

COMMENT

***SMITH V. CITY OF SALEM:* TRANSGENDERED JURISPRUDENCE AND AN EXPANDING MEANING OF SEX DISCRIMINATION UNDER TITLE VII**

MELINDA CHOW*

I. INTRODUCTION

Transgendered¹ people inhabit the outskirts of mainstream society. They have been marginalized, discriminated against, ridiculed, and even dehumanized. It is perhaps unsurprising, given this history of stigmatization, that transgendered people have not often found refuge in the law. In the context of sex discrimination, for example, courts have traditionally refused to expand protection against sex discrimination under Title VII of the Civil Rights Act² to cover discrimination against transgendered people.³ Recently, however, some courts have become more amenable to protecting gender variants.⁴ These courts have built upon the Supreme Court's de-

* J.D. Candidate, Harvard Law School, Class of 2006; B.A., B.S., University of California, Berkeley, 2002.

¹ I am using the term "transgendered" as an umbrella term that includes "anyone whose identity or behavior falls outside of stereotypical gender norms." See Samantha J. Levy, *Trans-forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 144 (2002) (citations omitted). Transsexuals are a subset of this group who experience a more extreme divergence between their biological sex and their gender identity, causing many to ultimately choose to undergo a surgical sex change. See *id.* at 144–47. Throughout this Comment, I also use the term "gender variant" synonymously with "transgendered."

² Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

³ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (stating that "Title VII does not protect transsexuals"); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977) (affirming the district court's decision that Title VII "does not embrace transsexual discrimination"); *Sommers v. Budget Mkt., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); see *infra* text accompanying notes 10–15.

⁴ In *Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the Ninth Circuit held that the Gender Motivated Violence Act provided protection to the transsexual plaintiff against gender discrimination. *Id.* at 1193, 1202. Following *Schwenck*, in *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001), the Ninth Circuit extended Title VII sexual harassment protection to an effeminate male who was tortured by his co-workers for carrying his tray "like a woman" and who was derided as a "faggot" and "fucking female whore." *Id.* at 870 (quotations omitted), 875. In *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), the Third Circuit stated that Title VII does not forbid discrimination based on sexual orientation, but further said in dicta that Title VII does prohibit one

cision in *Price Waterhouse v. Hopkins*,⁵ which granted Title VII relief to a woman who was discriminated against by her employer for being too “masculine,”⁶ in order to provide antidiscrimination protection to transgendered plaintiffs. Other courts have refused to interpret the holding in *Price Waterhouse* as applying to transgendered people.⁷

In light of this conflicting case law, it is significant that the Sixth Circuit recently took a strong stance on the expansion of transgendered rights. In *Smith v. City of Salem*, the court extended Title VII protection to a transsexual firefighter.⁸ The Sixth Circuit opinion is a welcome addition to anti-discrimination doctrine because transgendered people, so long marginalized by sex- and gender-based stereotypes, deserve legal protection. The reasoning in *Smith* is also significant because it expands the sex discrimination prohibited by Title VII to include discrimination based on both sex and gender.⁹

II. HISTORICAL CASES INVOLVING TRANSGENDERED PLAINTIFFS

*Ulane v. Eastern Airlines, Inc.*¹⁰ was the leading case on transgendered employment discrimination prior to *Price Waterhouse* and the recent Ninth Circuit opinions.¹¹ In *Ulane*, the Seventh Circuit denied Title VII sex discrimination protection to a transsexual pilot.¹² The court narrowly interpreted sex discrimination as discrimination “against women because they

from “acting to punish the victim’s noncompliance with gender stereotypes.” *Id.* at 261, 264. Although there is strong case law supporting the expansion of Title VII to include transgendered people from these two circuits, the Sixth Circuit, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), was the first to explicitly hold that Title VII covers transgendered people.

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁶ *Id.*

⁷ See *infra* text accompanying notes 21–39 (discussing the decisions in *Dobre v. National Railroad Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993), *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002), and *James v. Ranch Mart Hardware*, 881 F. Supp. 478 (D. Kan. 1995)).

⁸ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁹ The term “sex” is “commonly used to denote one’s status as a man or woman based upon biological factors,” while the term “gender” is “generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex. Gender, as used in this sense, is socially constructed.” Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271, 274 (1999). Thus, gender can be a much more expansive category than sex. Although gender and sex are separate concepts, they are interlinked in that gender discrimination often results from stereotypes based on what is expected of members of each sex. There is significant literature on the meanings and salience of sex and gender. Full discussion of that topic is beyond the scope of this Comment.

¹⁰ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

¹¹ *Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Nichols v. Azteca Res. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

¹² *Ulane*, 742 F.2d at 1083. *Ulane* was born a biological male and underwent sex reassignment surgery to become a biological female. *Id.*

are women and against men because they are men.”¹³ The court further stated, “The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.”¹⁴ Justice Scalia, in order to keep gender out of the definition of “sex” discrimination, clarified in his dissent in a 1994 case the distinction between sex and gender: “The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”¹⁵

Five years after *Ulane*, in a groundbreaking case for gender jurisprudence, the Supreme Court held in *Price Waterhouse* that Title VII prohibits gender discrimination, which includes sex stereotyping.¹⁶ The court stated, “Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.”¹⁷ In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied partnership at her accounting firm because she failed to conform to gender stereotypes of how women should look and act.¹⁸ Partners of the firm described her as “macho,” noted that she “over-compensated for being a woman,” recommended that she take “a course at charm school,” and mentioned that she could improve her chances for partnership if she could “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.”¹⁹ Following the *Price Waterhouse* precedent, the Ninth Circuit has also stated that Title VII “prohibit[s] discrimination based on gender as well as sex.”²⁰

Despite its groundbreaking holding, the potential impact of the *Price Waterhouse* decision has not been fully realized. In *Dobre v. National Railroad Passenger Corp.*,²¹ Amtrak hired the plaintiff, who “presented herself as a man,” but who several months afterwards informed her²² supervisors that she was commencing hormone treatment for the process of becoming a biological female.²³ In response, Amtrak required Dobre to dress as a male, forbade her to use the women’s restroom, referred to her by her male name, and moved her desk away from public view.²⁴ Like the

¹³ *Id.* at 1085.

¹⁴ *Id.*

¹⁵ *J.E.B. v. Ala. ex rel. T.B.*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting).

¹⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40, 251 (1989).

¹⁷ *Id.* at 242.

¹⁸ *Id.* at 231–35.

¹⁹ *Id.* at 235 (quotations omitted).

²⁰ *Schwenck v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

²¹ *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993).

²² I refer to Dobre by her gender identity, rather than her biological sex. By doing so, I highlight the importance of gender identity. For a discussion on pronouns for transsexuals, see Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 348–53 (1999). I will refer to people by their gender identity, if it differs from their biological sex, throughout the piece.

²³ *Dobre*, 850 F. Supp. at 285.

²⁴ *Id.* at 286.

courts in the pre-*Price Waterhouse* decisions, the *Dobre* court held that Title VII does not protect transsexuals from such discrimination because the term “sex” should be narrowly construed, according to its plain meaning, which it stated was biological and anatomical sex, a concept distinct from gender.²⁵ In its opinion, the district court did not mention the *Price Waterhouse* case; instead it relied on the *Ulane* line of cases.²⁶

Even when courts have accepted the proposition that gender discrimination is included in the sex discrimination forbidden by Title VII and that Title VII prohibits sex stereotyping, they sometimes still deny protection to transgendered people by distinguishing Ann Hopkins’s predicament in *Price Waterhouse* from more extreme forms of gender nonconformity. The courts that have taken this approach²⁷ appear to believe that discrimination against transsexuals, transvestites, and transgendered people “is of a different and permissible sort.”²⁸ These courts insist that Title VII does not cover transsexuals because there is something categorically different between an effeminate male and a transgendered male that moves discrimination against transgendered males into the realm of permissible gender discrimination.

The plaintiff in *Oiler v. Winn-Dixie Louisiana, Inc.* was a male cross-dresser diagnosed with transvestic fetishism and gender identity disorder (“GID”) who was fired from his job at Winn-Dixie “because he publicly adopted a female persona and publicly cross-dressed as a woman.”²⁹ In an effort to distinguish Oiler’s experience from Hopkins’s in *Price Waterhouse*, the court clarified that

this is not a situation where the plaintiff failed to conform to a gender stereotype The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women’s clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman.³⁰

The *Oiler* court assumed that the definition of gender stereotypes is not broad enough to include men with GID or men who dress like women. However, by definition, a gender stereotype is an assumption about how a

²⁵ *Id.* at 286–87.

²⁶ *Id.* at 286.

²⁷ *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. 2002); *James v. Ranch Mart Hardware*, 881 F. Supp. 478 (D. Kan. 1995).

²⁸ Sunish Gulati, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177, 2187 (2003) (further stating that “[t]hey justify these findings by classifying the gender nonconformist plaintiff as transsexual and arguing that discrimination against them is not based on their sex”).

²⁹ *Oiler*, 2002 U.S. Dist. LEXIS 17417, at *4, *9.

³⁰ *Id.* at *28.

person of a particular sex should look and act. For example, in *Price Waterhouse*, the gender stereotype was that women should wear jewelry and make-up. In *Oiler*, there was also a gender stereotype involved—that men should be gendered masculine and not wear make-up—and Oiler failed to conform to that stereotype. It is difficult for courts to overcome the stereotypical idea that men should want to appear masculine and women should want to appear feminine. Although *Price Waterhouse* outlawed discrimination based on this exact stereotype, gender nonconformists who pass beyond a certain degree of deviance are apparently too “unnatural” for some courts, like that in *Oiler*, to accept.

In *James v. Ranch Mart Hardware*,³¹ the defendant hired Glenn Wayne James, biologically a male, for a sales clerk position.³² After James informed the store manager that she would become Barbara Renee James and wear a wig, a dress, and make-up in order to appear like a woman, the manager told James that he did not want her to come to work appearing in that manner, but agreed to discuss the idea with the president of Ranch Mart and to let James know the outcome.³³ The manager spoke with the president, and the two decided to make a final decision the next day when James came to work, although they did not inform her of their conversation or decision.³⁴ When James did not show up to work for the following two days, Ranch Mart fired her for her absence.³⁵

The district court held that James failed to state a claim of employment discrimination under Title VII.³⁶ The court dismissed James’s claim because she was not a member of a protected class as either a male or a transsexual and thus did not meet the first element of a prima facie case of employment discrimination.³⁷ In its discussion, the court explained that in order to evaluate James’s claim, the court would have had to compare how James was treated, as a male, to the treatment of a similarly situated female, which the court determined was a female-to-male transsexual.³⁸ The court should have compared James, a biological male who wore dresses, to a biological female who wore dresses and concluded that the female would not have been fired.³⁹ Instead, the court said that it is permissible to discriminate against transsexuals as long as one discriminates against all transsexuals. The type of analysis suggested by the *James* court is a contrived method of avoiding the real issue of gender discrimination. It further-

³¹ *James v. Ranch Mart Hardware*, 881 F. Supp. 478 (D. Kan. 1995).

³² *Id.* at 480.

³³ *Id.* at 480–81.

³⁴ *Id.* at 481.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* The court also stated that there was no triable issue of fact as to pretext, which would have been the issue had the plaintiff been able to establish a prima facie case of employment discrimination. *Id.* at 482.

³⁸ *Id.* at 481.

³⁹ *See Gulati, supra* note 28, at 2190.

more relies upon the assumption that discrimination against transsexuals and others who stray from gender-based stereotypes is acceptable.

III. SMITH V. CITY OF SALEM

Jimmie L. Smith was employed by the City of Salem (the “City”) as a lieutenant in its fire department, where she worked without any negative incidents for seven years.⁴⁰ Smith is a transsexual; she was born a biological male, but has a female sexual identity.⁴¹ After doctors diagnosed Smith with Gender Identity Disorder (“GID”),⁴² her co-workers began “commenting that [her] appearance and mannerisms were not ‘masculine enough.’”⁴³ Consequently, Smith spoke with her immediate supervisor, Thomas Eastek, about her GID diagnosis and treatment “so that Eastek could address Smith’s co-workers’ comments and inquiries.”⁴⁴ Shortly after, Eastek met with Walter Greenamy, the chief of the fire department, against Smith’s wishes, and Greenamy then discussed Smith’s condition with the law director for the city, Brooke Zellers.⁴⁵ “Greenamy and Zellers arranged a meeting of the City’s executive body to discuss Smith and devise a plan for terminating [her] employment.”⁴⁶ At the meeting, Zellers, Greenamy, and the mayor of Salem agreed to have the City select physicians to conduct psychological evaluations of Smith on three separate occasions.⁴⁷ “They hoped that Smith would either resign or refuse to comply” with these humiliating and scrutinizing requirements.⁴⁸ Four days after Smith received a “right to sue” letter from the Equal Employment Opportunity Commission, Greenamy suspended Smith for one twenty-four hour shift based on an alleged violation of an outdated policy.⁴⁹

As a result of these incidents, Smith filed Title VII claims of sex discrimination and retaliation, equal protection and due process claims under 42 U.S.C. § 1983, and state law claims of invasion of privacy and civil conspiracy.⁵⁰ After determining that Title VII does not protect transsexuals

⁴⁰ Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

⁴¹ *Id.*

⁴² *Id.* The court explains: “the American Psychiatric Association characterizes [GID] as a disjunction between an individual’s sexual organs and sexual identity.” *Id.* (citation omitted). GID is also known as gender dysphoria and involves “a persistent discomfort about one’s assigned sex.” Jody Lynn Madeira, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals’ Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 142 (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 533 (4th ed. 1994)) (quotations omitted).

⁴³ *Smith*, 378 F.3d at 568.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 569.

⁴⁸ *Id.* If Smith refused to comply, the City planned to fire her for insubordination. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 569, 576–77.

als as a class, the district court judge dismissed all of Smith's claims and granted summary judgment for the defendants on the federal claims.⁵¹

On appeal, the Sixth Circuit first examined Smith's sex stereotyping claim in light of the Supreme Court's pronouncements in *Price Waterhouse*.⁵² The court found that Title VII's prohibition on discrimination because of sex bars gender discrimination.⁵³ The court aptly observed that the district court relied on a series of pre-*Price Waterhouse* decisions that failed to include gender in the definition of "sex."⁵⁴ According to the court, these decisions were "eviscerated" by the Supreme Court's logic in *Price Waterhouse*.⁵⁵ From the Supreme Court's prohibition on discrimination against females who act too masculine, the Sixth Circuit extrapolated, "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."⁵⁶ The Sixth Circuit also further clarified the definition of "gender," which is a term "borrowed from grammar to designate the sexes as viewed as *social* rather than *biological* classes."⁵⁷ Thus, the Sixth Circuit recognized that limiting the analysis of sex discrimination to biological categories is inadequate and thus expanded the bases upon which sex discrimination is forbidden.

Moreover, contrary to the *Oiler* and *James* courts, the Sixth Circuit held that Smith's status as a transsexual did not bar her claim. By definition, transsexuals are individuals who fail to conform to stereotypes about how those of a particular biological sex should act, dress, and self-identify.⁵⁸ The Sixth Circuit clarified that from a legal perspective, a transsexual is not categorically different from a "macho" woman; the difference is only a matter of degree.⁵⁹ Transsexuality is merely an extreme instance of a person whose biological sex fails to match his or her gender.

Second, the court held that Smith sufficiently pled that her suspension constituted an "adverse employment action."⁶⁰ The court found that the

⁵¹ *Id.* at 569, 572.

⁵² *Id.* at 571–72.

⁵³ *Id.* at 572.

⁵⁴ *Id.* at 572–73 (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084, 1085, 1086 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)).

⁵⁵ *Smith*, 378 F.3d at 573.

⁵⁶ *Id.* at 574.

⁵⁷ *Id.* at 572 (emphasis added) (quoting Richard A. Posner, *SEX AND REASON* 24–25 (1992)) (quotations omitted).

⁵⁸ *Id.* at 575.

⁵⁹ *Id.*

⁶⁰ *Id.* In order to establish a prima facie case of employment discrimination pursuant to Title VII, the plaintiff must show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position in question; and (4) she was treated differently from employees outside of her protected class who were similarly situated. *Id.* at 570. Thus, the adverse employment action discussion pertains to the second element of establishing a Title VII claim. Moreover, proof of an adverse em-

fire department's suspension of Smith for a twenty-four-hour shift, which constituted 60% of a forty-hour workweek, was sufficient to establish a "materially adverse change in the terms and conditions of [plaintiff's] employment."⁶¹ On Smith's claims pursuant to 42 U.S.C. § 1983,⁶² the court held that Smith sufficiently stated a claim of sex discrimination in violation of her equal protection rights, but failed to state a claim based on violations of her right to due process.⁶³ The court did not address the state law claims.

The Sixth Circuit correctly applied the *Price Waterhouse* decision to hold that transsexuals are protected against sex discrimination under Title VII. More broadly, the court clarified that the sex discrimination prohibited under Title VII includes gender-based discrimination. Thus, the Sixth Circuit increased the scope of protection available against sex discrimination by including multiple concepts of proscribed sex discrimination. This expansion is appropriate because sexual stereotypes and the discrimination that results from applying these stereotypes to the detriment of another often involves societal expectations of gender.

IV. CONCLUSION

The Sixth Circuit's holding and reasoning in *Smith* represents a significant victory for transgendered people. By reiterating that discrimination based on both sex and gender is forbidden under Title VII, the court steers transgendered jurisprudence in a more expansive and just direction. There are still other types of discrimination, however, that are currently not prohibited by Title VII, but that occur as a result of gender stereotyping.

To continue progress in this area, courts should extend Title VII protection to forbid discrimination based on sexual orientation and to prohibit gender-based dress codes. Courts have consistently denied Title VII protection to homosexuals on the basis that Title VII's use of the term "sex" does not include "sexual orientation."⁶⁴ Like the *Oiler* and *Dobre* courts,

ployment action is also relevant to establishing a prima facie case of retaliation under Title VII, which involves the following elements: (1) the plaintiff engaged in an activity protected by Title VII; (2) the defendant had knowledge of her engagement in the protected activity; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the adverse employment action. *Id.*

⁶¹ *Id.* at 575 (quoting *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999)) (quotations omitted).

⁶² Individuals have a civil cause of action under 42 U.S.C. § 1983 when they are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under the color of state law. 42 U.S.C. § 1983.

⁶³ *Smith*, 378 F.3d at 578.

⁶⁴ *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258–59 (1st

which considered transsexuals categorically distinguishable from “sissy” men or “macho” women, courts denying protection to homosexuals also consider homosexuality a different and hence permissible basis for discrimination. Yet, like transsexuals, homosexuals can be seen as extreme gender nonconformers: they do not conform to the stereotype that men ought to desire women sexually or that women ought to desire men sexually. Homosexuality and transsexuality subvert norms and expectations about how women and men should live their lives as sexual beings. Traditional notions of sex and gender are transgressed by both homosexuals and transsexuals, but a progressive society must free itself from such outdated and rigid notions of human nature. Extending Title VII protection to people discriminated against on the basis of sexual orientation is an important step toward achieving this goal.

Along the same lines, Title VII’s prohibition on sex discrimination should also be interpreted to forbid gender-based dress codes. Such dress codes have been upheld on the grounds that grooming policies are “not within the statutory goal of equal employment” and because the policies supposedly only have a “de minimis effect.”⁶⁵ The Seventh Circuit has stated, “So long as [dress codes] find some justification in commonly accepted social norms and are reasonably related to the employer’s business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women.”⁶⁶ This type of stereotype-accommodating attitude only undermines the goal of equality. Norms about clothing, grooming, hair, and physical appearance in general often originate from gender stereotypes. Thus, dress codes that force people to dress in ways expected of those of their biological sex are mechanisms that reinforce gender stereotypes and create backlash against gender nonconformists. Courts that uphold these dress codes are therefore sanctioning gender discrimination.

The obstacles to expanding Title VII to forbid discrimination against homosexuals and to outlaw gender-based dress codes are not insurmountable. Before *Price Waterhouse*, the outlook for transsexuals seemed grim. The Sixth Circuit’s holding in *Smith* demonstrates that courts can successfully transcend deeply ingrained societal prejudices and decide cases based on sound legal principles that accurately reflect the complexities involved with sex and gender.

Cir. 1999).

⁶⁵ *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (holding that a policy requiring male, but not female, employees, to have short hair does not violate Title VII) (citations omitted).

⁶⁶ *Carroll v. Talman Fed. Savs. & Loan Ass’n*, 604 F.2d 1028, 1032 (7th Cir. 1979).

