




## Office of the Attorney General

Washington, D. C. 20530

December 15, 2014

### MEMORANDUM

TO: UNITED STATES ATTORNEYS  
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL 

SUBJECT: Treatment of Transgender Employment Discrimination Claims  
Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual “because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies “shall be made free from any discrimination based on . . . sex”). Title VII’s prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce. In a variety of judicial and administrative contexts, however, questions have arisen concerning the appropriate legal standard for establishing claims of gender identity discrimination, including discrimination claims raised by transgender employees.<sup>1</sup>

Many courts have recognized that gender identity discrimination claims may be established under a “sex-stereotyping” theory. Following the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have interpreted Title VII’s prohibition of discrimination because of “sex” as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females. *See, e.g., Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *see also Glenn v. Bromby*, 663 F.3d 1312 (11th Cir. 2011). But courts have reached varying conclusions about whether discrimination based on gender identity in and of itself—including transgender status—constitutes discrimination based on sex. *Compare Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), with *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2005).

The federal government’s approach to this issue has also evolved over time. In 2006, the Department stated in litigation that Title VII’s prohibition of discrimination based on sex did not cover discrimination based on transgender status or gender identity *per se*; the district court rejected that position. *See Schroer*, 577 F. Supp. 2d at 293. Subsequently, in 2011, the Office of

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<sup>1</sup> Guidance from the Office of Personnel Management states that “[t]ransgender individuals are people with a gender identity that is different from the sex assigned to them at birth,” and defines “gender identity” as an individual’s “internal sense of being male or female.” *See* <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

Personnel Management issued guidance announcing that the federal government's policy of providing a workplace free of discrimination based on sex includes a prohibition against discrimination based on gender identity. In 2012, the Equal Employment Opportunity Commission ruled that discrimination on the basis of gender identity is discrimination on the basis of sex. *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). More recently, the President announced that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting. See Executive Order 13672 (July 21, 2014); see also U.S. Dep't of Labor Directive 2014-02 (August 19, 2014).

After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination "because of . . . sex" includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex. As the Court explained in *Price Waterhouse*, by using "the simple words 'because of,' . . . Congress meant to obligate" a Title VII plaintiff to prove only "that the employer relied upon sex-based considerations in coming to its decision." 490 U.S. at 241-242. It follows that, as a matter of plain meaning, Title VII's prohibition against discrimination "because of . . . sex" encompasses discrimination founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether. Although Congress may not have had such claims in mind when it enacted Title VII, the Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

For these reasons, the Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).<sup>2</sup> This memorandum is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case. The application of Title VII to any given case will necessarily turn on the specific facts at hand. My hope, however, is that this clarification of the Department's position will foster consistent treatment of claimants throughout the government, in furtherance of this Department's commitment to fair and impartial justice for all Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component's Front Office.

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<sup>2</sup> "Sex-stereotyping" remains an available theory under which to bring a Title VII claim, including a claim by a transgender individual, in cases where the evidence supports that theory.