



# New Title VII and EEOC Rulings Protect Transgender Employees

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Few Americans, including the LGBT community, are aware that today a transgender employee is protected against being fired because of his or her status as a transgender person in all 50 states.

These protections are based on recent rulings from federal courts and the Equal Employment Opportunity Commission (EEOC) under Title VII of the 1964 Civil Rights Act, which made it illegal to discriminate “because of sex.” Almost all public and private-sector employees and job applicants (at companies of 15 or more employees) are covered under Title VII.

It may seem obvious that firing someone from their job “because of [his or her] sex” would include discrimination against transgender people, who are often fired when they transition from one sex to another or when they are outed for having transitioned previously.

However, courts and administrative agencies that deal with employment law have historically not been very sympathetic to transgender people, having traditionally held that they were excluded from coverage under Title VII.

Now that has changed completely.

This change has been building for the past decade or more. Federal cases which have upheld transgender rights under Title VII include *Smith v. City of Salem* in the Sixth Circuit (2004), *Schroer v. Billington* in the U.S. District Court for the District of Columbia (2008), and *Glenn v. Brumby* in the Eleventh Circuit in Atlanta (2011).

All of these victories set the table for the landmark EEOC decision, issued on April 20, 2012, in a case brought by Transgender Law Center: *Macy v. Holder*.

**In that case, the bipartisan EEOC—the federal agency in charge of enforcing employment discrimination laws—declared unanimously that anti-trans bias was sex discrimination under Title VII.**

An employer who discriminates against a transgender employee can still challenge the EEOC’s ruling in *Macy* if a case goes to federal court. However, given *Smith v. City of Salem*, *Schroer v. Billington* and *Glenn v. Brumby*, plus a growing number of EEOC decisions benefiting the transgender charging party since the *Macy* decision. Employers are unlikely to prevail on this issue in most federal courts.

In *Glenn*, the United States Court of Appeals for the Eleventh Circuit—which included the Hon. William H. Pryor, Jr., one of the more conservative federal judges in the nation, on the panel that decided the case—noted that the federal courts are ruling with “**near-total uniformity**” on behalf of transgender claimants. This is a sea change. Top employment lawyers do not expect any challenge to this basic legal concept to prevail.

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## WHAT ABOUT GAYS, LESBIANS & BISEXUALS?

Discrimination against gay, lesbian and bisexual people because they are “gender non-conforming” is similarly illegal as a form of sex discrimination. This includes discrimination against feminine gay men and masculine lesbians, as well as straight employees who don’t fit gender norms. There is also a growing body of decisions recognizing that discrimination based on sexual orientation is by definition a form of sex discrimination under Title VII. But an explicit federal law like ENDA will be critical to make clear that discrimination against gender-conforming LGB people is illegal under federal law.

## WHAT ABOUT LOCAL LAWS?

There are also laws in 17 states, the District of Columbia and Puerto Rico, as well as in 140+ local jurisdictions, that explicitly protect trans persons. These areas combined cover nearly 50% of the U.S. population. Given the urban concentration of the out trans community, it is fair to say that a large majority of them already have civil rights protections through state and local ordinances, in addition to the federal law, Title VII, that is the subject of this paper.



## IS IT A 'SLAM DUNK?'

No. You still have to file your case with the EEOC. If you receive a cause determination from the EEOC, your employer might then work with you to resolve matters. However, they can insist on going to court. Because of the recent strong trend in court and EEOC decisions, you can expect to prevail on the legal principle that it's illegal to discriminate against someone for being transgender. But you still have to prove that you were in fact discriminated against, and it's YOUR responsibility to collect and keep ALL possible evidence of what happened so you can win in a hearing or lawsuit.

## DO WE STILL NEED ENDA?

Yes. ENDA—the Employment Non-Discrimination Act—is a federal bill that would *expressly* make it illegal to fire someone because of their sexual orientation or gender identity. As a law, it would add strength to the recent rulings holding that Title VII protects transgender employees, it would educate employers and the community about those rights, and it would have the added benefit of making crystal clear that gender-conforming gay, lesbian and bisexual persons are also protected. Until ENDA passes, it is technically possible—although extremely unlikely—that the U.S. Supreme Court could reverse the very strong trend in the federal courts holding that transgender employees are protected by Title VII.

It is uncertain how long it may take to pass ENDA. However, even without ENDA, the EEOC ruling in *Macy v. Holder* and the strong trend in federal court decisions make it very clear that transgender employees are covered by existing law prohibiting sex discrimination.

## Why Don't More People Know About This Important Ruling?

The EEOC's ruling in *Macy v. Holder* is not secret, and no one has tried to keep it secret. However, it is fair to say most people in the transgender community, and even the wider LGBT community, are unaware of it, and unaware of the very strong trend in court decisions holding that transgender people are protected from discrimination.

If you don't know your rights, you can't exercise them. Not many employers know about these legal protections, either, which means they don't realize that they can be held liable for discriminating. And not many lawyers know about this ruling either, which can make it difficult to obtain legal representation. Our goal in writing this document is to help you know your rights, so you can act.

## So Our Problems Are Over?

No, not quite! Firings, lay-offs, failures-to-promote and failures-to-hire of transgender employees will remain common. Laws only change so much, and in any case you still have to bring—and win—a lawsuit.

However, few employers want to be on the wrong side of the law and expose themselves to an embarrassing and costly federal lawsuit. Most of them are unaware of the law.

So it's YOUR job to be aware of the new ruling and your legal rights, and to use them to protect yourself.

**If you think you have a discrimination claim, call the EEOC: 1-800-669-4000.**

**For more details, check out Transgender Law Center's step-by-step guide to filing an EEOC charge at <http://transgenderlawcenter.org/issues/employment/eecocomplaint>.**

# For Lawyers

Title VII, 42 U.S.C. § 2000e-1, *et seq.*, is the federal law that prohibits discrimination in employment because of sex. In 1989, the United States Supreme Court ruled that sex discrimination includes discrimination based on “sex stereotyping,” or a person’s perceived nonconformity with gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Prior to the Supreme Court’s decision in *Price Waterhouse*, most courts to consider the issue had ruled that transgender people were not protected by Title VII. Some of the most prominent decisions ruling against transgender employees included *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

The sex stereotyping theory established by *Price Waterhouse* started to turn things around, however, as the logic of that decision clearly applied to employees who were fired or denied a job for being transgender. Since *Price Waterhouse*, two of the thirteen federal appeals courts have explicitly ruled that discrimination based on transgender status is a prohibited form of sex discrimination under Title VII and/or the Equal Protection Clause: the Sixth and the Eleventh Circuits, covering Alabama, Florida, Georgia, Kentucky, Michigan, Ohio, and Tennessee. The First, Ninth, and Tenth Circuits have also suggested that such protections should now be available after *Price Waterhouse*.

Federal district courts throughout the country have also held that transgender plaintiffs can pursue a sex stereotyping theory. In addition, the federal district court for the District of Columbia has ruled that discrimination based on gender transition itself is *per se* sex discrimination, and does not require further proof of stereotyping. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008). More courts can be expected to follow this theory in the future.

The EEOC’s ruling in *Macy v. Holder*, No. 0120120821 (EEOC April 20, 2012), is based on this robust body of case law. As a practical matter, *Macy* means that if a transgender person asserts that s/he was subjected to adverse actions based on transgender status by a state or local government, or private-sector employer with 15 or more employees, the EEOC must take the complaint and investigate. If the EEOC finds that there is clear evidence to support the complaint, it will issue a ruling in favor of the transgender employee, and attempt to “conciliate” the complaint. If the employer rebuffs the EEOC, the employee can bring the case to federal court under Title VII. The court then hears the case *de novo*. EEOC rulings like *Macy*, while not strictly binding on courts, are generally accorded some deference. Needless to say, if a transgender discrimination case were brought in the federal courts, all the rulings cited above would constitute, at a minimum, extremely persuasive precedent in the plaintiff’s favor.

For discrimination claims brought by federal employees, the EEOC can act as a judicial body and issue decisions itself. The *Macy* decision is binding on all federal agencies.

For more details, see [www.transgenderlawcenter.org/eecoc](http://www.transgenderlawcenter.org/eecoc).

Encouragingly, in the Glenn case the Eleventh Circuit held: “[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that ‘the approach in *Holloway*, *Sommers*, and *Ulane*. . . has been eviscerated’ by *Price Waterhouse*’s holding that ‘Title VII’s reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.’” *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011)



*Nothing in this section or this paper should be construed as legal advice, which can only be provided by a qualified attorney admitted in your jurisdiction.*

## More about State Laws

Seventeen states and D.C. have explicitly included gender identity as a protected category: CA, CO, CT, DE, HI, IA, IL, MA, ME, MN, NJ, NM, NV, OR, RI, VT and WA. A few other states have court rulings holding that other protected categories, such as sex or disability, include transgender employees. Over 140 municipalities have laws prohibiting discrimination based on gender identity. Examples of cities with strong laws include New York City, San Francisco and D.C.

### A BRIEF HISTORY OF TIME

The first state gender identity anti-discrimination law was passed in Minnesota in 1993, nearly twenty years after the federal Employment Non-Discrimination Act (ENDA) was first introduced by Congresswoman Bella Abzug of New York in 1974.

Since that time, ENDA failed by one vote in the Senate in 1996, just ten days after the passage of DOMA (the Defense of Marriage Act). In 2007, “gender identity and expression” was excluded from ENDA before a House vote in favor of a sexual orientation-only version.

During that debate it was argued that lesbian, gay, and bisexual people needed those gender expression protections as well as trans people, because much of homophobia is based on misogyny and rooted in rigid codes of masculinity and femininity.

In 2013, a bill inclusive of both gender identity and sexual orientation passed the Senate on a bipartisan vote in November 2013. Passage through the Republican-led House would be the next challenge.

At the same time as the battle for ENDA was being fought on Capitol Hill, lawyers, LGBT legal organizations, academics, and others were making significant progress within the courts and federal and state agencies in expanding the understanding of “sex discrimination” under existing laws including Title VII of the 1964 Civil Rights Act.

They began to build the arguments, and the case law, for protecting transgender employees under Title VII. Because of their work, the federal legal system has increasingly come to agree that workplace discrimination against transgender persons is covered under Title VII. The successes of these tireless advocates are the reason for this paper.

### FOR MORE INFORMATION

Transgender Law Center  
[transgenderlawcenter.org/help](http://transgenderlawcenter.org/help)  
415.865.0176 x306

Freedom to Work  
[freedomtowork.org](http://freedomtowork.org)

