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Open for Business: Developing a Welcoming and Compliant Workplace for LGBTQ Employees

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For the past decade or more, and on its own initiative, the American business community has led the way on building diverse workplaces that welcome LGBTQ employees. In many instances, the law has lagged behind most large employers’ policies, slowly – and sometimes not at all – catching up to Corporate America’s pace car. Employers bested lawmakers in recognize that welcoming, diverse workplace cultures help drive business, engage customers, maintain healthy and happy employees, and reduce the risk of employment-related claims. In Canada, the law has already protected LGBTQ employees for decades.

Going beyond mere compliance means demonstrating desire and investment in developing a welcoming and compliant workplace for LGBTQ employees. Compliance is the foundation, but it is not alone sufficient to attract and keep talent in a pluralistic society with increasingly welcoming attitudes toward LGBTQ employees. Employers should mine the labor pool for talent wherever it may be found and refuse to allow attitudes about irrelevant immutable and social traits to dominate recruitment and employment policies and practices.

This panel first aims to guide employers on the current state of the law with respect to nondiscrimination and nonharassment of individuals who identify as LGBTQ. It will then offer practical guidance for employers to mitigate the risk of discrimination claims by LGBTQ persons and to, in a culturally sensitive manner, investigate and respond to claims of discrimination made by LGBTQ employees. Finally, the panel will move beyond compliance to offer tips on building a workplace culture that embraces diversity, equity and the full inclusion of LGBTQ employees in everyday workplace culture.

The Current State of the Law Regarding LGBTQ Employees

United States

Advocates of explicit protections for LGBTQ employees have waged a two-front war, alternating between legislative and judicial approaches to ensuring that existing civil rights laws extend to
cover LGBTQ employees. In brief, federal law does not currently provide consistent nondiscrimination and nonharassment protection based on sexual orientation or gender identity. The U.S. Supreme Court will decide in its next term whether Title VII – as it is currently written -- prohibits discrimination on the basis of sexual orientation and/or gender identity. Pending in Congress is the Equality Act (which has already passed the House of Representatives) is a legislative solution that would existing civil rights law, including Title VII, to include sexual orientation and gender identity as protected classes. But because it is unlikely to becomes law because Majority Leader McConnell refuses to bring it to a vote, advocates for workplace equality are placing their hopes that an ideologically diverse coalition will broadly read Title VII’s prohibition against sex discrimination to include claims of sexual orientation and gender identity.

Meanwhile, 21 states, the District of Columbia, and two U.S. territories explicitly protect employees from discrimination on the basis of both sexual orientation and gender identity. This list includes many of the most populous states in the country and areas in which large employers operate and employ many. So, although federal law remains unsettled for now, employers operating in those states must already protect against LGBTQ discrimination and harassment.

Canada

In contrast, in Canada, discrimination and harassment based on sexual orientation has been prohibited in most jurisdictions for decades. Under the Constitution Act, 1867, civil rights are a matter of provincial and territorial jurisdiction, except where they involve the federal government and its agencies and programs in which case the Canadian Charter of Rights and Freedoms applies. Each Canadian province or territory has its own statute, usually called a Human Rights Code or Human Rights Act, that prohibits discrimination based on specific grounds in employment, housing, and the provision of facilities and services.

Quebec was the first province to include sexual orientation as a protected ground in its human rights legislation in 1977. Alberta was among the few provinces that resisted updating its legislation to prohibit discrimination based on sexual orientation. In 1988, the Supreme Court of Canada unanimously decided that Alberta’s human rights legislation (then called the Individual Rights Protection Act) would be interpreted to include sexual orientation as a prohibited ground even if the province did not move to expressly include it.

In May 1995, in a 5:4 split decision, the Supreme Court of Canada took a step back in deciding that, although sexual orientation was a protected ground, same sex couples were not entitled to the same social retirement benefits as married or common law heterosexual couples. In May 1999, the Supreme Court of Canada found that Ontario’s Family Law Act that defined “spouse” as a person of the opposite sex was unconstitutional. The following year, the federal government amended 68 federal statutes to provide same-sex couples with the same social and tax benefits as heterosexual couples.
Also of note is that the ban on gays and lesbians serving in the Canadian military was lifted in November 1992 and that same sex marriage has been a legal right since July 2005 (although it was preceded by much debate). Where religious objections have been cited as a justification for discrimination based on sexual orientation (usually in employment situations), Canadian adjudicators have generally dismissed these arguments.

More recently, many Canadian provinces and territories have amended their human rights legislation to cite gender identity and gender expression as protected grounds; others maintain that sex discrimination includes discrimination based on gender identity.

**Compliant Policies and Practices**

With a diversity of genders now represented in the workplace, including those who identify as transgender, employers must adopt policies and best practices to ensure full inclusion and avoid gender-based discrimination claims. For example, employers cannot force an employee to use restroom and locker facilities that are inconsistent with the employee’s gender identity. Likewise, employers must take steps to ensure an employee’s chosen name is reflected across human resources information systems, company records, email, and identification badges. And, employers have to remain vigilant to protect LGBTQ employees from harassment by coworkers, especially if a complaint arises. Finally, there are ways to respect and balance the rights of LGBTQ employees with those of employees whose religious beliefs oppose LGBTQ status without compromising anyone’s values and rights to be safe and healthy.

**Beyond Compliance: Culture Counts**

Employers are keen on talking about building inclusive and welcoming cultures where employees of all backgrounds can thrive. For many, this means reaching into diverse communities to find talent rather than taking the more passive approach of simply welcoming diverse applicants. In addition, many large employers foster affinity networking groups for employees that share similar cultures, backgrounds, or experiences. LGBTQ employee resource groups are now common in large American and Canadian employers. To keep pace with expectations of modern culture and new entrants to the job market, employers must maintain an entrepreneurial and innovative spirit when it comes to welcoming and embracing LGBTQ employees.
Gender Inclusiveness at Work

Issues Facing Transgender and Gender Non-Conforming Employees

Presented by Don Davis
Employment, Labor & Benefits Associate
Policies

Equal Employment Opportunity Policy

• The Company is an equal employment opportunity employer. Our policy is to recruit, hire and promote qualified individuals without regard to race, color, religion, sex, age, national origin, disability, veteran status, sexual orientation, gender identity or any other status protected by state or local law.

Harassment Policy

• The Company does not tolerate verbal or physical conduct that harasses, disrupts, or interferes with another employee's work performance, or that creates an intimidating, offensive, or hostile work environment. Intimidating, hostile, or offensive behavior relating to your race, color, creed, citizenship status, marital status, sex, age, religion, national origin, disability, veteran status, gender identity or sexual orientation, or any other status protected by federal, state, or local law, is prohibited.
Sex v. Gender

- **Sex**: the biological assignment of reproductive organs based upon an X or Y chromosome
  - Generally, XX or XY
  - Anatomy of reproductive system
  - Secondary sex characteristics (e.g., facial hair, enlarged breasts, wider hips, etc.)

- **Gender**: the range of characteristics pertaining to, and differentiating between, masculinity and femininity
  - May include a combination of traits such as biological sex, sex-based social structures (i.e., gender roles), or gender identity
  - Gender is not a biological reality
  - Typically assigned at birth to be consistent with observed sex
    - Observed sex = female; Assigned gender = girl
  - Sometimes matches sex, sometimes doesn’t (sex = female; gender = boy)
  - It isn’t binary or either/or (some feel like both or neither gender)
  - Based on internal awareness (often realized at very young ages)
  - Internal identity vs. external identity
Sex v. Gender

- **Cisgender**: Gender identity matches biological/observed sex
- **Transgender**: Gender identity does not match biological/observed sex
  - May be living “in the closet” and choose not to express
  - May not yet be aware of one’s identity
  - May choose to express through:
    - Clothing, hair, makeup
    - Hormone treatment
    - Sex reassignment surgery
    - Any or all of the above
- **Gender Non-Conforming (“GNC”) or Non-Binary**: Gender identity does not fit into the traditional binary social construct
  - May identify as transgender
  - May identify in some other way (pangender, trigender, two-spirit, gender-queer, etc.)
- **Intersex**: Born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones, or genitals that do not fit the typical definitions for male or female bodies
The Genderbread Person

Identity

Attraction

Expression

Sex
Limitations of Our Current Narrative

• Binary construct (male and female) versus non-binary spectrum of GNC / transgender identities

• Even best practices that we can adopt do not account for limitations in language and the vastly different experiences of transmen and transwomen
  – Don’t assume the experience or opinions of any two transgender persons is similar or alike

• Gender dysphoria is a condition defined by the severe distress a person feels when his/her body does not match his/her gender identity
  – Forcing restroom use inconsistent with gender identity exacerbates gender dysphoria and makes it very difficult for transgender employees to focus and perform as expected
  – “Separate but equal” facilities also exacerbate gender dysphoria, and enforce the notion that the transperson is “other”
Reporting Process for Managers and HR Professionals

- When transgender identity becomes known, front-line manager or recruiter should be trained to:
  - (1) Give a simple statement of support and validation to the employee / applicant
  - (2) Immediately report to HRBP or Employee Relations
  - (3) Does NOT have to be in response to a problem, issue, or negative report – be proactive

- First point of HR contact must funnel notice upward to Senior Employee Relations staff immediately
- Senior Employee Relations staff notifies Legal
- Legal supervises and advises ER as necessary and ER contacts manager or recruiter directly to guide and counsel
- Manager or Recruiter/ER/Legal to remain in constant communication until employee issues resolved
- Manager to engage in interactive process / cooperative dialogue to ensure employee needs are met
- If applicant, recruiter will detail how Company supports trans/GNC employees
Case Study 1: Transition Planning & Announcement

- Anthony is a long-time employee
- Customer-facing position
- Begins to wear hair accessories, make-up, necklaces, and bracelets to work
- Anthony tells Manager she wants to be called Aimee and that she plans to transition and will express as a woman
- A Company leader from HQ visits the worksite, notes Aimee's accessories, and contacts HR to express his disapproval that a man is dressing like a woman
Case Study 1: Transition Planning & Announcement

- What should Aimee’s manager do?
  - Process:
    - Front-line manager provides assurance and affirms support for the employee
    - Front-line manager and/or HRBP (if the HRBP was informed) immediately and confidentially informs HR representative and/or HRBP
    - HR representative or HRBP immediately escalates to Senior ER
    - Senior ER informs Legal
    - HR will notify Senior ER immediately about the Company leader’s comments, and Senior ER will contact the Company leader to explain and reinforce the Company policy and commitment to equal dignity and respect for all employees
    - Senior ER will work closely with Legal and the manager to
      - Review the Company policies regarding non-discrimination and non-harassment and
      - Engage in a cooperative dialogue with Aimee and build a support checklist to ensure a smooth transition and protection from discrimination/harassment
Case Study 1: Transition Planning & Announcement

- Senior ER will train Aimee’s manager on how to:
  - Collaboratively discuss key issues
    - Name choice and preferred pronouns
    - Document, email, and PeopleSoft changes
    - Dress code: Assuming the dress is professional, we must permit Aimee to present as she chooses
    - Restroom use: Must permit Aimee to use restroom that matches her/his/their gender identity
  - Develop action plan
    - When transition will occur (transition means any change in identity or expression)
    - When and how to inform others
    - Aimee’s needs moving forward, such as leave or questions about application of employee benefits
      - (the Company offers a transgender-inclusive health plan)
    - Identify a support team and resources for Aimee
Case Study 2: Restroom Use

- After having worked for several years for the Company as “Shannon” and having presented as a woman, Shane notifies his supervisor in December that he wishes to be called Shane and will present as a man when he returns from the holiday break in January.

- Shane asks his manager whether he will be able to use the men’s restroom at work without question, or whether he should use one of the four single-stall restrooms located in the facility.

- When he returns from holiday break, Shane reports to his manager that someone said to him in the men’s room, “Get out of here, Shannon!”
Case Study 2: Restroom Use

- **Company Policy (and the Legal Requirement):**
  - Employees must be permitted to use the restroom that reflects their gender identity, regardless of whether it aligns with their biological sex.
  - Forcing employees to use unisex or segregated facilities is a violation of the Company policy (and is akin to “separate but equal” facilities).
  - Even where there are gender-neutral facilities available in addition to gender-specific facilities, the gender-neutral facilities should be available as a voluntary alternative for anyone – regardless of gender identity/expression – to use according to their comfort level.
Case Study 2: Restroom Use

What does the law say?

• EEOC Ruling 4/2015
  - Employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees may have negative reactions to allowing the employee to do so.

• OSHA Guidance issued 6/1/15
  - Available at https://www.osha.gov/Publications/OSHA3795.pdf

• Federal and state court decisions

• Statutes and ordinances
Case Study 2: Restroom Use

Practical Guidance for ER and Managers

- Face-to-face communications with Shane about logistics planning for the transition (similar to cooperative dialogue / interactive process)

- Clearly and explicitly articulate support for Shane and desire for input on the smooth transition, including timing issues

- Document concerns expressed by Shane along the way and continue to bring to Senior ER/Legal’s attention

- If Shane communicates a different gender identity but is not yet apparently expressing that identity, have a conversation about which restroom the employee feels most comfortable using. If a single-stall facility is available, let him know that it is available as an alternative, if he feels more comfortable using it, but that he is not required to do so.
Case Study 2: Restroom Use

What about harassment?

– the Company should immediately address the separate issue regarding harassment or bullying
– An investigation should be conducted
– The situation should be monitored closely
– Prompt remedial action should be taken to correct any identified violations
– Top-down reinforcement of the Company’s policies, including dignity and respect for all, is critical
Case Study 3: Dress and Grooming Standards

• Shania, a phlebotomist, comes to work wearing some of the new perfume she got as a holiday gift from her husband, Mutt

• Local policy at the Company facility forbids the use of fragrances by employees because of customer sensitivity

• Employee’s manager smells the perfume and asks Shania to make sure she doesn’t wear it again to work

• Shania says she wants to continue to wear perfume because it makes her feel like a woman
Case Study 3: Dress and Grooming Standards

General Hygiene and Grooming Policy

- Recognizing that employees and visitors to our offices may have sensitivity and/or allergic reactions to various fragrant products, employees are asked not to wear an excessive amount of personal products, such as fragrances, colognes, lotions, and powders.
Case Study 3: Dress and Grooming Standards

• Can the Company enforce its fragrance policy and discipline Shania if she continues to wear the perfume to work?

• The policy on its face is gender-neutral because applies to male and female employees and is rooted in a legitimate business reason.

• But application / enforcement of the policy has a subjective element
  - As long as the policy is also enforced equally against male customer-facing employees who wear “excessive” cologne or fragrances to work
  - Beware: managers might be consciously or unconsciously enforcing the policy in an inconsistent manner pursuant to their own gender biases or personal dislikes

• The Company should, however, allow Shania to express as a woman in accordance with a gender-neutral application of the dress and grooming policies
Case Study 4: Intersections with Coworkers

• Jolene works as a technologist in one of your facilities
• Jolene, with the full and vocal support of her manager and some of her co-workers, begins to transition and begins presenting as a woman at work
• Jolene uses the women’s restroom one evening during second shift and while in the restroom, she runs into Linda
• Linda knows that Jolene used to go by Joe and previously didn’t wear women’s attire to work
• Linda reports Jolene to HR for being in the wrong restroom
Case Study 4: Intersections with Coworkers

• ER contacts Linda and explains to her that Jolene has a right to be in the women’s restroom under the Company’s policy because she identifies as a woman.

• Linda tells ER that the Company’s support of Jolene infringes on her privacy rights.

• Linda also tells ER that the Company’s refusal to make Jolene use the bathroom of her biological sex (male) amounts to discrimination against Linda based on her faith because she is not permitted to voice her objections to the transgender “lifestyle” and has to work next to this individual.

• What should ER do?
Case Study 4: Intersections with Coworkers

- Reaffirm support for the rights and privacy of all employees
- Ask Linda specifically how Jolene’s use of the women’s restroom infringes on Linda’s religious observance or expression
- Explain the Company’s restroom use and non-discrimination policy to Linda
- Also explain the Company’s non-harassment policy, which forbids harassment of any employee, including while using the restroom, and that the policy applies equally to Linda and Jolene
- Tell Linda that should she experience any violation of privacy or unprofessional or harassing conduct while she is using the restroom, that she should report it to HR
- Tell Linda that if she does not feel comfortable using the women’s restroom, she may use a gender-neutral single-user facility (if one exists)
- You may also want to consider permitting Linda to move to another work space to avoid conflict between Linda and Jolene
- You must continue to protect Jolene’s rights because there is no actual infringement on Linda’s privacy or her religious rights. Your obligation to accommodate Linda’s religious beliefs or expression does not mean that you must sacrifice the rights of other employees to do so.
Case Study 5: Interactions with Customers

• Aimee works as a phlebotomist, is a trans woman, and transitioned years ago and has been highly performing and is generally well-liked by patients

• One day, a patient that Aimee did a blood draw for seeks out her manager

• The patient complains about Aimee being a safety threat because Aimee used the women’s restroom and because she believes most transgender people have AIDS

• The customer informs the manager that she and the other members of her house of worship will not only boycott the Company but will also protest on site until Aimee is fired

• After Aimee’s car and other of her supportive co-workers’ cards are keyed, a few of Aimee’s coworkers suggest to Aimee that it would be easier if she would just quit
Case Study 5: Interactions with Customers

- Preventative and remedial education is key
- Management training to report situation to ER
- Handling of customer complaints and explaining the Company employment nondiscrimination policy
- Implicit and explicit support of inclusion of transgender individuals
- Investigate keying incident and discipline any employees who may have been involved in accordance with policies and procedures
- Collaborate with Aimee to fully understand and address concerns and reiterate support
- Counsel coworkers (especially those who mentioned that Aimee should quit)
- Things to consider: Should the Company involve local law enforcement regarding the destruction of property on its premises? Is there a threat of imminent danger to Aimee or others?
  - Communication with ER / Legal
  - Does Aimee get a say in how this is handled, or should she comply with the company’s decision on how to handle?
Process and Practices Takeaways

- Provide assurance and affirm support for the employee and support for the Company policy
- Don’t fall prey to stereotypes and fears!
- Collaboratively discuss key issues
- Restroom/locker room access must be granted consistent with employee’s gender identity
- Name change/pronouns consistent with employee preference
- Document and systems changes
- Dress code and grooming policies should be gender-neutral and applied evenly
- Coworker and customer prejudices – be polite and acknowledge their beliefs, but be firm and explain that supporting transgender persons does not infringe on privacy or religious rights
Process and Practices Takeaways

- Develop action plan
- When transition will occur
- When and how to inform others
- Employee’s needs moving forward, such as leave
- Identify support team/resources
- Update personnel records
- Explain to employee technological or software challenges that preclude easy or quick updates in the Company’s HR or IT systems, but assure that the company is dedicated to ensuring proper name and pronoun use
questions?

• Contact Don Davis at dcdavis@mintz.com
CHAPTER 3 Compliance and Best Practices for Employers

§ 3.01 Fostering an Inclusive and Welcoming Workplace


In many states and municipalities, the law expressly prohibits discrimination in the workplace on the basis of sex, sexual orientation, and gender identity/expression. As noted elsewhere in this Practice Guide, the federal government does not currently expressly extend the same protections to the LGBTQ community. Irrespective of the lack of protections at the federal level, employers who adopt fully inclusive non-discrimination policies will be in a better position to protect themselves from claims and improve employee morale and business performance. Indeed, adopting workplace policies that extend employment protections and benefits to LGBTQ workers is the first, best step in fostering an inclusive work environment.

Discrimination is, at its most basic, the unequal provision, administration and application of the terms and conditions of employment, including the following: hiring, selection, promotion, transfer, pay, tenure, benefits, discipline, and termination. You should ensure that employers who adopt policies governing these matters are expressly inclusive of lesbian, gay, bisexual, transgender and queer employees.

Of course, as we discuss in § 5.01 of the Practice Guide, a standard Equal Employment Opportunity (“EEO”) policy that meets best practices should expressly include these protections as follows:

BEGIN SAMPLE POLICY

EQUAL EMPLOYMENT OPPORTUNITY POLICY

Acme, Inc. is an equal opportunity employer. It has been a long standing policy of our company to recognize the dignity of the individual and to be fair and impartial in all its relations with employees, applicants, interns, and contractors without regard to sex (including pregnancy, childbirth, breastfeeding or related medical conditions), race, religion, color, gender, gender identity, gender expression, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, registered domestic partner status, age, sexual orientation, military and veteran status or any other basis protected by federal, state or local law or ordinance or regulation. Acme, Inc. also prohibits discrimination, harassment, disrespectful or unprofessional conduct based on the perception that anyone has any of those characteristics, or is associated with a person who has or is perceived as having any of those characteristics.

Employees will not be retaliated against for inquiring about or discussing wages. However, Acme, Inc. is not obligated to disclose the wages of other employees.

2 Id.
3 See § 5.01[2], Creating and Fostering Inclusiveness and Acceptance in the Workplace, infra.
Employees who believe they are the subject of discrimination in violation of this policy should utilize Acme, Inc.’s complaint reporting procedures outlined in this Policy Guide. No employee who is the subject of discrimination will be retaliated against for reporting a complaint in good faith, participating in an investigation into a complaint in good faith, or for reporting retaliation that occurs after a complaint is made or an investigation is conducted. An employee who makes a complaint in bad faith, however, or who intentionally or maliciously provides false information during an investigation, will be subject to disciplinary action, up to and including termination of employment.

[END OF SAMPLE POLICY]

Beyond simply adopting a fully inclusive EEO policy, some employers will find it valuable and important to modify existing employee handbooks and other policies to remove gender binary pronouns and gender-specific references, where appropriate. For example, rather than use “he,” “she,” “him,” “her,” etc., policies may be updated to only refer to gender neutral nouns such as “employee,” “associate,” or “team member.” Alternatively, where a policy uses “he/she” or “him/her,” employers may consider adding a gender-neutral pronoun such as “ze,” “e,” or “they.” For example, a policy that currently reads:

“An employee who believes he/she is the subject of discrimination should report it to Human Resources immediately”

may be redrafted to read either:

“An employee who believes the employee is the subject of discrimination should report it to Human Resources immediately”

or

“An employee who believes he/she/ze/they is the subject of discrimination should report it to Human Resources immediately.”

We have included a chart detailing various gender-neutral pronouns that employers may consider using in various policies and other internal publications that are distributed to employees.

In addition, employers should consider adopting measures by which applicants and employees can indicate their preferred gender pronoun usage for personnel-related matters. As we discuss below, not every employee is comfortable being “out” in the workplace, but creating an environment in which employees at least know the employer will be respectful of their identity irrespective of the decision to be “out” or not, will lead to improved employee morale. Specifically, employers should consider providing an opportunity on applications and personnel documents for LGBTQ employees who do not ascribe to gender binary societal norms to identify and disclose their gender-reference preferences.

While these changes may seem minor, simply including them in workplace policies will help make LGBTQ employees feel welcome, valued and empowered—all of which are proven to
improve employee performance and productivity, and increase customer loyalty.\textsuperscript{4}

**TABLE OF GENDER NEUTRAL PRONOUNS**

Gender Neutral Pronoun Usage:\textsuperscript{5}

<table>
<thead>
<tr>
<th></th>
<th>SUBJECT</th>
<th>OBJECT</th>
<th>POSSESSIVE</th>
<th>POSSESSIVE PRONOUN</th>
<th>REFLEXIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FEMALE</strong></td>
<td>She</td>
<td>Her</td>
<td>Her</td>
<td>Hers</td>
<td>Herself</td>
</tr>
<tr>
<td><strong>MALE</strong></td>
<td>He</td>
<td>Him</td>
<td>His</td>
<td>His</td>
<td>Himself</td>
</tr>
<tr>
<td><strong>GENDER NEUTRAL</strong></td>
<td>Ze</td>
<td>Hir</td>
<td>Hir</td>
<td>Hirs</td>
<td>Hirself</td>
</tr>
<tr>
<td><strong>GENDER NEUTRAL ALTERNATIVE</strong></td>
<td>They</td>
<td>They</td>
<td>Their</td>
<td>Theirs</td>
<td>Themself</td>
</tr>
</tbody>
</table>

Examples of how to use these pronouns:

She went to her job.
He went to his job.
Ze went to hir job.

They went to their job.

I am her co-worker.
I am his co-worker.
I am hir co-worker.
I am their co-worker.

She works for herself.
He works for himself.
Ze works for hirself.
They work for themself.


[2] No Harassment Policies

In addition to an inclusive EEO policy, a no harassment policy is essential to ensuring employees know their rights and employers can appropriately defend themselves against claims of harassment and discrimination. No harassment policies should cover both “Sexual Harassment” and “Other Harassment,” and, under applicable EEOC rules and guidance, should ensure all elements of what constitutes unlawful harassment are a part of the policy. Such a policy will outline what constitutes unlawful harassment, provide an avenue of reporting harassment to at least two individuals, and disclaim a reporting employee’s right to be free from retaliation as a result of the complaint and/or participation in an ensuing investigation. The following is a sample no harassment policy that includes all such elements:

[SAMPLE POLICY]

DISCRIMINATION, HARASSMENT AND SEXUAL HARASSMENT

Discrimination and Harassment

Acme, Inc. is committed to providing a work environment that is free from harassment and discrimination. In keeping with this commitment, Acme, Inc. maintains a strict policy prohibiting unlawful harassment or discrimination for reasons of sex (including pregnancy, childbirth, breastfeeding or related medical conditions), race, religion, color, gender, gender identity, gender expression, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, registered domestic partner status, age, sexual orientation, military and veteran status or any other basis protected by federal, state or local law or ordinance or regulation. Acme, Inc. also prohibits discrimination, harassment, disrespectful or unprofessional conduct based on the perception that anyone has any of those characteristics, or is associated with a person who has or is perceived as having any of those characteristics. This applies to all employees, including non-supervisory, supervisory, managerial personnel and any other agents of the company, contractors, interns, and third parties. Furthermore, it includes harassment in any form, including verbal, physical and visual harassment.

Any employee who engages in an unlawful discriminatory practice will be subject to disciplinary action, up to and including termination of employment.

Any employee who wants additional information about Acme, Inc.’s policy against unlawful discrimination or has a complaint about unlawful discrimination should contact her/his/hir/their supervisor, a representative of the Human Resources Department or the President.

Sexual Harassment

Sexual harassment includes, but is not limited to, making unwanted sexual advances or requests for sexual favors where either (1) submission to such conduct is made an explicit term or condition of employment; (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or, (3) such conduct that has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.
Prohibited harassment includes, but is not limited to, the following behavior:

- Verbal conduct such as epithets, derogatory jokes or comments, slurs or unwanted sexual advances, invitations, comments, posts or messages;

- Visual displays such as derogatory and/or sexually-oriented posters, photography, cartoons, drawings or gestures;

- Physical conduct including assault, unwanted touching, intentionally blocking normal movement or interfering with work because of sex, race or any other protected basis;

- Threats and demands to submit to sexual requests or sexual advances as a condition of continued employment, or to avoid some other loss and offers of employment benefits in return for sexual favors;

- Retaliation for reporting or threatening to report harassment; and

- Communication via electronic media of any type that includes any conduct that is prohibited by state and/or federal law or by company policy.

Sexual harassment does not need to be motivated by sexual desire to be unlawful or to violate this policy. For example, hostile acts toward an employee because of his/her/hir/their gender, gender identity, or gender expression can amount to sexual harassment, regardless of whether the treatment is motivated by sexual desire.

Additionally, prohibited harassment is not just sexual harassment but harassment based on any protected category, as set forth in Acme, Inc.’s Equal Employment Opportunity Policy.

Employees who violate this policy will be subject to immediate disciplinary action up to and including dismissal.

[END OF SAMPLE POLICY]


As we note in §§ 5.04, 6.02 and 6.04 of this Practice Guide, employees with disabilities and sincerely held religious beliefs must be provided reasonable accommodations, with some exceptions, that allow them to perform their essential job duties. Policies that address an employee’s ability to perform his or her essential job duties with or without a reasonable accommodation, like other policies addressed above, should be fully inclusive, and should include a process by which an employee needing an accommodation can request it. Of course, not every accommodation requested is reasonable. For example, an accommodation that poses an undue financial burden on an employer—such as requiring major structural changes to a workspace which would significantly impact the employer’s financial bottom line—is considered “unreasonable” under applicable legal standards. Alternatively, an accommodation that poses a direct threat to the health or safety of the requesting employee or others is unreasonable.

#Comment Begins
In counseling employers on reasonable accommodation requests, you should educate your client on what the EEOC considers a true “undue burden” on an employer. As the EEOC notes, “generalized conclusions [about what constitutes an undue burden] will not suffice to support a claim of undue [burden] … [which] must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.”6 Thus, simply because a requested accommodation is expensive to implement will not obviate an employer’s obligations under the ADA, and you should carefully counsel your client regarding whether it can reasonably deny such an accommodation request. Factors to consider in determining whether an accommodation would pose an undue burden include:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facility making the reasonable accommodation;
- The number of persons employed at the particular facility;
- The effect on expenses and resources of the facility;
- The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- The impact of the accommodation on the operation of the facility.7

#Comment Ends

Similar considerations should be assessed in determining whether an accommodation for a sincerely held religious belief is reasonable under the circumstances. Of course, a religious accommodation that impacts the ability of LGBTQ workers to perform their job duties free of discrimination and/or harassment may cause tensions among workers, which may impose...

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6 EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, No. 915.002, October 17, 2002 (emphasis added). Note that this guidance was issued prior to enactment of the Americans With Disabilities Act Amendments Act of 2008, which included significant modifications to the definition of “disability” under the law. The concept of “undue hardship,” however, was not significantly altered and thus as of this publication, the 2002 enforcement guidance is still effective.

7 Id.
complicating factors on an employer’s obligations. We discuss these issues in more detail in § 6.04, infra.

A sample reasonable accommodation policy is as follows:

[SAMPLE POLICY]

REASONABLE ACCOMMODATION

Acme, Inc. will provide reasonable accommodation for the known physical or mental disabilities or for the sincerely held religious beliefs of a qualified employee or applicant, unless to do so would create an undue hardship under applicable law. Reasonable accommodation varies from case to case and is evaluated on an individual basis.

An employee who believes he/she/ze/they has a disability or sincerely held religious belief which impacts his/her/hir/their ability to perform one or more essential job-related functions should notify his/her/hir/their supervisor or a representative of the Human Resources Department, and the Company will engage in the interactive process to determine what reasonable accommodations can be made, if any.

[END OF SAMPLE POLICY]

§ 3.02 Handling Internal Complaints of Discrimination and Harassment

[1] Maintaining Strong and Effective Reporting Policies

Beyond simply updating employment policies to ensure they are inclusive of LGBTQ issues, employers should also maintain strong and effective reporting procedures for employees who have suffered or observed discriminatory or harassing conduct. Ensuring that an employer implements these procedures helps engender confidence in the employer’s equal employment opportunity mission. In the event the employer is faced with a charge or complaint of discrimination through the EEOC or in a court action, strong reporting and investigation procedures (addressed in the next section) will help demonstrate the employer had appropriate tools to correct or eliminate the complained of discrimination, a strong point of defense in any employment discrimination litigation.

There are three basic elements to an effective discrimination and harassment reporting procedure: (1) a statement that describes how an employee should report harassment, including at least two individuals to whom a report can be made, and that such a report must be made immediately; (2) a description of the investigation procedure and employee requirements under the same, including that the company will investigate promptly, but that it cannot guarantee complete confidentiality; and (3) an anti-retaliation provision. The following sample reporting and investigation procedure contains these elements:

[SAMPLE POLICY]

Reporting Unlawful Discrimination or Harassment
Any employee who believes he/she/ze/they has been subjected to conduct that violates Acme, Inc.’s Discrimination, Harassment and Sexual Harassment policy should immediately contact her/his/hir/their supervisor, a representative of the Human Resources Department or the President.

In addition, anyone who believes he/she/ze/they has been subjected to unlawful discrimination or harassment may file a complaint with the local office of the United States Equal Employment Opportunity Commission (“EEOC”) or the [INSERT STATE FEPA]. Each federal or state office has authority to remedy violations. The nearest office can be found by visiting the agency websites at www.dfeh.ca.gov and www.eeoc.gov.¹

Any employee who becomes aware of an incident of unlawful discrimination or harassment by any employee, contractor, customer or vendor, whether by being the subject of it, witnessing the incident or being told of it, must report it to her/his supervisor or a representative of the Human Resources Department immediately to ensure that such conduct does not continue.

Investigation

All reports of unlawful discrimination or harassment will be promptly and thoroughly investigated. Acme, Inc. will promptly investigate all reports of discrimination and harassment as discretely as reasonable under the circumstances. While any investigation will pay special attention to the privacy of everyone involved, Acme, Inc. cannot guarantee complete confidentiality. Employees are expected to participate in an investigation if requested to do so.

If an employee is found to have violated this policy, he/she/ze/they will be subject to disciplinary action, up to and including termination of employment. Acme, Inc. will also take any additional action necessary to reasonably and appropriately address employee concerns about unlawful discrimination or harassment.

Any employee who knowingly or intentionally provides a false report of unlawful discrimination or harassment will be subject to disciplinary action, up to and including termination of employment.

No employee will be retaliated against who makes a good faith effort to report alleged unlawful discrimination or harassment, or for participation in any investigation, proceeding or hearing conducted by the EEOC or any state agency. If an employee believes he/she/ze/they is being retaliated against, he/she/ze/they should promptly contact his/her/hir/their supervisor or a representative of the Human Resource Department, so an investigation can be conducted.

[END OF SAMPLE POLICY]

¹Note that not every state requires inclusion of contact information for the EEOC or the state FEPA. Your client may not want to include this information in a handbook if it is not required under state law, so be sure to understand applicable state requirements and your client’s desires before including such information in an employment policy.
[2] Conducting an Investigation

In addition to maintaining policies that meet minimum requirements and foster inclusivity in the workplace, an employer should be prepared and have the tools available to it to conduct the kind of investigation promised. If you advise employers regarding their legal obligations, you may be called on to assist in or advise about an investigation. Ensuring a complete and accurate investigation occurs and that proper documentation is collected is important to ensure your client has the best defenses available to it should an aggrieved employee file an agency charge or commence some other litigation.

#Comment Begins

Practice Tip

Being deeply involved in an investigation as an attorney may complicate privilege-related issues down the line. You should be sure that your advice pertaining to your client’s investigation of a complaint is limited to a few key players. In most circumstances, you should avoid conducting interviews of employees except for high-level decision-makers or in circumstances where you can ensure, under applicable state and federal laws, privilege can be maintained. For non-management-level employees, you should simply let your client’s internal human resources conduct any necessary interviews and advise as necessary. Furthermore, in any interview you conduct as legal counsel, you should always inform the interviewee that you are not the interviewee’s attorney, but rather that you are the attorney of the company and that any applicable privilege lies with the company and not between you and the employee. You should also inform the employee that the company, at its discretion, can choose to waive a privilege but the employee may not, and thus confidentiality is expected. In any notes you take during the interview, including any signed and/or sworn declaration you collect from the employee interviewed, you should note that you told the employee you are not his/her/hir/their attorney and that only the company can waive applicable attorney-client privileges. If a client is not equipped to conduct its own investigation, and it is not appropriate for you as an attorney to do so for the reasons stated above, your client may also consider engaging an outside workplace investigator to conduct the investigation.

#Comment Ends

Upon receipt of a complaint of discrimination or harassment, an employer should either request that the complaining employee submit a written statement of the alleged bad conduct or the investigating employee should draft such a document. The content of a statement drafted by the investigator should be neutral in tone and objective in perspective. That is, the statement should contain dates, witness names and observed/witnessed facts that pertain to the complaint, among other pertinent details.

#Comment Begins

Practice Tip

Prior to collecting the pertinent details, the complaining employee should be reminded that, although the employer will conduct any necessary investigation discretely, confidentiality cannot be guaranteed because speaking with witnesses and the alleged bad actor is likely necessary to ensure completeness of the investigation.
After receiving the initial complaint, the investigator should determine whether the complaint, if true, violates a policy or would constitute unlawful conduct. If so, then the investigator should collect pertinent records (such as emails, performance reviews, and other personnel files) and interview key witnesses, including the alleged bad actor. When interviewing witnesses, the investigator should remind the interviewees that (i) they are obligated to provide truthful responses to the questions posed, (ii) knowingly providing false information is grounds for disciplinary action, and (iii) retaliation for either being the subject of a complaint or participating in an investigation is prohibited and that they should report any such retaliation immediately. Again, statements taken should be objective in perspective and neutral in tone to avoid any perception of bias on the part of the investigator.

All documents collected or created during the course of an investigation should be maintained in confidential files, or, if corrective action is taken in response to the complaint, in the relevant personnel files. Such documents should be maintained for a minimum of four years.

[3] Discipline

After collection of all pertinent details, the employer should determine whether and what corrective action is necessary under the circumstances and juxtaposed to the applicable employer policies and legal standards. If discipline is warranted, and the employer maintains a progressive discipline policy, you should ensure the employer follows that policy. If the employer does not have an established progressive discipline policy, then one or more of several corrective actions may be imposed on the subject of the complaint, including:

- Verbal coaching/training the problem actor
- Verbal warning
- Written warning
- Placing the problem actor on a performance improvement plan
- Removing the problem actor from the complaining employee’s team or from a supervisory position over the complaining employee
- Transferring the problem actor to another facility or office location
- Suspending the problem actor without pay
- Termination

Of course, as with the collection of documents and conducting interviews, disciplinary documents should be neutral in tone and objective in perspective, meaning that only the pertinent results of the investigation upon which the disciplinary action is based should be included in any disciplinary documentation, along with an explanation of which policies were violated as a result.
§ 3.03 Accommodating LGBTQ Employees with Disabilities

As we note in §§ 5.04 and 6.02 of this Practice Guide, employees living with HIV and/or who are taking prescription medication to treat symptoms of the disease are or may be “disabled” within the meaning of the ADA. Indeed, any physical and mental condition that limits one or more major life activity is considered a “disability” under the terms of the ADA, as amended.¹ The law also defines a disability as a record of an impairment that limits one or more major life activities, or being regarded as having such an impairment (or perceived as having a physical or mental disability, whether or not the disability limits a major life activity).² A “major life activity” includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as “major bodily functions.”³ Such functions include “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”⁴ In addition, even if an employee who otherwise has a disability is being treated for the disabling condition, the mitigating effects of medication, medical equipment, assistive technology, auxiliary aids, etc., do not impact whether an impairment is considered a disability; indeed, even the side effects or other impacts the mitigating measures themselves have on the employee’s ability to perform the job duties need to be considered in making any decisions with respect to the employee.⁵ In short, this broad definition of “disability” is intended to reach most impairments that do or could conceivably cause a disabling condition that impacts an employee’s ability to perform essential job functions.

Employers who receive a request for an accommodation should, thus, be sure they have a clearly defined process in place to address the request and determine whether the employee is qualified for the position with or without an accommodation. To do so, the employer should have a system whereby they seek information from the requesting employee’s medical provider that indicates (i) whether the employee has an impairment that substantially limits one or more major life activities, (ii) whether such impairment impacts the employee’s ability to perform the essential job duties, and (iii) if the impairment does so impact the employee’s ability to perform the job, then whether there is an accommodation the employer can provide that would allow the employee to perform those essential job duties.

Practice Tip

When counseling a client on assessing an employee’s disability, be sure to remind the employer that any health information received should not include family medical history or other information that identifies an employee’s genetic makeup or genetic information. Affirmatively collecting such information may violate the Genetic Information Non-Discrimination Act. Thus,

¹ 42 U.S.C. § 12102(1)(a).
² 42 U.S.C. § 12102(1)(b), (c); (3)(a).
⁵ 42 U.S.C. § 12102(4)(e)(i) and (ii).
any request for medical information should disclose the fact that the employer is not seeking family medical history or other such identifying information.

#Comment Ends#Comment Begins

Practice Tip

Any medical information received about an employee should not be placed in the employee’s personnel file, but rather it should be kept in a separate confidential medical file that is only accessible on a need to know basis by a very limited number of individuals.

#Comment Ends

Once this information is collected from the employee’s provider, then the employer can assess whether the requested accommodation is “reasonable” under the circumstances. If the accommodation requested is feasible for the employer to implement, then the employer should do so and should clearly document the accommodation it is providing to ensure there is no confusion between the employee and the employer as to what was agreed to.

If, on the other hand, the accommodation requested is not reasonable, then the employer must offer an alternative accommodation that it considers reasonable, to which the employee and his/her/hir/their medical provider should be provided the opportunity to review. This process is called the “interactive” process, and must be engaged in by the employer and the employee until a reasonable accommodation is identified or it is determined that no reasonable accommodation is available that would allow the employee to perform his/her/hir/their essential job functions.

Of particular importance for employers to understand is what is considered a “reasonable” accommodation. The EEOC’s implementing policies state that the following are generally considered reasonable accommodations:

- Job restructuring, such as reallocating or redistributing marginal, non-essential job functions that an employee is unable to perform because of a disability, and altering when and/or how a function, whether it is essential or marginal, is performed;

- Allowing limited leave, such as permitting the use of paid or unpaid leave, to obtain medical treatment, recuperate from an illness or other disabling condition, obtaining a medical device such as a wheelchair, accessible van, etc., avoiding temporary adverse conditions at the workplace that may impact or exacerbate a disability, training a service animal, and/or receiving training related to the disability, such as reading braille or learning sign language;

- Modifying a schedule or allowing the employee to work part-time, so long as doing so does not cause an undue hardship on the employer, such as a major disruption to the employer’s operations or a production slowdown;

- Modifying workplace policies that impact an employee’s disability-related needs; or
• Reassignment to a vacant position with equivalent pay and benefits, so long as the employee is actually qualified for that position.\(^6\)

This list is non-exhaustive, so upon advising a client regarding their obligations to provide reasonable accommodations, you should ensure you understand the various issues that are involved in determining whether an accommodation request is reasonable.

§ 3.04 Ensuring the Wellbeing of Transgender Employees

[1] Health Care Benefits for Transgender Employees

[a] Introduction

Transgender employees have unique health care needs related to transitioning, including various drug treatments, hormone therapies, surgeries, and other health issues. For employers who are obligated to or who do maintain health insurance benefits for employees under the Patient Protection and Affordable Care Act (commonly called the “ACA” or “Obamacare”), there are three things to consider regarding transgender-related health care issues: (1) ACA Section 1557 regulations, (2) regulations issued by the Office of Federal Contract Compliance Programs (OFCCP), and (3) enforcement by the Equal Employment Opportunity Commission (EEOC).

Under these various rules and laws, if an employer does not provide retiree medical coverage and does not have any federal contracts, the employer is not required to provide coverage for transgender reassignment services, but there is a Title VII risk for discrimination on the basis of sex.

[b] ACA Section 1557

On May 18, 2016, the Department of Health and Human Services (“HHS”) under the Obama administration issued regulations under Section 1557 of the ACA, which generally prohibit group health plans from discriminating against transgender individuals with respect to health coverage. Generally, employer-sponsored health plans are only subject to Section 1557 if they receive federal funding from the HHS, such as under Medicare Part D payments. Importantly, funding from other federal departments does not trigger compliance. If an employer does not receive Medicare Part D federal subsidies, or any other type of HHS funding, then it has no current obligation to comply with Section 1557.

Under the rules, if an employer meets the federal contractor requirements under Section 1557, then the employer must comply with the following gender identity nondiscrimination requirements set forth therein with respect to their group health plan, which became effective January 1, 2017:

• The plan cannot contain a categorical coverage exclusion or limitation for all healthcare services related to gender transition;

• The plan cannot deny coverage based on gender identity or sex stereotyping; and

• The plan must treat individuals consistently with their gender identity but cannot deny coverage for treatment ordinarily or exclusively available to individuals of one gender based on an individual’s identity as a gender other than their birth gender.

In December 2016, a federal court issued a nationwide injunction\(^1\) enjoining HHS from enforcing these regulations before they ever took effect. HHS under the Trump administration has thus far refused to defend Section 1557’s transgender discrimination prohibition, and has indicated that it plans to re-evaluate the Section 1557 regulations, which could mean that they will ultimately eliminate or relax these rules for qualifying employers who employ transgender employees.

However, in September 2017, a separate federal court ruled that discrimination on the basis of gender identity is a form of sex discrimination prohibited under Section 1557,\(^2\) thus allowing transgender individuals to seek recourse directly in federal court rather than relying on HHS’s administrative procedures through its civil rights officer. This ruling is important for employee-side practitioners to note given the Trump administration’s refusal to defend Section 1557 as written.

[c] OFCCP Regulations

The OFCCP regulations, as recently amended, prohibit discrimination on the basis of gender identity and transgender status with respect to health benefits.\(^3\) Indeed, the OFCCP’s rules governing non-discrimination on the basis of sex expressly includes gender identity as a protected characteristic, and as such, health plans that exclude certain services related to gender transitioning are discriminatory on their face. The OFCCP regulations generally apply if an employer has entered into contracts with the federal government valued at more than $10,000. So, similar to Section 1557, if an employer does not have any federal contracts meeting this threshold, the employer does not have to comply with the OFCCP regulations. Employers that do, however, cannot have group health plans that exclude health services that are specific to gender transitioning, sex reassignment, hormone therapy, etc.

[d] EEOC Enforcement

As with the EEOC’s position pertaining to Title VII’s coverage of other employment-related discrimination against transgender employees on the basis of “sex,” the EEOC has taken the position that failure to provide health coverage for transgender reassignment services violates Title VII’s prohibition on sex discrimination in the terms, conditions and privileges of employment.\(^4\) Indeed, the EEOC has brought multiple lawsuits against employers and has issued “right to sue” letters concerning this issue, and has entered into several conciliation agreements between employers and the EEOC regarding employer health plans’ exclusion of coverage for

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\(^3\) See 41 C.F.R. 60-20; 81 Fed. Reg. 39135–39137. Importantly, the rule also protects workers of such contracts from discrimination in other aspects of the workplace, including use of bathrooms, changing rooms, showers, and similar facilities.
transgender-related services. However, to date, no court has yet to affirm the EEOC’s position and award damages or otherwise issue an injunction in this context.


Federal civil rights laws do not currently expressly protect transgender workers from discrimination. The EEOC, however, has taken the position that discrimination on the basis of an individual’s transgender status is a form of sex discrimination protected by Title VII of the Civil Rights Act of 1964. As we discuss elsewhere herein, some states, too, have enacted express provisions protecting the rights of transgender workers in the workplace. Employers seeking to create an inclusive environment thus should look to these laws and applicable enforcement guidelines to ensure they are meeting current minimum legal standards. Multi-state employers may wish to adopt certain company-wide policies and procedures that are gender inclusive to limit isolation or marginalization of transgender employees.

Confidentiality and privacy are of particular importance to ensuring transgender employees are respected in the workplace. Employees in transition may want minimal publicity about or attention to their transition. This desire may stem from concerns about safety, employment security, or the stress that is associated with “coming out” and transitioning in a largely homogenous environment. Other transgender employees may want to talk about their transition with trusted coworkers or others. Employers should be careful to balance both the transitioning and/or transitioned employees’ desire for privacy, or conversely the employee’s desire to discuss his or her status with others, against providing an appropriate level of training and education to others in the workplace. Employers should only share information about a transitioning employee’s status to others on a need-to-know basis or as expressly authorized by the transitioning employee. Questions about the transitioning employee should, at the transitioning employee’s discretion, be directed to the transitioning employee or to a human resources official. However, questions pertaining to the transitioning employee’s health, medical status, sexuality, gender, etc. are inappropriate and may result in harassing or embarrassing the transitioning employee. Employers should be sure to maintain an open door for transitioning or transgender employees to raise concerns about their wellbeing, interactions with coworkers and customers, and any other matters that relate to transitioning and/or transgender status in the workplace.

Use of restrooms is of particular concern to many transgender employees. Specifically, once a transgender employee begins working in the gender that reflects the employee’s gender identity, the employer should allow access to restrooms, locker rooms, etc., consistent with that employee’s gender identity. As an employee transitions, this may change from day-to-day or week-to-week, and employers should be flexible to allow the employee to utilize the facilities as needed. OSHA has issued a Best Practices guide to restroom access for transgender workers which is helpful to any company employing a transgender or transitioning employee.

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5 EEOC v. Deluxe Financial Services Corp., Case No. 15-cv-2646-ADM-SER, filed June 4, 2015 (D. Minn.) (settled); see also EEOC Amicus Brief file in support of the Plaintiff, Robinson v. Dignity Health, Case No. 4:16-cv-3035 YGR (N.D. Cal.), Dkt. No. 43-1.


§ 3.05 Employee Leave Rights and Obligations

[1] Introduction to the FMLA and its Eligibility Requirements

The Family and Medical Leave Act (FMLA) is a federal law that entitles eligible employees of covered employers to take unpaid leave for specified family and medical reasons.¹ Employers that are subject to the FMLA are required to provide eligible employees with up to 12 weeks of unpaid leave per year.² Eligible employees who take FMLA leave to care for a child, spouse, parent or next of kin who is a member of the armed services are entitled to take up to 26 weeks of unpaid leave per year.³ The FMLA only provides unpaid leave and does not require employers to pay employees who take FMLA leave.

Practice Tip

Each company policy may vary on whether employees may use any paid annual, vacation or sick leave in conjunction with FMLA leave. Some states have state-based paid family and medical leave programs and other states require employers to allow the option for employees to use accrued paid vacation or sick leave during their FMLA leave. It is important to know and understand the applicable state law and the specific company policy when advising clients of their FMLA rights. This Practice Guide does not cover various state laws on the topic of family and medical leave, but there are other resources published by the Publisher covering these topics.

There are three main criteria for determining whether an employee is eligible for unpaid, job-protected leave under the FMLA. First, a covered employer includes all private sector employers with at least 50 employees for 20 or more workweeks during the current or preceding calendar year and all public employers (including state, local or federal government, or a public school).⁴ Second, an eligible employee includes those who have worked for their employer for at least 12 months and for at least 1,250 hours during the previous year.⁵ Lastly, the employee must take leave for the purpose of addressing the employee’s own “serious health condition,” the serious health condition of a covered family member, to care for a new child, to care for a wounded service family member, or to address particular circumstances arising from a covered family member’s deployment or call to active duty in the armed forces.⁶ While FMLA provides important protections to eligible employees and their families, the FMLA’s restrictive definitions of certain terms inherently exclude LGBTQ employees and their families from the same protections.

17, 2018).

1 29 U.S.C.S. § 2601.
3 29 U.S.C.S. § 2612(3).
Practice Tip

Employees who are not FMLA-eligible may still be covered by the ADA, such that an employee with a qualifying disability may be entitled to certain leave from work as a reasonable accommodation, assuming such leave does not pose an undue burden on the employer. You should be sure to understand the interplay between FMLA and ADA leave rights when advising clients on the same.

#Comment Ends

[2] Specific Definitions of the FMLA Impacting LGBTQ Employees

[a] “Spouse”

The FMLA protects leave from work to care for a “spouse.” However, prior to June 2013, Section 3 of the Defense of Marriage Act (DOMA) defined “spouse” as a person of the opposite sex who is a husband or a wife. Because this definition applied to the FMLA, same-sex couples were prevented from exercising FMLA leave to care for their spouses. In June 2013, the Supreme Court overturned that definition of spouse under Section 3 of DOMA. Between June 2013 and March 27, 2015, only LGBTQ employees who resided in a state that recognized the legality of same-sex marriages were eligible to take FMLA leave to care for a same-sex spouse. Same-sex couples who were legally married but resided in a state that did not recognize same-sex marriages were not eligible for FMLA leave. On March 27, 2015, the Department of Labor issued a new FMLA rule that defined “spouse” by looking to the law in the particular state in which the employee became married, not the state where the employee resided. This new rule allowed all same-sex couples who were married to take FMLA leave to care for each other, but still prevented same-sex couples who were unable to get married in their states to take protected leave under the FMLA.

In June 2015 when the Supreme Court found state laws banning same-sex marriage unconstitutional, all same-sex married couples presumably became eligible for FMLA leave. Today, all employees who are legally married to another person of the same sex are eligible to take FMLA leave to care for their spouse. However, same-sex partners who are in a domestic partnership or civil union are currently not covered under the FMLA. The Department of Labor has stated that expanding the definition of spouse to include domestic partnerships or civil unions is beyond the scope of their authority.

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10 29 C.F.R. § 825.122(b) (2015).
13 Id.
[b] “Son or Daughter” and “Parent”

The FMLA also extends protected leave to care for a son or a daughter.\footnote{29 U.S.C.S. § 2612(a)(1)(C).} The FMLA defines “son or daughter” to mean “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.”\footnote{29 U.S.C.S. § 2611(12).} The key issue related to unmarried LGBTQ parents is the term “loco parentis,” which refers to someone who acts in the place of a parent. In June 2010, the U.S. Department of Labor clarified that FMLA’s definition of “son or daughter” broadly includes children who have no biological or legal relationship to the parents who are raising them.\footnote{United States Department of Labor, “US Department of Labor clarifies FMLA definition of ‘son and daughter,’” (June 22, 2010), https://www.dol.gov/opa/media/press/WHD/WHD20100877.htm.} Whether an employee stands in loco parentis such that the employee’s child falls under the definition of “son or daughter” in the FMLA is ultimately a question of fact.\footnote{See Martin v. Brevard Cty. Pub. Sch., 543 F.3d 1261, 1266 (11th Cir. 2008) (finding that the plaintiff-employee created a genuine issue of material fact on whether he stood in loco parentis to his granddaughter when he provided substantial financial support and care).} The FMLA defined standing in loco parentis as including those who assume the day-to-day responsibilities of caring for or financially supporting the child.\footnote{29 C.F.R. § 825.122(c)(3).} At the same time that the Department of Labor clarified the definition of “son or daughter,” it also clarified that one does not need to provide both day-to-day care and financial support in order to stand in loco parentis to a child.\footnote{United States Department of Labor, Administrator’s Interpretation No. 2010-3 (June 22, 2010), https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAIA2010_3.htm.} Moreover, in the same interpretation, the Department of Labor stated, “an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.”\footnote{Id.} Similarly, an adult child can take FMLA leave to care for his or her LGBTQ parent who is not biologically or legally related if that parent stood in loco parentis when the employee was under 18.\footnote{29 U.S.C.S. § 2611(7), (12).}

That said, LGBTQ parents have a variety of parental-like relationships in which they may otherwise legally be entitled to FMLA leave, including surrogacy, adoption and fostering. Because state law generally determines the legal status of parental-child relationships, you should be sure to understand those laws when advising clients on their leave-related rights. For example, some same-sex couples may elect surrogacy to have children, in which one of the spouses donates sperm or eggs, which is then carried by a surrogate birthmother. At birth, the donating parent may be legally presumed as the parent, whereas the non-donating parent must engage in a legal process whereby they will obtain legal parental rights over the child. You should understand the interplay between state and federal laws on legal parental rights, as well as applicable leave laws, to properly advise your clients on such rights.

[c] “Serious Medical Condition”

The term “serious medical condition,” as defined in the FMLA, includes any period of
incapacity or treatment connected with patient care, such as an overnight stay, in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such in-patient care or continuing treatment by a health care provider which includes any period of incapacity. The key issue related to this definition is the ambiguity as to whether treatments and conditions associated with a person’s medically-supervised gender transition qualifies as “serious medical condition” under the FMLA. Gender transition related care or health needs that require an overnight stay likely qualify for FMLA leave, as it would fall under inpatient care. However, serious health conditions that do not involve overnight stay in a healthcare facility will still qualify if it is an illness, injury, impairment, or physical or mental condition resulting in period of incapacity for more than three consecutive calendar days and involving either (a) treatment two or more times by health care provider or (b) treatment by healthcare provider on one occasion which results in regimen of continuing treatment.

As such, any gender transition related care that requires an employee to be out of work for three consecutive calendar days may also qualify as a serious medical condition under the FMLA, entitling eligible transgender employees to protected leave under such circumstances. The determination of a “serious health condition” is a question of fact, and there is currently a lack of case law to rely on for guidance on its application to transgender employees, or their parents, children, or spouses.

[3] Returning from FMLA Leave

The FMLA also protects employees who are on leave from losing their jobs, seniority, or employer-provided health insurance. While an employee is on FMLA leave, the employer must continue to pay for health insurance coverage as if the employee was going to work as usual. However, if the employee does not return to work after reaching the limits of 12 weeks of FMLA leave, the employer has the option to discontinue payments towards the employee’s health insurance. Additionally, if the employee advises the employer that he/she/ze/they does not intend to return to work, then the employer can also stop making payments towards the employee’s health insurance plan.

It is important to note that an employer can require the employee to pay back the money that the employer paid to maintain the employee’s health insurance during the FMLA leave. However, this cannot be required if the employee did not return the work due to circumstances that are beyond his/her/hir/their control, including an FMLA-qualifying medical condition. In

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26 See Ryl-Kuchar v. Care Ctrs., Inc., 565 F.3d 1027 (7th Cir. 2009) (finding that the employer violated the FMLA when the defendant-employer retroactively cancelled the plaintiff-employee’s health insurance after she went on FMLA leave); Tornberg v. Bus. Interlink Servs., 237 F. Supp. 2d 778 (E.D. Mich. 2002) (holding that the employer violated the FMLA when the defendant-employer retroactively terminated the plaintiff-employee’s medical coverage without notice); compare Salser v. Clarke Cty. Sch. Dist., 802 F. Supp. 2d. 1339 (M.D. Ga. 2011) (holding that the defendant-employer did not violate the FMLA when they continued to pay plaintiff-employee’s healthcare premiums and maintained her health insurance benefits during her leave); see also Guide to Family and Medical Leave Act (FMLA), National Partnership for Women & Families (2016), http://www.nationalpartnership.org/research-library/work-family/fmla/guide-to-fmla.pdf.
addition, if the employee’s job is eliminated while on FMLA leave, then the employer is entitled to terminate health insurance payments on behalf of the employee at the time employment is terminated.

[4] Filing a Claim

The statute of limitations for a FMLA violation is generally two years from the date of the last event constituting the alleged violation for which the lawsuit is brought.27 However, it can be three years if the employer knew of or recklessly disregarded its duties under the FMLA.28 State family and medical leave laws may provide longer statute of limitations periods. It is important to note that if the U.S. Department of Labor files a lawsuit on an employee’s behalf, then that employee can no longer file his/her/their own lawsuit. Remedies that may be available include recovery of lost employment wages and benefits, and under certain circumstances, liquidated damages.

[5] Paid Sick Leave Rights

No federal law currently requires private employers to provide paid sick leave to employees, but many states and municipalities have adopted such rules. Furthermore, federal contractors, however, may be required under Executive Order 13706 and Department of Labor regulations to provide some amount of paid sick leave to their workers.29 Under the applicable federal contractor rules, four major categories of contractors are covered, including:

- Procurement contracts for construction covered by the Davis-Bacon Act;
- Service contracts covered by the McNamara-O’Hara Service Contract Act;
- Concessions contracts, including any concessions contracts excluded by the McNamara-O’Hara Service Contract Act; and
- Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.30

Subcontracts of a covered contract are also covered, assuming they fall within one of the covered contract types above. Moreover, among some other narrow exceptions, these federal rules do not apply to employees of a contractor who do not actually work on the contract subject to the Department of Labor’s paid sick leave rules, or employees who work under a collective bargaining agreement (“CBA”) that was ratified as of September 30, 2016 and terminates on the earlier of January 1, 2020 or the date the CBA terminates, and provides at least 56 hours of paid time that can be used for reasons related to the employee’s sickness or health care.31

For employees that are covered, employers must allow such employees to accrue 1 hour

30 29 C.F.R. § 13.3.
31 29 C.F.R. § 13.4.
of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to a maximum of 56 hours annually. Exempt employees are presumed to work 40 hours in a work week for purposes of accrual. Unused time must be allowed to carry over from one year to the next, but employers can cap the total number of hours of accrued paid sick time to 56 hours at any point in time. Finally, employees are not entitled to a payout of accrued but unused sick leave upon termination of employment, but employees who are terminated and return to work within 12 months of the termination are eligible to have their unused paid sick bank reinstated at the level it was prior to the termination.

Federal contractor employees can use accrued sick leave for a variety of absences, including those that result from:

- physical or mental illness, injury, or medical condition of the employee;
- obtaining diagnosis, care, or preventive care from a health care provider by the employee;
- caring for the employee’s child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or need for diagnosis, care, or preventive care described above; or
- domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described above or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee in engaging in any of these activities.

This rule is incredibly inclusive of LGBTQ workers, and thus employers and employees should take an expansive view of the coverage provided under the law.

In addition to federal contractors, many states and municipalities require private employers to provide paid sick leave for their employees. For example, the City of Chicago and Cook County have adopted ordinances that require employers who have employees that work within the jurisdictional limits of the City or County for at least 80 hours in any 180-day period to provide sick leave that accrues at a rate of 1 hour for every 40 hours worked in a benefit year, up to a total of 40 hours per year for non-FMLA reasons. Employees who do not use all accrued sick leave in a benefit year are entitled to carry over up to half of that time into the next benefit year, but, importantly, may also carry over up to an additional 20 hours of time for FMLA-reasons only. In such a scenario, it is conceivable that the employer will be obligated to provide up to 60 hours of paid sick leave each benefit year to its eligible employees. Like the federal contractor requirements, the Chicago and Cook County paid sick leave ordinances are inclusive of LGBTQ employee needs.

Between 2006 and 2016, nearly 50 states and municipalities have adopted paid sick leave rules governing at least some workers within their jurisdictions. Paid sick leave rules are constantly changing and being updated. As such, attorneys for employers should review and understand the rules applicable to clients those rules cover, and should do so regularly given the frequency with which the rules are changing and being adopted.
§ 3.06 Separation Agreements and Other Termination Issues

[1] The At-Will Employment Doctrine

All employment relationships come to an end, either through termination, voluntary separation, retirement, layoff, a business closing, or death of the employee. As in any separation scenario, there are various considerations to determine how the employer can legally separate an employee and avoid the risks associated therewith. While this Practice Guide does not address employee benefits, executive compensation and/or retirement-related matters that may be associated with employees who have written employment agreements, or participate in an employer-sponsored retirement savings, pension or other benefit plan, attorneys who represent employers or employees who are subject to such agreements and plans should be sure they understand all applicable consequences of termination, including in terms of severance payments due, tax consequences flowing therefrom, and liability associated therewith.

In employment scenarios that do not involve such agreements or plans, employers and employees should consider a variety of other issues when ending an employment relationship. Of course, most states are “at-will” employment states, meaning that employers and employees may terminate the employment relationship for any reason or no reason at all, and with or without advance notice. There are several exceptions to this rule, including for some public sector employees and employees who work under a collective bargaining agreement (indeed, employers under those arrangements may usually only terminate employees for “just cause” in connection with a violation of certain workplace rules and only after an employee is given adequate notice of the violation and a chance to appeal a termination decision through a formalized appeal process), but for purposes of this Practice Guide, we focus on terminations under the at-will employment doctrine.

Because an employer can terminate employment with or without any reason in an at-will employment relationship, no employee has an expectation of continued employment. As such, the rights for employees are limited in at-will relationships, and employers are generally free to do as they wish in making termination decisions, as long as such a decision does not violate the law or some other public policy.

Practice Tip

Notwithstanding the presumed at-will nature of employment in most jurisdictions in the United States, employer statements, policies and/or actions can, in some circumstances, create in employees an expectation of continued employment. As such, when advising employers, you should ensure that any written policies, agreements or other documents clearly and plainly state that nothing in that written document nor any communications, written or oral, to the employee about employment alters the at-will nature of the employee’s employment.

However, because an employer cannot terminate an employee in violation of the law or some public policy, an employee may have a claim under one or more federal, state or local laws governing the employment relationship if the employer does, in fact, terminate the employment relationship on a prohibited basis. For example, an employer who terminates a gay male
employee over the age of 40 because the employer is disgusted by the employee’s relationship with another man, likely violate state laws that protect employees on the basis of their sexual orientation, may violate federal law under Title VII in certain jurisdictions where a circuit court has recognized sexual orientation as a protected characteristic under that law’s prohibition of discrimination on the basis of sex, but likely has not violated state or federal laws on the basis of that employee’s age.

[2] Separation Agreements

Even where an employer makes a perfectly objective and legal decision to terminate an employee’s employment, the employer may wish to offer a severance payment in exchange for a release of claims. Employers sometimes offer severance as a general rule to all employees who are terminated for reasons other than violation of workplace policies or some unlawful conduct, while other employers may only do so in circumstances where it suspects an employee may be litigious or file a charge or complaint of discrimination. In any case, employers that do offer severance in exchange for a release should ensure their release includes an explicit reference to all laws, both statutory and common laws at the federal, state and local level, from which the employer is seeking a waiver. In jurisdictions that have separate employment protections for LGBTQ workers, the release should include an express waiver of the laws, regulations or ordinances extending such protections. The employer should also ensure it includes a statement indicating that the waiver does not include a release of claims which cannot be released as a matter of law (such as workers’ compensation laws) and a disclaimer that, notwithstanding the employee’s release of claims, the employee still has a right to file a charge of discrimination with the EEOC or a FEPA and to participate in such agencies’ investigations, but that the employee has no right to monetary recovery from the same.

#Comment Begins

Practice Tip

Employees who are separated and over the age of 40 have additional rights under the Older Worker Benefits Protection Act\(^1\) to extended consideration and revocation periods for their waiver of age-related claims. While this Practice Guide is does not address these rights, you should be sure you review applicable legal standards to ensure your client understands its obligations to older employees under the same, as a failure to meet the minimum requirements could result in nullification of the entire waiver of claims contained in the separation agreement.

#Comment Ends

#Comment Begins

Practice Tip

Employees subject to a layoff may also have extended notice period rights under the Worker Adjustment and Retraining Notification (“WARN”) Act\(^2\) and similar state laws. Depending on the size of the layoff in comparison to the workforce, you should advise employers about such extended notification requirements as well as the public official notification requirements under

\(^{1}\) 29 U.S.C. Sec. 621 et seq.
\(^{2}\) 29 U.S.C. § 2101 et seq.
such laws. Other resources from the Publisher are available that address WARN-related matters.

#Comment Ends

[3] Continuing Health Benefits

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), employers are required to provide workers the right to choose to continue group health benefits provided by their employer-sponsored group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events. The U.S. Department of Labor’s web page has detailed descriptions of employer and employee rights and obligations.

COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary continuation of health coverage in certain instances where coverage under the plan would otherwise end. Notice of continuation coverage rights and obligations must be provided by the employer and/or its plan administrator within 14 days of notification of the termination (or other qualifying event) so that the employee can elect, within 30 days following notification, whether or not to continue on the employer’s group health plan. The employee can elect to continue coverage at the employee’s cost for payment of all applicable premiums. Other more detailed resources pertaining to COBRA continuation coverage are available from this Publisher.

Transgender employees requiring continued health coverage for their transition-related health care needs should be particularly aware of their rights under COBRA, and, in circumstances where loss of coverage could subject the employee could subject them to significant health risks, they should explore whether assistance with the costs of continued coverage under the employer’s group health plan should be sought. Where an employer offers some sort of severance benefit, it may be more advantageous to transgender employees to seek more health coverage-related severance rather than a cash payout. Attorneys advising separated transgender employees should be sure they help their clients navigate these issues.

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March 20, 2019

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1. **EEOC v. R.G., 884 F.3d 560**

- **Client/Matter:** 012846-010
- **Search Terms:** EEOC v. R.G., 884 F.3d 560
- **Search Type:** Natural Language
- **Narrowed by:**
  - **Content Type**
    - Cases
  - **Narrowed by**
    - Court: 11th Circuit
**EEOC v. R.G.**

United States Court of Appeals for the Sixth Circuit

October 4, 2017, Argued; March 7, 2018, Decided; March 7, 2018, Filed

File Name: 18a0045p.06

No. 16-2424

REPORTER


**Core Terms**

funeral home, sex, Funeral, religious, transgender, stereotypes, employees, gender, woman, female, district court, compelling interest, dress, discriminated, wear, transitioning, conform, male, exercise of religion, funeral director, fired, burdened, least restrictive, parties, clothing, dress code, eradicating, ministerial, terminated, sex discrimination

**Case Summary**

**Overview**

HOLDINGS: [1]-The EEOC was entitled to summary judgment on its unlawful termination charge under Title VII, 42 U.S.C.S. § 2000e-2(a)(1), because the employer violated Title VII when it fired the employee, a transgender woman, for failing to conform to sex stereotypes, and it could pursue a Title VII claim on the ground that the employer discriminated against the employee on the basis of her transgender status and transitioning identity; [2]-Enforcement of Title VII was not precluded because the employer did not qualify for the ministerial exception, and RFRA provided the employer with no relief because continuing to employ the employee would not substantially burden the owner's religious exercise, and even if it did, the EEOC had shown that enforcing Title VII was the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination.

**Outcome**

District court's grant of summary judgment on both unlawful-termination and discriminatory-clothing-allowance claims reversed. Summary judgment granted to EEOC on its unlawful-termination claim. Case remanded.

**LexisNexis® Headnotes**

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

[https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=LNHNREFcIscc1](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=LNHNREFcIscc1) Standards of Review, De Novo Review

The appellate court reviews a district court's grant of
summary judgment de novo. Summary judgment is warranted when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a).* In reviewing a grant of summary judgment, the appellate court views all facts and any inferences in the light most favorable to the nonmoving party. The appellate court also reviews all legal conclusions supporting the district court's grant of summary judgment de novo.

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Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

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**Burdens of Proof, Burden Shifting**

*Title VII of the Civil Rights Act of 1964* prohibits employers from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.S. § 2000e-2(a)(1). A plaintiff can establish a prima facie case of unlawful discrimination by presenting direct evidence of discriminatory intent. A facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent. A facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent. Once a plaintiff establishes that the prohibited classification played a motivating part in the adverse employment decision, the employer then bears the burden of proving that it would have terminated the plaintiff even if it had not been motivated by impermissible discrimination.

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Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Gender Stereotypes

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**Scope & Definitions, Gender Stereotypes**

Discrimination based on a failure to conform to stereotypical gender norms was no less prohibited under *Title VII of the Civil Rights Act of 1964* than discrimination based on the biological differences between men and women. And no reason has been found to exclude *Title VII* coverage for non sex-stereotypical behavior simply because the person is a transsexual. Thus, a transgender plaintiff (born male) who suffers adverse employment consequences after he began to express a more feminine appearance and manner on a regular basis could file an employment discrimination suit under *Title VII* because such discrimination would not have occurred but for the victim's sex. *Title VII* proscribes discrimination both against women who do not wear dresses or makeup and men who do. Under any circumstances, sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.

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Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Gender Stereotypes

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**Scope & Definitions, Gender Stereotypes**

*Title VII of the Civil Rights Act of 1964* strikes at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.
Title VII of the Civil Rights Act of 1964’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.

Requiring women to wear makeup does constitute improper sex stereotyping. After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.

An employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave.
and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity.

Title VII of the Civil Rights Act of 1964 protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of the laws rather than the principal concerns of the legislators by which the courts are governed.

Nothing precludes discrimination based on transgender status from being viewed both as discrimination based on gender identity for certain statutes and, for the purposes of Title VII of the Civil Rights Act of 1964, discrimination on the basis of sex.

Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex, no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII of the Civil Rights Act of 1964. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under Price Waterhouse. The United States Supreme Court has made it clear that a policy need not affect every woman or every man to constitute sex discrimination. A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.
While it is indisputable that a panel of the appellate court cannot overrule the decision of another panel when the prior decision constitutes controlling authority, one case is not controlling authority over another if the two address substantially different legal issues.

When a later decision of the appellate court conflicts with one of its prior published decisions, the appellate court is still bound by the holding of the earlier case.

A plaintiff may state a claim under Title VII of the Civil Rights Act of 1964 for discrimination based on gender nonconformance that is expressed outside of work.

The ministerial exception to Title VII of the Civil Rights Act of 1964 is rooted in the First Amendment's religious protections and precludes application of employment discrimination laws such as Title VII to claims concerning the employment relationship between a religious institution and its ministers. In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee. The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which concern internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.

Private parties may not waive the First Amendment's ministerial exception because this constitutional protection is structural.
Freedom of Religion, Free Exercise of Religion

The ministerial exception applies only to religious institutions. While an institution need not be a church, diocese, or synagogue, or an entity operated by a traditional religious organization, to qualify for the exception, the institution must be marked by clear or obvious religious characteristics.

Four factors have been identified to assist courts in assessing whether an employee is a minister covered by the ministerial exception: (1) whether the employee’s title conveys a religious, as opposed to secular, meaning; (2) whether the title reflects a significant degree of religious training that sets the employee apart from laypersons; (3) whether the employee serves as an ambassador of the faith and serves a leadership role within the church, school, and community; and (4) whether the employee performs important religious functions for the religious organization.

The Religious Freedom Restoration Act (RFRA) precludes the government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person, (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

Congress intended the Religious Freedom Restoration Act to apply only to suits in which the government is a party.

The appellate court typically will not consider issues raised for the first time on appeal unless they are presented with sufficient clarity and completeness and their resolution will materially advance the process of the litigation.
Amici may not raise issues or arguments that exceed those properly raised by the parties.

Religious Freedom, Religious Freedom Restoration Act

To assert a viable defense under the Religious Freedom Restoration Act (RFRA), a religious claimant must demonstrate that the government action at issue would (1) substantially burden (2) a sincere (3) religious exercise. In reviewing such a claim, courts must not evaluate whether asserted religious beliefs are mistaken or insubstantial. Rather, courts must assess whether the line drawn reflects an honest conviction. In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000, protects any exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C.S. § 2000cc-5(7)(A).

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

A religious claimant cannot rely on customers’ presumed biases to establish a substantial burden under the Religious Freedom Restoration Act.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

A government action that puts a religious practitioner to the choice of engaging in conduct that seriously violates his religious beliefs or facing serious consequences constitutes a substantial burden for the purposes of the Religious Freedom Restoration Act.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Under the "to the person test," the Equal Employment Opportunity Commission must demonstrate that its compelling interest is satisfied through application of the challenged law to the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C.S. § 2000bb-1(b). This requires looking beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizing the asserted harm of granting specific exemptions to particular religious claimants.
Discrimination in employment on the basis of sex is an invidious practice that causes grave harm to its victims.

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

Title VII of the Civil Rights Act of 1964 serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. The stigmatizing injury of discrimination, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.

By enacting Title VII of the Civil Rights Act of 1964, Congress clearly targeted the elimination of all forms of discrimination as a highest priority. Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.

O Centro’s "to the person test" does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether the asserted harm of granting specific exemptions to particular religious claimants is sufficiently great to require compliance with the law.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

The Religious Freedom Restoration Act does not effectuate the First Amendment's guarantee of free exercise because it sweeps more broadly than the Constitution demands. And in any event, the United States Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs, even those that are squarely protected by the Free Exercise Clause.

The final inquiry under the Religious Freedom Restoration Act is whether there exist other means of achieving the government's desired goal without imposing a substantial burden on the exercise of religion by the objecting party. The least-restrictive-means standard is exceptionally demanding, and the Equal Employment Opportunity Commission bears the burden of showing that burdening the objecting party's religious exercise constitutes the least restrictive means of furthering its compelling interests. Where an alternative option exists that furthers the government's interest equally well, the government must use it. In conducting the least-restrictive-alternative analysis, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries. Cost to the government may also be an important factor in
Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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Summary Judgment, Evidentiary Considerations

At the summary-judgment stage, a court may not make credibility determinations, weigh the evidence, or draw adverse inferences from the facts.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

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Religious Freedom, Religious Freedom Restoration Act

There may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under the Religious Freedom Restoration Act.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

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Religious Freedom, Religious Freedom Restoration Act

The very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist.

Governments > Legislation > Statutory Remedies & Rights

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Legislation, Statutory Remedies & Rights

It is established in strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

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Freedom Restoration Act defenses to discrimination made illegal by Title VII. Anti-discrimination laws are precisely tailored to achieving the government's compelling interest in providing an equal opportunity to participate in the workforce without facing discrimination.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=LNHNREFclsscc44
Religious Freedom, Religious Freedom Restoration Act

Title VII of the Civil Rights Act of 1964 constitutes the least restrictive means for eradicating discrimination in the workforce.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Religious Freedom Restoration Act constitutes the least restrictive means for eradicating discrimination in the workforce.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=LNHNREFclsscc45
Religious Freedom, Religious Freedom Restoration Act

The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal. This means that enforcement actions brought under Title VII of the Civil Rights Act of 1964, which aims to provide an equal opportunity to participate in the workforce without regard to race and an array of other protected traits, will necessarily defeat Religious Freedom, Religious Freedom Restoration Act
Discrimination, Scope & Definitions

Title VII of the Civil Rights Act of 1964 does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise, 42 U.S.C.S. § 2000e-2(e)(1), and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

Scope & Definitions, Gender Stereotypes

Nothing in Title VII of the Civil Rights Act of 1964 or the court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. A plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind an adverse employment action. Title VII protects both the right of male employees to come to work with makeup or lipstick on their faces, and the right of female employees to refuse to wear dresses or makeup, without any internal contradiction.

Authorities & Powers, Investigative Authority

Where facts related with respect to the charged claim would prompt the Equal Employment Opportunity Commission (EEOC) to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim. EEOC charges must be liberally construed to determine whether there was information given in the charge that reasonably should have prompted an EEOC investigation of a separate type of discrimination.

Scope & Definitions, Gender Stereotypes

Discrimination against employees, either because of their failure to conform to sex stereotypes or their
transgender and transitioning status, is illegal under Title VII of the Civil Rights Act of 1964.


John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, for Intervenor.

Douglas G. Wardlow, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee.

ON BRIEF: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant.

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Opinion by: KAREN NELSON MOORE

Opinion

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

1 We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.
The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII’s proscriptions against sex discrimination to the Funeral Home would substantially burden Rost’s religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government’s compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home’s clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we REVERSE the district court’s grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, GRANT summary judgment to the EEOC on its unlawful-termination claim, and REMAND the case to the district court for further proceedings consistent with this opinion.

[***4] I. BACKGROUND

Aimee Stephens, a transgender woman who was “assigned male at birth,” joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49-51) (Page ID #817); R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.’s Statement of Facts ¶ 1) (Page ID #1683). Thomas Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. Id. ¶¶ 4, 8, 17 (Page ID #1684-85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." R. 55 (Def.’s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home’s website contains a mission statement that states that the Funeral Home’s "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. Id. ¶¶ 21-22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.’s Counter Statement of Facts ¶¶ 25-27; 29-30) (Page ID #1832-34). "Employees have worn Jewish head coverings when holding a Jewish funeral service." Id. ¶ 31 (Page ID #1834). Although the Funeral Home places the Bible, "Daily Bread" devotionalists, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." Id. ¶¶ 33-34 (Page ID #1834).

Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities." Id. ¶¶ 37-38 (Page ID #1835).

[***5] The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.’s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836-37). All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees. Id. ¶ 55 (Page ID #1839).

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. Id. ¶ 54 (Page ID #1838-39). Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. Id. ¶ 54 (Page ID #1838-39). Rost contends
that the Funeral Home would provide suits to all funeral directors, regardless of their sex, id., but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336-37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. Id. ¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" [*9] her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that "[t]he first step [she] must take is to live and work full-time as a woman for one year." Id. To that end, [*69] Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." Id. After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.'s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122). Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 10-11) (Page ID #1828). Rost said, "this is not going to [*6] work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." R. 54-15 (Stephens Dep. at 75-76) Page ID #1455; R. 63-5 (Rost Dep. at 126-27) Page ID #1974. Stephens refused. Id. Rost testified that he fired Stephens because "he was no longer going to [*10] represent himself as a man. He wanted to dress as a woman." R. 51-3 (Rost 30(b)(6) Dep. at 135-36) (Page ID #667).

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." R. 54-2 (Rost Aff. ¶¶ 42-43, 45) (Page ID #1334-35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." Id. ¶¶ 43, 45 (Page ID #1334-35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She [*11] further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." Id. During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation [*7] process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1-9).

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon [*12] which the EEOC could pursue its unlawful-termination claim. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC [*570] could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. See id. at 598-99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex-or gender-based preferences, expectations, or stereotypes." Id. at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4-5)).
The parties then cross-moved for summary judgment. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. Id. at 850. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home. [*13] as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." Id. at 862-63. Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. Id. The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. Id. at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing- [*8] allowance claim because, under longstanding Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's—in this case, Stephens's—original charge. Id. at 864-70. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC [*14] filed a timely notice of appeal shortly thereafter, see R. 78 (Notice of Appeal) (Page ID #2236-37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. See D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5-7). The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp'n at 2-11). We determined that Stephens's request was timely given that she previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. Id. Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc2 We review a district court's grant of summary judgment de novo.” [*571] Risch v. Royal Oak Police Dep't, 581 F.3d 383, 390 (6th Cir. 2009) (quoting CenTra, Inc. v. Estrin, 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reviewing a grant of summary judgment, "we view all facts and any inferences in the light most favorable to the nonmoving party." Risch, 581 F.3d at 390 (citation omitted). We also review all "legal conclusions supporting [the district court's] grant of summary judgment de novo," Doe v. Salvation Army in U.S., 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

[*9] B. Unlawful Termination Claim

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc2 Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff can establish a prima facie case [of unlawful discrimination] by presenting direct evidence of discriminatory intent." Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion)). "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." Id. (citation omitted). Once a plaintiff establishes that "the prohibited classification played a motivating part in the [**16] adverse employment decision," the employer then
bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination." Id. (citing, inter alia, Price Waterhouse, 490 U.S. at 244-45).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 850 ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), a plurality of the Supreme Court explained that https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc3 "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004). And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person [**18] is a transsexual." Id. at 575. Thus, in Smith, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, id. at 572, because such "discrimination would not [have] occur[red] but for the victim's sex," id. at 574. As we reasoned in Smith, Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. Id. Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." Id. at 575.

Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," see R. 51-3 (Rost 30(b)(6) Dep. at 135-36) (Page ID #667), falls squarely within the ambit of sex-based discrimination that Price Waterhouse and Smith forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens [***11] for any performance-related issues. See R. 51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #667). We therefore [**19] agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female." Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees—because such a
policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. Id. at 12. In support of its position, the Funeral Home relies principally on Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc), and Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977). Jespersen held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. See 444 F.3d at 1109-11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was "more burdensome for women than for men"). Barker, for its part, *573 held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. See 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in Jespersen and Barker—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific [*12] dress code, simply because she refused to conform to the Funeral Home's [*21] notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] . . . for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision." See Appellee Br. at 19-20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either Jespersen or Barker to do so. Barker was decided before Price Waterhouse, and it in no way anticipated the Court's recognition that https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc5 Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Price Waterhouse, 490 U.S. at 251 (plurality) (quoting Manhart, 435 U.S. at 707 n.13). Rather, according to Barker, "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 549 F.2d at 401-02 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k), as recognized in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 89, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)). Of course, this is precisely the sentiment that Price Waterhouse "eviscerated" when it [*22] recognized that https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc5 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." Smith, 378 F.3d at 573 (citing Price Waterhouse, 490 U.S. at 251). Indeed, Barker's incompatibility with Price Waterhouse may explain why this court has not cited Barker since Price Waterhouse was decided.

As for Jespersen, that Ninth Circuit case is irreconcilable with our decision in Smith. Critical to Jespersen's holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." 444 F.3d at 1113. We reached the exact opposite conclusion in Smith, as we explained that https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc5 requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 ("After Price Waterhouse, an employer who discriminates against women because, for instance, they do [***13] not wear dresses or makeup, is engaging in sex discrimination because the [*574] discrimination would not occur but for [**23] the victim's sex."). And more broadly, our decision in Smith forecloses the Jespersen court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to
perform her job," Jespersen, 444 F.3d at 1113, as the Smith plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. Jespersen's incompatibility with Smith may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII only when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.'" Appellee Br. at 18 (quoting Price Waterhouse, 490 U.S. at 251). This interpretation of Title VII cannot be squared with our holding in Smith. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." Smith, 378 F.3d at 572. It is apparent from both Price Waterhouse and Smith that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. See Zarda v. Altitude Express, Inc., No. 15-3775, 883 F.3d 100, 2018 U.S. App. LEXIS 4608, *48 (2d Cir. Feb. 26, 2018) (en banc) (plurally) ("[T]he employer in Price Waterhouse could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.").

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," see White v. Columbus Metro. Hous. Auth., 429 F.3d 232, 238 (6th Cir. 2005) (quoting ***25]) discrimination on the basis of transgender and transitioning ***575 status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d at 598. The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is always based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned at birth." Appellant Br. at 24; see also Intervenor Br. at 10-15. The Funeral Home, in turn, argues ***26 that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." Appellee Br. at 26. According to the Funeral Home, transgender status ***15 refers to "a person's

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3 See also Appellee Br. at 16 ("It is a helpful exercise to think about Price Waterhouse and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there—both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").
self-assigned 'gender identity'” rather than a person’s sex, and therefore such a status is not protected under Title VII. Id. at 26-27.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex. The Seventh Circuit’s method of "isolat[ing] the significance of the plaintiff’s sex to the employer’s decision" to determine whether Title VII has been triggered illustrates this point. See Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017). In Hively, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking [***27] whether the plaintiff, a self-described lesbian, would have been fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." Id. If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. See id. Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women’s dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens’s sex impermissibly affected Rost’s decision to fire Stephens.

The court’s analysis in Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee “because of religion,” regardless of whether the employer feels any animus against either Christianity or Judaism, because “[d]iscrimination ‘because of religion’ easily encompasses discrimination because of a change of religion.” Id. at 306 (emphasis in original). By the same token, religious identity” can be just as fluid, variable, and difficult to define as “gender identity”; after all, both have “a deeply personal, internal genesis that lacks a fixed external referent.” Sue Landsittel, Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII, 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for “[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary”).

On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. See R. 53-6 (Rost Dep. at 136-37) (Page ID #974) (At his deposition, when asked whether "the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed — or that he would no longer dress as a man," Rost answered: "That he would no longer dress as a man," and when asked, "if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him," Rost answered: "No.").
Title VII requires "gender [to] be irrelevant to employment decisions." *490 U.S. at 240.* Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

Second, https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc12 discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in Smith, a transgender person is someone who "fails to act and/or identify with his or her gender”—i.e., someone who is inherently "gender non-conforming." *378 F.3d at 575;* see also id. at 568 (explaining that "transgender status is characterized by the American Psychiatric Association as *a disjunction between an individual's sexual organs and sexual identity*). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

We did not expressly hold in Smith that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this court and others. In *G.G. v. Gloucester County School Board,* 654 F. App'x 606 (4th Cir. 2016), for instance, the Fourth Circuit described Smith as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." *Id. at 607.* And in *Dodds v. United States Department of Education,* 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. *Id. at 220-21.*

In so holding, we cited Smith as evidence that this court's "settled law" prohibits "sex stereotyping based on a person's gender non-conforming behavior," *id. at 221* (second quote quoting Smith, *378 F.3d at 575,* and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," id. (citing Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)), and "the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," *id.* (quoting G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), cert. granted in part, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016), and vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). Such references support what we now directly hold:

Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity."

Appellee Br. at 25-26. But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because 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 principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see also Zarda, 2018 U.S. App. LEXIS 4608, slip op. at 24-29 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] indisputably prohibited by Title VII*

6 We acknowledge that Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), read Smith as focusing on "look and behav[ior]." *Id. at 737* ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in Barnes.
... [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, Smith and Price Waterhouse preclude an interpretation of Title VII that reads "sex" to mean only individuals’ "chromosomally driven physiology and reproductive function." See Appellee Br. at 26. Indeed, we criticized the district court in Smith for "relying on a series of pre-Price Waterhouse cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" 378 F.3d at 572 (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration [*33] in original). According to Smith, such a limited view of Title VII’s protections had been "eviscerated by Price Waterhouse." Id. at 573. The Funeral Home’s attempt to resurrect the reasoning of these earlier cases thus runs directly counter to Smith’s holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27-28. It is true, of course, that an individual’s [*19] biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in Zarda, 378 F.3d at 572 (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration [*33] in original). According to Smith, such a limited view of Title VII’s protections had been "eviscerated by Price Waterhouse." Id. at 573. The Funeral Home’s attempt to resurrect the reasoning of these earlier cases thus runs directly counter to Smith’s holding.

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Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "individual" is discriminated against "because of such individual’s . . . sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

2018 U.S. App. LEXIS 4608 at *43 (plurality opinion) [*34] (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)).

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc16

Because an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under Price Waterhouse. See Hively, 853 F.3d at 346 n.3 ("[T]he Supreme Court has made it clear that a policy need not affect every woman [or every man] to constitute sex discrimination. . . . A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, see Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders [*35] to achieve its objectives," Hively, 853 F.3d at 344; see also Yates v. United States, 135 S. Ct. 1074, 1096, 191 L. Ed. 2d 64 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may [*579] have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In In re Rodriguez, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII’s prohibition on discrimination on the basis of national origin, see id. at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, see 20 U.S.C. § 1092(f)(1)(F)(ii). [*20] Moreover, Congress’s failure to modify Title VII to include expressly gender identity "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.' Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990) (quoting United States v. Wise, 370 U.S. 405, 411, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

DON DAVIS
The Funeral Home places great emphasis on the fact that our published decision [***36**] in Smith superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual . . . has alleged a claim of sex stereotyping pursuant to Title VII." Smith v. City of Salem, 369 F.3d 912, 922 (6th Cir.), opinion amended and superseded, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding Smith opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. See Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that Smith did not expressly recognize Title VII protections for transgender persons based on identity. But Smith’s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in Vickers that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." Id. at 764. Vickers thus rejected [***37**] the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." Id. The Vickers court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." Id. (quoting Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005)).

The Funeral Home insists that, under Vickers, Stephens’s sex-stereotyping claim survives only to the extent that it [***21**] concerns her "appearance or mannerisms on the job," see id. at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, Vickers does not control this case because Vickers concerned a different legal question. As the EEOC and amici Equality Ohio note, Vickers "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." Appellant Br. at [*5**80**] 30; see also Equality Ohio Br. at 16 n.7. [https://advance.lexis.com/api/document?collection=00000-00&context=&link=clsc18]

While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling [***38**] authority," Darrah v. City of Oak Park, 255 F.3d 301, 309 (6th Cir. 2001) (quoting Salmi v. Secretary of Health & Human Services, 774 F.2d 685, 689 (6th Cir. 1985)), one case is not "controlling authority" over another if the two address substantially different legal issues. cf. Int’l Ins. Co. v. Stonewall Ins. Co., 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

Second, we are not bound by Vickers to the extent that it contravenes Smith. See Darrah, 255 F.3d at 310 (https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clsc19)

"[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, Vickers indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." 453 F.3d at 764 (emphasis added). The Vickers court’s new "observable-at-work" requirement is at odds with the holding in Smith, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated Vickers by more than a year—in which we held that a reasonable [***39**] jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman outside of work were well-known within the [workplace]." Id. at 738 (emphasis [***22**] added).

7 Oddly, the Vickers court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the Vickers court cited Smith for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he ‘fails to act and/or identify with his or her gender’—a proposition that is necessarily broader than the narrow rule Vickers sought to announce. 453 F.3d at 764 (citing Smith, 378 F.3d at 579) (emphasis added). The Vickers court also seemingly recognized Barnes as binding authority, see id. (citing Barnes), but portrayed the
Smith and Barnes, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The Vickers court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was transgender [*581] and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined [**40] that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 857-64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds—

decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his 'ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was 'not sufficiently masculine.'" Id. This summary is accurate as far as it goes, but it entirely omits the discussion in Barnes of the plaintiff's discrimination against the plaintiff based on "his practice of dressing as a woman outside of work." 401 F.3d at 738 (emphasis added). namly that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act. See Public Advocate Br. at 20-24.

[***23] We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore REVERSE the district court's grant of summary judgment in the Funeral Home's favor and GRANT summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 555 U.S. 385, 396 (2009) (quoting Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 833 (6th Cir. 2015) (quoting Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law." Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 409 (6th Cir. 2010) (quoting Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original). [**42]

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial
employee. Public Advocate Br. at 20-24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial exception [*582] defense by failing to raise it, see Conlon, 777 F.3d at 836 (holding that https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B- 00000-00&context=&link=clscc23 private parties may not "waive" the First Amendment's ministerial exception" because "[this constitutional protection is . . . structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in Conlon, https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B- 00000-00&context=&link=clscc24 the ministerial exception applies only to "religious institution[s]." id. at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," id. at 834 (quoting Hollins, 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," id. at 834 (quoting Shalielehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously [*43] determined that the InterVarsity Christian Fellowship/USA ("IVCF"), an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. See id. at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord." Id. at 831 (citation omitted). In addition, IVCF’s website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." Id. (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF’s Purpose Statement and Doctrinal Basis." Id.

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in Conlon, the Funeral Home does not purport or seek to "establish and advance" Christian values. See id. As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious [*44] views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33-34 (citing R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 25-27, 30, 37) (Page ID #1832-35)). Though the Funeral Home’s mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R. 55 (Def.’s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home’s sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, see R. 51-3 (Rost 30(b)(6) Dep. at 39-40) (Page ID #652). The Funeral [*25] Home does not decorate its rooms with "religious figures" because it does not want to "offend[] people of different religions." R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 33) (Page ID #1834). The Funeral Home is open every day, including on Christian holidays. Id. at 88-89 (Page ID #659-60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. Id. at 89 (Page ID #660).

Nor is Stephens a "ministerial employee" under Hosanna-Tabor. Following Hosanna-Tabor, https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B- 00000-00&context=&link=clscc25 we have [*45] identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee’s title "conveys a religious—as opposed to secular—meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith" [*583] and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions . . . for the religious organization." Conlon, 777 F.3d at 834-35. Stephens’s title—"Funeral Director"—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," see id. at 835; rather, Rost’s description of funeral directors’ work identifies mostly secular tasks—making initial contact with the deceased’s families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating [*46] the families’ "final farewell," R. 53-3 (Rost Aff. ¶¶ 14-33) (Page ID #930-35). The only responsibilities assigned to
Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." [Id. ¶ 20 (Page ID #932-33)]. Such responsibilities are a far cry from the duties ascribed to the employee in Conlon, which "included assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.'" 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

[***26] b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). See City of Boerne v. Flores, 521 U.S. 507, 511-15, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). To that end, https://advance.lexis.com/api/document?collection=cases&id-urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc26[***27] RFRA [**47] precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless [**48] demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a [**584] burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that https://advance.lexis.com/api/document?collection=cases&id-urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc27 RFRA intended RFRA to apply only to suits in which the government is a party." Seventh-Day Adventists, 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. See id. Now that Stephens has intervened in this suit, she argues [***27] that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has [**49] never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); see also D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34-35 (citing Illinois Bell Tel. v. FCC, 911 F.2d 776, 786, 286 U.S. App. D.C. 34 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party
to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand [**50] before this court.

Stephens nevertheless insists that "intervenors . . . are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing Grutter v. Bollinger, 188 F.3d 394, 400-01 (6th Cir. 1999)). But in Grutter, this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

[***28] Moreover, https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clsc28 To consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] . . . litigation." Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1461 (6th Cir. 1988) (citation [*585] omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.8

8 For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. See Private Rights/Public Conscience Br. at 15; see also id. at 5-15; Americans United Br. at 6-15.

ii. Prima Facie Case Under RFRA


The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identify[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice,'" id. at 43 (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679, 384 U.S. App. D.C. 240 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels [**29] compelled by his faith to "serve grieving people" through the funeral home, and thus "requiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home's] ability to carry out Rost's religious exercise of caring for..."

An Amici may not raise "issues or arguments [that] . . . exceed those properly raised by the parties." Shoemaker v. City of Howell, 795 F.3d 553, 562 (6th Cir. 2015) (quoting Cellnet Communis. v. FCC, 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici's position.
the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. See United States v. Sterling, 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part . . . falls within RFRA's expansive definition of 'religious exercise"), cert. denied, 137 S. Ct. 2212, 198 L. Ed. 2d 657 (2017). The question then [*586] becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the [*53] Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden—that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60-61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition [*54] to the point that their healing [*30] from their loved ones' deaths would be hindered, see R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. See Tree of Life Christian Schs. v. City of Upper Arlington, 823 F.3d 365, 371-72 (6th Cir. 2016) (holding that this court "cannot assume . . . a fact" at the summary judgment stage); see also Guess?, Inc. v. United States, 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred belief regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' actual preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have [*55] seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); see also Langston-Bradley v. Pizzaco, Inc., 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven [*587] deliverymen because "[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers"). Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would "destroy the essence of [the defendant's] business"—a theory based on the premise that South American clients would not want to work with a female vice-president—because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at [*31] issue). District courts within [*56] this circuit have
endorsed these out-of-circuit opinions. See, e.g., Local 567 American Federation of State, etc. v. Michigan Council 25, American Federation of State, etc., 635 F. Supp. 1010, 1012 (E.D. Mich. 1986) (citing Diaz, 442 F.2d 385, and Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like Diaz, Fernandez, and Bradley concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position even if nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in Fernandez, and we reject it here. In Fernandez, the Ninth Circuit held that customer preferences could not transform a person's gender identity into a relevant consideration for a particular position even if the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. See 653 F.2d at 1276-77. Just as the Fernandez court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under Holt v. Hobbs, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015), https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc33 a government action that "puts [a religious practitioner] to th[e] choice" of "engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. See id. at 862 (quoting Hobby Lobby, 134 S. Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire" for the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure . . . to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38-39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, [**58] though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. See Appellant Br. at 49 ("[T]he EEOC's suit would require only that if Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees."); [*588] R. 54-2 (Rost Aff.) (Page ID 1326-37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in Hobby Lobby, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. See 134 S. Ct. at 2776. And while "it is predictable that the companies [in Hobby Lobby] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, id. at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]"—namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334-35)—constitutes "an honest conviction." See Hobby Lobby, 134 S. Ct. at 2779 (quoting Thomas, 450 U.S. at 716). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

[***33] Most circuits, including this one, have recognized that a party can sincerely believe that he is
being coerced into engaging in conduct that violates his religious convictions [*60] without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice. See Eternal Word TV Network, Inc. v. Sec'y of the United States HHS, 818 F.3d 1122, 1132-33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. See id. at 1141 (collecting cases); see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell, 807 F.3d 738 (6th Cir. 2015), cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell, 136 S. Ct. 2450, 195 L. Ed. 2d 261 (2016).9 The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute—and not the employer's act of opting out—that "entitle[d] plan participants and [*589] beneficiaries to [*61] contraceptive coverage." See, e.g., Eternal Word, 818 F.3d at 1148-49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. See id.

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare [*34] compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree [*62] with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (citing Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 250, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (plurality opinion)); see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841-42, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is not endorsing his employee's religious beliefs by employing them." Appellant Reply Br. at 18-19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834-36); R. 51-3 (Rost Dep. at 41-42) (Page ID #653)).

At bottom, the fact that Rost sincerely believes that he is being compelled [*63] to make such an endorsement does not make it so. Cf. Eternal Word, 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government

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9 Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.
requires and leaves that answer entirely to the religious adherent. Such a framework improperly [*35] substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination [*590] does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we REVERSE the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we GRANT summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, [*64] in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore GRANT summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] . . . the particular claimant whose sincere exercise of religion is being substantially burdened." Gonzales, 546 U.S. at 430-31 (citing 42 U.S.C. § 2000bb-1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." Id. at 431.

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex [*36] discrimination.'" Appellee Br. at 41 (quoting Appellant Br. at 51). However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. [*65] Id. According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." Id. The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing Lusardi v. McHugh, EEOC DOC 0120133395, 2015 EEOPUB LEXIS 896, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)).

 Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23-25.

[*591] The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim—that the Funeral Home terminated [*66] Stephens because of her proposed gender nonconforming behavior—the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in Hobby Lobby, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. See 134 S. Ct. at 2780.

11 While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. See R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 857-59.
The Supreme Court stated, the “stigmatizing injury” of discrimination proscribed by the statute. See, e.g., interest in eradicating all forms of invidious employment discrimination. Title VII serves a compelling interest in eradicating discrimination as a ‘highest priority.’ Congress clearly targeted the elimination of all forms of discrimination as a ‘highest priority.’ Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdens the exercise of religious convictions.”), abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).
cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc38 But O Centro's "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether the asserted harm of granting specific exemptions to particular religious claimants is sufficiently great to require compliance with the law. O Centro, 546 U.S. at 431. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII’s requirements.

Finally, we reject the Funeral Home’s claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC’s interest in eradicating discrimination, because “the constitutional guarantee of free exercise[,] effectuated here via RFRA . . .[,] is a higher-order right that necessarily supersedes a conflicting statutory right,” Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate . . . the First Amendment's guarantee of free exercise," id., because it sweeps more broadly than the Constitution demands. See Boerne, 521 U.S. at 532. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. See Cutter v. Wilkinson, 544 U.S. 709, 722, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution’s need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home’s discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc40 The final inquiry under RFRA is whether there exist "other means of achieving [the government’s] desired goal without imposing a substantial burden on the exercise of religion by the objecting party."]" Hobby Lobby, 134 S. Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," id. (citing Boerne, 521 U.S. at 532), and the EEOC bears the burden of showing that burdening the Funeral Home’s religious exercise constitutes the least restrictive means of furthering its compelling interests, see id. at 2779. Where an alternative option exists that furthers the government's interest "equally well," see id. at 2782, the government "must use it," Holt, 135 S. Ct. at 864 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." Hobby Lobby, 134 S. Ct. at 2781 n.37 (quoting Cutter, 544 U.S. at 720). Cost to the government may also be "an important factor in the least-restrictive-means analysis." Id. at 2781.

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens could wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost’s conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 861, 863.

Neither party endorses the district court’s proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to dress as a woman" and "would no longer dress as a man," see R. 54-5 (Rost 30(b)(6) Dep. at 136-37) (Page ID #1372) (emphasis added), the record also contains uncontested evidence that Rost’s reasons for terminating Stephens extended to other aspects of Stephens’s intended presentation. For instance, Rost stated that he fired DON DAVIS.
Stephens because Stephens "was no longer going to represent himself as a man," id. at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," id. at 74, 138-39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc41 At the summary-judgment stage, where a court may not "make credibility determinations," [*594] weigh the evidence, or draw [adverse] inferences from the facts," Terry Barr Sales Agency, Inc. v. All-Lock Co., 96 F.3d 174, 178 (6th Cir. 1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202, (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally as well." *594 Hobby Lobby, 134 S. Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether [***41] Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." See Oral Arg. at 46:50-47:46.

The Funeral Home's proposed alternative—to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44-45—is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis [**75] of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.13

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. See, e.g., Appellant Br. at 55-61; Intervenor Br. at 27-33. We agree.

To start, the Supreme Court has previously acknowledged that

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc42 "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA," O Centro, 546 U.S. at 436. The Court highlighted Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions." [*595] O Centro, 546 U.S. at 435. In Braunfeld, the plurality "denied a claimed [***42] exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." O Centro, 546 U.S. at 435 (quoting Sherbert, 374 U.S. at 408 (discussing Braunfeld)). Braunfeld thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exception to Sunday closing laws.

In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17-18) (Page ID #2117-18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." Hobby Lobby, 134 S. Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions—which it no longer pushes on appeal—are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." See id. at 2782.
exemption that would elevate its religious practices above a government policy designed [*76] to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, see O Centro, 546 U.S. at 435, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in Hobby Lobby, as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S. Ct. at 2783. As the Hobby Lobby Court explained, https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc43 "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." Id. We understand this to mean that enforcement actions brought under Title VII, which aims to "provide[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, see id., will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the [*77] opposite conclusion, reasoning that Hobby Lobby did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 857. But the majority did say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. Hobby Lobby, 134 S. Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc44 Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. See Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), [*43] adhered to on reconsideration, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 810-11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII"—"we also find that the intrusion is the least restrictive means that Congress could have used [*78] to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc45 "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 475 [*596] (5th Cir. 2014) (citing Hobby Lobby, 134 S. Ct. at 2781-82); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc46) "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (omission in original) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541-42, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring))). Indeed, a driving force in the Hobby Lobby Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." See 134 S. Ct. at 2782. https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc47 Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis [*79] of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1)—and in that case, the preference is no longer discriminatory in a
malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme’s objectives is through its enforcement.

[***44] State courts’ treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. See State v. Arlene’s Flowers, Inc., 187 Wn.2d 804, 389 P.3d 543, 565-66 (Wash. 2017) (collecting cases), petition for cert. filed Arlene’s Flowers, Inc. v. Washington, 86 U.S.L.W. 3047 (U.S. July 14, 2017) (No. 17-108). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home’s suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC’s interest in combating sex stereotypes. According to the Funeral Home, the EEOC’s requested relief reinforces sex stereotypes because the agency essentially asks that Stephens “be able to dress in a stereotypical feminine manner.” R.G. & G.R. Funeral Homes, Inc., 201 F. Supp. 3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court’s jurisprudence requires employers to reject their employer’s stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. See Smith, 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that “his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind” an adverse employment action (emphasis added)). Title VII protects both the right of male employees “to c[o]me to work with makeup or lipstick on [their] face[s],” Barnes, 401 F.3d at 734, and the right of female employees to refuse to “wear dresses or makeup,” Smith, 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering [**81] its compelling interest in eradicating discrimination in the workplace. Thus, even if we [**597] agreed with the Funeral Home that Rost’s religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless REVERSE the district court’s grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of [***45] furthering the government’s compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost’s religious exercise is substantially burdened by the EEOC’s enforcement action in this case, we GRANT summary judgment to the EEOC on the Funeral Home’s RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC’s discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is “limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.” EEOC v. Bailey Co., 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, [**82] Tipler v. E. I. Du Pont de Nemours & Co., 443 F.2d 125, 131 (6th Cir. 1971)), disapproved of on other grounds by Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)). The EEOC now urges us to hold that Bailey is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under Bailey, we need not decide whether Bailey has been rendered obsolete.

In Bailey, a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. Id. at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant’s charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had
seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding [**83] alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." Id. at 446. We determined, however, that the [***46] EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." Id. at 452 (citations omitted).

As we explained in Bailey, the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar [**598] with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. Id. at 446 (quoting Tipler, 443 F.2d at 131). Second, [**84] an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." Id. at 447 (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in Bailey that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." Id. at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have [**85] engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." Id.

The EEOC now insists that Bailey is no longer good law after the Supreme Court's decision in General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). In General Telephone, the Supreme Court held that Rule 23 of the Federal Rules of Civil [***47] Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. Id. at 331. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3)—are incompatible with the EEOC's enforcement responsibilities under Title VII:

The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any [**86] violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Don Davis

884 F.3d 560, *597; 2018 U.S. App. LEXIS 5720, **82; 2018 FED App. 0045P (6th Cir.), ***45

\*598; 2018 U.S. App. LEXIS 5720, **82; 2018 FED App. 0045P (6th Cir.), ***45
investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing Gen. Tel., 446 U.S. at 331)), we need not resolve Bailey's compatibility with General Telephone at this time because our holding in Bailey does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually [*87] distinguishable from Bailey. In Bailey, the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, [*48] Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.14 And, unlike the EEOC's investigation of religious discrimination in Bailey, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge [*88] of discrimination." See Bailey, 563 F.2d at 446. As we explained in Davis v. Sodexho, 157 F.3d 460 (6th Cir. 1998), [https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc50](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc50) "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." Id. at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether . . . there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." Leigh v. Bureau of State Lottery, 876 F.2d 104, 1989 WL 62509, at *3 (6th Cir. 1989) (Table) (citing Bailey, 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims [*89] alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to [*600] represent them in securing the higher paying job designations." [*49] Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 380 (6th Cir. 2002) (citing Farmer, 660 F.2d at 1105). As we recognized then, underlying the Farmer plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." Id. By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore REVERSE the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance [*90] claim and REMAND with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

[https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc51](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTH-B6C1-FC1F-M20B-00000-00&context=&link=clscc51) Discrimination

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14 The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. See R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.
against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer’s stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost’s religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore REVERSE the district court’s grant of summary judgment in favor of the Funeral Home and GRANT summary judgment to the EEOC on its unlawful-termination claim. We also REVERSE the district court’s grant of summary judgment on the EEOC’s discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC’s [*91] claim on the merits. We REMAND this case to the district court for further proceedings consistent with this opinion.

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1. *Price Waterhouse v. Hopkins, 490 U.S. 228*

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Price Waterhouse v. Hopkins

Supreme Court of the United States

October 31, 1988, Argued; May 1, 1989, Decided

No. 87-1167

Reporter

PRICE WATERHOUSE v. HOPKINS

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.


Core Terms

title vii, sex, cases, employment decision, plurality, motive, gender, causation, partnership, but-for, stereotyping, illegitimate, comments, decisions, burden of proof, shift a burden, evaluations, evidentiary, words, candidate, discriminatory, disparate treatment, candidacy, partners’, reasons, played, impermissible, burden of persuasion, discriminated, courts

Case Summary

Procedural Posture
Defendant employer appealed from the decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the lower court's ruling in favor of plaintiff employee in her sex discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

Overview
Defendant employer appealed a judgment in favor of plaintiff employee in her action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. The courts below held that an employer who had allowed a discriminatory impulse to play a motivating part in an employment decision could avoid liability by showing by clear and convincing evidence that it would have made the same decision in the absence of discrimination. However, the Supreme Court held that conventional rules of civil litigation generally applied in Title VII cases, and one of those rules was that parties to civil litigation need only prove their case by a preponderance of the evidence. Thus, the Court held that when a plaintiff in a Title VII case proved that gender played a motivating part in an employment decision, defendant could avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account.

Outcome
The Court reversed and remanded the case to the lower court, holding that defendant employer had to prove by a preponderance of the evidence that its employment decision relating to plaintiff employee was not motivated by a discriminatory purpose.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Labor & Employment Law > ... > Disability Discrimination > Evidence > General Overview

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Governments, Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 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. 42 U.S.C.S. §§ 2000e-2(a)(1), (2).

Torts > ... > Elements > Causation > Causation in Fact

Causation, Causation in Fact

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, the court begins by assuming that that factor was present at the time of the event, and then asks whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > General Overview

Gender & Sex Discrimination, Scope & Definitions

An important aspect of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., is its preservation of an employer's remaining freedom of choice. The preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.

Evidence > Burdens of Proof > Allocation

Labor & Employment Law > ... > Disability Discrimination > Evidence > General Overview

Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > EEOC & State Actions

Burdens of Proof, Allocation

After a plaintiff has made out a prima facie case of discrimination under Title VII of the Civil Right Act of 1964, 42 U.S.C.S. § 2000e et seq., the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. The plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision.
Since the plaintiff retains the burden of persuasion on the issue whether gender played a part in an employment decision, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

When an employer has asserted that gender is a bona fide occupational qualification within the meaning of § 703(e) of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(e), the employer who must show why it must use gender as a criterion in employment.

If an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision.

As to the employer's proof in sex discrimination suits, in most cases, the employer should be able to present some objective evidence as to its probable decision in
the absence of an impermissible motive. Moreover, proving that the same decision would have been justified is not the same as proving that the same decision would have been made. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason.

An employer who had allowed a discriminatory impulse to play a motivating part in an employment decision must prove by a preponderance of the evidence that it would have made the same decision in the absence of discrimination.

Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action, action more dramatic than entering an award of money damages or other conventional relief, against an individual.
following year, suggested that she could improve her chances for partnership by walking, talking, and dressing more femininely. After the partners in her office refused to repropose her for partnership the next year, the woman resigned and brought an action against the firm in the United States District Court for the District of Columbia, which action alleged that the firm had discriminated against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), partly on the theory that the evaluations of the woman had been based on sexual stereotyping. The District Court (1) held the firm liable under that theory, as it found that (a) the firm and its partners had not intentionally discriminated on the basis of gender, but (b) the firm had consciously maintained a system which, in this and other partner-candidacy decisions, had given weight to biased criticisms without discouraging sexism or investigating comments to determine whether they were influenced by sexual stereotypes; and (2) ruled that, while the firm could avoid equitable relief such as an order for backpay by proving by clear and convincing evidence that it would have placed the woman's candidacy on hold even absent the discrimination, it had not met that burden of proof; but (3) concluded on other grounds that the woman was not entitled to any relief except (a) attorneys' fees and (b) the difference between her pay and that of a partner from the date she would have been elected partner until her resignation (618 F Supp 1109).

The United States Court of Appeals for the District of Columbia Circuit (1) affirmed the District Court's judgment with regard to liability, although it held that an employer may avoid liability, and not merely equitable relief, if it proves by clear and convincing evidence that it would have made the same employment decision even if discrimination had not played a role; (2) reversed the District Court's judgment with respect to remedies; and (3) remanded the case for the determination of appropriate damages and relief (825 F2d 458).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals with respect to the firm's liability and remanded the case for further proceedings. Although unable to agree on an opinion, six members of the court agreed that (1) on some showing by the plaintiff in a Title VII action that an illegitimate factor such as gender entered into an employment decision--which showing had been sufficiently made by the woman in the case at hand--the employer may be required to prove, by a preponderance of the evidence, that it would have made the same decision absent consideration of the illegitimate factor; but (2) the courts below had erred in requiring the defendant firm to prove this point by clear and convincing evidence.

Brennan, J., announced the judgment of the court and, in an opinion joined by Marshall, Blackmun, and Stevens, J.J., expressed the view that (1) when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision, for a legitimate reason, even if it had not taken the plaintiff's gender into account; (2) gender need not be a "but-for" cause of an employment decision in order for the decision to have been made "because of" sex within the prohibition of Title VII, and the burden placed on the employer under the above rule is most appropriately deemed an affirmative defense rather than a shift in the burden of proof; (3) the District Court's finding that sexual stereotyping was permitted to play a part in the evaluation of the plaintiff in this case was not clearly erroneous, given that the firm relied heavily on partner evaluations and had not disclaimed reliance on the sexual-stereotype comments, and regardless of the fact that many of those comments were made by the plaintiff's supporters; (4) in most cases the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive; and (5) the principles announced in this opinion apply with equal force to discrimination based on race, religion, or natural origin.

White, J., concurred in the judgment, expressing the view that (1) the plaintiff's burden was to show not that the illegitimate factor was the only, principal, or true reason for the firm's action, but that the unlawful motive was a substantial factor in the adverse employment action; (2) the burden of persuasion then should have shifted to the defendant firm to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the unlawful motive; (3) if that burden of proof is carried, there is no violation of Title VII; and (4) there is no special requirement in such cases that the employer carry its burden by objective evidence, and ample proof is provided if the legitimate motive found would have been ample ground for the action taken and the employer credibly testifies that the action would have been taken for the legitimate reasons alone.

O'Connor, J., concurred in the judgment, expressing the view that (1) if a plaintiff alleging individual disparate treatment under Title VII offers direct evidence that an
illegitimate criterion was a substantial factor in the employment decision in question, and proves this point by a preponderance of the evidence, then the burden shifts to the defendant employer to demonstrate by a preponderance of the evidence that, with the illegitimate factor removed, sufficient business reasons would have led to the same decision; (2) a substantive violation of Title VII occurs only when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action, but when a plaintiff makes the above showing, a reasonable factfinder could conclude, absent further explanation, that the employer's discriminatory motive "caused" its decision, and nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule shifting the burden of persuasion to the employer; and (3) this burden-shift rule is part of the liability phase of the case.

Kennedy, J., joined by Rehnquist, Ch. J., and Scalia, J., dissented, expressing the view that (1) regardless of who bears the burden of proof, Title VII liability requires a finding that impermissible motives are a "but-for" cause of employment decisions; (2) while an inference of discrimination arises once a Title VII plaintiff presents a prima facie case, and the defendant must then rebut that inference by articulating a legitimate nondiscriminatory reason for its action, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; (3) the burden-shift rule adopted by the court will benefit plaintiffs in only a limited number of cases, and will burden the courts with the difficult and confusing task of developing standards for determining when to apply that rule; and (4) since the District Court found that sex discrimination was not a "but-for" cause of the defendant's decision to put the plaintiff's partnership candidacy on hold, the case should be remanded for entry of a judgment in favor of the defendant.

Headnotes

APPEAL §1677 > CIVIL RIGHTS §63 > EVIDENCE §383 > employment discrimination action -- Title VII -- burden of proof -- reversal and remand -- > Headnote:

Under the facts presented in an action charging a nationwide professional accounting firm with employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.)--where (1) the plaintiff, a woman who formerly worked for the firm as a senior manager, alleges that the firm's decision to place her nomination for partnership on hold for a year, based on evaluations by the nearly all-male partners that were critical of the woman's interpersonal skills, reflects sexual stereotyping, and (2) a Federal District Court, in holding the firm liable, finds that the firm had not fabricated the complaints about the woman's interpersonal skills, and had not given those traits decisive emphasis only because of her gender, but had consciously given credence and effect to partners' comments resulting from sexual stereotypes--the firm is properly required to prove by a preponderance of the evidence that it would have reached the same decision concerning the woman's candidacy for partnership absent consideration of her gender, and, on certiorari, the United States Supreme Court will reverse a Federal Court of Appeals' judgment which affirms the finding of liability because of the firm's failure to make such a showing by clear and convincing evidence, and will remand the case for further proceedings, where (1) four Justices are of the opinion that (a) when a plaintiff in a Title VII case proves her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision, for a legitimate reason, even if it had not taken the plaintiff's gender into account, (b) gender need not be a "but-for" cause of an employment decision in order for the decision to have been taken "because of" sex within the prohibition of Title VII, and the burden placed on the employer under the above rule is most appropriately deemed an affirmative defense rather than a shift in the burden of proof, and (c) the same principles apply to cases of discrimination on the basis of race, religion, or national origin; (2) a fifth Justice is of the opinion that (a) the woman in this case has the burden of showing, not that the illegitimate factor was the only, principal, or true reason for the firm's action, but that the unlawful motive was a substantial factor in the adverse employment action, (b) the burden of persuasion then should have shifted to the defendant firm to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the unlawful motive, and (c) if that burden is carried, there is no violation of Title VII; and (3) a sixth Justice is of the opinion that (a) if a plaintiff alleging individual disparate treatment under Title VII shows by a preponderance of the evidence, using direct evidence, that an illegitimate criterion was a substantial factor in the employment decision in question, then the burden shifts to the defendant employer to demonstrate by a preponderance of the evidence that, with the illegitimate factor removed,
sufficient business reasons would have led to the same decision, (b) a substantive violation of Title VII occurs only when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action, but when a plaintiff makes the above showing, a reasonable factfinder could conclude, absent further explanation, that the employer's discriminatory motive "caused" its decision, and nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule shifting the burden of persuasion to the employer, and (c) this burden-shift is properly part of the liability phase of the litigation. [Per Brennan, Marshall, Blackmun, Stevens, White, and O'Connor, JJ. Dissenting: Kennedy, J., Rehnquist, Ch. J., and Scalia, J.]

Syllabus

Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held: The judgment is reversed, and the case is remanded.

Counsel: Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were Paul M. Bator, Douglas A. Poe, Eldon Olson, and Ulric R. Sullivan. James H. Heller argued the cause for respondent. With him on the brief was Douglas B. Huron. *

[**231] [***276] [**1780] JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e et


Briefs of amici curiae urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by Marsha S. Berzon and Laurence Gold; for the American Psychological Association by Donald N. Bersoff; for the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York by Jonathan Lang, Eugene S. Friedman, Arthur Leonard, and Colleen McMahon; and for the NOW Legal Defense and Education Fund et al. by Sarah E. Burns, Lynn Hecht Schafran, Joan E. Bertin, John A. Powell, and Donna R. Lenhoff.

Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Clegg, Brian J. Martin, and David K. Flynn filed a brief for the United States as amicus curiae.
including Hopkins -- were "held" for reconsideration the partnership. [****6] seven of these candidates were admitted to the partnership that year, only 1 -- Hopkins -- was a woman. Forty-eight women. Of the 88 persons proposed for partnership, Washington, D. C., for five years when the partners in Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D. C. The Office of Government Services is responsible for the Office's internal audit and financial management functions. The Office's principal client is the Department of State, which receives the Office's services free of charge. [***277] Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D. C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1 -- Hopkins -- was a woman. Forty-seven of these candidates were admitted to the partnership. [****6] 21 were rejected, and 20 -- including Hopkins -- were "held" for reconsideration the following year. [1] Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

[****7] [**1782] In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." Plaintiff's Exh. 15. Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Gesell specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." 618 F. Supp., at 1112. Indeed, he went on, "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." Ibid.

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity." Plaintiff's Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Tr. 150. Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist." Id., at 156-157. Evaluations such as these led Judge Gesell to conclude that Hopkins "had

1 Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned. Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose her for partnership amounted to a constructive discharge. That court remanded the case to the District Court for further proceedings to determine appropriate relief, and those proceedings have been stayed pending our decision. Brief for Petitioner 15, n. 3. We are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold. Decisions pertaining to advancement to partnership are, of course, subject to challenge under Title VII. Hishon v. King & Spalding, 467 U.S. 69 (1984).
no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." 618 F. Supp., at 1112-1113.

[***278] On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for [****9] partnership. Virtually all of the partners' negative remarks about Hopkins -- even those of partners supporting her -- had to do with her "inter-personal [*235] skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." Id., at 1113.

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" (Defendant's Exh. 30); another suggested that she "overcompensated for being a woman" (Defendant's Exh. 31); a third advised her to take "a course at charm school" (Defendant's Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Tr. 321. Another supporter explained that Hopkins "had matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Defendant's Exh. 27. But it was the man who, as Judge Gesell found, [****10] bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F. Supp., at 1117.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at [**1783] Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff (Defendant's Exh. 27), and another described her as "consistently annoying and irritating" (ibid.); yet these were people who had had very little contact with Hopkins. According to [‘236] Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) [****11] and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping -- although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

[***279] In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[inity] while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[ber]' was regarded as [a] negative comment." 618 F. Supp., at 1117. In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers [****12] -- yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." Ibid.

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an
impermissibly [*237] cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to dissavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by [****13] proving by clear and convincing evidence that it would have placed Hopkins’ candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court’s ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. 263 U.S. App. D. C., at 333-334, 825 F. 2d, at 470-471. Under this approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court’s approach, the employer’s proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the [**1784] employer to make its proof by clear and convincing evidence.

II

The specification of the standard of causation under Title VII is a decision [****14] about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee’s [**280] gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse’s theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had [*238] not discriminated. In Hopkins’ view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer’s proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability. 2 We conclude that, as often happens, the truth lies somewhere in between.

[****15] [*239] A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. 3 Yet, the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions. The converse, therefore, of [**281] “for cause” legislation, 4 Title VII eliminates [**1785] certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

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2 This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, e. g., Bellissimo v. Westminster Electric Corp., 764 F. 2d 175, 179 (CA3 1985), cert. denied, 475 U.S. 1035 (1986); Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-366 (CA4 1985); Peters v. Shreveport, 818 F. 2d 1148, 1161 (CA5 1987); McQuillen v. Wisconsin Education Assn. Council, 830 F. 2d 659, 664-665 (CA7 1987). The First, Second, Sixth, and Eleventh Circuits, on the other hand, hold that once the plaintiff has shown that a discriminatory motive was a "substantial" or "motivating" factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, e. g., Fields v. Clark University, 817 F. 2d 936-937 (CA1 1987) (“motivating factor”); Berl v. Westchester County, 849 F. 2d 712, 714-715 (CA2 1988) (“substantial part”); Terbovitz v. Fiscal Court of Adair County, Ky., 825 F. 2d 111, 115 (CA6 1987) (“motivating factor”); Bell v. Birmingham Linen Service, 715 F. 2d 1552, 1557 (CA11 1983). The Court of Appeals for the District of Columbia Circuit, as shown in this case, follows the same rule except that it requires that the employer’s proof be clear and convincing rather than merely preponderant. 263 U.S. App. D. C. 321, 333-334, 825 F. 2d 458, 470-471 (1987); see also Toney v. Block, 227 U.S. App. D. C. 273, 275, 705 F. 2d 1364, 1366 (1983) (Scalia, J.) (it would be "destructive of the purposes of [Title VII] to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). The Court of Appeals for the Ninth Circuit also requires clear and
Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of . . . sex." 42 U. S. C. §§ 2000e-2(a)(1), (2) (emphasis added). 5 [****17] We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them. 6

convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment decision -- at which point the employer may avoid liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, e. g., Fadhl v. City and County of San Francisco, 741 F. 2d 1163, 1165-1166 (1984) (Kennedy, J.) ("significant factor"). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, e. g., Bibbs v. Block, 778 F. 2d 1318, 1320-1324 (1985) (en banc) ("discernible factor").

We disregard, for purposes of this discussion, the special context of affirmative action.

Congress specifically declined to require that an employment decision have been "for cause" in order to escape an affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an "individual was . . . refused employment or advancement, or was suspended or discharged for cause." H. R. Rep. No. 7152, 88th Cong., 1st Sess., 77 (1963) (emphasis added). The phrase "for cause" eventually was deleted in favor of the phrase "for any reason other than" one of the enumerated characteristics. See 110 Cong. Rec. 2567-2571 (1964). Representative Celler explained that this substitution "specif[ied] cause"; in his view, a court "cannot find any violation of the act which is based on facts other . . . than discrimination on the grounds of race, color, religion, or national origin." Id., at 2567.

In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that "tended to deprive" a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

We made passing reference to a similar question in McDonald v. Santa Fe Trail Transportation Co., 427 U. S. 273, 6 (1976), where we stated that when a Title VII plaintiff seeks to show that an employer's explanation for a challenged employment decision is pretextual, "no more is required to be shown than that race was a 'but for' cause." This passage, however, does not suggest that the plaintiff must show but-for cause; it indicates only that if she does so, she prevails. More important, McDonald dealt with the question whether the employer's stated reason for its decision was the reason for its action; unlike the case before us today, therefore, McDonald did not involve mixed motives. This difference is decisive in distinguishing this case from those involving "pretext." See infra, at 247, n. 12.

7 Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of." 110 Cong. Rec. 2728, 13837 (1964).

VII but-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that [****18] that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ("to fail or refuse"), in contrast, turns our attention to the actual moment of the [****19] event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the [***282] words "because of" do not mean "solely because of," 7 we also know
Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations— even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account. [*241]

To say that an employer may not take gender into account in making an employment decision, namely, when gender is a “bona fide occupational qualification [BFOQ]" reasonably necessary to the normal operation of th[e] particular business or enterprise.” 42 U. S. C. § 2000e-2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.

An employer may not, we [*242] have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

To begin with, the existence of the BFOQ [*22] exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact [*243] cases, see Watson and Griggs, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In McDonnell Douglas, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no [*187] racial discrimination, subtle or otherwise." 411 U.S., at 801.

When an employer ignored the attributes enumerated in the statute, Congress hoped, [*23] it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the

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To attribute this meaning to the words "because of" does not, as the dissent asserts, [*1786] post, at 282, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. Ibid. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine[*20] that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant [*242] to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words "because of" also is supported by the fact that https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:3S4X-BDG0-003B-42B6- 00000-00&context=&link=clscc3 Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification [BFOQ]" reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U. S. C. § 2000e-2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.

An employer may not, we [*241] have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:3S4X-BDG0-003B-42B6- 00000-00&context=&link=clscc5 The other important aspect of [*283] the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ [*22] exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact [*243] cases, see Watson and Griggs, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In McDonnell Douglas, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no [*187] racial discrimination, subtle or otherwise." 411 U.S., at 801.

When an employer ignored the attributes enumerated in the statute, Congress hoped, [*23] it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the

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theme of a good deal of the statute's legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, coauthors of the bill in the Senate, is representative of this general theme. According to their memorandum, Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 8 According to their memorandum, Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 9 110 Cong. Rec. 7247 (1964), quoted in [***244] Duke Power Co., supra, at 434. The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong. Rec. 7213 (1964).

[***25] Many other legislators made statements to a similar effect; we see no need to set out each remark in full here. The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think 8 We have in the past acknowledged the authoritative nature of this interpretive memorandum, written by the two bipartisan "captains" of Title VII. See, e.g., Firefighters v. Stotts, 467 U.S. 561, 581, n. 14 (1984).

Many of the legislators' statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which "sex" came to be included as a forbidden criterion for employment -- it was included in an attempt to defeat the bill, see C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-117 (1985) -- does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added "sex" as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.

By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin. 9 Many of the legislators' statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which "sex" came to be included as a forbidden criterion for employment -- it was included in an attempt to defeat the bill, see C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-117 (1985) -- does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added "sex" as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.

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these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

[***26] Our holding casts no shadow on Burdine, in which we decided that, 10 Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received. She relies on Title VII's § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual . . . if such individual was refused . . . employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-5(g) (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g) -- a provision defining remedies -- to influence the substantive commands of the statute. We think that this provision merely limits courts' authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer's discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions. "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984), quoting Teamsters v. United States, 431 U.S. 324, 360, n. 46 (1977).

Without explicitly mentioning this portion of § 706(g), we have in the past held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. See

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discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. [*246] 450 U.S., at 256-258. We stress, first, that neither [*246] court below shifted the burden of persuasion to Price Waterhouse on this question, and in fact, the District Court found that Hopkins had not shown that the firm's stated reason for its decision was pretextual. 618 F. Supp., at 1114-1115. Moreover, since we hold that [****27] the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in Burdine. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on [*247] another. See NLRA v. Transportation Management Corp., 462 U.S. 393, 400 (1983). 11

11 Given that both the plaintiff and defendant bear a burden of proof in cases such as this one, it is surprising that the dissent insists that our approach requires the employer to bear "the ultimate burden of proof." Post, at 288. It is, moreover, perfectly consistent to say both that gender was a factor in a particular decision when it was made and that, when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination. Thus, we do not see the "internal inconsistency" in our opinion that the dissent perceives. See post, at 285-286. Finally, where liability is imposed because an employer is unable to prove that it would have made the same decision even if it had not discriminated, this is not an imposition of liability "where sex made no difference to the outcome." Post, at 285. In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision even if it had not discriminated, this is not an inconsistency in our opinion that the dissent perceives. See, e.g., post, at 292. Juries long have been required to cast aspersions on the utility of that scheme in the absence of discrimination, we are entitled to conclude that gender did make a difference to the outcome.

[****28] Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until the plaintiff has shown "substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the 'true reason' for its action" (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case [*247] must squeeze her proof into Burdine's framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was [*1789] "the 'true reason'" (Brief for Petitioner 20 (emphasis added)) for the decision -- which is the question asked by Burdine. See Transportation Management, supra, at 400, n. 5. 12 [***286] Obvious to this last point, the dissent would insist that Burdine's framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source -- for the premise of Burdine[***29] is that either a legitimate or an illegitimate set of considerations led to the challenged decision. To say that Burdine's evidentiary scheme will not help us decide a case admittedly involving both kinds of considerations is not to cast aspersions on the utility of that scheme in the

[12] Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following Burdine, that the employer's stated reason for its decision was pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. See, e.g., post, at 292. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.

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These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. NLRA v. Transportation Management Corp., 462 U.S. 393, 400, n. 5 (1983). See Burdine Transportation Management, supra, at 400, n. 9 (1977). These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. NLRA v. Transportation Management Corp., 462 U.S. 393, 400, n. 5 (1983).
circumstances for which it was designed.

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice.

When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. See Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977). In a related context, although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a "factor other than sex," see 29 U. S. C. § 206(d)(1), we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked. See Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). Finally, some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy. See, e. g., Hayes v. Shelby Memorial Hospital, 726 F. 2d 1543, 1548 (CA11 1984); Wright v. Olin Corp., 697 F. 2d 1172, 1187 (CA4 1982).

As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 [**1790] (1977), the [**249] plaintiff claimed that [****32] he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. Because we did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." id., at 285, we concluded that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." Id., at 286. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." Id., at 287. A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision. See Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 417 (1979).

In Transportation Management, we upheld the NLRB's interpretation of § 10(c) of the National Labor Relations Act, which forbids a court to order affirmative relief for discriminatory conduct against a union member "if such individual was suspended or discharged for cause." 29 U. S. C. § 160(c). The Board had decided that this provision meant that once an employee had shown that his suspension or discharge was based in part on hostility to unions, it was up to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive. In such a situation, we emphasized, [**250] "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." 462 U.S., at 403.

We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful
motive. Our decision today treads this well-worn path.

C

In saying that gender played a motivating part in an employment [*288] decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. [*251] In the specific context of sex stereotyping, [***1791] an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

[***35] Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. [*251] As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. See infra, at 255-256. As for the legal relevance of sex stereotyping, 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." Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness[***36] in women but whose positions require that trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:3S4X-BDG0-003B-42B6- 00000-00&context=&link=clscc11[††] Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination[***37] brought to ground and visited upon" an employee. Brief for Respondent 30. By focusing on Hopkins' [***289] specific proof, however, we do not suggest a limitation on the possible ways [*252] of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But see post, at 277 (O'Connor, J., concurring in judgment).

https://advance.lexis.com/api/document?collection= cases&id=urn:contentItem:3S4X-BDG0-003B-42B6- 00000-00&context=&link=clscc12[††] As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. 14 Moreover, proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." Givhan, 439 U.S., at 416, quoting Ayers v. Western Line Consolidated School District, 555 F. 2d 1309, 1315 (CA5 1977). An employer may not, in other words, prevail in a mixed-motives case by offering a

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13 After comparing this description of the plaintiff's proof to that offered by Justice O'Connor's opinion concurring in the judgment, post, at 276-277, we do not understand why the concurrence suggests that they are meaningfully different from each other, see post, at 275, 277-279. Nor do we see how the inquiry that we have described is "hypothetical," see post, at 283, n. 1. It seeks to determine the content of the entire set of reasons for a decision, rather than shaving off one reason in an attempt to determine what the decision would have been in the absence of that consideration. The inquiry that we describe thus strikes us as a distinctly nonhypothetical one.

14 Justice White's suggestion, post, at 261, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling.

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legitimate [****38] and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate [**1792] reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

III

The courts below held that an employer who has allowed a discriminatory [****39] impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence [*253] of discrimination. We are persuaded that the better rule is that

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDG0-003B-42B6-00000-00&context=&link=clscc13[‡] the employer must make this showing by a preponderance of the evidence.

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDG0-003B-42B6-00000-00&context=&link=clscc14[‡] Conventional rules of civil litigation generally apply in Title VII cases, see, e. g., United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. See, e. g., Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action -- action more dramatic than entering an award of [****40] money damages or other conventional relief -- against an individual. See Santosky v. Kramer, 455 U.S. 745, 756 (1982) (termination of parental rights); Addington v. Texas, 441 U.S. 418, 427 (1979) (involuntary [**290] commitment); Woody v. INS, 385 U.S. 276 (1966) (deportation); Schneiderman v. United States, 320 U.S. 118, 122, 125 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, see, e. g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (defamation), and we find it significant that in such cases it was the defendant rather than the plaintiff who sought the elevated standard of proof -- suggesting that this standard ordinarily serves as a shield rather than, as Hopkins seeks to use it, as a sword.

It is true, as Hopkins emphasizes, that we have noted the "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931). [****41] Likewise, an Equal Employment Opportunity Commission (EEOC) regulation does require federal agencies proved to have violated [*254] Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief. See 29 CFR § 1613.271(c)(2) (1988). And finally, it is true that we have emphasized the importance of make-whole relief for victims of discrimination. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). Yet each of these sources deals with the proper determination of relief rather than with the initial finding of liability. This is seen most easily in the EEOC's regulation, which operates only after an agency or the EEOC has found that "an employee of the agency was discriminated against." See 29 CFR § 1613.271(c)(2) (1988). Because we have held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help Hopkins to show why [**1793] we should elevate the standard of proof for an employer in this position.

Significantly, the cases from this Court [****42] that most resemble this one, Mt. Healthy and Transportation Management, did not require clear and convincing proof. Mt. Healthy, 429 U.S., at 287; Transportation Management, 462 U.S., at 400, 403. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Although Price Waterhouse does not concretely tell us how its proof was preponderant even if it was not clear and convincing, this general claim is implicit in its request for the less stringent standard. Since the lower
courts required Price Waterhouse to make its proof by clear and convincing evidence, they did not determine whether Price Waterhouse had proved by a preponderance of the evidence that it would have placed Hopkins’ candidacy on hold even if it had not permitted [*255] sex-linked evaluations to play a part [***291] in the decision-making [***43] process. Thus, we shall remand this case so that that determination can be made.

IV

The District Court found that sex stereotyping “was permitted to play a part” in the evaluation of Hopkins as a candidate for partnership. 618 F. Supp., at 1120. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins’ candidacy on hold. In the firm’s view, in other words, the District Court’s factual conclusions are clearly erroneous. We do not agree.

In finding that some of the partners’ comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske’s expert testimony. Without directly impugning Dr. Fiske’s credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel for Price Waterhouse twice assured the court that he did not question Dr. Fiske’s expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned [***44] sex stereotyping in the partners’ evaluations of Hopkins, and she further explained that it was part of her business to identify stereotyping in written documents. Id., at 64. We are not inclined to accept petitioner’s belated and unsubstantiated characterization of Dr. Fiske’s testimony as “gossamer evidence” (Brief for Petitioner 20) based only on “intuitive hunches” (id., at 44) and of her detection of sex stereotyping as “intuitively divined” (id., at 43). Nor are we disposed to adopt the dissent’s dismissive attitude toward Dr. Fiske’s field of study and toward her own professional integrity, see post, at 293-294, n. 5.

[*256] Indeed, we are tempted to say that Dr. Fiske’s expert testimony was merely icing on Hopkins’ cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer’s memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills [***45] that has drawn the criticism. 15

[***1794] Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm’s partners; that it generally relied very heavily on such evaluations in making its decision; [***46] [***292] that some of the partners’ comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins’ case or in the past. Certainly a plausible -- and, one might say, inevitable -- conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper deportment. 16

[*257] Price Waterhouse concedes that the proof [***47] in Transportation Management adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. Brief for Petitioner 45. But the only evidence in that case that a discriminatory motive contributed to the plaintiff’s discharge was that the employer harbored a grudge toward the plaintiff on account of his union

15 We reject the claim, advanced by Price Waterhouse here and by the dissenting judge below, that the District Court clearly erred in finding that Beyer was “responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy.” 618 F. Supp., at 1117. This conclusion was reasonable in light of the testimony at trial of a member of both the Policy Board and the Admissions Committee, who stated that he had “no doubt” that Beyer would discuss with Hopkins the reasons for placing her candidacy on hold and that Beyer “knew exactly where the problems were” regarding Hopkins. Tr. 316.

16 We do not understand the dissenters’ dissatisfaction with the District Judge’s statements regarding the failure of Price Waterhouse to “sensitize” partners to the dangers of sexism. Post, at 294. Made in the context of determining that Price Waterhouse had not disclaimed reliance on sex-based evaluations, and following the judge’s description of the firm’s history of condoning such evaluations, the judge’s remarks seem to us justified.

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activity; there was, contrary to Price Waterhouse's suggestion, no direct evidence that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U.S., at 396. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

Nor is the finding that sex stereotyping played a part in the Policy Board's decision undermined by the fact that many of the suspect comments were made by supporters rather than detractors of Hopkins. A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate; the Policy Board, in fact, did not simply tally the "yesses" and "noes" regarding a candidate, [*258] but carefully reviewed the content of the submitted comments. The additional suggestion that the comments were made by "persons outside the decisionmaking chain" (Brief for Petitioner 48) -- and therefore could not have harmed Hopkins -- simply ignores the critical role that partners' comments played in the Policy Board's partnership decisions.

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory [*258] on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a woman manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew [*293] that Hopkins had "personality problems," this would [*49] not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as [*1795] sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

We hold that

https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDG0-003B-42B6-00000-00&context=&link=clscc15 when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

It is so ordered.

Concur by: WHITE; O'CONNOR

Concur

JUSTICE WHITE, concurring in the judgment.

In my view, [*50] to determine the proper approach to causation in this case, we need look only to the Court's opinion in Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). In Mt. Healthy, a public employee was not rehired, in part [*259] because of his exercise of First Amendment rights and in part because of permissible considerations. The Court rejected a rule of causation that focused 'solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire," on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. Id., at 285. Instead, the Court outlined the following approach:

"Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' -- or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence [*51] that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." Id., at 287 (footnote omitted).
It is not necessary to get into semantic discussions on whether the Mt. Healthy approach is "but-for" causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. As in Mt. Healthy, the District Court found that the employer was motivated by both legitimate and illegitimate factors. And here, as in Mt. Healthy, and as the Court now holds, Hopkins was not required [***294] to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a substantial factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found, 263 U.S. App. D. C. 321, 333, 334, 825 F. 2d 458, 470, 471 (1987), and I agree that the finding was supported by the record. The burden of persuasion then [260] should have shifted [****52] to Price Waterhouse to prove "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of" the unlawful motive. Mt. Healthy, supra, at 287.

I agree with Justice Brennan that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 [**1796] (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court has made clear that "mixed-motives" cases, such as the present one, are different from pretext cases such as McDonnell Douglas and Burdine. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." NLRB v. Transportation Management Corp., 462 U.S. 393, 400, n. 5 (1983). In mixed-motives cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. It can hardly be said that our decision in this case is a departure from cases [****53] that are "inapposite." Ibid. I also disagree with the dissent's assertion that this approach to causation is inconsistent with our statement in Burdine that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S., at 253. As we indicated in Transportation Management Corp., the showing required by Mt. Healthy does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her. See 462 U.S., at 400, n. 5.

Because the Court of Appeals required Price Waterhouse to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in Mt. Healthy, I concur in the judgment reversing this case in part and remanding. [*261] With respect to the employer's burden, however, the plurality seems to require, at least in most cases, that the employer submit objective evidence that the same result would have [****54] occurred absent the unlawful motivation. Ante, at 252. In my view, however, there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This [295] would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.

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JUSTICE O'CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision [****55] concerning Ann Hopkins' candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation. I thus concur in the judgment of the Court. My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving [262] substantial weight to an impermissible [**1797] criterion. I write separately to explain why I believe such a departure from the McDonnell Douglas standard is justified in the circumstances presented by this and like cases, and to

* I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.
express my views as to when and how the strong medicine of requiring [*56] the employer to bear the burden of persuasion on the issue of causation should be administered.


Title VII provides in pertinent part: “It shall be an unlawful employment practice for an employer . . . to fail or refuse 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 race, color, religion, sex, or national origin.” 42 U. S. C. § 2000e-2(a) (emphasis added). The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a "thought control bill," and argued that it created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (remarks of Sen. Ervin). [*57] Senator Case, whose views the plurality finds so persuasive elsewhere, responded:

"The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental [*269] act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." Ibid.

Thus, I disagree with the plurality’s dictum that the words "because of" do not mean "but-for" causation; manifestly they [*263] do. See Sheet Metal Workers v. EEOC, 478 U.S. 421, 499 (1986) (White, J., dissenting) ("[T]he general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination"). We should not, and need not, deviate from that policy today. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

The evidence of congressional intent as to which party should bear the burden of proof on the issue of causation is considerably less clear. No doubt, as a general matter, Congress assumed [*58] that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. As the dissent points out, post, at 287, n. 3, the interpretative memorandum submitted by sponsors of Title VII indicates that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964) (emphasis added). But in the area of tort liability, from whence the dissent's "but-for" standard of causation is derived, see post, at 282, the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury. See e. g., Summers v. Tice, 33 Cal. 2d 80, 84-87, 199 P. 2d 1, 3-4 (1948). The same rule has been applied where the effect of a defendant's tortious [*59] conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See Kingston v. Chicago & N. W. R. Co., 191 Wis. 610, 616, 211 N. W. 913, 915 (1927) ("Granting that the union of that fire [caused by defendant's [*264] negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that . . . the fire set by him was not the proximate cause of the damage"). See also 2 J. Wigmore, Select Cases on the Law of Torts § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm").

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement [*60] of the policies behind those causes of action,

[*297] "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a
direction that is consistent with the policy considerations that underlie the controversy." Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956).

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination in employment. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (**61) (citation omitted). The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Id., at 418.

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." 110 Cong. Rec. 7218 (1964). See also id., at 13088 (remarks of Sen. Humphrey) ("What the bill does... is simply to make it an illegal practice to use race as a factor in denying employment"). Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, [**62] the inclusion of race or sex as a consideration within it harms both society and the individual. See Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a substantial factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's [**1799] discriminatory motivation "caused" the employment decision. The employer has [**266] not yet been shown to be a violator, but neither is it entitled to the same presumption of good [**298] faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in [**63] the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

We have given recognition to these principles in our cases which have discussed the "remedial phase" of class action disparate treatment cases. Once the class has established that discrimination against a protected group was essentially the employer's "standard practice," there has been harm to the group and injunctive relief is appropriate. But as to the individual members of the class, the liability phase of the litigation is not complete. See Dillon v. Coles, 746 F. 2d 998, 1004 (CA3 1984) ("It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case") (footnote omitted). Because the class has already demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons." Teamsters v. United States, 431 U.S. 324, 362 (1977). [**64] See also Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976).

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or [**267] contrary to the substantive command of the statute. In fact, an individual plaintiff who has shown that an illegitimate factor played a substantial role in the decision in his or her case has proved more than the class member in a Teamsters type action. The latter receives the benefit of a burden shift to the defendant
based on the likelihood that an illegitimate criterion was a factor in the individual employment decision.

There is a tension between the Franks and Teamsters line of decisions and the individual disparate treatment cases cited by the dissent. See post, at 286-289. Logically, under the dissent's view, each member of a disparate treatment class action would have to show "but-for" causation as to his or her individual employment decision, since it is not an element of the pattern or practice proof of the entire class and it is statutorily mandated that the plaintiff bear the burden of proof on this issue throughout the litigation. While the Court has properly drawn a distinction between the elements of a class action claim and an individual disparate treatment claim, see Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 873-878 (1984), and I do not suggest the wholesale transposition of rules from one setting to the other, our decisions in Teamsters and Franks do indicate a recognition that presumptions shifting the burden of persuasion based on evidentiary probabilities and the policies behind the statute are not alien to our Title VII jurisprudence.

Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons is consistent with our interpretation of the constitutional guarantee of equal protection. Like a disparate treatment plaintiff, one who asserts that governmental action violates the Equal Protection Clause must show that he or she is "the victim of intentional discrimination." Burdine, 450 U.S., at 256. Compare post, at 286, 289 (Kennedy, J., dissenting), with Washington v. Davis, 426 U.S. 229, 240 (1976). In Alexander v. Louisiana, 405 U.S. 625 (1972), we dealt with a criminal defendant's allegation that members of his race had been invidiously excluded from the grand jury which indicted him in violation of the Equal Protection Clause. In addition to the statistical evidence presented by petitioner in that case, we noted that the State's selection procedures themselves were not racially neutral. Id., at 630. Once the consideration of race in the decisional process had been established, we held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Id., at 632.

We adhered to similar principles in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions. In Arlington Heights a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow for the construction of low-income integrated housing was racially motivated. On the issue of causation, we indicated that the plaintiff was not required "to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." Id., at 265-266 (citation omitted).

If the strong presumption of regularity and rationality of legislative decisionmaking must give way in the face of evidence that race has played a significant part in a legislative decision, I simply cannot believe that Congress intended Title VII to accord more deference to a private employer in the face of evidence that its decisional process has been substantially infected by discrimination. Indeed, where a public employee brings a "disparate treatment" claim under 42 U. S. C. § 1983 and the Equal Protection Clause the employee is entitled to the favorable evidentiary framework of Arlington Heights. See, e.g., Hervey v. Little Rock, 787 F. 2d 1223, 1233-1234 (CA8 1986) (applying Arlington Heights to public employee's claim of sex discrimination in promotion decision); Lee v. Russell County Bd. of Education, 684 F. 2d 769, 773-774 (CA11 1982) (applying Arlington Heights to public employees' claims of race discrimination in discharge case). Under the dissent's reading of Title VII, Congress' extension of the coverage of the statute to public employers in 1972 has placed these employees under a less favorable evidentiary regime. In my view, nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule which places
the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role \([**1801**]\) in the employment decision. Even the dissenting judge below "[had] no quarrel with [the] principle" that "a party with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." 263 U.S. App. D. C. 321, 341, 825 F. 2d 458, 478 (1987) (Williams, J. dissenting).

\([*270]\) II

The dissent's summary of our individual disparate treatment cases to date is fair and accurate, and amply demonstrates that the rule we \([****70]\) adopt today is at least a change in direction from some of our prior precedents. See \(\text{post}\), at 286-289. We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. Nor have we confined the word "pretext" to the narrow definition which the plurality attempts to pin on it today. See \(\text{ante}\), at 244-247. McDonnell Douglas and Burdine clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not "the true reason" either because it never motivated the employer in its employment decisions or because it did not do so in a particular case. McDonnell Douglas and Burdine assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be carefully drawn.

First, McDonnell Douglas itself dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor under Title VII in making an employment decision. \([**71]\) The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of \([***301]\) potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. See Teamsters, 431 U.S., at 358, n. 44 ("[T]he McDonnell Douglas formula does not require direct proof of discrimination"). In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The plaintiff must then be given an "opportunity to demonstrate \([*271]\) by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." McDonnell Douglas, 411 U.S., at 805. Our decision in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), also involved the "narrow question" whether, after a plaintiff had carried the "not onerous" \([***72]\) burden of establishing the prima facie case under McDonnell Douglas, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. 450 U.S., at 250. As the discussion of Teamsters and Arlington Heights indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-714, n. 2 (1983). The question presented to the Court in that case involved only a challenge to the elements of the prima facie case under McDonnell Douglas and Burdine, see Pet. for Cert. in United States Postal Service Bd. of Governors v. Aikens, O. T. 1981, No. 81-1044, and the question we confront today was neither \([**1802]\) briefed nor argued to the Court. As should be apparent, \([***73]\) the entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Trans World \([*272]\) Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). See also East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403-404, n. 9 (1977).

Second, the facts of this case, and a growing number like it decided by the Courts of Appeals, convince me that the evidentiary standard I propose is necessary to make real the promise of McDonnell Douglas that "[i]n the implementation of [employment] decisions, it is abundantly \([***302]\) clear that Title VII tolerates no . . .
discrimination, subtle or [****74] otherwise." 411 U.S., at 801. In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. 618 F. Supp. 1109, 1116-1117 (DC 1985). The District Court further found that these evaluations were given "great weight" by the decisionmakers at Price Waterhouse. Id., at 1118. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." Id., at 1117 (footnote omitted). As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse "permit[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner." 263 U.S. App. D. C., at 324, 825 F. 2d, at 461.

At [****75] this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If, as we noted in Teamsters, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof," 431 U.S., at 359, n. 45, one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate [****76] concerns.

Moreover, there is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate [**1803] criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. See, e. g., Bell v. Birmingham Linen Service, 715 F. 2d 1552, 1556 (CA11 1983) (Tjoflat, J.) ("It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, [****303] nondiscriminatory reasons for its action"). Particularly in the context of the professional world, where decisions are often made [****77] by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions. See, e. g., Fields v. Clark University, 817 F. 2d 931, 935-937 [*274] (CA1 1987) (where plaintiff produced "strong evidence" that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); Thompkins v. Morris Brown College, 752 F. 2d 558, 563 (CA11 1985) (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion was a "substantial factor" in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, [****78] or national origin in order to maintain a work force in balance with the general population. See 42 U. S. C. § 2000e-2(j). The interpretive memorandum, whose authoritative force is noted by the plurality, see ante, at 243, n. 8, specifically provides: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964).

Last Term, in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), the Court unanimously concluded that the disparate impact analysis first enunciated in Griggs
appears to conclude that if a decisional process is
240-242, the plurality
seen
[****81]
the words "because of" in the
[**276]
, it is far from wholly illusory. Based on its
Watson
in this setting than in the situation the Court faced in
unwarranted preferential treatment is thus less dramatic
While the danger of forcing employers to engage in
making its employment decisions.
7
creates no incentive to preferential treatment in violation
§ 2000e-(2)(j).
The plurality went on to emphasize that in a disparate impact case, the plaintiff
may not simply [*275] point to a statistical disparity in the employer's work force. Instead, the plaintiff
must identify a particular employment practice and "must offer statistical evidence of a kind and degree sufficient
to show that the practice in question has caused the exclusion of applicants for jobs or promotions because
of their membership in a protected group." 487 U.S., at 994. The plurality indicated that "the ultimate burden of
proving that discrimination against a protected group has been caused by a specific employment practice
remains with the plaintiff at all times." Id., at 997.
I believe there are significant differences between shifting the burden of persuasion to the employer in a
case resting purely on statistical [[**304] proof as in the disparate impact setting and shifting the burden of
persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate
factor played a substantial role in a particular employment decision. First, the explicit consideration of
race, color, religion, [****80] sex, or national origin in making employment decisions "was the [[**1804] most
obvious evil Congress had in mind when it enacted Title VII." Teamsters, 431 U.S., at 335, n. 15. While the prima
facie case under McDonnell Douglas and the statistical showing of imbalance involved in a disparate impact
case may both be indicators of discrimination or its "functional equivalent," they are not, in and of
themselves, the evils Congress sought to eradicate from the employment setting. Second, shifting the burden of
persuasion to the employer in a situation like this one creates no incentive to preferential treatment in violation
of § 2000e-(2)(j). To avoid bearing the burden of justifying its decision, the employer need not seek racial
or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in
making its employment decisions.
While the danger of forcing employers to engage in unwarranted preferential treatment is thus less dramatic
in this setting than in the situation the Court faced in Watson, it is far from wholly illusory. Based on its
misreading of [**276] the words "because of" in the statute, [[****81] see ante, at 240-242, the plurality
appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the
employer has violated the statute, and Title VII thus commands that the burden shift to the employer to
justify its decision. Ante, at 250-252. The plurality thus effectively reads the causation requirement out of the
statute, and then replaces it with an "affirmative defense." Ante, at 244-247.
In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate
treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the
decision. As the Court of Appeals noted below: "While most circuits have not confronted the question squarely,
the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence
that discriminatory animus played a significant or substantial role in the employment decision, the burden
shifts to the employer to show that the decision would have been the same absent discrimination." 263 U.S.
that the plaintiff [[****82] demonstrate that an illegitimate factor played a substantial role in the employment
decision identifies those employment situations where the deterrent purpose of Title VII is most clearly
implicated. As an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation,
the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the
outcome, absent proof to the contrary from the employer. Where a disparate treatment plaintiff has
made such a showing, the burden then rests with the employer to convince the trier of fact that it is [[**305]
more likely than not that the decision would have been the same absent consideration of the illegitimate factor.
The employer need not isolate the sole cause for the decision; rather it must demonstrate that with the
illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the
same employment [*277] action. This evidentiary scheme essentially requires the employer to place the
employee in the same position he or she would have occupied absent discrimination. Cf. Mt. Healthy City
Bd. of Ed. v. Doyle, 429 U.S. 274, 286 (1977), [[****83]
If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made
"because of" consideration of the illegitimate factor and the substantive standard for liability under the statute is
satisfied.
Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see Meritor Savings
justifying requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements [*278] by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" [*84] might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See ante, at 250, n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any [*278] causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations. [*85] See also ante, at 259-260 (White, J., concurring in judgment).

In sum, because of the concerns outlined above, and because I believe that the deterrent purpose of Title VII is disserved by a rule which places the burden of proof on plaintiffs on the issue of causation in all circumstances, I would retain but supplement the framework we established [*306] in McDonnell Douglas and subsequent cases. The structure of the presentation of evidence in an individual disparate treatment case should conform to the general outlines we established in McDonnell Douglas and Burdine. First, the plaintiff must establish the McDonnell Douglas prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant's general qualifications. McDonnell Douglas, 411 U.S., at 802. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision. As the dissent [*86] notes, under this framework, the employer "has every incentive to convince the trier of fact that the decision was lawful." Post, at 292, citing Burdine, 450 U.S., at 258. Once all the evidence has been received, the court should determine whether the McDonnell Douglas or Price Waterhouse framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the Price Waterhouse threshold, the case should be decided under the principles enunciated in McDonnell Douglas and Burdine, [*279] with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.

I agree with the dissent, see post, at 293, n. 4, that the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court's allocation of the burden of proof in Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626-627 (1987), [*87] rested squarely on "the analytical framework set forth in McDonnell Douglas," id., at 626, which we alter today. It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants. But see ante, at 239, n. 3.

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern. On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.

Dissent by: KENNEDY
Dissent

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), [*88] is a wiser course than creation of more [***87] disarray in an area of the law already difficult for the bench and bar, and so I must dissent.

[*89] Before turning to my reasons for disagreement with the Court's disposition of the case, it is important to review the actual holding of today's decision. I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. Ante, at 276-277 (opinion of O'Connor, J.); ante, at 259-260 (opinion of White, J.). As the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. Ante, at 251 (opinion of Brennan, J.); ante, at 277 (opinion of O'Connor, J.).

Where the plaintiff makes the requisite showing, [*89] the burden that shifts to the employer is to show that legitimate employment considerations would have justified the decision without reference to any impermissible motive. Ante, at 260-261 (opinion of White, J.); ante, at 278 (opinion of O'Connor, J.). The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question: the Court does not accept the plurality's suggestion that an employer's evidence need be "objective" or otherwise out of the ordinary. Ante, at 261 (opinion of White, J.).

In sum, the Court alters the evidentiary framework of McDonnell Douglas and Burdine for a closely defined set of cases. Although Justice O'Connor advances some thoughtful arguments for this change, I remain convinced that it is unnecessary and unwise. More troubling is the plurality's rationale for today's decision, which includes a number of unfortunate pronouncements on both causation and methods of proof in employment discrimination cases. To demonstrate the defects in the plurality's reasoning, it is necessary [*281] to discuss, first, the standard of causation in Title VII cases, and, second, the burden of proof.

The [***90] plurality describes this as a case about the standard of causation under Title VII, ante, at 237, but I respectfully suggest that the description is misleading. [**1807] Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. See also ante, at 261, and n. (opinion of [***308] White, J.); ante, at 262-263 (opinion of O'Connor, J.).

The words of Title VII are not obscure. The part of the statute relevant to this case provides:

"It shall be an unlawful employment practice for an employer--"

"(1) to fail or refuse 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 [***91] individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2 (a)(1) (emphasis added).

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong. Rec. 7213 (1964). Congress could not have chosen a clearer way [*282] to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with
the mere presence of impermissible motives; it is
directed to employment decisions that result from those
motives. The verbal formula we have used in our
precedes are synonymous with but-for causation.
Thus we have said that providing different insurance
coverage to male and female employees violates [*282]
the statute by treating the employee
"in a manner which but-for that person's sex would be
different." Newport News Shipbuilding & Dry Dock Co.
v. EEOC, 462 U.S. 669, 683 (1983), quoting Los
Angeles Dept. of Water and Power v. Manhart, 435 U.S.
702, 711 (1978). We have described the relevant
question as whether the employment decision was
"based on" a discriminatory criterion, Teamsters v.
United States, 431 U.S. 324, 358 (1977), or whether the
particular employment decision at issue was "made on
the basis of" an impermissible factor, Cooper v. Federal

What we term "but-for" cause is the least rigorous
standard that is consistent with the approach to
causation our precedents describe. If a motive is not a
but-for cause of an event, then by definition it did not
make a difference to the outcome. The event would
have occurred just the same without it. Common-law
approaches to causation often require proof of but-for
cause as a starting point toward proof of legal cause.
The law may require more than but-for cause, for
instance proximate cause, [*283] [*309] before imposing
liability. Any standard less than but-for, however, simply
represents a decision to impose liability without
causation. As Dean Prosser puts it, "[a]n act or omission
is not regarded as a cause of an event if the particular
event would have occurred without it." W. Keeton, D.
Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on

1 The plurality's description of its own standard is both
hypothetical and retrospective. The inquiry seeks to
determine whether "if we asked the employer at the moment of
decision what its reasons were and if we received a truthful
response, one of those reasons would be that the applicant or
employee was a woman." Ante, at 250.

2 The plurality's discussion of overdetermined causes only
highlights the error of its insistence that but-for is not the
substantive standard of causation under Title VII. The opinion
discusses the situation where two physical forces move an
object, and either force acting alone would have moved the
object. Ante, at 241. Translated to the context of Title VII, this
situation would arise where an employer took an adverse
action in reliance both on sex and on legitimate reasons, and
either the illegitimate or the legitimate reason standing alone
would have produced the action. If this state of affairs is
proved to the factfinder, there will be no liability under
the plurality's own test, for the same decision would have been
made had the illegitimate reason never been considered.

The plurality begins by noting the quite
unremarkable [*94] fact that Title VII is written in the
present tense. Ante, at 240-241. It is unlawful "to fail" or
"to refuse" to provide employment benefits on the
basis of sex, not "to have failed" or "to have refused" to
have done so. The plurality claims that the present
tense excludes a but-for inquiry as the relevant standard
because but-for causation is necessarily concerned with a
hypothetical inquiry into how a past event would have
occurred absent the contested motivation. This
observation, however, tells us nothing of particular
relevance to Title VII or the cause of action it creates. I
am unaware of any federal prohibitory statute that is
written in the past tense. Every liability determination,
including the novel one constructed by the plurality,
necessarily is concerned with the examination of a past
event. [*95] The plurality's analysis of verb tense
serves only to divert attention from the causation
requirement that is made part of the statute by the
"because [*284] of phrase. That phrase, I respectfully
submit, embodies a rather simple concept that the
plurality labors to ignore. 2

We are told next that but-for cause is not required, since
the words "because of" do not mean "solely because of."
Ante, at 241. No one contends, however, that sex
must be the sole cause of a decision before there is a
Title VII violation. This is a separate question from
whether consideration [*96] of sex must be a cause of
the decision. Under the accepted approach to
causation that I have discussed, sex is a cause for the
employment decision whenever, either by itself or in
combination with other factors, it made a difference to

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**DON DAVIS**
the decision. [[**310**] Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, i.e., a but-for cause. See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282, n. 10 (1976). The plurality seems to say that since we know the words "because of" do not mean "solely because of," they must not mean "because of" at all. This does not follow, as a matter of either semantics or logic.

The plurality’s reliance on the "bona fide occupational qualification" (BFOQ) provisions of Title VII, 42 U. S. C. § 2000e-2(e), is particularly inapt. The BFOQ provisions allow an employer, in certain cases, to make an employment decision of which it is conceded that sex is the cause. That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite [[**97**] command [**285**] that a decision caused by sex in any other [[**1809**] case justifies the imposition of Title VII liability. This principle does not support, however, the novel assertion that a violation has occurred where sex made no difference to the outcome.

The most confusing aspect of the plurality’s analysis of causation and liability is its internal inconsistency. The plurality begins by saying: "When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations -- even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." Ante, at 241. Yet it goes on to state that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." Ante, at 242.

Given the language of the statute, these statements cannot both be true. Title VII unambiguously states that an employer who makes decisions "because of" sex has violated the statute. The plurality’s first statement therefore appears to indicate that [[**98**] an employer who considers illegitimate reasons when making a decision is a violator. But the opinion then tells us that the employer who shows that the same decision would have been made absent consideration of sex is not a violator. If the second statement is to be reconciled with the language of Title VII, it must be that a decision that would have been the same absent consideration of sex was not made "because of" sex. In other words, there is no violation of the statute absent but-for causation. The plurality’s description of the "same decision" test it adopts supports this view. The opinion states that ["[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision," Ante, at 249, and that this "is not an imposition of liability 'where sex made no difference to the outcome,'" ante, at 246, n. 11.]

[**286**] The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer’s showing as an "affirmative defense." This is nothing more than a label, and one not found in the language or legislative history of Title [[**311**] [[**99**] VII. Section 703(a)(1) is the statutory basis of the cause of action, and the Court is obligated to explain how its disparate-treatment decisions are consistent with the terms of § 703(a)(1), not with general themes of legislative history or with other parts of the statute that are plainly inapposite. While the test ultimately adopted by the plurality may not be inconsistent with the terms of § 703(a)(1), see infra, at 292, the same cannot be said of the plurality’s reasoning with respect to causation. As Justice O’Connor describes it, the plurality "reads the causation requirement out of the statute, and then replaces it with an 'affirmative defense.'" Ante, at 276. Labels aside, the import of today’s decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.

II

We established the order of proof for individual Title VII disparate-treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and reaffirmed this allocation in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). [[**100**] Under Burdine, once the plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff. Burdine makes clear that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id., at 253. See also Board of [[**1810**] Trustees of Keene State College v. [*287*] Sweeney, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting). 3 I

3 The interpretive memorandum on which the plurality relies makes plain that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964). Coupled with its earlier definition of
would adhere to this established evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

[****101] In view of the plurality's treatment of Burdine and our other disparate-treatment cases, it is important first to state why those cases are dispositive here. The plurality tries to reconcile its approach with Burdine by announcing that it applies only to a "pretext" case, which it defines as a case in which the plaintiff attempts to prove that the employer's proffered explanation is itself false. Ante, at 245-247, and n. 11. This ignores the language of Burdine, [***312] which states that a plaintiff may succeed in meeting her ultimate burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S., at 256 (emphasis added). Under the first of these two alternative methods, a plaintiff meets her burden if she can "persuade the court that the employment decision more likely than not was motivated by a discriminatory reason." United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 717-718 (1983) [*288] (Blackmun, J., concurring). The plurality [****102] makes no attempt to address this aspect of our cases.

Our opinions make plain that Burdine applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext. See Aikens, supra, at 714, n. 3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence"). The plurality is mistaken in suggesting that the plaintiff in a so-called "mixed-motives" case will be disadvantaged by having to "squeeze her proof into Burdine's framework." Ante, at 247. As we acknowledged in McDonnell Douglas, [**1811] Aikens illustrates the point. There, the evidence showed that the plaintiff, a black man, was far more qualified than any of the white applicants promoted ahead of him. More important, the testimony showed that "the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular." 460 U.S., at 713-714, n. 2. Yet the Court in Aikens reiterated that the case was to be tried under [****104] the proof scheme of Burdine. Justice Brennan and Justice Blackmun concurred to stress that the plaintiff could prevail under the Burdine scheme in either of two ways, one of which was directly to persuade the court that the employment decision was motivated by discrimination. 460 U.S., at 718. Aikens leaves no doubt that the so-called "pretext" framework of Burdine has been considered to provide a flexible means of addressing all individual disparate-treatment claims.

Downplaying the novelty of its opinion, the plurality claims to have followed a "well-worn path" from our prior cases. The path may be well worn, but it is in the wrong forest. The plurality again relies on Title VII's BFOQ provisions, under which an employer bears the burden of justifying the use of a sex-based employment qualification. See Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977). In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it. The same is true of the
The potential benefits of the new approach, in my view, are overstated. First, the Court makes clear that the Price Waterhouse scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. The burden shift properly will be found to apply in [*291] only a limited number of employment discrimination cases. The application of the new scheme, furthermore, will make a difference only in a smaller subset of cases. The practical importance of the burden of proof is the "risk of nonpersuasion," and the new system will make a difference only where the evidence is so evenly balanced that the factfinder cannot say that either side's explanation of the case is "more likely" true. This category will not include cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation [*108] issue. Cf. Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948) (allocation of burden dispositive because no evidence of which of two negligently fired shots hit plaintiff). Rather, Price Waterhouse will apply only to cases in which there is substantial evidence of reliance on an impermissible motive, as well as evidence from the employer that legitimate reasons supported its action.

Although the Price Waterhouse system is not for every case, almost every plaintiff is certain to ask for a Price Waterhouse instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of "substantial factor." Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying McDonnell Douglas and Burdine. Addition of a second burden-shifting mechanism, the application of which itself [*109] depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process. The presence of an existing burden-shifting mechanism distinguishes the individual disparate-treatment case from the tort, class-action discrimination, and equal protection cases on which [*292] Justice O'Connor relies. The distinction makes Justice White's assertions that one "need look only to" Mt. Healthy and Transportation Management to resolve this case, and that our Title VII cases in this area are "inapposite," ante, at 258-260, at best hard to understand.

In contrast [*106] to the plurality, Justice O'Connor acknowledges that the approach adopted today is a "departure from the McDonnell Douglas standard." Ante, at 262. Although her reasons for supporting this departure are not without force, they are not dispositive. As Justice O'Connor states, the most that can be said with respect to the Title VII itself is that "nothing in the language, history, or purpose of Title VII prohibits adoption" of the new approach. Ante, at 269 (emphasis added). Justice O'Connor also relies on analogies from the common law of torts, other types of Title VII litigation, and our equal protection cases. These analogies demonstrate that shifts in the burden of proof are not unprecedented in the law of torts or employment discrimination. Nonetheless, I believe continued adherence to the Burdine framework is more consistent with the statutory mandate. Congress' manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action, see ante, at 262 (opinion of O'Connor, J.), suggests to me that an [*1812] affirmative showing of causation should be [*314] required. And the [*107] most relevant portion of the legislative history supports just this view. See n. 3, supra. The limited benefits that are likely to be produced by today's innovation come at the sacrifice of clarity and practical application.

Closer analogies to the plurality's new approach are found in Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), but these cases were decided in different contexts. Mt. Healthy was a First Amendment case involving the firing of a teacher, and Transportation Management involved review of the NLRB's interpretation of the National Labor Relations [*290] Act. The Transportation Management decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. See 462 U.S., at 402-403. Neither case therefore tells us why the established Burdine framework should not continue to govern the order of proof under Title VII.
Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U. S. C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials. See, e. g., Note, The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change, 73 Va. L. Rev. 601 (1987) [*315] (noting high reversal rate caused by use of Title VII burden shifting in a jury setting). Perhaps such [*110] cases in the future will require a bifurcated trial, with the jury retiring first to make the credibility findings necessary to determine whether the plaintiff has proved that an impermissible factor played a substantial part in the decision, and later hearing evidence on the "same decision" or "pretext" issues. Alternatively, perhaps the trial judge will have the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case.

I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties [*1813] that will accompany it. Rather, I "remain confident that the McDonnell Douglas framework permits the plaintiff meriting relief to demonstrate intentional discrimination." Burdine, 450 U.S., at 258. Although the employer does not bear the burden of persuasion under Burdine, it must offer clear and reasonably specific reasons for the contested decision, and has every incentive to persuade the trier of fact that the decision was lawful. Ibid. Further, the suggestion that the employer should bear the burden of persuasion due to superior[*111] access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files. Ibid. [*293] In sum, the Burdine framework provides a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," Aikens, 460 U.S., at 715, and it should continue to govern the order of proof in Title VII disparate-treatment cases. 4

The ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue. Some of the plurality's comments with respect to the District Court's findings in this case, however, are potentially misleading. As the plurality notes, the District Court based its liability determination on expert evidence that some evaluations of respondent Hopkins were based on unconscious sex stereotypes, 5 and on the fact that [*294] [*316] Price Waterhouse failed to disclaim reliance on these comments when it conducted the partnership review. The District Court also based liability on Price Waterhouse's failure to "make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes." 618 F. Supp. 1109, 1119 (DC 1985).

[***113] Although the District Court's version of Title VII liability is improper under any of today's opinions, I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes or sex pursuant to an affirmative-action plan was a substantial factor in a decision, and the court will need to move on to the question of a plan's validity. Moreover, if the structure of the burdens of proof in Title VII suits is to be consistent, as might be expected given the identical statutory language involved, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal. See Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626-627 (1987).

[****112] III

5 The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral -- e. g., "overbearing and abrasive" -- without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could be overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." 263 U.S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting). Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis. See also ante, at 277 (opinion of O'Connor, J.).
is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." As the dissenting judge in the Court of Appeals observed, acceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." 263 U.S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting).

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees. As Justice Brennan notes, ante, at 258, courts do not sit to determine whether litigants are nice. In this case, Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, I doubt it would have been reversible error. Cf. Aikens, supra, at 714, n. 2. That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold. Attempts to evade tough decisions by erecting novel theories of liability or multistacked systems of shifting burdens are misguided.

IV

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made "because of" sex. Here the District Court found that the "comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose," 618 F. Supp., at 1118, and that "because plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations," id., at 1120. Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

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Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.
The Equality Act: Replace a Tenuous Judicial Status Quo with a Permanent Legislative Solution to Ensure Workplace Opportunity for LGBTQ2+ People

IN BRIEF

- Federal law does not provide consistent nondiscrimination protection based on sexual orientation or gender identity.
There has been much recent media attention around the Equality Act, especially after it passed in the U.S. House of Representatives on May 17, 2019. The act has been heralded as a first-of-its-kind bill and comes at a time when, according to the New York Times (https://www.nytimes.com/2019/05/17/us/politics/equality-act.html), “departments across the Trump administration have dismantled policies friendly to gay, bisexual and transgender individuals, like barring transgender recruits from serving in the military or formally rejecting complaints filed by transgender students who are barred from restrooms that match their gender identity.” Recently, the Department of Justice filed an amicus brief (http://time.com/5595474/donald-trump-roll-back-transgender-protections/) opposing protections for LGBTQ individuals in the trio of cases now before the U.S. Supreme Court that will decide whether Title VII already prohibits sexual orientation and gender identity discrimination.

BACKGROUND

Despite significant progress both legislatively and judicially, lesbian, gay, bisexual, transgender, and queer (LGBTQ) Americans still lack the most basic of legal protections in states across the country and at the federal level. This deficit in legal protection means that it is still lawful for an employer to fire or refuse to hire gay, lesbian, and bisexual people. In addition, despite federal judicial decisions that have recognized that Title VII prohibits discrimination...
against transgender and gender nonconforming individuals, there is no national standard, and many state laws remain hostile to transgender status.

The patchwork nature of federal and state laws providing various degrees of protection—or none at all—leaves millions of people subject to uncertainty and potential discrimination that adversely impacts their livelihoods. A common illustration of the unconscionable unfairness of the legal status quo is a gay, lesbian, or bisexual person can legally be fired on Monday simply for lawfully marrying the person she or he loves on Sunday.

Our nation’s civil rights laws prohibit and provide remedies for discrimination in areas such as employment, public accommodations, housing, and education on the basis of certain protected classes, such as race, color, national origin, sex, disability, and religion. However, as explained above, federal law does not provide consistent nondiscrimination protections based on sexual orientation or gender identity. The need for these protections is clear, especially in light of the current political climate that has been hostile to LGBTQ rights; in fact, nearly two-thirds of LGBTQ Americans report having experienced discrimination in their personal lives. Alarmingly high percentages of that cohort report that such discrimination has adversely impacted their work environment as well as their physical, psychological, and spiritual well-being.

According to the Human Rights Campaign, the leading LGBTQ rights advocacy group in the United States, “[d]ecades of civil rights history show that civil rights laws are effective in decreasing discrimination because they provide strong federal remedies targeted to specific vulnerable groups.” “Explicitly including sexual orientation and gender identity in these fundamental laws would afford LGBTQ people the exact same protections that already exist
under federal law. In other words, the aim is not to seek a special class of rights for LGBTQ persons, but to guarantee that they enjoy the same protections others already have.

Further, research shows broad public support for legislation that would ensure equal protection for LGBTQ persons, including a groundswell of support in the business community.[1]

**WHAT IS THE EQUALITY ACT?**

If enacted, the Equality Act (H.R. 5, S. 788, 116th Congress) would provide consistent and explicit nondiscrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.

The Equality Act would amend existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several other laws regarding employment with the federal government—to explicitly include sexual orientation and gender identity as protected characteristics. The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex.

Additionally, the Equality Act would update the public spaces and services covered in current law to include retail stores, services such as banks and legal services, and transportation services. These important updates would strengthen existing protections for everyone.

**LEGISLATIVE HISTORY OF THE ACT**

The bipartisan Equality Act was introduced in the House of Representatives by Reps. David Cicilline (D-RI) and Brian Fitzpatrick (R-PA), and in the Senate by Sens. Jeff Merkley (D-OR), Susan Collins (R-ME), Tammy Baldwin (D-WI), and Cory Booker (D-NJ), on March 13, 2019. The bill was
introduced with 287 original cosponsors—the most congressional support that any piece of pro-LGBTQ legislation has received upon introduction.

Made a legislative priority by Speaker Nancy Pelosi, the act passed the House on May 17, 2019, by a vote of 236-173. All Democratic members and eight Republicans voted for it. Its passage marked the first time legislation of its kind—that includes broad protections and remedies for LGBTQ people without religious exemptions—has ever passed in either chamber of Congress.

**WHY NOW AND WHY NOT?**

Whether Title VII, as it is currently written, prohibits discrimination on the basis of sexual orientation and/or gender identity will soon be answered by the U.S. Supreme Court as it takes up three cases in its 2019–2020 term. Predicting what the Court will do, especially before oral argument, may be a fool’s errand, but the current conservative bent of the Court means that a broad interpretation of Title VII is unlikely. The stakes are high, however. If a majority of justices narrowly read Title VII's prohibition against discrimination on the basis of sex, their decision would reverse two federal courts of appeal sitting *en banc* that have managed to find majorities across an ideological spectrum to hold that Title VII protects workers from discrimination on the basis of sexual orientation.[2] Further, one might reasonably predict that such a narrow reading of Title VII would reverse the Court's own decision in *Price Waterhouse v. Hopkins*, a case decided in 1989 that broadly read Title VII's prohibition against sex discrimination to include sex discrimination claims based on gender stereotyping.[3] A narrow decision might also upset the Court's unanimous 1998 decision in *Oncale v. Hopkins* that made same-sex sexual harassment claims actionable.[4] *Hopkins, Oncale*, and their progeny have contributed to progress in workplace gender equality over the last few decades.[5]
A simple and unambiguous legislative solution is waiting in the wings with the Equality Act. It would appease textual conservatives who do not oppose LGBTQ rights but who chafe at the thought of judicial overreach in interpreting statutory language. It would appease progressives who are nervous at the thought that a single Supreme Court decision could turn back decades of progress in the direction of gender equality in the workplace. Finally, the business community supports it. Corporate America has led the way with inclusive nondiscrimination policies; the law must catch up.

The question is not why, but when? The answer is now. Congress must finish the task it started.

[1] The nonpartisan Public Religion Research Institute (PRRI) found (https://www.prri.org/research/americans-support-protections-lgbt-people/) that, nationally, support for a bill like the Equality Act topped 70 percent, which includes a majority of Democrats, Republicans, and Independents. In addition, the Equality Act has been endorsed by the Business Coalition for the Equality Act, a group of more than 200 major companies with operations in all 50 states, headquarters spanning 27 states, and a collective revenue of $3.8 trillion. In total, these companies employ more than 10.9 million people across the United States. See Human Rights Campaign, Business Coalition for the Equality Act.


[5] Id.

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Don provides clients with representation and counsel on a broad range of employment matters. He has extensive experience handling issues pertaining to employment contracts, wage and hour disputes, employment...
Sixth Circuit Delivers One-Two Punch Knocking Out Transgender Discrimination

By Don Davis on March 16, 2018

The U.S. Court of Appeals for the Sixth Circuit ruled on March 7 that employer R.G. & G.R. Harris Funeral Homes unlawfully discriminated on the basis of sex when it fired a transgender employee after she informed the company that she would begin presenting consistent with her gender identity. In so doing, the court emphatically rejected the employer’s defense invoking religious liberty to discriminate on the basis of sex and other protected minorities. On the heels of the Second Circuit’s decision in Zarda v. Altitude Express, this case represents a further affirmation that existing civil rights laws protect LGBTQ employees from both gender identity and sexual orientation discrimination.

EEOC v. R.G. & G.R. Harris Funeral Homes featured the story of Aimee Stephens, a transgender woman who worked as a funeral director in Michigan. After presenting as male since she began employment, she informed her supervisor in 2013 that she had a gender identity disorder and planned to transition so that she could beginning expressing consistent with her identity as a woman. The company then terminated her. Her supervisor testified that he terminated Stephens because “he was no longer going to represent himself as a man,” and because he believes that gender transition “violat[es] God’s commands” because “a person’s sex is an immutable God-given fit.”
The EEOC sued on Stephens’ behalf in federal district court in Michigan, alleging discrimination in violation of Title VII. The district court ruled that the employer had discriminated against Stephens on the basis of sex because it engaged in sex stereotyping, but that her employer asserted a sufficient defense under the Religious Freedom Restoration Act (“RFRA”). According to the lower court, RFRA provides a defense to a private employer that terminates an employee because of a sincerely held religious belief. On appeal, a panel of the Sixth Circuit disagreed.

The Sixth Circuit agreed with the district court that Title VII bars employment discrimination against transgender people, holding that it violated Title VII for two reasons. First, as the panel stated, transgender discrimination amounts to gender stereotyping, which the Supreme Court has held violates Title VII: “[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.” Second, transgender discrimination is inherently sex discrimination. In other words, if an employer fires an employee based on her status as a transgender individual, it is “motivated, at least in part, by the employee’s sex.”

But, the Sixth Circuit parted ways with the district court on the issue of whether the RFRA permitted the employer’s discrimination. As the court noted, RFRA mandates that a “substantial burden” on “religious exercise” must be “in furtherance of a compelling government interest” and “the least restrictive means of furthering” that interest. The employer claimed two substantial burdens in this case: (1) the presence of a transgender employee would cause distractions in the operation of the business because family members of the deceased would not approve, and (2) that it would force the supervisor to leave the company because he asserted that his religious beliefs do not permit him to work with a transgender person.

The court rejected both of these claims, finding that neither posed a substantial burden on the employer. As to the first, the court reminded the company that employers cannot refuse to comply with Title VII because of customers’ “presumed biases.” Second, the court found that allowing Stephens to keep her job would not substantially burden the business. “[T]olerating Stephens’s understanding of her sex and gender identity is not tantamount to supporting it.” Stephens did not ask her employer to endorse her, to help or sponsor her transition, or to change its religious beliefs concerning the immutability of sex; she only sought to remain employed and present consistent with her gender identity as it permits all other employees to
do. Allowing her to remain employed did not “substantially burden [the employer’s] religious practice.”

To further support its analysis, the court went on to rule that RFRA did not trump Title VII under the other essential elements of a RFRA defense – (1) whether the government has a “compelling government interest” and (2) that it is using the “least restrictive means” to further that interest. The court found that preventing employment discrimination on the basis of sex clearly qualifies as a “compelling interest.” The court also had no difficulty finding that Title VII’s prohibition on sex discrimination represents the “least restrictive means” of forbidding sex discrimination. Were the court to reach the opposite conclusion, it would have cut out the heart of Title VII and provided a license to discriminate against minority populations under the guise of religious liberty.

While the Supreme Court has never expressly endorsed the notion that Title VII protects transgender employees, courts have been unequivocal in their interpretation of Title VII as inclusive of transgender-based discrimination. This case is one more guidepost along that road. Just as we cautioned in our recent posts about the Second and Seventh Circuit decisions on sexual orientation discrimination, employers operating in states within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) should ensure that their non-discrimination and non-harassment policies and training materials are up to date and that they specifically forbid discrimination against transgender individuals. Employers in other states should be sure to check both the federal case law and applicable state statutes, as a number of states have enacted anti-discrimination statutes explicitly protecting employees from gender identity and gender expression discrimination. Even in states without such laws, protecting employees from gender identity and gender expression discrimination is just good HR practice. If you are interested in learning more about best practices with regard to LGBTQ employees, consult with counsel and see my LGBTQ Employment Law Practice Guide.
issues. He has represented clients in a wide variety of cases with respect to employment contracts, wage and hour disputes, employment discrimination, disability accommodations, wrongful discharge claims, family and medical leave, defamation, and whistleblower rights.

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