UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Bobbie E. Burnett, Plaintiff, v. City of Philadelphia-Free Library, et al. Defendants.	Civil Action No. 09-4348

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

The Attorney General of the United States is charged with enforcing Title VII where, as here, the employer is a state or local "government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f). The United States thus has a strong interest in ensuring the proper interpretation and application of Title VII in order to eliminate unlawful employment discrimination. Accordingly, the United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517.[1]

This Statement of Interest addresses the scope of Title VII's protections against sex discrimination. Like all plaintiffs, transgender individuals may show that discrimination grounded in gender stereotypes is discrimination "because of … sex," in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). In this case, the plaintiff has provided sufficient evidence from which a reasonable jury could conclude that

[1] "The Solicitor General, or any other officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

the discrimination she endured was based on sex. The United States takes no position on plaintiff's motion for summary judgment or the ultimate merits of plaintiff's claim.

I. RELEVANT BACKGROUND

Plaintiff Bobbie Burnett ("Burnett") is a transgender woman who began her employment with Defendant City of Philadelphia-Free Library System ("Library") in 1991. *See* Doc. 23, First Amended Complaint ¶¶ 2-3. Burnett notified the Library of her intention to transition from male to female in 2001. *Id.* at ¶ 3. Prior to this notice, Burnett had been respected and got along well with her coworkers. *Id.* at ¶ 4. Burnett had gender reassignment surgery in November 2003 and returned from medical leave in February 2004. *Id.* at ¶ 59.

During and after Burnett's gender transition, both coworkers and supervisors made comments about her non-conformity with gender norms and expectations. For example, Burnett's coworkers commented that "they couldn't be fooled by her wig" and that she was "a monster … a freak, and a man in woman [sic] clothing." Doc. 76, p. 12; Doc. 83-2, pp. 105-06. One of Burnett's supervisors also asserted that "most people can look at [Burnett] and tell she was a man …." Doc. 75, pp. 25, 27, 32. This same supervisor advised Burnett that she should "move to a different branch, where people had not known her as a man … that she was perhaps making it more difficult than it needed to be … she might not receive such resistance at another branch." Doc. 75-1, p. 4. During this same time period, another supervisor told Burnett, "You are a woman, but you don't behave, or … act, in a lady-like manner." Doc. 75-1, p. 32. This same supervisor told Burnett, "If you want to be a woman … of course you are a woman … but if you want to be a lady … then you have to learn how to act like one." Doc. 75-1, pp. 33-34.

On September 24, 2009, Burnett filed a complaint in this Court alleging, *inter alia*, sex discrimination under Title VII. Defendants moved to dismiss Burnett's sex discrimination claim,

asserting among other things that Burnett had not proffered sufficient gender stereotyping evidence in her complaint. This Court denied the motion, finding that Burnett had alleged sufficient facts that she had failed to conform to gender stereotypes and thus could proceed with her sex discrimination claim. Doc. 28, p. 3.

After discovery, Burnett filed a motion for summary judgment. Defendants filed their opposition to the motion, again arguing among other things that Burnett has not developed sufficient gender stereotyping evidence in discovery to support her sex discrimination claim and that she is not protected by Title VII based on her transgender status.

II. ARGUMENT

A. Discrimination Against a Transgender Individual Because She Does Not Conform to Gender Stereotypes is Discrimination Because of Sex under Title VII

Burnett alleges that she was subjected to disparate treatment and harassment based on her sex. *See* Doc. 23, First Amended Complaint ¶ 147. Under Title VII, it is "an unlawful employment practice for an employer to … discriminate against *any* individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The plain language of the statute thus affirms that Title VII protects all individuals from sex discrimination. *Cf. United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting Webster's Third New International Dictionary 97 (1976)). Burnett's status as a transgender woman accordingly does not remove her from Title VII's ambit.

In *Price Waterhouse v. Hopkins*, the Supreme Court articulated one form of prohibited sex discrimination: gender stereotyping. The Court recognized that Title VII's prohibition of

discrimination "because of … sex" means "that gender must be irrelevant to employment decisions." 490 U.S. 228, 240 (1989). Ann Hopkins had alleged that she had been denied partnership in an accounting firm at least in part because the partners considered her too "macho." *Id.* at 235. In phrases that echo the comments made to the plaintiff here, the partner who informed Hopkins of the decision to place her candidacy on hold told her that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," if she wanted to advance at the organization. *Id.* Another partner advised Hopkins to take "a course at charm school." *Id.* In explaining why Hopkins had met her burden of showing "that the employer relied upon *sex-based considerations* in coming to its decision," *id.* at 241-42 (emphasis added), the Court explained that "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 sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 (internal citations omitted).

Since *Price Waterhouse*, in cases where the defendant's action had been motivated by the plaintiff's failure to conform with gender stereotypes, every federal circuit court of appeals that has addressed the question has recognized that disparate treatment against a transgender plaintiff can be discrimination "because … of sex." Most notably, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit held that the plaintiff firefighter, who transitioned on the job from male to female, had stated a cause of action under Title VII because "discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman." *Id.* at 575. The court

emphasized that treatment "based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Id.*

In another employment case, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit affirmed the grant of summary judgment for the plaintiff in a Fourteenth Amendment-based sex discrimination case brought by a transgender woman who had been fired from her job as an editor in the Georgia General Assembly's Office of Legislative Counsel based on the employer's perception of her as "a man dressed as a woman and made up as a woman." *Id*. at 1320-21. The court explained that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," and there is "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id*. at 1316. The court observed that its conclusion that the plaintiff's discharge was sex discrimination would have been the same under Title VII, noting that "[i]f this were a Title VII case, the analysis would end here." *Id*. at 1321.

Courts have found that transgender plaintiffs have stated sex discrimination claims in other contexts as well. For example, in *Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000), in the course of addressing a claim brought under the Gender Motivated Violence Act, 42 U.S.C. § 13981,[2] the Ninth Circuit held that a transgender prisoner had stated a claim of sex

[2] The Supreme Court later held that in enacting the Act, Congress had exceeded its powers under the Commerce Clause, because the Act targeted noneconomic intrastate activity whose effects on interstate commerce could not be aggregated, and under section 5 of the Fourteenth Amendment, because the Act's civil remedy was not directed solely at state action. *See United States v. Morrison*, 529 U.S. 598 (2000).

discrimination when she offered evidence that a prison guard targeted her "only after he discovered that she considered herself female." The court found that the plaintiff's assault was "motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor." The Ninth Circuit expressly drew a parallel to Title VII cases, explaining that "'[S]ex' under Title VII encompasses both sex – that is, the biological differences between men and women – *and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII." *Id.* at 1202. Finally, in *Rosa v. Park W. Bank &Trust Co.*, 214 F.3d 213, 214-15 (1st Cir. 2000), the First Circuit held that a transgender plaintiff had stated a sex discrimination claim under the Equal Credit Opportunity Act when a bank refused to provide her with a loan application because her "traditionally feminine attire … did not accord with his male gender."

In addition to the appellate courts that have squarely held that discrimination against transgender individuals can constitute impermissible discrimination on the basis of sex, two other courts of appeals – including the Third Circuit – have implicitly assumed that transgender plaintiffs can use gender stereotyping analysis to bring sex discrimination claims under Title VII. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-24 (10th Cir. 2007); *Stacy v. LSI Corp.*, 2013 WL 5996715 (3d Cir. Nov. 13, 2013) (focusing solely on whether defendant's proffered reason for terminating transgender employee was pretextual).[3]

[3] *See also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009) (denying summary judgment to defendant where plaintiff presented gender stereotyping evidence that harassment resulted from his failure to conform with employer's "vision of how a man should look, speak, and act"); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir. 2001) (stating that plaintiff "may be able to prove same-sex harassment by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Durhan Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) (stating that "hostile or paternalistic acts based on perceptions about womanhood or manhood are sex-based or 'gender-based'" discrimination).

While two early district court opinions in the Third Circuit found that transgender individuals are precluded from bringing sex discrimination claims under Title VII, *see Dobre v. Nat'l R.R. Passenger Corp. (Amtrak)*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993); *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 WL 302, *4 (D.N.J. 1975), those decisions rested explicitly on reasoning that *Price Waterhouse* and *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75 (1998), repudiated. Indeed, more recent cases from this Circuit have come down the other way. For example, in *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173, *2 (W.D. Pa. Feb. 17, 2006), a district court, citing *Price Waterhouse*, *Bibby*, and *Smith*, denied the defendant's motion to dismiss a transgender plaintiff's sex discrimination claim under Title VII based on "his failure to conform to sex stereotypes of how a man should look and behave."

As the Sixth Circuit explained in *Smith*, the argument that "sex" refers only to biological status was "eviscerated by *Price Waterhouse*." 378 F.3d at 573. *Price Waterhouse* makes clear that Title VII prohibits not only discrimination based on the biological aspects of sex, but also discrimination based on non-conformity with gender stereotypes. *See* 490 U.S. at 251. And *Oncale*, where the Court held that same-sex harassment is actionable, confirms that Title VII's protections extend beyond forms of discrimination specifically discussed by Congress. *See* 523 U.S. at 79-80. Thus, decisions reasoning that transgender individuals may not bring sex discrimination claims because "transgender status" is not specifically listed in Title VII disregard the plain statutory language and conflict with subsequent Supreme Court decisions.

Defendants' attempt to distinguish Title VII cases alleging gender stereotyping (which it concedes are actionable) from those involving discrimination based on gender identity or transgender status (which it alleges are not) is thus unpersuasive. Doc. 83, p. 20. Such a reading construes *Price Waterhouse* too narrowly. Preferring or insisting that an employee's gender

identity or expression "match" the actual or perceived biological sex is itself an impermissible gender stereotype. *See Smith*, 378 F.3d at 574-75; *Glenn*, 663 F.3d at 1316. Defendants should not be able to "superimpose" a "transgender status" classification on Burnett "and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Smith*, 378 F.3d at 574-75.

Finally, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title VII where the employer is the federal government or a private sector entity, has concluded that discrimination against a transgender individual may constitute sex discrimination under Title VII. In *Macy v. Holder*, 2012 WL 1435995, *9 (EEOC April 20, 2012), the EEOC, pointing to *Price Waterhouse*, *Oncale*, and the "steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex," declared that discrimination against an individual because he or she is transgender – and thus does not conform to gender stereotypes – is discrimination "because of … sex" under Title VII.

B. Burnett Presented Sufficient Evidence for a Reasonable Jury to Conclude that the Discrimination She Endured was Because of Sex

Burnett has presented sufficient gender stereotyping evidence for a reasonable jury to conclude that the discrimination and harassment she suffered was "because of … sex" under Title VII. The record evidence includes several incidents of Burnett being subjected to derogatory comments and harassment for her failure to conform with gender stereotypes after she notified the Library of her gender transition. Statements by coworkers and supervisors – for example, that Burnett does not behave or act like a lady and needs to learn how to act like one, that people "can look at her and tell she [i]s a man," and that people are not fooled by her wig – could be reasonably viewed as directed at Burnett because she does not conform to gender

stereotypes. Further, a jury could reasonably find that Burnett's supervisor suggested that Burnett transfer to another branch where people had not known her as a man because Burnett failed to conform with gender stereotypes. *See supra* Section I.

Given this record evidence, a reasonable jury could conclude that Burnett's coworkers and supervisors viewed her as a man who dressed as a woman, or as a woman who did not look or act sufficiently feminine or lady-like. As the district court explained in *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008), which concluded that a transgender plaintiff was entitled to judgment on her Title VII claim, Title VII liability should attach "whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Such gender stereotyping evidence is sufficient to demonstrate that the alleged discrimination and harassment occurred "because of … sex."

III. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court consider its views regarding the proper interpretation and application of Title VII.

Dated: April 4, 2014

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division

DELORA L. KENNEBREW
Chief
Employment Litigation Section

_/s/ Lori Kisch_____
Louis Lopez (DC Bar No. 461662)

Deputy Chief
Lori B. Kisch (DC Bar No. 491282)
Trial Attorney
Employment Litigation Section
Civil Rights Division
United States Department of Justice
601 D Street, NW
Patrick Henry Building, Room 4924
Washington, DC 20579
(202) 305-4422
(202) 514-1105 (fax)
Lori.Kisch@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Statement of Interest of the United States of America was served, upon all counsel of record, via the Court's Electronic Case Filing (ECF) system on April 4, 2014.

/s/ Lori Kisch

Lori B. Kisch
Senior Trial Attorney
Civil Rights Division
Employment Ligation Section
601 D Street, NW, PHB
Washington, DC 20579
Telephone: (202) 305-4422
Fax: (202) 514-1105
Lori.Kisch@usdoj.gov