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ESSAY

**LEGITIMIZING DISCRIMINATION AGAINST TRANS
EMPLOYEES**

*Natalie Hrubos*¹

I. Introduction

Trans² employees can experience subtle forms of workplace discrimination. Seemingly neutral or natural policies and practices sometimes reflect discriminatory attitudes and create unwelcoming or even hostile work environments for trans employees. Fortunately, courts have recently begun to recognize that discrimination against trans employees constitutes discrimination based on sex in violation of Title VII of the Civil Rights Act of 1984.³ Yet, despite increased protections for trans workers, subtle forms of discrimination, if not acknowledged by courts or addressed by employers, may erode employment opportunities for trans communities.

The way in which federal courts have interpreted the word “sex” in Title VII has changed significantly since Congress passed the anti-discrimination statute. Initially, federal courts limited “sex discrimination” to discrimination based on “biological sex.”⁴ In 1989,

¹ J.D. 2009, Temple University Beasley School of Law. The author would like to thank Nancy Knauer, Katrina C. Rose, and Dean Spade for reviewing earlier drafts.

² Trans people are people who identify or express their gender in a way that is different from that associated with their assigned sex at birth. See Julia Serano, Whipping Girl FAQ on Cissexual, Cisgender, and Cis Privilege (May 2009), <http://juliaserano.livejournal.com/14700.html> (last visited Dec. 11, 2009).

³ 42 U.S.C. § 2000 (2006).

⁴ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (construing “sex” in Title VII to refer to “biological sex”).

however, the United States Supreme Court held in *Price Waterhouse v. Hopkins*⁵ that “sex discrimination” includes discrimination based on sex stereotypes or gender non-conformity.⁶

In the last decade, federal courts—relying primarily on the *Price Waterhouse* decision—have held that trans employees who experience discrimination based on gender identity or gender non-conformity can establish the prima facie case of sex discrimination under Title VII.⁷ In Part II of this article, I briefly discuss the federal cases in which trans plaintiffs successfully asserted sex discrimination claims. Though trans employees lack trans-specific workplace protections in many, if not most, jurisdictions, federal courts increasingly find that trans employees can establish the prima facie case of sex discrimination under Title VII.

Nonetheless, a trans employee’s ability to establish the prima facie case does not guarantee the employee relief under Title VII, even where the evidence strongly suggests that the employee experienced discrimination because he or she is trans. Once an employee establishes the prima facie case, the court gives the employer an opportunity to articulate a legitimate, non-discriminatory reason for its decision to take adverse employment action against the employee. For example, the employer might assert that it discharged a female employee not because she is a woman, but because she talked on the phone too much during the workday.

Interestingly, in Title VII cases with trans plaintiffs, the employer often asserts a “legitimate, non-

⁵ 490 U.S. 228 (1989).

⁶ See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (discussing sex stereotyping theory described in *Price Waterhouse*).

⁷ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729, 742 (6th Cir. 2005); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

discriminatory” reason related to gender, the plaintiff’s protected characteristic. For example, in *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, the defendant employer stated that it discharged the plaintiff, a trans woman, because she “misrepresented” herself as female during her interview.⁸ In Part III of this article, I examine three so-called “legitimate, non-discriminatory” reasons that employers have asserted in Title VII cases with trans plaintiffs, including gender misrepresentation, inappropriate conversations related to gender, and potential liability for bathroom usage. I argue that the defendants in these cases seek to undermine well-established employment law principles to continue to lawfully discriminate against trans people and that judicial acceptance of their asserted reasons as legitimate and non-discriminatory would significantly erode employment opportunities for trans people.

In Part IV of this article, I further argue that the reasons asserted by the employers actually constitute direct evidence of discrimination because the reasons reflect the employers’ discriminatory attitudes toward trans people. Finally, in Part V of this article, I encourage employers to acknowledge that existing workplace practices and policies may actually support bias and discrimination against trans employees, and I suggest that employers use frameworks applied in other anti-discrimination contexts to erase discriminatory attitudes toward trans people and avoid future liability.

II. The Prima Facie Case

Before the United States Supreme Court decided *Price Waterhouse v. Hopkins*,⁹ the federal courts of appeals

⁸ *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008).

⁹ 490 U.S. 228 (1989).

that considered the issue agreed: Title VII's sex discrimination provision does not protect trans individuals who experience employment discrimination based on gender non-conformity or transsexual background.¹⁰ For example, in 1984, the Court of Appeals for the Seventh Circuit held, in *Ulane v. Eastern Airlines, Inc.*, that courts should narrowly construe the term "sex" in Title VII to mean biological sex rather than gender or sexual identity.¹¹ In *Ulane*, the plaintiff, a trans woman, was employed by the defendant airline as a pilot for nearly ten years before she began her gender transition from male to female.¹² She was terminated after she returned to work dressed in female attire following her sex reassignment surgery.¹³ The court held that the plaintiff in *Ulane* could not state a claim under Title VII because she had not experienced discrimination based on sex.¹⁴ Her "biological sex" was male, and she had not experienced discrimination based on her status as a "biological" male.¹⁵

Five years later, the way in which the federal courts interpreted Title VII's sex discrimination provision changed significantly when the Supreme Court decided *Price Waterhouse*.¹⁶ The Court held that discrimination based on gender non-conformity constitutes discrimination based on sex in violation of Title VII.¹⁷ The plaintiff in *Price Waterhouse*, a cis woman,¹⁸ filed a Title VII claim after she

¹⁰ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

¹¹ *Ulane*, 742 F.2d at 1084.

¹² *Id.* at 1082-83.

¹³ *Id.* at 1083.

¹⁴ *Id.* at 1085.

¹⁵ *Id.*

¹⁶ 490 U.S. 228 (1989).

¹⁷ *Id.*

¹⁸ Cis people are people who identify or express their gender in a way that is similar to that which is traditionally associated with their

was denied partnership at an accounting firm.¹⁹ She argued that the partners reacted negatively to her aggressive personality only because she is a woman and that they therefore based their decision to deny her partnership on sex stereotypes.²⁰ One partner described her as “macho,” and another stated that she “overcompensated for being a woman.”²¹

After the firm’s policy board reached its decision, the plaintiff in *Price Waterhouse* discussed her candidacy with the head partner, who advised her “to walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.”²² The Court held that the defendant employer had violated Title VII’s sex discrimination prohibition.²³ It stated:

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 . . . in 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.²⁴

Since the Supreme Court decided *Price Waterhouse* nearly twenty years ago, a handful of trans individuals who experienced employment discrimination successfully used

assigned sex at birth. See Julia Serano, Whipping Girl FAQ on Cissexual, Cisgender, and Cis Privilege (May 2009), <http://juliaserano.livejournal.com/14700.html> (last visited Dec. 11, 2009).

¹⁹ *Price Waterhouse*, 490 U.S. at 232-33.

²⁰ *Id.* at 235.

²¹ *Id.*

²² *Id.*

²³ *Price Waterhouse*, 490 U.S. at 237.

²⁴ *Id.* at 251 (internal citations omitted).

the sex stereotyping theory to argue that Title VII's sex discrimination provision prohibits discrimination against trans employees because they are trans.²⁵ For example, the plaintiff in *Smith v. City of Salem*, a trans woman, argued that her employer discriminated against her because she was a "biological male" who failed to conform to her employer's sex stereotypes regarding men.²⁶

The plaintiff, J. Smith, was employed by the City of Salem as a lieutenant in the fire department.²⁷ Smith had been employed by the fire department for nearly seven years when she began changing her appearance to reflect her female gender identity.²⁸ Several co-workers questioned Smith about her appearance, so she met with her immediate supervisor to discuss her gender transition.²⁹ Smith's immediate supervisor then met with superiors to discuss Smith's gender transition and to determine whether the fire department could terminate her employment.³⁰ Smith was ultimately suspended and later filed suit under Title VII, arguing that her employer discriminated against her based on her gender non-conformity.³¹

The Court of Appeals for the Sixth Circuit held that the fire department had violated Title VII by discriminating against Smith based on her failure to conform to the sex stereotypes associated with males.³² The court stated that "sex stereotyping 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

²⁵ See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

²⁶ *Smith*, 378 F.3d at 571-72.

²⁷ *Id.* at 568.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 571.

³² *Id.* at 575.

where the victim has suffered discrimination because of his or her gender non-conformity.”³³

Similarly, the Court of Appeals for the Ninth Circuit held that the term “sex” in 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.”³⁴ The plaintiff in *Schwenk v. Hartford*, a trans woman, filed a suit under the Gender Motivated Violence Act after a prison guard in an all-male Washington state prison raped her.³⁵ The court in *Schwenk* noted that the Gender Motivated Violence Act parallels Title VII and thus examined Title VII cases to determine whether the plaintiff had experienced violence motivated by gender.³⁶ The court held that the violence Schwenk experienced was motivated by her assumption of a feminine appearance and thus was motivated by gender in violation of the Gender Motivated Violence Act.³⁷

In the most recent trans-positive interpretation of Title VII by a federal court, the United States District Court for the District of Columbia held that Title VII’s sex discrimination provision prohibits discrimination against

³³ *Id.*

³⁴ *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (italics in original).

³⁵ *Id.* at 1193-94.

³⁶ *Id.* at 1202.

³⁷ *Id.* Similarly, when interpreting the sex discrimination provision of the Equal Credit Opportunity Act in *Rosa v. Park West Park & Trust Co.*, the First Circuit considered Title VII case law. 214 F.3d 213, 215-16 (1st Cir. 2000). The court determined that under *Price Waterhouse*, “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be evidence that gender played a part” in the defendant’s decision. *Id.* at 216. The plaintiff in *Rosa*, a “biological male,” tried to apply for a bank loan wearing “traditionally feminine attire,” but a bank employee told him that he could not apply for the loan until he changed clothes. *Id.* at 214.

trans employees.³⁸ The plaintiff in *Schroer v. Billington*, a trans woman named Diane Schroer, applied for a position as a terrorism specialist with the Congressional Research Service at the Library of Congress.³⁹ During her interview, she presented as male, as she had not yet started the phase of her gender transition where she would present as female.⁴⁰ She was well-qualified for the position with more than twenty-five years of military experience,⁴¹ and she received an offer.⁴² After she accepted, she asked the hiring official to lunch to discuss her gender transition.⁴³ Following the lunch, the hiring official discussed Schroer's transition with other hiring officials, and ultimately, the Library of Congress decided not to hire her for the position.⁴⁴ Schroer filed a sex discrimination claim under Title VII.⁴⁵

Schroer argued that the Library of Congress discriminated against her because she failed to conform to its gender stereotypes.⁴⁶ In other words, she argued that the Library of Congress failed to hire her because its hiring officials viewed her as a man who failed to conform to sex stereotypes associated with men.⁴⁷ Alternatively, Schroer argued that the Library of Congress may have discriminated against her because its hiring officials viewed her as a woman who failed to conform to the stereotypes associated with women.⁴⁸ In other words, she may have appeared too masculine for her employer to view her as a

³⁸ *Schroer*, 577 F. Supp. 2d at 308.

³⁹ *Id.* at 295.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 296.

⁴³ *Id.*

⁴⁴ *Id.* at 297-99.

⁴⁵ *Id.*

⁴⁶ *Id.* at 303-06.

⁴⁷ *Id.* at 305.

⁴⁸ *Id.*

“proper” female. Finally, Schroer also argued that the Library of Congress discriminated against her because she is a trans individual and that discrimination based on trans history constitutes discrimination based on sex *per se*.⁴⁹ The United States District Court for the District of Columbia held that whether the plaintiff relied on a sex stereotyping theory or a “sex discrimination *per se*” theory, she had stated a claim in violation of Title VII.⁵⁰

The *Schroer* court compared a change of sex to a change of religion, noting that “[d]iscrimination ‘because of religion’ easily encompasses discrimination because of a *change* of religion.”⁵¹ The court stated:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only to “converts.” . . . No court would take seriously the notion that ‘converts’ are not covered by the statute.⁵²

Though trans workers are certainly not protected in all jurisdictions, federal courts increasingly find that Title VII does protect trans employees because the sex discrimination provision encompasses gender identity or expression discrimination. In this unsettled, yet increasingly trans-inclusive, legal landscape, a trans plaintiff who experiences employment discrimination because she is trans can successfully establish a *prima facie* case of sex discrimination in several jurisdictions.

⁴⁹ *Id.* at 306. Schroer argued that gender identity is a component of sex; thus, gender identity discrimination is sex discrimination. *Id.*

⁵⁰ *Id.* at 308.

⁵¹ *Id.* at 306 (italics in original).

⁵² *Id.*

III. “Legitimate, Non-Discriminatory” Reasons

Once the plaintiff establishes the prima facie case, the court offers the employer an opportunity to articulate a “legitimate, non-discriminatory reason” for the adverse employment action taken against the plaintiff.⁵³ However, legitimate, non-discriminatory reasons asserted by employers in cases with trans plaintiffs typically relate to the plaintiffs’ gender identities or expressions. Judicial acceptance of these reasons would erode employment opportunities for trans people. Furthermore, employers that assert these reasons in Title VII cases undermine well-established employment law principles.

A. “Gender Misrepresentation”

In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,⁵⁴ after the trans plaintiff established a prima facie case of sex discrimination, the defendant employer stated that the company rescinded its previous job offer to the plaintiff because she “lied to the company when she failed to disclose that she is biologically male, both to her interviewers and on her resume and job application.”⁵⁵ The plaintiff in *Lopez*, a trans woman named Izza Lopez, applied for a scheduler position with the defendant medical clinic.⁵⁶ The defendant interviewed her for the position and later offered her the job, subject to her successful completion of a background check.⁵⁷ However, the defendant rescinded the job offer when Lopez’s background check results noted that she was, or had been

⁵³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing the burden-shifting framework for Title VII cases).

⁵⁴ 542 F. Supp. 2d 653 (S.D. Tex. 2008).

⁵⁵ *Id.* at 658.

⁵⁶ *Id.* at 655.

⁵⁷ *Id.* at 656.

previously, classified as male.⁵⁸ The company's hiring official sent Lopez a letter to confirm its decision to rescind the offer.⁵⁹ The letter stated: "As we previously explained to you, our offer was rescinded because we believe you misrepresented yourself to us during the interview process. You presented yourself as a female and we later learned you are a male."⁶⁰

Lopez filed a sex discrimination suit under Title VII and, according to the District Court for the Southern District of Texas, established a *prima facie* case of employment discrimination based on the *Price Waterhouse* sex stereotyping theory.⁶¹ Thus, the burden of production shifted to the defendant to articulate a legitimate, non-discriminatory reason for its decision.⁶² However, the defendant in *Lopez* argued that the company did not base its decision to rescind Lopez's job offer on the plaintiff's sex or her gender non-conformity.⁶³ Rather, the defendant argued that the company based its decision solely on its belief that she had misrepresented herself during the interview process.⁶⁴ The court held that it could not grant summary judgment in either party's favor because it remained unclear whether the company based its decision on sex or sex stereotypes or whether the company based its decision on its purportedly legitimate belief that Lopez affirmatively misrepresented her sex during the hiring process.⁶⁵

The defendant in *Lopez* seemed to argue that it based its adverse employment decision on the plaintiff's actual, individual misrepresentation rather than on a general

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 660-61.

⁶² *Id.* at 661.

⁶³ *Id.* at 667.

⁶⁴ *Id.*

⁶⁵ *Id.*

belief that trans individuals are necessarily deceptive. However, the defendant's inability to explain the relevance of the information and the significance of a "misrepresentation" suggests that the defendant's asserted reason is pretextual. Despite its assertion to the contrary, the defendant in *Lopez* may have rescinded the plaintiff's job offer based on a general view that trans people are fraudulent or untrustworthy.⁶⁶ Similarly, the defendant's conduct in the recent *Schroer* case was at least partially motivated by the employer's belief that trans individuals are deceptive and thus untrustworthy.⁶⁷ The defendant employer in *Schroer*, the Library of Congress, argued that it failed to hire the plaintiff, a trans woman, because, among other things, it was concerned about her trustworthiness given that she had not mentioned her gender transition at the start of the interview process.⁶⁸

The District Court for the District of Columbia held that the defendant's concerns regarding the plaintiff's trustworthiness were "pretextual."⁶⁹ The court stated that the hiring official's "concern with Schroer's trustworthiness

⁶⁶ Trans people have been accused of gender fraud in various contexts. See, e.g., *Transgender Politician Faces Fraud Lawsuit*, Associated Press, N.Y. TIMES, Nov. 23, 2007, at A35 (discussing lawsuit filed against a trans city council member by an unsuccessful political opponent who claimed the trans woman misled voters by running for office as a woman); Abigail Van Buren, *Transsexual Owes Boyfriend Truth*, THE INTELLIGENCER, Jan. 7, 2007, at D7 (noting that failure to discuss trans history with future husband could constitute fraud); *Husband's Sex-Change Subject of Appeal, Wife Says Marriage Was Never Valid*, Associated Press, LEXINGTON-HERALD LEADER, June 28, 2004, at B1 (discussing cis woman's effort to annul her marriage after her spouse transitioned from male to female based on the fact that "her husband represented himself as a man when psychologically, he knew all along he was a woman" and noting her argument that her spouse's "failure to disclose his gender identity before the wedding constitutes 'a fraud involving the essentials of marriage'").

⁶⁷ *Schroer*, 577 F. Supp. 2d at 302.

⁶⁸ *Id.*

⁶⁹ *Id.*

was belied by the fact that she thanked Schroer for her honesty in the course of rescinding the job offer.”⁷⁰ The *Schroer* court correctly determined that the defendant’s concerns regarding the plaintiff’s trustworthiness were “pretextual” in light of the particular factual circumstances of the *Schroer* case.⁷¹ Unfortunately, the court failed to hold that concerns about a trans individual’s trustworthiness due to a so-called misrepresentation regarding his or her gender or due to a failure to disclose trans background, gender identity, assigned sex, intent to transition, or some combination of the aforementioned, are *facially* discriminatory.

The *Lopez* court, however, went a little further than the *Schroer* court, stating that “to the extent [the defendant argues] that any person who dresses in a manner inconsistent with traditional gender stereotypes is necessarily deceptive, such a position is rejected.”⁷² Still, the *Lopez* court’s opinion left unresolved the question of whether an affirmative “gender misrepresentation” on an employment application or job interview *could* constitute a legitimate, non-discriminatory reason to take adverse employment action against a trans employee or applicant. In fact, the court’s opinion suggested that if the evidence in the case proved that the plaintiff had affirmatively lied to the company regarding her assigned sex, then the defendant would not have violated Title VII when it rescinded the plaintiff’s job offer after it discovered her assigned sex.⁷³ The *Lopez* court’s opinion largely ignores the reality that any acceptance of gender misrepresentation as a legitimate, non-discriminatory reason would not only severely cripple a trans employee’s ability to prevail under Title VII, but

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Lopez*, 542 F. Supp. 2d at 663.

⁷³ *Id.*

would also have more immediate, practical consequences for trans individuals seeking employment.

By recognizing so-called affirmative gender misrepresentation as employee misconduct and thus accepting it as a legitimate reason to take adverse action against an employee, courts would effectively compel (trans) applicants to reveal their assigned sex on employment applications and to discuss their assigned sex (and probably much more) in job interviews. To avoid termination due to dishonesty or misrepresentation, trans individuals would have to initiate irrelevant discussions about their bodies and in some cases their medical histories. Furthermore, where a trans applicant discloses or discusses his or her assigned sex or gender presentation during the hiring stage of the employment process, the applicant risks the very real possibility that the employer's hiring official will allow his or her prejudices to affect or undercut the trans individual's employment opportunities.

Trans people who fail to disclose their assigned sex on applications or during interviews, however, would severely undermine any future employment discrimination claims they might otherwise assert under Title VII. First, upon discovering that an employee is trans, an employer could lawfully discharge the employee even in a jurisdiction in which a trans plaintiff can establish a prima facie case of sex discrimination. Second, an employer who discharges an employee based on the employee's failure to conform to sex stereotypes might argue that even though the employer did not base its decision on the affirmative gender misrepresentation, after-acquired evidence of misconduct allows the employer to evade liability for its discriminatory conduct.⁷⁴ This places trans workers in an

⁷⁴ See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995):

The object of compensation is to restore the employee to the position he or she would have been in absent the

intolerable and impermissible Catch 22: immediate exposure to discriminatory attitudes or erasure of Title VII protection against future discriminatory attitudes.⁷⁵

In essence, judicial acceptance of gender misrepresentation as a legitimate, non-discriminatory reason to take adverse employment action against a trans person totally erases Title VII protection for trans employees in jurisdictions where the judiciary has explicitly determined that Title VII protects trans people against discrimination. In other words, trans people are in the same unprotected position they were in prior to the trans-positive Title VII decisions. Once an employer discovers that an employee is trans, the employer may lawfully opt to discharge the employee based on the “misrepresentation,” or the employer may opt to retain the trans employee despite the “misrepresentation.” Because employers in jurisdictions that do not protect trans people against discrimination possess the very same options, the trans-positive rulings are rendered utterly meaningless.⁷⁶

discrimination . . . but that principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit.

Id. (citations omitted).

⁷⁵ See *Price Waterhouse*, 490 U.S. at 251 (“An employer who objects to aggressiveness in women but whose positions require this 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.”).

⁷⁶ Similarly, in applying anti-discrimination laws that expressly protect trans employees, courts have determined that an employer *may allow* a trans employee to use the restroom that reflects the employee’s gender identity and/or presentation; however, the employer is *not legally required* to, for example, allow a trans woman to use the female-

In addition to diminishing employment opportunities for trans people, the assertion that gender misrepresentation constitutes a legitimate, non-discriminatory reason to take adverse employment action against a trans individual undercuts well-established employment law principles regarding misrepresentations on employment applications. In general, an employee's misrepresentation constitutes misconduct only where *material* to the duties of the positions sought. For example, an individual's misrepresentation regarding alcoholism is not material where the individual applies for a position as a chef.⁷⁷ Does an individual's "misrepresentation" regarding gender constitute a *material* misrepresentation where the individual, like the plaintiff in *Lopez*, applies for a position as a scheduler? Is gender ever material to the duties of a job in a society that has outlawed gender discrimination in the workplace?

Title VII does permit discrimination based on gender—and other protected characteristics—in very limited circumstances. Section 703 of Title VII states that "it shall *not* be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. . . ."⁷⁸ One might therefore argue that a misrepresentation regarding

designated restroom at work. Katrina C. Rose points out that anti-discrimination laws are ineffective where the employer ultimately retains sole discretion as to whether to permit a trans worker to use the restroom that reflects his or her gender presentation. Katrina C. Rose, *Toilets, Transgendered People and the Law: The Minnesota Microcosm and Beyond* at 9 (2007) (unpublished manuscript, on file with author).

⁷⁷ *Indep. Sch. Dist. No. 709 v. Hansen*, 412 N.W.2d 320, 322-23 (Minn. Ct. App. 1987).

⁷⁸ 42 U.S.C. §2000e-2(e)(1) (2006) (emphasis added).

assigned sex is material only where assigned sex is a bona fide occupational qualification. Courts have held that sex is a bona fide occupational qualification in rare cases where the employment of members of one sex would jeopardize the safety of third parties⁷⁹ and where it would undermine the essence of the business's operation.⁸⁰ Given that Title VII limits the exception to these rare instances, sex or gender certainly would not qualify as a bona fide occupational qualification for the appointment scheduler job; thus, a misrepresentation regarding assigned sex could not be material to the duties of the job.

Furthermore, in *Lopez*, the defendant, as well as the court, failed to distinguish between assigned sex and "legal" sex (or sex as it is reflected on an individual's legal identity documents). In the defendant's letter to Lopez, the defendant stated: "As we previously explained to you, our offer was rescinded because we believe you misrepresented yourself to us during the interview process. You presented yourself as a female and we later learned [through a background check] you are a male."⁸¹ The court's opinion does not discuss whether the background check revealed that Lopez's assigned sex was male or that Lopez's legal identity documents classified her as male.⁸² Certainly, the gender markers on the plaintiff's legal identity documents *may* have matched her assigned sex. However, because

⁷⁹ *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (holding that hiring exclusively male "correctional counselors in a 'contact' position in an Alabama male maximum security penitentiary" was legal discrimination pursuant to the "bona fide occupational qualification" exception).

⁸⁰ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (hiring only female stewardesses is not legal discrimination pursuant to the bona fide occupational qualification exception where the essence or primary function of the business is the safe transportation of passengers).

⁸¹ *Lopez*, 542 F. Supp. 2d at 656 (internal citations omitted).

⁸² *See generally id.*

many state agencies permit gender reclassification, an individual's legal identity documents need not reflect the individual's assigned birth sex.⁸³

In the United States, various agencies issue identity documents with gender markers, including state departments of health that issue birth certificates, state departments of motor vehicles that issue drivers' licenses, and the Social Security Administration ("SSA") that issues social security cards.⁸⁴ Many, though not all, state agencies, as well as the SSA, permit individuals to change the gender marker on their identity documents from male to female or from female to male.⁸⁵ However, the gender reclassification procedures vary widely among agencies with some requiring proof of sex reassignment surgery.⁸⁶ As a result, an individual could, for example, change the gender marker on his or her driver's license as well as the gender marker associated with his or her social security card, but maintain the original gender marker on his or her birth certificate. In such a scenario, the person's "legal gender" would remain unclear.⁸⁷

⁸³ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 750-51 (2008).

⁸⁴ *Id.* at 760-74.

⁸⁵ *Id.* at 767-70:

Forty-seven states and New York City allow gender reclassification on birth certificates. Idaho, Ohio, and Tennessee will not change gender on a birth certificate. Twenty-eight states plus the District of Columbia and New York City specifically authorize gender reclassification by statute or administrative ruling, while the other nineteen have no written rule stating that they allow sex designation change, but in practice do provide sex designation change upon application.

Id. at 767-68 (citations omitted).

⁸⁶ *Id.* at 768-70. For example, New York requires that the applicant has undergone penectomy or hysterectomy and mastectomy. *Id.* at 769.

⁸⁷ *Id.* at 734:

Many people are under the impression that everyone has a clear 'legal gender' on record with the government, and that

Thus, the plaintiff in *Lopez* might have changed her gender marker from male to female on all of her identity documents, including her birth certificate, driver's license, and social security card. If that were the case, would the defendant still have considered her female presentation a misrepresentation given that her assigned sex was male? Alternatively, the plaintiff in *Lopez* might have changed her gender marker from male to female on some, but not all, of her identity documents. If that were the case, might the defendant have considered her gender presentation a misrepresentation regardless of whether her presentation was stereotypically male or female?

Even if the plaintiff in *Lopez* had changed the gender markers on her identity documents from male to female, neither the defendant nor the court discussed whether the plaintiff should have disclosed her assigned sex or the sex that appeared on her identity documents (or perhaps on the majority of her identity documents in the event that they contained different gender markers). In light of the various gender reclassification policies in the United States, the *Lopez* defendant's statement regarding the plaintiff's status as a male seems oversimplified and its characterization of her female presentation as a misrepresentation somewhat illogical.⁸⁸

B. "Inappropriate Conversations"

Like the defendant in *Lopez*, the defendant in *Sturchio v. Ridge* asserted a similarly suspect legitimate, nondiscriminatory reason for the adverse action it took

changing 'legal gender' involves presenting some kind of evidence to a specific agency or institution in order to make a decisive and clear change to the new category. . . . As it turns out, the reality of the rules that govern gender reclassification in the United States is far more complex.

Id.

⁸⁸ See *Lopez*, 542 F. Supp. 2d at 656.

against a trans employee.⁸⁹ The plaintiff in *Sturchio*, a trans woman named Tracy Nicole Sturchio, had worked for the United States Border Patrol as a telecommunications specialist for about eleven years before she transitioned to female.⁹⁰ As she began changing her appearance, Sturchio occasionally discussed her gender presentation with co-workers.⁹¹

Some of her co-workers felt uncomfortable discussing gender matters with Sturchio and complained to management.⁹² United States Border Patrol supervisors took various disciplinary actions against Sturchio and instructed her not to discuss her appearance or any gender-related issues with her co-workers.⁹³ Sturchio may not have been an exemplary employee. In fact, some evidence suggests that Sturchio talked too much while working and that she repeatedly told co-workers a seemingly outlandish, and likely false, story about how a government doctor said she would “turn into a woman” because she had accidentally been exposed to “military estrogen.”⁹⁴

Regardless, the defendant’s trial brief and the court’s opinion in *Sturchio* strongly suggest that the United States Border Patrol ultimately took adverse employment action against the plaintiff, not because she talked too much or told falsehoods, but because she initiated so-called “inappropriate conversations” regarding her gender and subsequently caused discomfort among her co-workers.⁹⁵

⁸⁹ *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 at *6, 16 (E.D. Wash. June 23, 2005).

⁹⁰ *Id.* at *1, 3-4.

⁹¹ *Id.* at *3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *See Sturchio*, 2005 WL 1502899, at *3, 15-16; *see also* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 10 (1994) (noting that “gender identity seems to be an unspeakable thing in our culture”). Bornstein further explains: “In this culture, the

For example, Sturchio asked one female co-worker for hair and makeup advice.⁹⁶ On another occasion, Sturchio told a co-worker about an instance where Sturchio had visited a waterslide park with her family and did not know which restroom to use to change into her bathing suit.⁹⁷

Additionally, the defendant's trial brief stated that another employee would testify that "[a]ll of a sudden with no prompting and apropos of nothing, Sturchio started talking about how he wears a dress, that people call him a woman's name, and that people sometimes mistake him for a woman, talking for about five minutes."⁹⁸ The defendant's trial brief also indicated that another co-worker would testify that "Sturchio made unsolicited comments about . . . his accident [with military estrogen], his bra size, having certain body parts cut off, that his estrogen patch was not working and his hormones are not right."⁹⁹

Most of the employees who said that they felt uncomfortable during conversations with Sturchio seemed primarily uncomfortable with Sturchio's gender transition as a general matter, rather than with any specific comments that an employer might consider inappropriate or offensive independent of an employee's gender transition.¹⁰⁰ The defendant's trial brief states that one United States Border Patrol employee "was very religious, and Sturchio's comments made him uncomfortable."¹⁰¹ Another employee

only two sanctioned gender clubs are 'men' and 'women.' If you don't belong to one or the other, you're told in no uncertain terms to sign up fast." *Id.* at 24. "Then there's gender attribution, whereby we look at somebody and say, 'that's a man,' or 'that's a woman.' And this is important because the way we perceive another's gender affects the way we relate to that person." *Id.* at 26.

⁹⁶ Defendant's Trial Brief at 6, *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. June 23, 2005).

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 11.

⁹⁹ *Id.* at 21.

¹⁰⁰ *See id.* at 6, 9, 11, 15, 19.

¹⁰¹ *Id.* at 19.

noted that “he could have a problem if he had to work with Sturchio on a regular basis, because Sturchio’s appearance would take some getting used to.”¹⁰² Others expressed concern regarding whether the defendant employer would permit Sturchio to use the women’s restroom.¹⁰³ These comments illustrate that many employees who complained about the conversations they had with Sturchio were simply uncomfortable with her new gender presentation.

The *Sturchio* court’s opinion further demonstrated that the United States Border Patrol employees who felt uncomfortable during conversations with Sturchio were simply uncomfortable with Sturchio’s gender transition and perhaps trans individuals in general.¹⁰⁴ For example, the court stated: “Understandably, the discomfort was caused because the subject was too intimate for the type of relationship between [Sturchio] and the coworker, or it was interpreted as inappropriate because of the coworker’s belief system.”¹⁰⁵ The court further stated: “Testimony revealed that many of *his* coworkers were uncomfortable in discussing Plaintiff’s appearance with *him*. In our society, most people relate to others under the assumption that they are who they appear to be, *i.e.*, male or female, and content to be so.”¹⁰⁶ The court said that the employees’ “discomfort was understandable, given the topic of discussion, the environment in which it was being spoken, and the fact that the coworkers were receiving mixed signals regarding [Sturchio’s] gender identity.”¹⁰⁷

The court’s statements regarding Sturchio’s gender, and gender in general, suggest that the defendant took adverse action against Sturchio because she is trans or

¹⁰² *Id.* at 21.

¹⁰³ *See id.* at 6.

¹⁰⁴ *See Sturchio*, 2005 WL 1502899, at *3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

otherwise because she failed to conform to its gender norms. Yet, the court in *Sturchio* held that the adverse action taken by the defendant against Sturchio was not based on Sturchio's "failure to act or look in the way expected of a man."¹⁰⁸ The court's conclusion is incomprehensible given the court's poignant discussion of appropriate gender behavior and the statements of Sturchio's co-workers regarding their discomfort surrounding Sturchio's diverse gender presentation.

For the most part, the "inappropriate conversations" in *Sturchio* merely involved non-sexual aspects of Sturchio's gender transition or otherwise related to Sturchio's new gender expression.¹⁰⁹ The court's acceptance of these so-called inappropriate conversations as a legitimate, non-discriminatory reason to take adverse employment action against a trans worker¹¹⁰ places significant burdens on trans people in violation of Title VII. Gender is an integral part of every person's identity.¹¹¹ For a trans individual, gender can have even more significance.¹¹²

¹⁰⁸ *Id.* at *13.

¹⁰⁹ *See id.* at *15.

¹¹⁰ *See id.*

¹¹¹ "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom." THE YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 11 (2007), http://www.yogyakartaprinciples.org/principles_en.pdf.

¹¹² *See* SUSAN STRYKER, *TRANSGENDER HISTORY* 1 (2004):

I use [transgender] in this book to refer to people who move away from the gender they were assigned at birth, people who cross over (*trans-*) the boundaries constructed by their culture to define and contain that gender. Some people move away from their birth-assigned gender because they feel strongly that they properly belong to another gender in which it would be better for them to live; others want to strike out toward some new location, some space not yet clearly defined or concretely occupied; still others simply feel the need to get

Stifling conversations related to gender for a trans individual, but not for a cis individual, is discriminatory and doing so creates an unwelcome or even hostile environment for gender-variant people and people who transition from one gender to another. In this type of environment, trans people lose employment opportunities while cis people who engage in gender-appropriate conversations do not. Furthermore, state and federal employers, like the United States Border Patrol, may violate their employees' First Amendment right of free speech when they prohibit workplace conversations.¹¹³

C. "Potential Liability"

In *Etsitty v. Utah Transit Authority*, the United States Court of Appeals for the Tenth Circuit assumed, without deciding, that the plaintiff could establish a prima facie case of sex discrimination under the *Price Waterhouse* sex stereotyping theory.¹¹⁴ When the plaintiff in *Etsitty*, Krystal Etsitty, was hired by the defendant, Utah Transit Authority, as a bus driver, she presented as male and used male restrooms on her bus route.¹¹⁵ Utah Transit Authority terminated Etsitty shortly after she began presenting as female and using female restrooms.¹¹⁶ Etsitty filed a Title VII sex discrimination claim.¹¹⁷ Because the court assumed that the plaintiff could establish a prima facie case of sex discrimination, the burden shifted to the defendant

away from the conventional expectations bound up with the gender that was initially put on them.

¹¹³ See U.S. CONST. amend. I.

¹¹⁴ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223-24 (10th Cir. 2007).

¹¹⁵ *Id.* at 1218-19.

¹¹⁶ *Id.* at 1219

¹¹⁷ *Id.*

“to articulate a legitimate, nondiscriminatory reason” for its decision to discharge the plaintiff.¹¹⁸

The defendant, Utah Transit Authority, stated that it terminated Etsitty’s employment solely because she planned to use female restrooms along her bus route even though she was a biological male.¹¹⁹ The defendant said it was concerned that a biological male’s use of a female restroom would result in liability for the defendant.¹²⁰ The court agreed that the defendant’s articulated reason for Etsitty’s termination constituted a legitimate and nondiscriminatory reason for purposes of Title VII.¹²¹

The court’s unfortunate decision in *Etsitty* conflicts with well-established employment discrimination law principles. The Supreme Court has already determined that an employer cannot discriminate against an employee in violation of Title VII simply because the employer fears the remote possibility of liability.¹²² In *Automobile Workers v. Johnson Controls, Inc.*, the defendant employer, a battery manufacturer, barred all fertile women from jobs involving lead exposure in an effort to avoid liability for harm caused to unborn children whose mothers were exposed to lead.¹²³ The Court held that the employer’s policy violated Title VII.¹²⁴ First, the Court noted that the bases suggested for holding the employer liable for harm caused to unborn children were weak.¹²⁵ The Court stated that the

¹¹⁸ *Id.* at 1224.

¹¹⁹ *Id.* at 1224-25.

¹²⁰ *Id.* at 1224.

¹²¹ *Id.* at 1227.

¹²² *See* *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991); *see also* *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (holding that an employer must have a “strong basis in evidence” to believe that it will be subject to disparate impact liability before it can “engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact”).

¹²³ 499 U.S. 187, 192 (1991).

¹²⁴ *Id.* at 206.

¹²⁵ *Id.* at 208.

defendant's "speculation [regarding liability] appears unfounded as well as premature."¹²⁶

Second, and most importantly, the Court stated that the employer in *Johnson Controls* "attempt[ed] to solve the problem of reproductive health hazards by resorting to an exclusionary policy."¹²⁷ As the Court stated, "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace."¹²⁸ In other words, employers cannot evade their Title VII obligations by arguing that it is simply too difficult or costly to avoid discriminating against female workers.

As in *Johnson Controls*, no real basis for liability exists in the *Etsitty* case. As an initial matter, it is generally lawful for trans women to use female-designated restrooms. In fact, some cities have guidelines or regulations that require or strongly encourage public entities, including employers, not to discriminate against trans people by denying them access to restrooms that reflect their gender identities or expressions.¹²⁹ Furthermore, courts that have addressed the issue of restroom discrimination have held that because employers need not fear liability when trans

¹²⁶ *Id.* at 210.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See District of Columbia Regulations, Compliance Rules and Regulations Regarding Gender Identity or Expression, § 801(a), (c), available at http://newsroom.dc.gov/file.aspx/release/10121/Final_Transgender_Regulations.pdf. The D.C. regulations state that unlawful discriminatory practices shall include denying access to restrooms and other gender-specific facilities that are consistent with the employee's gender identity or expression in both the employment and public accommodations contexts. See also New York City Guidelines, Guidelines Regarding "Gender Identity" Discrimination, A Form of Discrimination Prohibited by the New York City Human Rights Law; San Francisco Regulations, San Francisco Compliance Rules and Regulations Regarding Gender Identity Discrimination.

women use female-designated restrooms,¹³⁰ it follows that all public entities need not fear liability when trans people use restrooms that match their gender identities or expressions.

In *Cruzan v. Special School District, No. 1*, the plaintiff, a cis woman and teacher, filed sex and religious discrimination claims against her employer based on the school's policy to allow trans women to use the female-designated restrooms.¹³¹ The Court of Appeals for the Eighth Circuit held that the school's policy did not create a hostile work environment for cis women.¹³² The *Cruzan* court stated that "no case law supports [the plaintiff's] assertion" that "reasonable [cis] women could . . . find their working environment is abusive or hostile when they must share bathroom facilities with a coworker who self-identifies as female, but who may be biologically male."¹³³ The court's discussion in *Cruzan* reveals the defects in Utah Transit Authority's argument that it feared liability based on the plaintiff's use of female-designated restrooms.

Most importantly, the court's acceptance of the defendant's dubious liability theory as a legitimate reason to take adverse action against a trans worker will drastically erode employment opportunities for trans people. The *Etsitty* court seemed to rely heavily on the defendant's distinction between the plaintiff's use of public, off-site restrooms, which the defendant argued it could not accommodate, and the plaintiff's use of on-site restrooms, which presumably the defendant may have been able to

¹³⁰ *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002). "We agree with the district court that Cruzan [the plaintiff] failed to show the school district's policy allowing [the trans school teacher] to use the women's faculty restroom created a working environment that rose to this level." *Id.*

¹³¹ *Id.* at 982-83.

¹³² *Id.* at 984.

¹³³ *Id.*

accommodate.¹³⁴ The defendant and the court were concerned about liability that may result from “public complaints.”¹³⁵

Though one could argue that the *Etsitty* court limited its decision to off-site public restrooms, a future defendant employer could certainly argue that it may lawfully discharge a trans woman where she plans to use an on-site restroom either open to the public or used by customers and clients. The same potential for complaints exists in both cases. Contrary to the purpose of Title VII, the *Etsitty* decision encourages employers to wholly exclude trans people from their workplaces.¹³⁶ As the Court stated in *Johnson Controls*, exclusionary policies stand in direct opposition to the anti-discrimination laws.¹³⁷

IV. “Legitimate” Reasons to Discriminate?

The so-called “legitimate, non-discriminatory reasons” asserted against the trans plaintiffs in *Lopez*, *Sturchio*, and *Etsitty* are actually quite discriminatory and therefore not legitimate reasons to take adverse employment action against trans applicants and workers. In fact, the reasons proffered by the defendants in these cases constitute *direct* evidence of employment discrimination. Direct evidence includes “evidence of

¹³⁴ *Etsitty*, 502 F.3d at 1219.

¹³⁵ *Id.* at 1227.

¹³⁶ *Id.* at 1225. “The record also reveals UTA believed, and *Etsitty* has not demonstrated otherwise, that it was not possible to accommodate her bathroom usage” *Id.* at 1224. See also BORNSTEIN, *supra* note 95, at 102 (describing “either/or” as a control mechanism).

‘Ladies’ are the kind of people who won’t let my girlfriend use the public ladies’ room, thinking she’s not a woman. Oh, but they’re not going to let her use the men’s room either—they’re not going to let her be a man either. If she’s not a man, and she’s not a woman, then what is she?”

Id. (quoting Holly Hughes, *Clit Notes*, 1993).

¹³⁷ *Johnson Controls*, 499 U.S. at 210.

conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude.”¹³⁸ The reasons proffered by the defendants in these cases strongly reflect their “discriminatory attitude[s]” toward trans people.

A discussion of direct evidence cited in other types of employment discrimination cases may shed some light on the proposition that the “legitimate, non-discriminatory” reasons articulated by the defendants merely reflect their discriminatory attitudes toward trans people rather than their legitimate exercises of employer discretion. “Direct evidence” of discrimination typically consists of statements that reveal a belief on the part of the employer that a particular type of person is generally not viable as an employee.¹³⁹ In an age discrimination case, for example, the direct evidence presented will likely reflect the employer’s belief that older individuals are not viable employees.

In *Ostrowski v. Atlantic Mutual Insurance Cos.*, an age discrimination case, the defendant’s agent, a senior regional vice president for the company, stated that the defendant should not have hired two older individuals because “they should have been, or should have remained, retired.”¹⁴⁰ The vice president further stated that a 64-year-old employee “can’t . . . be superior” and that “there is no

¹³⁸ *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1043 (8th Cir. 2007) (quoting *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993)).

¹³⁹ *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 174 (2d Cir. 1992) (discussing employer’s discriminatory statements, including: “[Plaintiff is] not the type of person that we want to hire. . . . [T]hat guy should have retired years ago.”); *Jerge v. City of Hemphill, Texas*, 80 F. App’x 347, 350 n.4 (5th Cir. 2003) (discussing statements by plaintiff’s supervisor that she “lacked the ‘nuts’ for the job” and that “the community would never accept a woman as City Manager”).

¹⁴⁰ *Ostrowski*, 968 F.2d at 183.

way [a 60-year-old employee] can contribute.”¹⁴¹ The Court of Appeals for the Second Circuit held that the vice president’s statements, which reflected his “discriminatory attitude” toward older individuals, constituted direct evidence of age discrimination.¹⁴² The evidence presented reflected the vice president’s belief that the older individuals were not viable employees due to their age.

Similarly, in *Jerge v. City of Hemphill*, a sex discrimination case, the Court of Appeals for the Fifth Circuit held that the plaintiff presented direct evidence of sex discrimination where the evidence reflected the defendant’s discriminatory attitude toward women and more specifically the defendant’s belief that women are not viable employees.¹⁴³ The plaintiff in *Jerge* filed a sex discrimination suit after the city’s mayor and councilmen failed to appoint her City Manager.¹⁴⁴ The evidence showed that the mayor told the plaintiff that the councilmen would not support her candidacy for City Manager because they “don’t think a woman can do the job.”¹⁴⁵ The evidence further showed that one councilman “expressed reservation as to whether the two women applicants could handle the ‘outside parts’ of the job.”¹⁴⁶ Another councilman stated that he was “concerned about a woman being called out to work at night—one of the requirements of the job of City Manager.”¹⁴⁷ The court in *Jerge* held that the evidence presented constituted direct evidence of discrimination.¹⁴⁸ The mayor and councilmen’s statements reflected their belief that a woman is not viable as a City Manager.

¹⁴¹ *Id.* at 174.

¹⁴² *Id.* at 182-83.

¹⁴³ *Jerge*, 80 F. App’x at 350.

¹⁴⁴ *Id.* at 349-50.

¹⁴⁵ *Id.* at 349.

¹⁴⁶ *Id.* at 351.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 350-51.

Like the statements in *Ostrowski* and *Jerge*, the “legitimate, non-discriminatory” reasons asserted by the defendants in *Lopez*, *Sturchio*, and *Etsitty* constitute direct evidence of discrimination because the reasons asserted reflect the employers’ discriminatory attitudes toward trans people. Unlike the evidence in *Ostrowski* and *Jerge*, however, the direct evidence in these cases more than simply reflects the employers’ belief that trans people are not viable employees, although that particular belief is implicit in the evidence presented. More significantly, the statements strongly reflect the defendants’ belief that trans people are not viable as individuals in our society and thus cannot possibly function appropriately within the workplace.¹⁴⁹

For example, in *Lopez*, the defendant’s articulation of “gender misrepresentation” as the “legitimate, non-discriminatory” reason for its failure to hire the plaintiff reflects, at a minimum, the decision maker’s belief that a person who transitions from one gender to the other affirmatively lies when he or she presents as his or her affirmed gender. This suggests that the trans individual’s identity is fraudulent. The employer in *Lopez* essentially suggests that the plaintiff does not exist as a woman and thus cannot function properly in a workplace where the employer must, among other things, “note [its] employees’ sex on healthcare benefits forms.”¹⁵⁰ The employer’s belief

¹⁴⁹ See STRYKER, *supra* note 105, at 6 (2004) (“Because most people have great difficulty recognizing the humanity of another person if they cannot recognize that person’s gender, the gender-changing person can evoke in others a primordial fear of monstrosity, or loss of humaneness.”).

¹⁵⁰ *Lopez*, 542 F. Supp. 2d at 664 n.15. See also Dean Spade, *Trans Formation*, LOS ANGELES LAWYER, at 36 (Oct. 9, 2008) (describing the myth that trans people do not exist and stating:

[t]his belief that transgender people’s gender identities are fraudulent or false and that legal obstacles to articulating such an identity publicly should be upheld by judges is based in a

regarding the plaintiff's viability as a female employee strongly reflects its "discriminatory attitude" toward trans people.

Similarly, in *Sturchio*, the defendant's articulation of "inappropriate conversations" regarding gender as the "legitimate, non-discriminatory" reason for the adverse employment action taken against the plaintiff reflects the defendant's beliefs that a trans woman is essentially a man and that it is "inappropriate" for men to discuss certain topics, such as makeup and hair styles.¹⁵¹ The employer's statements in *Sturchio* also show the employer's general discomfort with gender transitions. The employer's discomfort reflects the employer's belief that gender transitions are objectionable and perhaps incompatible with a healthy workplace. These beliefs strongly reflect the employer's "discriminatory attitude" toward trans people and thus constitute direct evidence of discrimination.

Finally, in *Etsitty*, the employer's articulation of potential liability for the plaintiff's restroom usage as a "legitimate, non-discriminatory" reason for its decision to discharge the plaintiff strongly reflects the employer's belief that it is inappropriate for trans women to use the women's restroom because trans women are essentially men or because trans women are unnaturally non-gendered.¹⁵² One of the plaintiff's supervisors stated in her

fundamental notion that birth-assigned gender is the only "true" gender an individual can have and that transgender identity is not recognizable or legitimate.

¹⁵¹ See STRYKER, *supra* note 111, at 10 ("Secondary sex characteristics constitute perhaps the most socially significant part of morphology—taken together, they are the bodily "signs" that others read to guess at our sex, attribute gender to us, and assign us to the social category they understand to be most appropriate for us.").

¹⁵² Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 921 (2007) ("As the discrimination faced by the transgendered is often intrinsically tied to

deposition testimony that she and another supervisor “both felt that there was an image issue out there for us, that we could have a problem with having someone who, even though *his* appearance may look female, *he’s* still a male because *he* still had a penis.”¹⁵³ The court then stated that “[i]mmediately after [the supervisor] mention[ed] Etsitty’s appearance, she explain[ed] the problem with this appearance is that [Etsitty] may not be able to find a unisex bathroom on the route and that liability may arise if Etsitty was using female restrooms.”¹⁵⁴

The supervisor’s statements in *Etsitty* reveal the employer’s belief that trans individuals are abnormally gendered and that it is impractical, if not impossible, to integrate trans people into a workplace—or a society—where bathrooms, among other things, are gendered.¹⁵⁵ This belief on the part of the employer in *Etsitty* reflects its view that trans people are not viable as individuals and thus cannot function properly in society, let alone the workplace. This belief strongly reflects the employer’s “discriminatory attitude” toward trans people and thus constitutes direct evidence of discrimination.

In the typical employment discrimination case, the “legitimate, non-discriminatory” reason asserted by the

their gender, which bathroom to use is a fundamental and unnecessarily complicated choice that highlights the discord between the transgender individual’s personal identity and society’s label of what is acceptable.”).

¹⁵³ *Etsitty*, 502 F.3d at 1225 (emphasis added).

¹⁵⁴ *Id.* at 1225-26.

¹⁵⁵ See BORNSTEIN, *supra* note 95, at 45-52 (describing the rules of gender, including there are two, and only two, genders; one’s gender is invariant; genitals are the essential sign of gender; any exceptions to two genders are not to be taken seriously; there are no transfers from one gender to another except ceremonial ones; everyone must be classified as a member of one gender or another; the male/female dichotomy is a “natural” one; and membership in one gender or another is “natural”) (citing HAROLD GARFINKLE, *STUDIES IN ETHNOMETHODOLOGY* (1967)).

employer for the adverse employment action taken against the plaintiff is generally unrelated to the plaintiff's protected characteristic. For example, the defendant in an age discrimination case might assert that it discharged the plaintiff because he or she was repeatedly late for work or stole from the company. The employer in such a case would probably not assert that it discharged the plaintiff, an older individual, because his or her gray hair was unprofessional or because he or she inappropriately discussed dentures with other employees.

Yet, in discrimination cases with trans plaintiffs, the so-called legitimate, non-discriminatory reasons asserted by the defendants often relate directly to the plaintiff's gender—his or her (claimed) protected characteristic.¹⁵⁶ When the “legitimate, non-discriminatory” reason asserted by the defendant relates directly to the plaintiff's protected characteristic, the defendant's reason often reflects the defendant's “discriminatory attitude” toward people with the claimed protected characteristic. Most importantly, the asserted reason often signals an employer's belief that a person with the protected characteristic is not viable as an employee or even as an individual (as is, sadly, often the case in discrimination cases with trans plaintiffs). If the employer asserts a so-called non-discriminatory reason that essentially reflects its discriminatory attitude, the employer may face legal consequences because the asserted non-discriminatory reason constitutes direct evidence of discrimination.

¹⁵⁶ See, e.g., *Lopez*, 542 F. Supp. 2d at 656 (asserting gender misrepresentation as a legitimate, non-discriminatory reason to rescind job offer to a trans employee); *Schroer*, 577 F. Supp. 2d at 302 (asserting trustworthiness as a legitimate, non-discriminatory reason to rescind job offer to trans applicant); *Sturchio*, 2005 WL 1502899 at *3 (asserting inappropriate conversations related to gender as a legitimate, non-discriminatory reason for its decision to take adverse employment action against a trans employee).

V. Recycled Frameworks

In most jurisdictions, trans plaintiffs struggle to establish the prima facie case of sex discrimination under Title VII.¹⁵⁷ Subsequently, the employer need not articulate a legitimate, non-discriminatory reason for the adverse employment action taken against the trans individual. Instead, the court quickly determines that the law simply fails to protect the trans employee.¹⁵⁸ Nonetheless, the law is changing. Courts have recently held that discrimination against a trans individual constitutes discrimination based on sex in violation of Title VII.¹⁵⁹ In this legal environment, employers that fail to address their discriminatory attitudes and practices toward trans people risk serious legal consequences under Title VII.

Fortunately, employers seeking to avoid liability for gender discrimination by creating trans-inclusive work environments need not wait for the courts to hand down trans-positive rulings or for the Equal Employment Opportunity Commission (EEOC) to issue trans-focused guidelines. Rather, state and federal case law, along with the regulations issued by the EEOC in other contexts, already offers some guidance for employers seeking to

¹⁵⁷ Dawson v. Bumble & Bumble, 398 F.3d 211, 223 (2d Cir. 2005) (holding that trans plaintiff's Title VII claim based on gender stereotyping must fail).

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Smith v. City of Salem, 378 F.3d 566, 578 (6th Cir. 2004); Schroer v. Billington, 577 F. Supp. 2d 293, 307 (D.D.C. 2008). In addition to the increased protection for trans employees under Title VII, anti-discrimination statutes in twelve states and 103 localities expressly prohibit employment discrimination against trans people. National Gay and Lesbian Task Force, *Scope of Explicitly Transgender-Inclusive Anti-discrimination Laws*, http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf (last visited December 15, 2008). The twelve states are California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

comply with anti-discrimination laws. For example, the EEOC has issued guidelines for employers to use during the interviewing process.¹⁶⁰ The guidelines assist hiring officials in their efforts to avoid asking discriminatory interview questions that may later serve as the basis for a discrimination suit. In the face of legal uncertainty and legislative inaction, employers that apply well-established anti-discrimination frameworks to emerging trans workplace issues can create trans-friendly workspaces and better avoid the legal consequences of discriminatory attitudes.

A. “Gender Misrepresentation”

The hiring part of the employment process offers the employer unique opportunities to discriminate. Interview questions or application materials that reflect the employer’s discriminatory attitude toward trans people could serve as direct evidence of discrimination in a subsequent Title VII suit.¹⁶¹ As a general rule, employers should not ask questions that relate to protected characteristics, including sex. When an employer does not try to ascertain information about a protected characteristic, an applicant need not “misrepresent” in terms of the protected characteristic. Massachusetts case law, coupled with EEOC guidelines, on pregnancy-related inquiries provides a useful framework.

In *Lysak v. Seiler*, the Massachusetts Supreme Court established a useful framework for pre-employment

¹⁶⁰ *EEOC Guide to Pre-Employment Inquiries*, 8A FAIR EMPL. PRAC. MAN. (BNA) 443:65 (1993); *Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act*, 8 FAIR EMPL. PRAC. MAN. (BNA) 405:7191 (1995).

¹⁶¹ *Barbano v. Madison County*, 922 F.2d 139, 144-45 (2d Cir. 1990) (discussing case where interviewer asked female applicant about her childbearing plans and whether her husband would approve of her transporting male veterans as part of her job duties).

inquiries based on protected characteristics.¹⁶² The plaintiff was pregnant when she interviewed for the defendant company's marketing director position.¹⁶³ During her interview, she told the company's president "without any solicitation . . . that her husband stayed home and took care of their two children with the help of an au pair and that 'she was not planning on having any more kids.'"¹⁶⁴ After she was hired, the plaintiff told the company's president that she was pregnant; she knew at the time of her interview that she was pregnant.¹⁶⁵ The defendant demoted the plaintiff because she had affirmatively lied during the interview, and the plaintiff filed suit under the state anti-discrimination law.¹⁶⁶

The *Lysak* court held that an employer could not take adverse employment action against an employee because of the employee's false responses to the employer's unlawful inquiries.¹⁶⁷ Thus, if the employer had asked the plaintiff whether she was pregnant, and she said that she was not pregnant, then the employer could not take adverse action against her if the employer later discovered that she was pregnant at the time of the interview. However, an employer can take adverse action against an employee where the employee or applicant volunteers false statements without solicitation by the employer.¹⁶⁸ Thus, because the plaintiff volunteered the false statements regarding her plans for children *without solicitation* by the employer, the *Lysak* court held that the plaintiff had affirmatively lied to the defendant and that the

¹⁶² *Lysak v. Seiler Corp.*, 614 N.E.2d 991 (Mass. 1993).

¹⁶³ *Id.* at 992.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 991.

¹⁶⁶ *Id.* at 993. Though the framework developed in *Lysak* is useful, whether the *Lysak* plaintiff's statement actually constitutes a lie is arguable.

¹⁶⁷ *Lysak*, 614 N.E.2d at 993.

¹⁶⁸ *Id.*

defendant could therefore take adverse employment action against her based on the misrepresentation.¹⁶⁹

The *Lysak* court's framework for misrepresentations regarding pregnancy provides some guidance to employers for so-called misrepresentations regarding sex. EEOC guidelines state that "[b]ecause Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries."¹⁷⁰ In fact, "[t]he EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker."¹⁷¹ Similarly, because Title VII prohibits discrimination based on sex and gender, employers should not make sex- or gender-related inquiries, including inquiries regarding whether the applicant or employee is trans.

Thus, where the employer asks during an interview whether the plaintiff is male or female, the employer cannot take adverse action against the employee if the employer later discovers that the employee provided affirmed sex rather than assigned sex. Yet, if the applicant affirmatively states, *without solicitation*, that the applicant's assigned sex is male where the applicant's assigned sex is female, then applying the *Lysak* framework, the employer may take adverse action against the employee for the misrepresentation. Employer assumptions regarding assigned or legal gender based on an applicant's gender presentation are not misrepresentations on the part of the applicant, just as assumptions regarding pregnancy based on whether an applicant appears pregnant are not misrepresentations on the part of the applicant.

¹⁶⁹ *Id.*

¹⁷⁰ EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, *available at* <http://www.eeoc.gov/policy/docs/caregiving.html>.

¹⁷¹ *Id.*

Accordingly, the employer in *Lopez* should not have taken adverse employment action against the plaintiff when it discovered that she was or had once been classified as male. The plaintiff had not engaged in any misconduct when she identified herself as female on an employment application that unlawfully solicited the information. An employer has “no authority to discharge [an employee] for giving false answers to questions that the [employer] under law had no right to ask.”¹⁷² The *Lopez* employer’s argument that the trans plaintiff affirmatively misrepresented her sex because she presented as female and used a female name during the interview process equates to an argument that a pregnant applicant affirmatively misrepresents her pregnancy where she fails to appear pregnant.

To summarize, an employer should not make sex-related inquiries during the hiring process. More importantly, where the employer solicits gender-related information during the hiring process, the employer should not take adverse employment action against an employee after the employer discovers that the employee provided his or her affirmed sex rather than assigned sex.

B. “Inappropriate Conversations”

Employers also permit discriminatory attitudes throughout the workday. Prohibitions against particular workplace speech, for example, may constitute discrimination in violation of Title VII where the speech at issue relates directly to a worker’s protected characteristic.

¹⁷² *Lysak*, 614 N.E.2d at 993 (quoting *Kraft v. Police Comm’r of Boston*, 571 N.E.2d 380 (1991)). This is not to say that a trans individual provides a false answer where he or she provides his or her affirmed sex rather than assigned sex on an employment application. Rather, the phrase “false answer” should be interpreted as “legally inaccurate” or “answer at odds with the employer’s definition of sex or gender.”

Courts have held that English-only workplace policies violate Title VII's prohibition against discrimination based on national origin because a close relationship exists between language and national origin.¹⁷³ The EEOC Guidelines on English-only policies provide:

Speaking English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. *It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment.* Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.¹⁷⁴

Naturally, significant differences exist between English-only policies and policies that prohibit trans

¹⁷³ EEOC v. Premier Operator Servs, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

¹⁷⁴ 29 C.F.R. § 1606.7(a)-(b) (2008) (emphasis added).

people's gender-related conversations.¹⁷⁵ However, both policies operate to suppress the identities of the individuals silenced by the policies. The English-only policies subjugate the cultural or ethnic identities of employees whose ethnic identities are disfavored by the employer.¹⁷⁶ Similarly, the restrictions on gender-related conversations suppress the gender identities of trans employees, whose gender identities the employer presumably disfavors.

In the average English-only policy case, the employer typically defends its policy on the grounds that non-English speakers create an uncomfortable working environment for those who speak English only and thus cannot comprehend the non-English speakers.¹⁷⁷ Similarly, the employer in *Sturchio* argued that the trans employee's gender-related conversations created an uncomfortable work environment for other cis employees.¹⁷⁸ Given the similarities between the English-only policy cases and the *Sturchio* case, employers might adopt the EEOC Guidelines

¹⁷⁵ *Premier Operator Services*, 113 F. Supp. 2d at 1070 (describing "code-switching," where a bilingual person unconsciously switches from one language to another, as impossible to restrain).

¹⁷⁶ See *Garcia v. Spun Steak*, 13 F.3d 296 (9th Cir. 2003).

Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as "inconvenience" to the affected employees. [. . .] Even when an individual learns English and becomes assimilated into American society, his native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture. English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality.

Id. at 298 (Reinhardt, J., dissenting).

¹⁷⁷ *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 942 (E.D. Va. 1995) (noting that defendant implemented English-only policy after employees and supervisors complained that plaintiffs were making fun of them in Spanish, which made them feel uncomfortable).

¹⁷⁸ *Sturchio*, 2005 WL 1502899, at *3.

on English-only rules as guidelines for gender identity-related conversations as well.

Blanket prohibitions on conversations related to gender transitions, gender identities, or gender presentations and expressions place significant burdens on trans workers especially when the prohibitions do not apply to the gender-related conversations of cis workers. Most importantly, the prohibitions “may also create an atmosphere of inferiority, isolation, and intimidation” based on gender identity or expression, “which could result in a discriminatory working environment.”¹⁷⁹ Though blanket prohibitions are typically unnecessary and discriminatory, employers can certainly prohibit gender-related conversations “at certain times where the employer can show the rule is justified by business necessity.” Thus, in *Lopez*, the employer should have prohibited the gender-related conversations only “at certain times” when such a prohibition was “justified by business necessity.”¹⁸⁰

The blanket prohibition, however, served only to isolate the plaintiff from her cis co-workers and to create the impression that the plaintiff’s gender expression was inferior to her cis co-workers’ expressions. Before employers silence trans employees in this manner, they should consider whether business necessity justifies such speech restrictions. Otherwise, a blanket prohibition on gender-related conversations may reflect the employer’s discriminatory attitude toward trans people and thus constitute direct evidence of discrimination.

C. Potential Liability

When creating a non-discriminatory workplace for trans employees, employers seem to view the issue of appropriate restroom access as the most difficult to address.

¹⁷⁹ 29 C.F.R. § 1606.7(a) (2008).

¹⁸⁰ *Id.* § 1606.7(b).

In the workplace and in the public sphere, bathrooms are typically labeled either male or female. For whatever reason, people often feel uncomfortable or alarmed when, for example, an individual they perceive as male enters the restroom labeled female. Creating a non-discriminatory work environment for trans people may require more than policy changes to an employee handbook. Rather, anti-discrimination initiatives may require more significant structural changes. Workplace reforms pursuant to the Americans with Disabilities Act may provide some useful guidance.

The Americans with Disabilities Act requires employers to make “reasonable accommodations” for employees with disabilities.¹⁸¹ Courts have held that the ADA requires employers to install handicap bathrooms, build ramps, and lower sinks in the restrooms.¹⁸² Though the Americans with Disabilities Act specifically excludes trans people from its coverage,¹⁸³ employers who want to prepare for an increasingly trans-inclusive legal environment might consider preemptive structural changes to restrooms to increase opportunities for trans people and ultimately avoid liability for gender discrimination.

In “Integrating Accommodation,” Professor Elizabeth Emens posits that integrating people with

¹⁸¹ 42 U.S.C. § 12111(8)-(9) (2000).

¹⁸² *See, e.g.,* *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir.1982).

In the context of public transportation and the handicapped, denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing. As plaintiffs pointedly observe, “It is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.”

Id.

¹⁸³ 42 U.S.C. § 12211(b)(1) (2000).

disabilities into the workplace also means integrating accommodations.¹⁸⁴ She argues that workplace accommodations for disabled people provide third-party usage benefits and attitudinal benefits, in addition to the individual benefits to the disabled person or to the people who sought the accommodation.¹⁸⁵ To illustrate the potential for third-party usage benefits, Professor Emens states:

Design matters. An employee whose disability requires her to work from home for periods of time could be accommodated by periodically reassigning her tasks to a coworker, creating added burdens for the coworker. Or, alternatively, her accommodation request could lead her employer to create a broad-based telecommuting initiative that benefits multiple employees who wish to work from home.¹⁸⁶

Interestingly, structural changes in the form of restroom accommodations intended to benefit trans employees could provide similar third-party usage benefits for cis employees *and* customers. For example, gender-neutral bathrooms would likely provide usage benefits to a wheelchair user who requires the assistance of his or her opposite-sex partner in a restroom, a woman standing in a long line outside the female-designated restroom while no line exists outside the male-designated restroom, and a parent tending an opposite-sex child when the parent or the child suddenly needs to use a restroom in a movie theater.¹⁸⁷

¹⁸⁴ Elizabeth Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 843 (2008).

¹⁸⁵ *Id.* at 848.

¹⁸⁶ *Id.* at 841-42.

¹⁸⁷ Terry Kogan, *Sex Separation in Public Restrooms: Law,*

Professor Emens also discusses the attitudinal benefits that flow from workplace accommodations for disabled people. Attitudinal benefits in the disability context involve benefits that change attitudes about disabled people.¹⁸⁸ Similarly, structural changes to restrooms in the workplace could produce attitudinal benefits, including improvements in co-worker and supervisor attitudes toward trans employees. Where an employer integrates accommodations, the employer may discover that cis employees no longer perceive trans employees as “mysterious others” who do not belong in either male- or female-designated bathrooms. Thus, the attitudinal benefits of integrating accommodations for trans employees include improving or eliminating the discriminatory attitudes that often lead to costly litigation.

VI. Conclusion

Both employers, as potential defendants, *and* judges, as potential decision-makers, should recognize that purportedly legitimate employer policies and practices may actually discriminate against trans employees in violation of Title VII. In this article, I examined three “legitimate, non-discriminatory” reasons that employers have asserted for their decisions to take adverse employment action

Architecture, and Gender, 14 MICH. J. GENDER & L. 1, 3-4 (2007) (using these examples to illustrate situations where a gendered bathroom is not the obvious choice).

¹⁸⁸ See Emens, *supra* note 183, at 885:

[I]ntegrating not only people with disabilities, but also disability accommodations, can change the culture in ways that are consistent with the inclusionary purposes of the ADA. In particular, designing accommodations with an eye to their benefits for third parties may help improve attitudes toward disability and the ADA. These attitudinal benefits may arise through three routes: (1) improved “contact,” (2) positive associations, and (3) increased uptake of the social model.

Id.

against trans employees, including gender misrepresentation, inappropriate conversations related to gender, and potential liability for bathroom usage. I argued that judicial acceptance of these reasons as legitimate and non-discriminatory would severely limit employment opportunities for trans people and would undercut well-established employment law principles.

Furthermore, the reasons asserted by the employers suggest that trans people are not viable as employees and therefore reflect the discriminatory attitudes of the decision-makers toward trans people. Where the asserted reasons reflect the discriminatory attitudes of the employers, the reasons constitute direct evidence of discrimination. Finally, in light of recent trans-positive federal case law, employers should consider the ways in which they can create trans-inclusive workplaces. Employers that try to avoid liability by pandering to the biases and discriminatory attitudes of the decision-makers rather than by actually preventing discrimination risk the very real possibility that the decision-makers will discern the true nature of their assertions and refuse to accept them as legitimate and non-discriminatory.