National Center for TRANSGENDER EQUALITY

Legal Developments on Gender Identity Discrimination as Sex Discrimination
May 2018

The vast majority of courts to have considered the issue have determined that federal sex discrimination laws prohibit discrimination based on an individual's transgender status.[1] Over nearly two decades, numerous federal district and appeals courts have repeatedly affirmed that federal sex discrimination laws such as Section 1557 of the Affordable Care Act prohibit discrimination based on transgender status.[2]

Prior to 1998, most courts rejected such claims. However, two Supreme Court rulings on sex discrimination 1989 and 1998—though they did not involve transgender plaintiffs—have dramatically changed courts' approach to this issue. While the Supreme Court has not directly addressed whether federal sex discrimination laws prohibit discrimination against transgender people, since 1998 an overwhelming majority of federal courts addressing the issue have applied Supreme Court precedents to hold that discrimination based on a person being transgender or undergoing gender transition constitutes unlawful sex-based discrimination under a variety of federal laws. These laws include Title VII of the Civil Rights Act, the Equal Protection Clause of the Constitution, and Title IX of the Educational Amendments of 1972, as well as Section 1557 of the Affordable Care Act, whose protections are determined through Title IX's analytical framework.[3]

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[1] Because of the statutes' similar language and relatively smaller body of Title IX case law, courts often look to case law arising under Title VII of the 1964 Civil Rights Act in interpreting Title IX. *See Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) As discussed below, similar issues of statutory interpretation also arise under other federal sex discrimination statutes, as well as under the Equal Protection Clause of the U.S. Constitution.

[2] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (sex discrimination under Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX); *Evancho v. Pine-Richland Sch. Dist.*, --- F.Supp.3d ---, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017) (Equal Protection Clause); *Mickens v. Gen. Elec. Co.*, No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (Title VII); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (Title IX); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio 2016), *stay pending appeal denied sub nom. Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX, Equal Protection Clause); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); *U.S. v. S.E. Okla. State Univ.*, No. CIV–15–324–C, 2015 WL 4606079 (Title VII); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (Title VII); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03–CV–0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (Title VII). *See also Hively v. Ivy Tech*, 853 F.3d 339 (7th Cir. Apr. 4, 2017) (en banc) (citing gender identity cases favorably and holding that sexual orientation discrimination constitutes sex discrimination). *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (relying on now-overturned Seventh Circuit precedent to hold that anti-transgender discrimination is not covered *per se* under Title VII but may be covered as sex stereotyping discrimination).

[3] 42 U.S. Code § 18116: "Except as otherwise provided for in this title … an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

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Five courts of appeal and numerous district courts have now held that anti-transgender bias violates the prohibition on sex discrimination under these federal laws. Most courts that have been presented with the question of whether Section 1557's sex discrimination prohibition specifically covered anti-transgender discrimination have firmly ruled that it does.[4]

Courts Prior to 1989 Dismissed Sex Claims Discrimination by Transgender People

Prior to 1989, courts uniformly held that federal sex discrimination laws such as Title VII did not prohibit discrimination against transgender individuals. In *Holloway v. Arthur Anderson & Co.*, ,[5] Ramona Holloway was fired for transitioning from male to female.[6] The court reasoned that Title VII did not extend protection to transgender people because Congress's "manifest purpose" in enacting the statute was only "to ensure that men and women are treated equally."[7] In the court's view, Holloway was not discriminated against "because she is male or female, but rather because she is a transsexual who chose to change her sex." [8] *Sommers v. Budget Marketing, Inc.*, under similar facts, the court held that discrimination based on a person's gender transition was not within the "plain meaning" of "sex," and that "the legislative history does not show any intention to include transsexualism in Title VII."[9] In Ulane v. Eastern Airlines, Inc., the Seventh Circuit held that a transgender employee fired because of her transition failed to state a viable sex discrimination claim.[10] The court reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."[11]

***Price Waterhouse* Held that Sex Discrimination Includes Discrimination Based on Sex Stereotypes**

Although it did not involve a transgender plaintiff, *Price Waterhouse v. Hopkins*,[12] considered and rejected the argument that the term "sex" in Title VII refers only to a person's physical characteristics. Ann Hopkins was denied a partnership in an accounting firm, in part because her demeanor, appearance, and personality were deemed insufficiently "feminine."[13] To improve her chances for partnership, Hopkins was told that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[14] The Supreme Court stated that the words "because of…sex" encompassed discrimination where "the employer relied upon sex-based

[4] *E.g., Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding that discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act); *Prescott v. Rady Children's Hospital-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, 857 F.3d. 771 (8th Cir. 2017 (implicitly assuming that discrimination claims on the basis of transgender status are permitted under Section 1557 of the Affordable Care Act)

[5] *Holloway v. Arthur Anderson & Co*., 566 F.2d 659 (9th Cir. 1977)

[6] *Id.* at 661

[7] *Id.* at 663

[8] *Id.* at 664

[9] *Sommers v. Budget Marketing, Inc.* 667 F.2d 748, 749–50 (8th Cir. 1982).

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

[11] Id. at 1085. *See also Powell v. Read's, Inc.*, 436 F.Supp. 369 (D. Md. 1977).

[12] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

[13] *Id. at 234-35.*

[14] *Id.* at 235.

considerations in coming to its decision," including behavioral and social sex-based considerations, rather than narrowly applying to discrimination based on physical differences.[15] "As for the legal relevance of sex stereotyping," the Court held, "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.'"[16]

In the decade following *Price Waterhouse,* rulings on gender identity discrimination were mixed. Some courts continued to reject such claims. [17] Others rejected this interpretation, taking the view that one's identity as male or female inherently relates to sex.[18]

Oncale Held that Sex Discrimination Is Not Limited to Circumstances Specifically Intended by Congress

In *Oncale v. Sundowner Offshore Oil Services, Inc.*, Joseph Oncale sued his former employer under Title VII, alleging that he was subjected to sexual harassment and attacks by his male coworkers.[19] Justice Scalia authored a unanimous opinion rejecting the view that the scope of Title VII is limited to what the enacting Congress specifically intended to cover. The Court acknowledged that when Congress enacted Title VII, it was not specifically concerned about sexual harassment of a man by other men. The Court noted, however, that "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."[20]

A Growing Majority of Courts Permitted and Continue to Permit Transgender Claims Following *Price Waterhouse* and *Oncale*

Following *Oncale*, courts, considering *Price Waterhouse* and *Oncale* together, have increasingly held that Title VII and other sex discrimination laws encompass anti-transgender discrimination. For example, in *Schwenk v. Hartford*,[21] the Ninth Circuit relied on *Price Waterhouse* and *Oncale* in concluding that transgender people must be protected under the Gender Motivated Violence Act. The plaintiff in the case, Crystal Schwenk, a transgender prisoner, alleged that a guard targeted her for a physical assault because of her sex. On appeal, the guard argued that sex discrimination laws do not protect transgender people, relying on the Ninth Circuit's earlier decision in *Holloway*. The court, however stated:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In Price Waterhouse…the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination

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[15] *Id.* at 242.
[16] *Id.* at 251 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).
[17] *James v. Ranch Mart Hardware 881* F.Supp. 478 (D.Kan. 1995); *Dobre v. Nat'l Rail Road Passenger Corp.,* 850 F.Supp 284 (E.D.Pa. 1993); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96 (D.D.C. 1994).
[18] *Rentos v. OCE-Office Sys.*, No. 95 CIV. 7908 LAP, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (interpreting state sex discrimination laws); *see also Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (interpreting local sex discrimination ordinance).
[19] *Oncale v. Sundowner Offshore Oil Services, Inc.* 523 U.S. 75, 77 (1998).
[20] *Id.* at 79.
[21] *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000)

> based on the fact that she failed "to act like a woman"—that is, to conform to socially-constructed gender expectations. Thus, under Price Waterhouse, "sex" under Title VII encompasses both…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.[22]

In the 2012 *Macy* decision, the Equal Employment Opportunity Commission held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on ... sex,' and such discrimination therefore violates Title VII."[23] Since then, courts have been presented with an increasing number of cases alleging discrimination against transgender employees, patients, and students. The growing majority of courts permit transgender claims under Title VII, Title IX, Section 1557 of the Affordable Care Act, and other laws.

Below, we offer a circuit-by-circuit overview of courts' approach to sex discrimination laws in cases involving transgender people.

First Circuit

The First Circuit Court of Appeals has not directly spoken on the topic of transgender discrimination under Title VII, Title IX, or Section 1557, but has relied on *Oncale* and *Price Waterhouse* in finding claims of sex discrimination under other federal nondiscrimination laws. In *Rosa v. Park West Bank & Trust Co.*, the First Circuit held that a bank customer stated a sex discrimination claim under the Equal Credit Opportunity Act, where the bank allegedly told the customer to go home and change out of traditionally feminine clothes in order to obtain a loan.[24]

Second Circuit

District courts in the Second Circuit have repeatedly recognized that sex discrimination laws encompass anti-transgender discrimination.[25] In *Cruz v. Zucker*, a New York federal district court ruled that Section 1557's sex discrimination protections include discrimination on the basis of gender identity. The court also found that a New York Medicaid regulation that categorically excluded coverage of specific surgeries for the treatment of gender dysphoria violated the Medicaid Act.[26] .

Third Circuit

District courts in the Third Circuit have reaffirmed that anti-transgender discrimination is prohibited under Title VII and Title IX.[27]

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[22] *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000), at 1201-02.
[23] *Macy v. Holder,* No. 0120120821 (EEOC Apr. 20, 2012).
[24] *Rosa v. Park West Bank & Trust Co*. 214 F.3d 213 (1st Cir. 2000).
[25] *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (finding claim of discrimination based on gender transition constitutes sex discrimination under Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (holding that discrimination based on transgender status of a job applicant constitutes sex-based discrimination under Title VII).
[26] *Cruz v. Zucker.* 195 F.Supp.3d 554, 571 (S.D.N.Y. Jul. 5, 2016)
[27] *See*, e.g., *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (holding termination of employee based on transgender status constituted discrimination based on sex stereotypes under Title VII).

In *Johnston v. University of Pittsburgh*, the court acknowledged that some cases of anti-transgender discrimination may be covered under *Price Waterhouse*, but concluded that, in the case before it, the university did not violate Title IX by excluding a male transgender student from men's restrooms.[28] Two years later, however, the same district court stated that "the decisional law has developed further [since Johnston], and has done so rather swiftly."[29] The court held in *Evancho v. Pine-Richland School District* that "Plaintiffs have demonstrated a reasonable likelihood of showing that Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity."[30]

In *A.H. v. Minersville Area School District*, a district court found that Title IX encompassed anti-transgender discrimination, and that these statutory protections continued to be in effect regardless of the Department of Education's withdrawal of a 2016 guidance document that clarified that Title IX protected transgender students from discrimination.[31] Following the reasoning of *Evancho* and the Seventh Circuit's *Whitaker* ruling, the District Court emphasized that Title IX independently prohibits anti-transgender discrimination:

> The fact that the Department of Justice and the Department of Education withdrew their interpretation of Title IX does not necessarily mean that a school, consistent with Title IX, may prohibit transgender students from accessing the bathrooms that are consistent with their gender identity. Instead, it simply means that the 2016 Guidance cannot form the basis of a Title IX claim.[32]

Fourth Circuit

In *G.G. ex rel. Grimm v. Gloucester County School Board*, the Fourth Circuit held that the Department of Education's then-current position that sex discrimination encompassed anti-transgender discrimination was a reasonable interpretation.[33] A concurring opinion further argued that, irrespective of any deference to the Department, "the weight of circuit authority" strongly favored the position that anti-transgender discrimination was a form of sex discrimination.[34] The Supreme Court granted review, but later vacated and remanded the case "for further consideration in light of" the Department of Education's rescission of a 2016 guidance document clarifying that transgender students were protected from discrimination under Title IX.[35] The Court of Appeals subsequently remanded the case to the district court to decide whether the case has become moot on the grounds that Grimm had graduated from high school.[36] The case remains pending before the court. However, as district courts have recognized, *G.G.* remains binding

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[28] *Johnston v. University of Pittsburgh*., 97 F.Supp.3d 657 (W.D. Pa. 2015).
[29] *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 288 n.33 (W.D. Pa. 2017)
[30] *Id.* at 297.
[31] A.H. v. Minersville Area School District, F.Supp.3d, 2017 WL 5632662 (M.D. Pa. 2017).
[32] *Id.* at *4.
[33] *G.G. ex rel. Grimm v. Gloucester County School Board*. 822 F.3d 709, 720-23 (4th Cir. 2016).
[34] *Id.* at 727-28 (Davis, J., concurring).
[35] *G.G. ex rel. Grimm v. Gloucester County School Board*. 137 S.Ct. 1239 (Mar. 6, 2017).
[36] *G.G. ex rel. Grimm v. Gloucester County School Board*. 869 F.3d 286 (4th Cir. 2017).

circuit precedent to the extent it holds that Title IX does not preclude claims of discrimination by transgender students.[37]

Lower courts in the Fourth Circuit have continued to hold that sex discrimination encompasses anti-transgender discrimination. For example, in *M.A.B. v. Board of Education of Talbot County*, 286 F.Supp.3d 704 (D. Md. 2018), the court held that a transgender boy who was prohibited from using the boys' locker room had a valid Title IX sex-discrimination claim.[38]

Fifth Circuit

District courts in the Fifth Circuit hold varying positions on sex discrimination claims based on transgender status. Judges in the Southern District of Texas have held that workplace discrimination based on transgender status constitutes sex discrimination under Title VII.[39] In contrast, in *Franciscan Alliance v. Burwell*, a district court judge issued a nationwide pre-enforcement injunction of preventing the Department of Health and Human Services from enforcing a regulation clarifying that the Affordable Care Act's sex discrimination prohibition encompassed anti-transgender discrimination.[40] While the injunction was intended to temporarily pause HHS' own enforcement activities while the case proceeded, it did not change the meaning of the underlying law or the ability of private individual to enforce their rights under the law, and courts have continued to find that Section 1557's sex discrimination provision includes discrimination based on transgender status without relying on HHS' regulation or its enforcement.[41] Similarly, the same district court, under the same judge, issued a preliminary injunction of the Department of Education's 2016 guidance clarifying that Title IX protected against discrimination based on transgender status, but courts have continued to hold that Title IX protects against this form of discrimination regardless of the later rescission of this guidance.

Sixth Circuit

In a trio of cases, *Smith v. City of Salem*,[42] *Barnes v. City of Cincinnati*,[43] and *EEOC v. Harris Funeral Homes*,[44] the Sixth Circuit held that a firefighter, police officer, and funeral home employee, respectively, all stated Title VII claims by alleging they were terminated because of being transgender. As in *Schwenk*, the *Smith* court stated that "the approach in *Holloway*, *Sommers*, and *Ulane*…has been eviscerated by *Price Waterhouse*."[45]. Most recently in *EEOC v. Harris Funeral Homes*, the Sixth Circuit reiterated that discrimination on the basis of transgender status violates Title VII, reasoning as follows:

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[37] *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704 (D. Md. 2018) (quoting *United States v. Giddins*, 858 F.3d 870, 886 n.12 (4th Cir. 2017)).

[38] *M.A.B. v. Board of Education of Talbot County*, 286 F.Supp.3d 704 (D. Md. 2018). *See also Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (holding a claim of discrimination based on gender identity constitutes sex discrimination under Title VII); *Stone v. Trump*, 280 F.Supp.3d 747 (D. Md. 2017) (holding that discrimination against transgender people is gender-based discrimination under the Equal Protection Clause of the Constitution).

[39] *Lopez v. River Oaks*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Wittmer v. Phillips 66 Co.*, CV No. H-17-2188 (S.D. Tex. 2018).

[40] *Franciscan Alliance v. Burwell*, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).

[41] *Prescott v. Rady Children's Hospital*, 265 F.Supp.3d 1090 (S.D. California., 2017).

[42] 378 F.3d 566 (6th Cir. 2004).

[43] 401 F.3d 729 (6th Cir. 2005).

[44] --- F.3d ---, 2018 WL 1177669 (6th Cir. 2018).

[45] *Smith v. City of Salem*, 378 F.3d at 573

> 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…. Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping…. 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…. Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.[46]

In *Board of Education of Highland Local School District v. U.S. Department of Education*, a school district sued the Department of Education after the Department found that it had discriminated against a transgender student by denying her access to girls' restrooms, and the transgender student who had been denied restroom access intervened.[47] The district court held that the Department's Title IX interpretation was reasonable and entitled to deference, and that in any event the school's actions violated the Equal Protection Clause.[48] The Sixth Circuit denied a stay pending appeal, pointing to the "settled law" that discrimination based on gender nonconformity is sex discrimination.[49]

Seventh Circuit

In *Whitaker v. Kenosha Unified School District*, the district court granted a preliminary injunction to Ash Whitaker, a boy who faced discrimination based on his transgender status, including by being banned from the boys' restrooms. The court held that Whitaker was likely to prevail under both Title IX and the Equal Protection Clause and was entitled to relief to prevent him from "spending his last school year trying to avoid using the restroom, living in fear of being disciplined, [and] feeling singled out and stigmatized."[50] The Seventh Circuit affirmed, holding that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX," as well as the Equal Protection Clause.[51]

Eight Circuit

The Eighth Circuit has ruled on two cases involving transgender plaintiffs where the court implicitly assumed that anti-transgender discrimination claims are permitted under sex discrimination laws, including Section 1557 of the ACA.[52]. In *Tovar v. Essentia Health*, a mother of a transgender son brought suit against her employer under Title VII and Section 1557, alleging that the exclusion for

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[46] *EEOC*, --- F.3d ---, 2018 WL 1177669 at *8 (6th Cir. 2018). *See also Mickens v. Gen. Elec. Co.*, No. 16-603 (W.D. Ky. 2016) (holding termination of employee based on his transgender status violates Title VII).
[47] 208 F.Supp.3d 850 (S.D. Ohio Sept. 26, 2016).
[48] *Id*. at 878-79.
[49] *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. Dec. 16, 2016). A dissenting opinion did not address the merits, arguing instead that a stay should be granted based on the Supreme Court's expected review in G.G. *Id.* at 222-23 (Sutton, J., dissenting).
[50] No. 16-CV-943-PP, 2016 WL 5239829, at *5 (E.D. Wis. Sept. 22, 2016).
[51] 858 F.3d 1034, 1049 (7th Cir. 2017). *See also E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F.Supp.3d 952 (C.D. Ill. 2017) (holding that discrimination against transgender workers violates Title VII).
[52] *Hunter v. United Parcel Service*, 697 F.3d 697, 703 (8th Cir. 2012) (Title VII); *Tovar v. Essentia Health*, 857 F.3d. 771 (8th Cir. 2017) (Title VII and Affordable Care Act)

transition-related care that the employer maintained in its health plan unlawfully discriminated against her child, a beneficiary of the plan. The district court dismissed both claims on the grounds that a dependent was not protected from discrimination under either statute, and the plaintiff appealed to the Eighth Circuit. The circuit court upheld the district court's dismissal of her Title VII claim for lack of standing, but it found that the district court erred when it dismissed the claim under Section 1557. In its opinion, the court assumed without explicitly holding that discrimination based on transgender status was actionable under Section 1557.[53]

Several district courts in the Eighth Circuit have expressly held that anti-transgender bias constitutes sex discrimination.[54] In *Rumble v. Fairview Health Services*, a district court considered the case of a transgender man who was harassed and mistreated in a hospital because of being transgender. The court found that these facts would constitute sex discrimination under Section 1557.[55]

Ninth Circuit

In *Schwenk v. Hartford*, the Ninth Circuit relied on *Price Waterhouse* and *Oncale* in concluding that transgender people must be protected under the Gender Motivated Violence Act (see discussion above).[56]

Following the holding in *Schwenk*, district courts in the Ninth Circuit have consistently held that transgender discrimination claims are a form of sex-based discrimination.[57] *In Prescott v. Rady's Children Hospital San Diego*, the district court considered a lawsuit filed by the mother of a deceased transgender child alleging that a children's hospital had violated Section 1557 by discriminating against her son, Kyler Prescott, because of his transgender status. The district court reaffirmed that Section 1557 of the ACA's sex discrimination protection includes discrimination on the basis of transgender identity. The court based its conclusion on longstanding circuit court case law on Title VII and Title IX. Because the court held that the underlying statute of Section 1557 prohibits discrimination on the basis of transgender status independently of its implementing regulation, the court denied the hospital's request for the case to be stayed based on the *Franciscan Alliance v. Burwell* injunction, as the injunction was limited to HHS's own enforcement of its implementing regulation. According to the court, "the ACA claim and the Court's decision under the ACA do not depend on the enforcement or constitutionality of the HHS's regulation."[58]

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[53] *Tovar v. Essentia Health*, 857 F.3d. 771 (8th Cir. 2017) (Title VII and Affordable Care Act)

[54] *Dawson v. H&H Electric*, No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. 2015) (holding that the termination of an employee based on transgender status and gender transition constitutes discrimination based on sex under Title VII); *Brown v. Dept. of Health and Human Servs.*, No. 8:16DCV569, 2017 WL 2414567 (D. Neb. June 2, 2017) (holding that discrimination against transgender prisoners constitutes sex discrimination that is subject to heightened scrutiny under the Equal Protection Clause).

[55] *Rumble v. Fairview Health Services*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. 2015)

[56] *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

[57] *Norsworthy v. Beard*, 87 F.Supp.3d 1104 (N.D. Ca. 2015) (applying heightened Equal Protection scrutiny to policy of denying necessary medical treatment for transgender prisoner as a form of sex-based discrimination; *Roberts v. Clark Cty. Sch. Dist*., No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016) (holding that excluding transgender employee from restrooms consistent with his gender identity constitutes sex-based discrimination under Title VII); *Doe v. Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. 2016) (holding that discrimination against a transgender employee constitutes sex-based discrimination under Title VII); *Karnoski v. Trump*, C17-1297-MJP, 2018 WL 993973 (W.D. Wash. 2017) (holding that ban on transgender military service members is subject to heightened Equal Protection scrutiny); *F.V. v. Barron*, 286 F.Supp.3d 1131 (D. Ida. 2018) (applying heightened scrutiny to discriminatory practice of denying transgender individuals' applications to change the sex listed on their birth certificates).

[58] *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017)

Tenth Circuit

A Tenth Circuit case, *Etsitty v. Utah Transit Authority*, represents the only circuit court decision since 1998 to have held that anti-transgender discrimination is not *per se* actionable under Title VII.[59] The *Etsitty* court relied heavily on the since-overturned Seventh Circuit precedent *Ulane v. Eastern Airlines*.[60] The *Etsitty* court suggested, however, that while discrimination based on transgender status *per se* does not constitute sex discrimination, discrimination based on the perception a transgender person does not conform to sex stereotypes may be actionable.

Many courts in other circuits have typically declined to distinguish between discrimination based on transgender status and discrimination based on the perception that transgender people do not conform to sex stereotypes, with some arguing that this distinction is largely meaningless.[61] In the Tenth Circuit, however, several district courts have relied on this distinction in *Etsitty* to conclude that transgender plaintiffs' discrimination claims are actionable under Title VII.[62]

Eleventh Circuit

In *Glenn v. Brumby*, Vandy Beth Glenn was fired from her job as a legislative editor based on her gender transition. The Eleventh Circuit applied heightened scrutiny and found that the termination of an employee based on transgender status constitutes sex-based discrimination in violation of the Equal Protection Clause. The court explained that anti-transgender discrimination is inherently sex discrimination under the Equal Protection Clause because "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[63] The court added that "[d]iscrimination on such basis is subject to heightened scrutiny under the Equal Protection Clause."[64]

D.C. Circuit

In Schroer v. Billington, the D.C. district court determined that Diane Schroer—who had been offered a counterterrorism expert position at the Library of Congress, which was rescinded after she disclosed her gender transition—stated Title VII and Equal Protection claims.[65] The court analogized the case to that of an employer who "harbors no bias toward either Christians or Jews but only 'converts' from one religion to the other." The court noted that "[n]o court would take seriously the notion that 'converts' are not covered by the statute" and that "discrimination 'because of religion' easily encompasses discrimination because of a change of religion," and held that the same reasoning applies to cases of

[59] *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2005)
[60] *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984)
[61] *See* e.g., *EEOC v. Harris Funeral Homes* --- F.3d ---, 2018 WL 1177669 (6th Cir. 2018).
[62] *See*, e.g., *Tudor v. Se. Oklahoma State Univ.*, No. 15-324, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017) (holding that denying a professor tenure and promotion due to being transgender constituted a Title VII violation). Similarly, courts have found that the Fair Housing Act's bar on sex discrimination prohibits discrimination against transgender individuals. *See Smith v. Avanti*, 249 F.Supp.3d 1149 (D. Colo. 2017).
[63] *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).
[64] *Id*. at 1319.
[65] *Schroer v. Billington* 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

gender transition.[66] The court rejected earlier cases' reliance on "judge-supposed legislative intent" as "no longer a tenable approach to statutory construction."[67]

The District Court has also followed *Glenn v. Brumby* in holding that policies singling out transgender people are subject to heightened scrutiny as a form of sex-based discrimination under the Equal Protection clause.[68]

Conclusion

The overwhelming majority of courts to address the question since the most relevant Supreme Court precedent in 1998 have held that anti-transgender bias constitutes sex discrimination under federal laws like Title VII, Title IX, and Section 1557 of the Affordable Care Act. These courts have relied on the Supreme Court's instruction in *Price Waterhouse* that Title VII is not limited to physical characteristics but bars discriminations based on all "sex-based considerations," and on the Court's instruction in *Oncale* that Title VII and similar laws are not limited by presumed legislative intent.

At least three district courts have now explicitly held that anti-transgender discrimination violates Section 1557 of the ACA. The injunction in *Franciscan Alliance v. Burwell*, which temporarily prevents HHS from enforcing the 2016 rule's prohibition on discrimination on the basis of gender identity and termination of pregnancy, does not change the meaning of the underlying federal statute. Courts have continued to conclude that Section 1557 prohibits discrimination based on transgender status even after the *Franciscan Alliance* ruling, a conclusion that is supported by the overwhelming majority of courts to have considered the same question under federal sex discrimination law over the past two decades.

[66] *Id.* at 307.
[67] *Id.* (quoting Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108 (2007) (Scalia, J., dissenting)).
[68] *Doe 1 v. Trump*, 275 F.Supp.3d 167 (D.D.C. 2017) (applying intermediate scrutiny to directive banning transgender military service members).