation (June 12, 2015) http://www.merriam-webster.com/medical/sexual%20orientation

[5] AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION, 2 (2011) ("Transgender people may be straight, lesbian, gay, bisexual, or asexual, just as non[-]transgender people can be.").

But an employer acts on the basis of a gender stereotype—the assumption that men should not transition to being women—when it discriminates against someone for being transgender. As the Eleventh Circuit has emphasized, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn*, 663 F.3d at 1316 (citations omitted). Thus, as the Sixth Circuit explained, "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." *Smith*, 378 F.3d at 574-75. Dawson's allegation that H & H discriminated against her because she is transgender, if true, states a claim for Title VII sex discrimination.

CONCLUSION

Dawson alleges that she was fired as a result of her transgender status. H & H is taking sex into account if it was motivated to fire Dawson because she is no longer male. The plain language of Title VII prohibits that. For the reasons stated above, the EEOC urges this court to hold that transgender discrimination is cognizable as sex discrimination under Title VII.

Respectfully submitted,

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June 26, 2015

CERTIFICATE OF SERVICE

I, Julie L. Gantz, hereby certify that I filed the foregoing brief using the court's CM/ECF filing system this 26th day of June, 2015, and notice was sent to the parties registered as counsel in this case through the CM/ECF system.

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