Members of the transgender community deserve to be afforded the same protection under the law as other classes when it comes to employment discrimination. In New York State, the Sexual Orientation Non- Discrimination Act (SONDA) affords protection for gay, lesbian and bisexual individuals against employment discrimination, but omits similar protection for members of the transgender community employed or seeking employment by private businesses. A similar statute, the Gender Expression Non-Discrimination Act (GENDA), would address this oversight. GENDA, already passed by the state house of representatives but currently stalled in the senate, would prohibit discrimination based on an individual's gender identity or expression.[1] The lack of a federal statute addressing discrimination of LGBT individuals in the workplace has required the states to address this issue at their own discretion, and the courts have largely ruled against transgender plaintiffs seeking relief under Title VII of the 1964 Civil Rights Act. Without assistance from the courts or the federal government in the foreseeable future, these rights must be achieved at a statewide level, and in New York that means passing GENDA. The resistance to passage among opponents of GENDA is largely rooted in politics and personal ideology. In a progressive and culturally sophisticated state such as New York, this opposition should be easily surmountable. Members of the transgender community are entitled to and should be afforded the same constitutional protections as the rest of us.

Title VII of the 1964 Civil Rights Act came about largely due to the increasing concern for the legal protections against discrimination for a rapidly growing female workforce. Women were forcefully expanding into roles that were largely male dominated and that had led to an increase of instances of sex discrimination.[2] Title VII identifies specific characteristics, and forbids discrimination based upon those characteristics. It makes unlawful the hiring or firing of

---

[1] N.Y. State Assembly Passes Gender Expression Non-Discrimination Act, Again. *LGBTQ Nation*. June 19, 2014.
[2] 1960s: A Decade of Change for Women. Walsh, Kenneth T., *U.S. News and World Report*. March 12, 2010.

individuals, or the limiting of employment opportunities, or any other perceivable manner of discrimination, based upon "such individual's race, color, religion, sex, or national origin."[3] Thus, under "sex," men and women were protected from discriminatory decisions made regarding their employment based upon being a man or being a woman. When it comes to determining if protection is afforded to transgender people under Title VII, the argument devolves into an interpretive analysis of what constitutes sex discrimination and whether transgender people by definition are eligible for such claims. The original intent of Title VII was the prohibition of discrimination based upon the sex one has at birth. It is pretty hard to refute that the architects of the law had any other intentions. This was in the mid-1960's, and transgender people at the time were not a class with enough political clout to be on the radar of congressional lawmakers. A more interpretive reading of "sex" in this statute *has* been used to attempt to include and protect gays, lesbians, and transgender people under this classification.[4] In the courts, this attempt has largely failed due to both a constructionist reading of the law and the complex and misunderstood nature of a group of people who have only recently begun to demand and secure equal protection under the law.

Transgender discrimination is a difficult issue to identify mainly because of the myriad of conflicting opinions, medical diagnosis, psychiatric diagnosis, legal diagnosis and cultural interpretations of the meaning of transgender. That is the main problem with regards to Title VII. It could be forced to apply through legalese, but its true intention was never to address employment discrimination of transgender people, which deserves its own specific, pointed legislation. Transgender individuals are a class of people who have been, historically and still

---

[3] 42 U.S.C. § 2000e

[4] Sex Stereotyping Per Se: Transgender Employees and Title VII. Ilona M. Turner. California Law Review Vol. 95, No. 2 (Apr. 2007), pp. 561-596

are today, underrepresented in government and seriously misunderstood. Although they are included with gays, lesbians and bisexuals under the LGBT acronym, transgender can also serve as an "umbrella term" in the sense that gays, lesbians and bisexuals can also be transgender.[5] Transgender people describe themselves as "trapped in the body of another person," a perception that is impossible to describe unless one has experienced it personally.[6] The best way to equate it is to imagine waking up one morning and truly, in every sense of the word, *feel* that you were meant to be a member of the opposite sex. That is the broadly asserted definition of transgender: those individuals who experience gender characteristics that differ from their physical sex. These inclinations are entirely based upon biology (internal, not external) and they begin at a very young age. The American Psychiatric Associate defines this as a medical disorder coined "gender identity disorder." It is considered diagnosed once feelings have persisted for two years and identification with specific gender traits allows the individual to feel self-actualized.[7] It is not a choice. Some individuals with gender identity disorder elect to undergo medical treatments (such as hormone therapy or sexual reassignment surgery), whereas others opt to keep their natural body but still adopt the traits, dress and mannerisms of the opposite sex. It is important to note that this is a large class of people. Discrimination or societal taboos can keep these individuals closeted, but they do make up a large portion of the U.S. population and that of the world as well. It is important to note that akin to homosexuality, bisexuality or heterosexuality, gender identity disorder is a derivation of biology, not a lifestyle decision. Like race or ethnic classes, they ought to be afforded the same constitutionally proscribed equal protection and due process under the law.

---

[5] Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality. Taylor Flynn. *Columbia Law Review.* Vol. 101, No. 2 (Mar., 2001), pp. 392-420.
[6] Coffey, Carolyn E. Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures. NYCLR 7 N.Y. City L. Rev. 161. p. 179. (2004)
[7] Diagnostic and Statistical Manual of Mental Disorders 5. American Psychiatric Association. 2013. p. 454.

The case that is most commonly cited as precedent for employment discrimination cases involving sex discrimination based upon gender is *Price Waterhouse v. Hopkins,* in which the plaintiff brought action for what she perceived to be gender stereotyping in an employment decision. *Price Waterhouse v. Hopkins* is not a transgender case, but it establishes some important conclusions that factor into how transgender people could argue and have argued for protection under Title VII. In *Price Waterhouse v. Hopkins*, the female plaintiff felt that her gender was the determining factor when being denied partner status at her accounting firm. The court ruled on her side, and importantly noted that gender stereotyping attributed to the discrimination she endured.[8] It wasn't so much that she was discriminated against for her biological sex attributes, but for behavioral characteristics attributed to her gender. Title VII only mentions sex not gender, but the court determined that under Title VII gender stereotyping is "actionable as sex discrimination".[9] Now this could be seen to apply to transgender individuals whose self-identification *with* a gender is just as real and powerful as a person born *to* a gender. If mannerisms adopted by a person that were not normative of that person's perceived gender influenced employment decisions (like in *Price Waterhouse* where the plaintiff was described as not feminine enough), it could fit the bill as gender stereotyping. Unfortunately, despite the Supreme Court's ruling in *Price Waterhouse*, the lower courts have consistently identified such discrimination within the bounds of sexual orientation or "transgender status," which they have overwhelmingly concluded do not apply under Title VII.[10] Behaviors attributed to sexuality – such as how an individual dresses, talks or otherwise

---

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

[9] Soul of a Woman: The Sex Stereotyping Prohibition at Work. Kimberly A. Yuracko. 161 U.PA.L.REV. 757 (2013)

[10] Gender Nonconformity and the Unfulfilled Promise of *Price Waterhouse v. Hopkins*. Joel W.M. Freidman. Duke Journal of Gender Law and Policy. Volume 14:205 (2007)

comports him or herself – are categorized as aspects of *orientation*, not gender, forcing courts to side with employers in such cases, as the literal reading of Title VII does not allow the courts to intercede when discrimination is based upon sexual orientation.

The courts have consistently found that transgender people are not a protected class under Title VII. In *Ulane v. Eastern Airlines Inc.*, a pilot for Eastern Airlines underwent sexual reassignment surgery to change from a man to a woman and was subsequently terminated. She filed suit under Title VII claiming discrimination based upon sex. On the appellate level, the judge struck down her claim, noting that Title VII only mentions sex, not sexual orientation, and that the statute was meant to be interpreted solely on the intentions of the lawmakers whom, he asserted, did not intend for the parameters of "sex" to be extended beyond traditional physical characteristics.[11] Previously, at the district level in this case, the court had invoked an argument reminiscent of *Price Waterhouse v. Hopkins* and the applicability of gender stereotyping as actionable. The opinion described sex as a psychological symptom that "literally and scientifically" applies to transsexuals, albeit not to homosexuals or transvestites.[12] Basically, the district judge was saying that transgender people embraced a traditional psychological identification with a sex, albeit the opposite of the one they were physically assigned. Thus, the argument can be made that their behavior is based upon sex, not sexual orientation, and Title VII could apply. However, the jurisprudence proscribed by the appellate court in *Ulane v. Eastern Airlines* has held sway in the majority of these cases. Most recently in *Etsitty v. Utah Transit Authority,* a case where the plaintiff sought relief under Title VII by invoking *Price Waterhouse v. Hopkins*, this argument was soundly rejected. In refuting Title VII, the argument was virtually identical to that of the opinion in *Ulane v. Eastern Airlines*. When addressing *Price Waterhouse*

---

[11] *Ulane v. Eastern Airlines, Inc.* 742 F.Supp. 1081
[12] *Ulane v. Eastern Airlines, Inc.* 581 F.Supp. 821 (Ill. 1984)

v. Hopkins, the court went into length describing circumstances in which *Price Waterhouse* has been successfully used to argue for discriminatory relief, but then succinctly concluded by refusing to apply the precedent because the plaintiff failed to successfully demonstrate her termination was connected to her transgender status.[13] It bears mentioning, however, the breadth the court spent delving into *Price Waterhouse v. Hopkins*. While the exploration of *Waterhouse* in this opinion was essentially dictum – as it was deemed irrelevant given the circumstances – the argument was not refuted but actually given credence and the promise that in future cases the precedent could successfully be applied to the question.

Although less prominent, there have been court rulings in favor of transgender plaintiffs, almost exclusively on the invocation of the equal protection and due process clauses and *Price Waterhouse v. Hopkins*. Two recent cases, *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.* and *Glenn v. Brumby,* demonstrate how the courts have ruled in favor of transgender individuals who have filed suits on discrimination grounds using the precedent set forth in *Price Waterhouse.* In *Lopez*, the plaintiff was rescinded a job offer after her employer discovered her transgender status. She brought suit under Title VII attesting that she had been discriminated on the basis of her sex. In its decision, the court used *Price Waterhouse v. Hopkins* to refute the line of thought that other courts had applied in similar circumstances; namely, that there is a distinction to be made between a woman having mannerisms that do not conform to gender norms and an individual completely juxtaposing their physical sex. The court found this to be a sliding scale. There is nothing in case law to denote at which point a woman becomes too masculine or a man too effeminate.[14] Either it all applies or none of it does. The court concluded, "To hold otherwise would be to permit employers and 'courts [to] superimpose

---

[13] *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (2007)
[14] *Lopez v. River Oaks* 542 F.Supp.2d 653 (2008)

classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.'"[15] The idea of some sort of litmus to determine degrees of nonconformity is inherently prejudicial and allows for individuals to be classified, and discriminated against, based upon that classification.

In *Glenn v. Brumby*, the plaintiff claimed wrongful termination from her position as an editor in the Georgia General Assembly's Office of Legislative Counsel based on prejudice suffered as a result of her medical condition. She had been diagnosed with gender identity disorder and had decided to fully pursue the process of becoming a woman through hormone treatment and surgery. Her supervisor deemed her conduct (the change in appearance as a result of her medical treatment) "inappropriate" and fired her from her position, essentially for being a distraction in the workplace. In its opinion, the court invoked *Price Waterhouse v. Hopkins* and *United States v. Virginia*, where the government was required to demonstrate that gender classification served "a sufficiently important government interest".[16] In *Virginia*, the complaint involved the state's exclusion of female candidates from the Virginia Military academy. The court found that the state could not refuse admittance based upon *gender* stereotyping. The court reaffirmed previous rulings that sex-based discrimination was subject to intermediate scrutiny under the equal protection clause.[17] In *Glenn v. Brumby*, the court extended this logic to the situation of the plaintiff. It determined the firing of the plaintiff because she failed to act according to socially prescribed gender roles constituted discrimination according to the rationale of *Price Waterhouse v. Hopkins.* Thus, because gender played a factor in how she was

---

[15] *Id.*, citing *Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004)
[16] *United States v. Virginia* 518 U.S. 515 (1996)
[17] *Id.*

treated, her rights were violated under the equal protection clause without any clear governmental interest.

In light of the failures of Title VII to sufficiently protect individuals from employment discrimination based upon sexual orientation, the Employment Non-Discrimination Act (ENDA) was introduced in the United States Congress in 1994. Originally, sexual orientation under ENDA was only defined as applying to homosexual, bisexual and heterosexual persons.[18] ENDA has been floated before every single congress for the last twenty years save one, and failed to pass both houses. Starting in 2007, updated versions of the bill have included protection for transgender individuals. However, in an increasingly partisan and gridlocked congress, it appears unlikely that such legislation will ever achieve success at a national level. The courts do not have the power to write the law and the United States Congress does not have the votes to pass it; therefore, it is has been left to the individual states.

In the United Sates, fifteen states currently have laws on the books to protect transgender people from employment and other types of discrimination.[19] In 2011, Connecticut Governor Dannel Malloy signed into law Public Act 11-55, "An Act Concerning Discrimination," which added gender identity or expression to Connecticut's anti-discrimination laws. According to the law, "'[g]ender identity or expression' means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical care, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is

---

[18] O'Keefe, Ed. "ENDA, Explained". The Washington Post. November 4th 2013.
[19] Know Your Rights – Transgender People and the Law. ACLU. April 24th 2013. www.aclu.org/lgbt-rights/knowyourrights-transgender-people-and-law.

sincerely held, part of a person's core identity or not being asserted for an improper purpose." [20] Yes, it's verbose, but that's important. It's just about the most comprehensive definition of gender identity currently under the law, and given the complexity of the issue the presence of specific language cannot be undervalued. The good news for the transgender community in New York State is that the GENDA law is almost identical to its successful Connecticut counterpart. It balances the broad with the descriptive, nailing the language of gender identity and awarding transgender people the equivalent protections afforded other classes.

The aims of GENDA have already been largely achieved in New York City. The New York City human rights law has been amended to define the protected class of gender to include transgender people, allowing self-determination to define one's sexual identity.[21] New York is a progressive state, a blue state, and a state that has often come first, or at least early, in addressing the concerns of minority groups seeking equal protection under the law. GENDA is a law that should easily pass, one that holds broad public support, and only seeks to extend protection to a deserving class of people, and by no means would intrude on legal protections enjoyed by other groups. The most vocal opposition to GENDA has come from conservative members of New York's Republican Party. The root of this opposition comes from a dubious perception of already existent equality. Party leaders, such as Michael Long, contend that there isn't a necessity to create classes designated for protection because we are all already equally protected.[22] By that argument, we could have done without the protections that Title VII *did* manage to secure for women, racial and ethnic minorities. Other opponents have made claims similar to Representative Steve McLaughlin, who postulated that given the chance, sexual

---

[20] Public Act 11-55 "An Act Concerning Discrimination." www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm

[21] "Transgender Employees: The New Protected Category?" Smith, Kristen. *New York Labor and Employment Law Report*. December 2, 2014.

[22] Transgender Politics: Michael Long and the New York Conservative Party Are Short on Tolerance. Kurlander, Steven. *The Huffington Post*. February 28th 2013.

predators will take advantage of the law by dressing up a women to gain access to their restroom facilities, thereby revealing a deeply held misunderstanding of the nature of gender identity disorder, which is a medical condition in no way associated with sexual predation.[23] Science aside, it seems implausible that the scenario, say, of a straight man claiming to be transgender so he can gain perversely- motivated access to the women's locker room would become such a common phenomenon that it should dissuade the Senate from adopting legislation that would enfranchise the civil rights of an entire class of people.

It is the responsibility of the courts to enforce and interpret the laws and statutes of the federal and state governments. Title VII could be interpreted to afford transgender people protection from employer discrimination, but it largely hasn't been and for a good reason. The law was not written with transgender people in mind and a literal interpretation of Title VII comes far short of affording them protection. Furthermore, without a federal statute to address this matter likely to come about any time soon, the determination of the federal courts is unlikely to change. Therefore, if the rights of transgender people are to be protected, then statutes have to be enacted at the state level. New York is on the cusp of making this happen for the transgender community. GENDA has been and still is very close to passage in New York State. Just this past January, Governor Cuomo called for an amendment to New York's civil rights laws to afford protection for transgender workers (essentially what GENDA is and would do).[24] The Empire State Pride Agency, an advocacy group supporting LBGT rights throughout the state, is sponsoring fundraising, events and other initiatives to generate greater awareness and support of GENDA to further its eventual passage.[25] The State of New York holds a responsibility to give

---

[23] GENDA passes Assembly, Squadron starts Senate push. Brunelle, Will. *Capital New York*. June 10th, 2014
[24] New York Governor Cuomo Calls for Transgender Protections in State and Civil Rights Law. Peters, Stephen. *Human Rights Campaign*. January 22, 2015
[25] Stepping Up the GENDA Pressure One More Time. Schindler, Paul. *Chelsea Now*. March 26th, 2015

its citizens equal protection under the law, especially in the absence of a federal statute addressing this disparity or a binding Supreme Court ruling. When the federal government fails to act, it is up to the individual states to address issues of equality. Passing GENDA would further that aim and secure the protection against discrimination to which the transgender community is entitled.